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(IMPERIAL ACTS)

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[SECOND EDITION]

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THE CIVIL COURT MANUAL (IMPERIAL ACTS).

THE ACTING JUDGES ACT (XVI OF 1867).¹

Short title given, Act 14 of 1897.

[1st March, 1867.

An Act to authorize the making of acting appointments to certain Judicial Offices.

WHEREAS the Governor-General of India in Council or the Local Government, as the case may be, is empowered by divers enactments to appoint the Judges of certain Courts in British India :
Preamble.
And whereas it has been doubted whether he or it is empowered to appoint persons to act temporarily as such Judges, and it is expedient to remove such doubts ; It is hereby enacted as follows :—

1. In every case in which the Governor-General of India in Council, or the Local Government, as the case may be, has power under any Act or Regulation to appoint a Judge of any Court in British India, such power shall be taken to include the power to appoint any person capable of being appointed a permanent Judge of such Court, to act as Judge of the same court for such time as the Governor-General of India in Council or the Local Government, as the case may be, shall direct. Every person so appointed to act temporarily as a Judge of any such Court shall have the powers and perform the duties which he would have had and been liable to perform in case he had been duly appointed a permanent Judge of the same Court.

Certain enactments to be construed as if they contained a clause like section 1 of this Act.

2. Every such Act and Regulation shall be construed as if it contained a special clause to the purport or effect of the first section of this Act.

THE ADMINISTRATOR-GENERAL'S ACT (III OF 1913).

S. 50 (2) am., Act X of 1914.

S. 50 (2) rep. in pt., Act V of 1917, Sch.

Am. by Act XXI of 1922.

PREFATORY NOTE.—The jurisdiction of the Court to compel due administration of the estate of deceased persons has existed from a very early period. It seems to have been of gradual growth, and founded rather on the necessity of supplying the defects of the Courts of common law and the ecclesiastical courts, than on execution of trusts cognizable in equity alone. (Ency. of Laws of England, Vol. I, p. 176.)

¹ Short title, "The Acting Judges Act, 1867." See the Indian Short Titles Act (XIV of 1897). The bill which was passed on the 1st March, 1867, and published as Act XVI of 1867, was introduced and passed at one sitting. See the Proceedings in Council published in Gazette of India, 1867, Supplement, p. 180. This Act has

been declare, by notification under s. 3 (a) of the Scheduled Districts Act (XIV of 1874), to be in force in the following Scheduled Districts, namely :—The Districts Hazaribagh, Lohardaga and Manbhum, and Pargana Dhalbhum and the Kolhan in the District of Singbhum—see Gazette of India, 1881, Pt. I, p. 504.

In ancient times, when a man died without making any disposition of such of his goods as were testable, it is said that the king, who is *paterfamilias*, and has the supreme care to provide for all his subjects, used to seize the goods of the intestate, to the intent that they should be preserved and disposed for the burial of the deceased, the payment of his debts, to advance his wife and children, if he had any, and if not, those of his blood. This prerogative the king continued to exercise for some time by his own Ministers of Justice, and probably in the County Court, where matters of all kinds were determined, and it was granted as a franchise to many lords of manors, and others, who had, until the passing of the Court of Probate Act, a prescriptive right to grant administration to their intestate tenants and suitors in their own Courts Baron and other Courts. Afterwards the Crown, in favour of the Church, invested the prelates with this branch of the prerogative; for it was said, none could be found more fit to have such care and charge of the transitory goods of the deceased than the Ordinary, who all his life had the cure and charge of his soul. (*Williams on Executors* 11th Edn. 312, 313).

The flagrant abuses of this power by the ecclesiastical courts occasioned the Legislature to interpose, in order to prevent the Ordinaries from keeping any longer the administration in their own hands, or those of their immediate dependents and therefore S. 31, Edn. III, St. 1, was passed.

The term "Administration" applied broadly denotes the management of an estate by a person appointed by authority of law to take charge thereof in place of the proper owner. (*Ame. Cyc. Vol. 1. — "Title, Administration" Popular Ed. Book I, p. 796.*)

Referring to the origin of the office of Administrator-General in British India, Mr. Kenny in his book on Administration Practice in British India says:—"The office of the Administrator-General in this country grew out of the Mercantile and Trading Community in Bengal, whose interest were safeguarded by the Charter establishing the Supreme Court of Judicature at Fort William in Bengal, dated the 26th March, 1774. Its functions have been developed, and regulated on lines which experience has shown to be necessary; and it is an illustration of the adoption, and modification, to suit local circumstances, of those principles which underlie the law of trusts, and the law affecting the administration of the estates, of deceased persons".

The earliest office out of which the office of the Administrator-General was developed is that of the Ecclesiastical Registrar in Bengal. The first Parliamentary statute which dealt with the powers of Ecclesiastical Registrar in Bengal and the other provinces to obtain administration to estates was 39 and 40 Geo. III, Cap. 79. In order to understand the position of the Registrar under this statute, attention may be directed to Sec. XXI of the Act which reads as follows:—"And whereas great inconveniences have arisen from the practice of granting Letters of Administration by the said Supreme Court of Judicature at Fort William aforesaid in cases where the next-of-kin or any of the creditors of the deceased do not apply for the same, to persons calling themselves friends of the deceased. Be it therefore further enacted that from and after the first day of March which will be in the year of our Lord one thousand eight hundred and one, whenever any British subject shall die intestate within either of the presidencies of Fort William, Fort Saint George or Bombay, or the territories subordinate to either of the said Presidencies or to become subordinate thereto, and on return of the citation to be issued from the proper Ecclesiastical Court, no next-of-kin or creditors shall appear and make out their claim to the administration of the effect of the intestate deceased to the satisfaction of the said Court, it shall and may be lawful for the Registrar of such Court, and he is hereby required and directed to grant such letters of administration and colligenda as to such Court shall seem meet, by virtue whereof such Registrar shall collect the assets of the deceased and shall bring them for safe custody into such Court and account for them regularly in like manner as is now by law provided in cases where assets are vested in the hands of any officer of the Court under or by virtue of the equitable jurisdiction of any such Court."

It was not long before it became necessary to further develop the law on the subject. To this end Stat. 55, Geo. III, Cap. 84, was enacted.

The Registrar under the old Act, had not by any means such a monopoly of administration of estates as was at one time considered to be the case: but private administrators were not by any means subject to similar restrictions in regard to the question of the method of keeping and filing their accounts, etc. The precautions, however, above referred to prove to be quite inadequate.

Gross irregularities and abuses were discovered in respect of estates under the charge of certain persons who held the office of Ecclesiastical Registrar, with the result that an order was passed by the Supreme Court on the 8th March 1848, appointing a Committee to enquire into the working of that office. The Committee so appointed, duly enquired into the working of the office, and presented their report on the 29th January, 1849. Among other things it proved the Registrars had abused their powers: that they had employed the monies in their hands in trade and that heavy losses had been incurred.

The Government of India, in view of the disclosures above alluded to, considered it advisable to take steps to protect the interests of the beneficiaries and next of kin of persons dying intestate as well as those who left wills, and after some consideration it was resolved that a public official should be appointed, who would protect the property of persons dying in cases where no steps were taken by the next of kin (if any) or where the next of kin were resident out of British India. It was also considered advisable to give such official power to deal with the estates of persons who had left wills where either the beneficiaries under the will were resident out of British India, or where they, or the executors named, took no steps to protect the estate. After carefully considering the position of matters the Government of India passed Act VII of 1849, which may be termed the first Administrator-General's Act in British India.

The next was Act II of 1850 (passed on 11th January, 1850) by which the Act of 1849 was extended to Madras and Bombay. It was provided that the rate of commission charged was not to

be the same : that the Administrators-General of these two provinces were not to cease to hold the office of Ecclesiastical Registrar : and by Sec. 4 of the Act the Administrator-General was strictly prohibited from trading, etc. This Act remained in force until the year 1855 when a further Act was passed (Act VIII of 1855), which repealed both the last mentioned Acts.

This Act (VIII of 1855) remained in force until the year 1867, when Act XXVI of 1867 was passed as a repealing and re-enacting Code relating to the subject.

Act II of 1874, which was the Act in force, until it was repealed and re-enacted by the present Act was presented to the Legislative Council on the 27th January, 1874. It recited that having regard to the fact of certain amendments, and also to the fact that the Act of 1867 had already been amended by Act XIX of 1867 and Act V of 1870, it was thought advisable to repeal the then existing Acts and re-enact them, so as to have the law conveniently within the compass of one Act. The Act again came up for discussion on 10th February, 1874, when it was discussed and finally received the assent of the Governor-General.

In 1913 it was thought expedient to consolidate Act II of 1874 and its several amending enactments, and also to make certain amendments in the law relating to the powers and duties of the Administrator-General, and this was effected by the Act which is now in force, Act III of 1913. (See Preface to Kinney's Administration Practice in India ; Statement of Objects and Reasons ; Report of Select Committee and Proceedings in Council).

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THE ADMINISTRATOR-GENERAL'S ACT (III OF 1913).¹

[27th February, 1913.

An Act to consolidate and amend the law relating to the office and duties of Administrator-General.

WHEREAS it is expedient to consolidate and amend the law relating to the office and duties of Administrator-General ; It is hereby enacted as follows :—

PART I.

PRELIMINARY.

Short title, extent and commencement.

1. (1) This Act may be called THE ADMINISTRATOR-GENERAL'S ACT, 1913.

(2) It extends to the whole of British India, including the Sonthal Parganas and British Baluchistan, and applies also to all British and Indian subjects of His Majesty in the territories of Native States in India.

(3) It shall come into force on such date² as the Governor-General in Council may, by notification in the Gazette of India, direct.

Interpretation clause.

2. In this Act, unless there is anything repugnant in the subject or context,—

(1) " assets " means all the property, moveable and immoveable, of a deceased person, which is chargeable with and applicable to, the payment of his debts and legacies, or available for distribution among his heirs and next-of-kin ;

(2) " exempted person " means an Indian Christian, a Hindu, Muhammadan, Parsi or Buddhist, or a person exempted under S. 332 of the Indian Succession Act, 1865, from the operation of that Act ;

(3) " Government " means the Governor-General in Council, so far as the Act relates to the Presidency of Bengal and the Local Governments of Madras and Bombay respectively, so far as the Act relates to those Presidencies :

¹ For Statement of Objects and Reasons, see Gazette of India, 1912, Pt. V, p. 188 ; for Report of Select Committee, see *ibid.*, 1913, Pt. V, p. 3 ; and for Proceedings in Council. See *ibid.*, 1912, Pt. VI, p. 697, and *ibid.*, 1913, Pt. VI, pp. 14, 28

and 64.

See, 1 (8).—² The 1st April, 1914, see Gazette of India, 1914, Pt. I, p. 365.

See, 2 (1).—" Assets " meaning of see A.I.R. 1926 Mad. 1026 : 97 I. C. 722 : 51 M. L. J. 334.

(4) "Indian Christian" means a Native of India who is or in good faith claims to be of unmixed Asiatic descent, and who professes any form of the Christian religion :

(5) "Letters of Administration" includes any letters of administration whether general or with a copy of the will annexed, or limited in time or otherwise :

(6) "next-of-kin" includes a widower or widow of a deceased person, or any other person who by law would be entitled to letters of administration in preference to a creditor or legatee of the deceased :

(7) "Official Gazette" means, in the case of the Presidency of Bengal, the Gazette of India, and in the cases of the Presidencies of Madras and Bombay, the Fort St. George and Bombay Government Gazettes, respectively :

(8) "Prescribed" means prescribed by rules under this Act :

(9) (a) "Presidency of Bengal" includes the territories for the time being under the government of the Governor of Fort William in Bengal in Council, the United Provinces of Agra and Oudh, the provinces of the Punjab, Burma, Bihar and Orissa, the Central Provinces, Assam, the North-West Frontier Province, the province of Delhi, Ajmer and Merwara, the Andaman and Nicobar Islands, and such of the territories of Native States aforesaid as the Governor-General in Council may, by notification¹ in the Gazette of India, direct :—

(b) "Presidency of Bombay" includes the territories for the time being under the government of the Governor of Bombay in Council the Province of British Baluchistan, and such of the territories of Native States aforesaid as the Governor-General in Council may, by notification in the Gazette of India, direct :

(c) "Presidency of Madras" includes the territories for the time being under the Government of the Governor of Fort St. George in Council, the province of Coorg, and such of the territories of Native States aforesaid as the Governor-General in Council may, by notification in the Gazette of India, direct :

(10) "Presidency" means any of the Presidencies mentioned in clause (9).

(11) "Revenues of the Government", means, in respect of any part of India, in which the powers and duties of government under this Act are exercised and discharged by a Local Government, the revenues allocated to that Government under the Government of India Act.

PART II.

THE OFFICE OF ADMINISTRATOR-GENERAL.

Appointment and designation of the Administrators-General in the three Presidencies.

3. (1) In each of the Presidencies of Bengal, Madras and Bombay, the Government shall appoint an Administrator-General.

(2) No person shall be appointed to the office of Administrator-General of any of the said Presidencies who is not—

(a) a Barrister ; or

(b) an Advocate, Attorney, or Vakil enrolled by a High Court ; or

(c) a person holding the office of Deputy Administrator-General at the commencement of this Act.

(3) The said Administrators-General shall be called respectively the Administrator-General of Bengal, the Administrator-General of Madras, and the Administrator-General of Bombay.

4. The Government may appoint a Deputy or Deputies to assist the Administrator-General ; and any Deputy so appointed shall, subject

Appointment and powers of Deputy Administrators-General.

to the control of the Government and the general or special orders of the Administrator-General, be competent to discharge any of the duties and to exercise any of the powers of the Administrator-General, and when discharging such duties or exercising such powers shall have the same privileges and be subject to the same liabilities as the Administrator-General.

Sec. 2 (9).—¹ For notification under this section in conjunction with section 58 including certain native States in the presidencies and pro-

vinces constituted for the purposes of the Act, see Gazette of India, 1914, Pt. I, p. 781.

Sec. 2 (11).—Added by Act XXI of 1922, S. 5.

Administrator-General to be a corporation sole, to have perpetual succession and official seal, and to sue and be sued in his corporate name.

5. The Administrator-General shall be a corporation sole by the name of the Administrator-General of the Presidency for which he is appointed and, as such Administrator-General, shall have perpetual succession and an official seal, and may sue and be sued in his corporate name.

PART III.

RIGHTS, POWERS, DUTIES AND LIABILITIES OF THE ADMINISTRATOR-GENERAL.

(a) *Grants of Letters of Administration and Probate.*

As regards Administrator-General, High Court at Presidency-town to be deemed a Court of competent jurisdiction for the purpose of granting probate or letters of administration.

Administrator-General entitled to letters of administration, unless granted to next-of-kin.

Administrator-General entitled to letters of administration in preference to creditor, non-universal legatee or friend.

- (a) a creditor ; or
- (b) a legatee other than an universal legatee ; or
- (c) a friend of the deceased.

When administrator-General is to administer estates of persons other than exempted persons.

9. If any person, not being an exempted person, has died leaving within any Presidency assets exceeding the value of [two thousand]¹ rupees,

and if no person to who any Court would have jurisdiction to commit administration of such assets has, within one month after his death, applied in such Presidency for probate of his will, or for letters of administration of his estate,

the Administrator-General of the Presidency in which such assets are shall, subject to any rules made by the Government, within a reasonable time after he has had notice of the death of such person, and of his having left such assets, take such proceedings as may be necessary to obtain from the High Court at the Presidency-town letters of administration of the estate of such person.

10. Whenever any person has died leaving assets within the local limits of the ordinary original civil jurisdiction of the High Court at a Presidency-town, the Court, on being satisfied that danger is to be apprehended of misappropriation, deterioration or waste of such assets unless letters of administration of the

Secs. 6, 7 and 8.—As to who are next of kin. See *Suc. Act XXXIX of 1925*, S. 24 and notes thereunder in *Madras Law Journal* Edition of the same. Administrator-General can be granted letters of administration to estate of illegitimate persons. 1 *Mad. H.C.* 171; 11 *Beng. L.R. App.* 6. Administrator-General entitled to letters in preference to pecuniary legatee or even a creditor. 1 *Bom.* 103 : (see *Sec. 8, cl. a*). On these Sections see also 4 *Cal.* 770. Calcutta High Court cannot grant letters to attorney of executor of deceased in respect of assets in Punjab. Such letters can be granted to Administrator-General in Bengal. 1 *B. L. R. (O. C.)* 3.

Sec. 9.—¹ Substituted by Act XXXII of 1926. Effect of the section as to administration of estates of less than Rs. 1,000. See 1 *Boub.* 622. See also 6 *Ind. Cas.* 905 : 12 *Bom. L. R.* 471.

Sec. 10.—Possession not to be taken by Administrator-General without previous order of court. 10 *C. W. N.* 241. As to the circumstances in which title of Administrator-General relates back to date of death of deceased, see *B. H. C. (O. C.)* 140. As to when Administrator-General can be directed to apply for administration. See 1 *M. H. C.* 234. (Mere possibility of debts being barred by limitation, not sufficient ground—case under old Act.)

estate of such person are granted, may upon the application of the Administrator-General or of any person interested in such assets or in the due administration thereof make an order, upon such terms as to indemnifying the Administrator-General against costs and other expenses as the Court thinks fit, directing the Administrator-General to apply for letters of administration of the estate of such person:

Provided that in the case of an application being made under this section for letters of administration of the estate of an exempted person, the Court may refuse to grant letters of administration, if it is satisfied that such grant is unnecessary for the protection of the assets; and in such case the Court shall make such order as to the costs of the application as it thinks fit.

11. (1) Whenever any person has died leaving assets within the local limits of the ordinary original civil jurisdiction of any of the said High Courts,

Power to direct Administrator-General to collect and hold assets until right of succession or administration is determined.

and such Court is satisfied that there is no person immediately available, who is legally entitled to the succession to such assets, or that danger is to be apprehended of misappropriation, deterioration or waste of such assets, before it can be determined who may be legally entitled to the succession thereto, or whether the Administrator-General is entitled to letters of administration of the estate of such deceased person,

the Court may, upon the application of the Administrator-General or of any person interested in such assets, or in the due administration thereof, forthwith direct the Administrator-General to collect and take possession of such assets, and to hold, deposit, realize, sell or invest the same according to the direction of the Court, and in default of any such directions according to the provisions of this Act so far as the same are applicable to such assets.

(2) Any order of the Court made under the provisions of this section shall entitle the Administrator-General,

(a) to maintain any suit or proceeding for the recovery of such assets, and

(b) if he thinks fit, to apply for letters of administration of the estate of such deceased person, and

(c) to retain out of the assets of the estate any fees chargeable under rules made under this Act, and to reimburse himself for all payments made by him in respect of such assets which a private administrator might lawfully have made.

Grant of probate or letters of administration to person appearing in the course of proceedings taken by Administrator-General under sections 9, 10 and 11.

12. If, in the course of proceedings to obtain letters of administration under the provisions of section 9, section 10, or section 11, any person appears and establishes his claim—

(a) to probate of the will of the deceased; or

(b) to letters of administration as next-of-kin of the deceased, and gives such security as may be required of him by law,

the Court shall grant probate of the will or letters of administration accordingly, and shall award to the Administrator-General the cost of any proceeding taken by him, under those sections to be paid out of the estate as part of the testamentary or intestate expenses thereof.

Sec. 11.—“Succession” in Sec. 11 should not be read as meaning intestate succession only. 56 I. C. 431 : 24 C. W. N. 326.

WHO CAN APPLY.—Direction to collect assets can be given under this Sec. to Administrator-General, not to a legal representative, 21 Bom. 102; not to a creditor or debtor to estate. See 1 M. H. C. 234. Though an Administrator-General is appointed executor of a will he can obtain an order to take possession of the assets before applying for probate, 56 I. C. 431 : 24 C. W. N. 326.

see also 5 Cal. 770 Effect of grant of probate to Administrator-General. The mere handing over of the keys of the business premises to the Administrator-General implies a transfer of the estate. 25 I. C. 153; 16 M. L. T. 26. Administrator-General not to take possession without orders of court previously obtained. 10 C. W. N. 241. As to right of Administrator-General to reimburse himself for costs. See 10 Bom. 350, see also 11 C. W. N. 123. On this Sec. See also 23 Bom. 428; 8 Bom. 140.

- 13.** If, in the course of proceedings to obtain letters of administration under the provisions of section 9, section 10 or section 11, no person appears and establishes his claim to probate of a will, or to a grant of letters of administration as next-of-kin of the deceased, within such period as to the Court seems reasonable,

Grant of administration to Administrator-General in certain cases.

or if a person who has established his claim to a grant of letters of administration as next-of-kin of the deceased fails to give such security as may be required of him by law,

the Court may grant letters of administration to the Administrator-General.

Administrator-General not precluded from applying for letters within one month after death.

- 14.** Nothing in this Act shall be deemed to preclude the Administrator-General from applying to the Court for letters of administration in any case within the period of one month from the death of the deceased.

(b) *Estates of Persons subject to the Army Act [or the Air Force Act].*¹

Act not to affect Regimental Debts Act, 1893.

- 15.** Nothing in this Act shall be deemed to affect the provisions of the Regimental Debts Act, 1893.

- 16.** It shall not be necessary for the administrator-General to take out letters of administration of the estate of any deceased person which is being administered by him in accordance with the provisions of the Regimental Debts Act, 1893, if the value of such estate does not on the date when such administration is committed to him exceed rupees one thousand, but he shall have the same power in regard to such estate as he would have had if letters of administration

had been granted to him.

Power to grant administrator-General letters limited to purpose of dealing with assets in accordance with the Regimental Debts Act, 1893.

- 17.** If the Administrator-General applies, in accordance with the provisions of the Regimental Debts Act, 1893, for letters of administration of the estate of any person subject to the Army Act, [or the air force Act]² the Court may grant to him letters of administration limited to the purpose of dealing with such estate in accordance with the provisions of the Regimental Debts Act, 1893.

(c) *Revocation of Grants.*

- 18.** If an executor or next-of-kin of the deceased, who has not been personally served with a citation or who has not had notice thereof in time to appear pursuant thereto establishes to the satisfaction of the Court a claim to probate of a will or to letters of administration in preference to the administrator-General, any letters of administration granted in accordance with the provisions of this Act to the Administrator-General may be revoked, and probate or letters of administration may be granted to such executor or next-of-kin as the case may be ;

Recall of Administrator-General's administration and grant of probate, etc., to executor or next-of-kin.

Provided that no letters of administration granted to the Administrator-General shall be revoked for the cause aforesaid, except in cases in which a will of the deceased is proved in the Presidency, unless the application for that purpose is made within six months after the grant to the Administrator-General and the Court is satisfied that there has been no unreasonable delay in making the application, or in transmitting the authority under which the application is made.

- 19.** If any letters of administration granted to the Administrator-General in accordance with the provisions of this Act or revoked, the Court may order the costs of obtaining such letters of administration, and the whole or any part of any fees which would otherwise have been payable under this Act, together with the costs of the Administrator-General in

Cost of obtaining administration, etc., may, on revocation, be ordered to be paid to Administrator-General out of assets.

any proceedings taken to obtain such revocation, to be paid to or retained by the Administrator-General out of the estate :

Provided that nothing in this section shall affect the provisions of clause (c) of sub-section (2) of section 11.

20. If any letters of administration granted to the Administrator-General in accordance with the provisions of this Act are revoked,

After revocation, letters granted to Administrator-General to be deemed to him to have been voidable only.

the same shall, so far as regards the Administrator-General and all persons acting under his authority in pursuance thereof, be deemed to have been only voidable, except as

to any act done by any such Administrator-General or other person as aforesaid, after notice of a will or of any other fact which would render such letters void :

Provided that no notice of a will or of any other fact which would render any such letters void shall affect the Administrator-General or any person acting under his authority in pursuance of such letters unless, within the period of one month from the time of giving such notice, proceedings are commenced to prove the will, or to cause the letters to be revoked, and such proceedings are prosecuted without unreasonable delay.

21. If any letters of administration granted to the Administrator-General in accordance with the provisions of this Act are revoked, upon the

Payments made by administrator-General prior to revocation.

grant of probate of a will, or upon the grant of letters of administration with a copy of the will annexed, all payments made or acts done by or under the authority of the

Administrator-General in pursuance of such letters of administration, prior to the revocation, which would have been valid under any letters of administration lawfully granted to him with a copy of such will annexed, shall be deemed valid notwithstanding such revocation.

(d) *General.*

22. Whenever any Administrator-General applies for

Administrator-General's petition for grant of letters of administration.

letters of administration in accordance with the provisions of this Act, it shall be sufficient if the petition required to be presented for the grant of such letters states,

(i) the time and place of the death of the deceased to the best of the knowledge and belief of the petitioner,

(ii) the names and addresses of the surviving next-of-kin of the deceased if known,

(iii) the particulars and value of the assets likely to come into the hands of the petitioner,

(iv) particulars of the liabilities of the estate if known.

23. (1) All probates or letters of administration granted to any Administrator-General shall be granted to him by that name, and all

Probates or letters to be granted to Administrator-General by his name of office, and powers of that officer in cases in which probate or letters of administration have been granted to the Ecclesiastical Registrar.

probates or letters of administration heretofore granted to the Ecclesiastical Registrar, or to the Administrator-General of any Presidency shall authorise the Administrator-General of the same Presidency to act as executor or administrator, as the case may be, of the estate to which such probate or letters relate.

Secs. 22 to 24.—As to vesting of estate in Administrator-General, *see* 26 I. C. 792 : 38 Mad. 1134 : 27 M. L. J. 400. As to vesting of estate in successor of Administrator-General, *see* 33 Cal. 713. Practice as to grant of letters where properties are situated in different provinces, *see* 1 Cal. 52 : 24 W. R. 206.

SUITS BY ADMINISTRATOR-GENERAL.—*See* 28 Bom. 529 : 30 Cal. 927. Administrator-General may sue and be sued in name of his office. *See also* 8 C. W. N. at p. 93.

SUITS AGAINST ADMINISTRATOR-GENERAL.

—*See* 6 M. H. C. Rep. 346 : 25 Cal. 54. (Suit by creditor. *See also* 10 Cal. 929). *See also* 38 Mad. 500 : 22 I. C. 566. Suit under S. 26 for assets improperly distributed by Administrator-General is not suit for administration.

POWERS OF ADMINISTRATOR-GENERAL.—An Administrator-General taking out Letters of Administration to the estate of a Hindu dying intestate can deal with it as if it were his own, because the whole estate vests in him completely. 38 M. 1134 : 26 I. C. 792 : 27 M. L. J. 400. An administration cannot be treated as closed until

(2) All probates and letters of administration granted to the Ecclesiastical Registrar of any of the late Supreme Courts shall have the same effect in all respects as to any act hereafter done or required to be done under this Act as if they had been granted to the Administrator-General.

24. Probate or letters of administration granted by the High Court at any Presidency-town to the Administrator-general of any Presidency shall have effect over all the assets of the deceased throughout such Presidency, and shall be conclusive as to the representative title against all debtors of the deceased and all persons holding such assets, and shall afford full indemnity to all debtors paying their debts and all persons delivering up such assets to such Administrator-General:

Provided that the High Court may direct, by its grant, that such probate or letters of administration shall have like effect throughout one or more of the other Presidencies.

Whenever a grant is made by a High Court to the Administrator-General with such effect as last aforesaid, the Court shall send to the other High Courts a certificate that such grant has been made, and such certificate shall be filed by the Courts receiving the same.

25. (1) Any private executor or administrator may, with the previous consent of the Administrator-General of the Presidency in which any of the assets of the estate, in respect of which such executor or administrator has obtained probate or letters of administration, are situate, by an instrument in writing under his hand notified in the official Gazette, transfer the assets of the estate vested in him by virtue of such probate or letters to the Administrator-General by that name or any other sufficient description.

(2) As from the date of such transfer the transferor shall be exempt from all liability as such executor or administrator, as the cases may be, except in respect of acts done before the date of such transfer, and the Administrator-General shall have the rights which he would have had, and be subject to the liabilities to which he would have been subject, if the probate or letters of administration, as the case may be, had been granted to him by that name at the date of such transfer.

26. (1) When the Administrator-General has given the prescribed notice for creditors and others to send in to him their claims against the estate of the deceased, he shall, at the expiration of the time therein named for sending in claims, be at liberty to distribute the assets or any part thereof in discharge of such lawful claims as he has notice of.

(2) He shall not be liable for the assets so distributed to any person of whose claim he had not notice at the time of such distribution.

(3) No notice of any claim which has been sent in and has been rejected or disallowed in part by the Administrator-General shall affect him unless proceedings to enforce such claim are commenced within one month after notice of the rejection or disallowance of such claim has been given in the prescribed manner and unless such proceedings are prosecuted without unreasonable delay.

(4) Nothing in this section shall prejudice the right of any creditor or other claimant to follow the assets or any part thereof in the hands of the persons who may have received the same respectively.

every act necessary for its completion has been done and where, to realise his commission he sells an item which had been previously sold by the son of the deceased on attaining majority, the sale by the son was held a nullity. *Ibid.* There is no provision of law by which an insolvent's estate in respect of which Letters of Administration have been granted to the Administrator-General, can be administered under that Law. 22 I. C.

566 : 38 Mad. 500. An Administrator-General in such cases can claim no higher than the deceased himself and he has not the rights of either the trustee or Official Assignee in insolvency. *Ibid.*

SECS. 25 AND 26.—See 8 C.W.N. 362 : 22 Ind. App. 107 : 22 Cal. 908 : 22 C. 107 : 22 Bom. 1. See also 38 Mad. 500 noted under S. 24.

(5) In computing the period of limitation for any suit, appeal or application under the provisions of any law for the time being in force, the period between the date of submission of the claim of a creditor to the Administrator-General and the date of the final decision of the Administrator-General on such claim shall be excluded.

27. (1) When the Administrator-General has, so far as may be, discharged all the liabilities of an estate administered by him, he shall notify the fact in the Official Gazette, and he may, by an instrument in writing, with the consent of the Official Trustee and subject to any rules made by the Government, appoint the Official Trustee to be the trustee of any assets then remaining in his hands.

Appointment of Official Trustee as trustee of assets after completion of administration.

(2) Upon such appointment such assets shall vest in the Official Trustee as if he had been appointed trustee in accordance with the provisions of the Official Trustees Act, 1913, and shall be held by him upon the same trusts as the same were held immediately before such appointment.

Power for High Court to give directions regarding administration of estate.

administration of any such estate.

(2) Applications under sub-section (1) may be made by the Administrator-General or any person interested in the assets or in the due administration thereof.

No security nor oath to be required from Administrator-General.

28. (1) The High Court at the Presidency-town may, on application made to it, give to the Administrator-General of the presidency any general or special directions as to any estate in his charge or in regard to the adminis-

29. (1) No Administrator-General shall be required by any Court to enter into any administration-bond, or to give other security to the Court, on the grant of any letters of administration to him by that name.

(2) No Administrator-General or Deputy Administrator-General shall be required to verify, otherwise than by his signature, any petition presented by him under the provisions of this Act, and, if the facts stated in any such petition are not within the Administrator-General's own personal knowledge, the petition may be subscribed and verified by any person competent to make the verification.

Manner in which petitions to be verified by Administrator-General and his Deputy.

(3) The entry of the Administrator-General by that name in the books of a Company shall not constitute notice of a trust, and a Company shall not be entitled to object to enter the name of the Administrator-General on its register by reason only that the Administrator-General is a corporation and in dealing with assets the fact that the person dealt with is the Administrator-General shall not of itself constitute notice of a trust.

30. The Administrator-General may, whenever he desires, for the purposes of this Act, to satisfy himself regarding any question of fact, examine upon oath (which he is hereby authorised to administer) any person who is willing to be so examined by him regarding such question.

Power to examine on oath.

(e) *Grant of Certificates.*

31. Whenever any person has died leaving assets within any Presidency, and the Administrator-General of such Presidency is satisfied that such assets excluding any sum of money deposited in a Government Savings Bank, or in any Provident Fund to which the provisions of the Provided Funds Act, 1897, apply, did not at the date of

Sec. 29.—As to mode of verification by Administrator-General, see 26 Cal. 404. See also 20 Cal. 579.

Secs. 31 to 34.—See 6 Ind. Cas. 905 : 12 Bom.

L. R. 471 (sufficiency of Administrator-General's certificate in case of small estates of less than Rs. 1,000) : 34 Bom. 506 (as to effect of Administrator-General's certificate under S. 31.)

death exceed in the whole [two thousand]¹ rupees—in value, he may, after the lapse of one month from the death if he thinks fit, or before the lapse of the said month if he is requested so to do by writing under the hand of the executor or the widow or other person entitled to administer the estate of the deceased, grant to any person, claiming otherwise than as a creditor to be interested in such assets, or in the due administration thereof, a certificate under his hand entitling the claimant to receive the assets therein mentioned left by the deceased, within the Presidency to a value not exceeding in the whole one thousand rupees :

Provided that no certificate shall be granted under this section—

(i) where probate of the deceased's will or, letters of administration of his estate has or have been granted, or

(ii) in respect of any sum of money deposited in a Government Savings Bank or in any Provident Fund to which the provisions of the Provident Funds Act, 1897, apply.

32. If, in cases falling within section 31, no person claiming to be interested

Grant of certificate to creditors and power to take charge of certain estates.

otherwise than as a creditor in such assets or in the due administration thereof obtains, within three months of the death of the deceased a certificate from the Administrator-General under the same section, or probate of a will or letters of administration of the estate of the deceased, and such deceased was not an exempted person, or was an exempted person who has left assets within the ordinary original civil jurisdiction of the High Court, or within any area notified by the Government in this behalf in the official Gazette, the Administrator-General may administer the estate without letters of administration, in the same manner as if such letters had been granted to him ;

and if he neglects or refuses to administer such estate, he shall, upon the application of a creditor, grant a certificate to him in the same manner as if he were interested in such assets otherwise than as a creditor,

and such certificate shall have the same effect as a certificate granted under the provisions of section 31, and shall be subject to all the provisions of this Act which are applicable to such certificate :

Provided that the Administrator-General may, before granting such certificate, if he thinks fit, require the creditor to give reasonable security for the due administration of the estate of the deceased.

33. The Administrator-General shall not be bound to grant any certificate under

Administrator-General not bound to grant certificate unless satisfied of claimant's title, etc.

section 31 or section 32 unless he is satisfied of the title of the claimant and of the value of the assets left by the deceased within the Presidency either by the oath of the claimant, or by such other evidence as he requires.

34. The holder of a certificate granted in accordance with the provisions of

Effect of certificate.

section 31 or section 32 shall have in respect of the assets specified in such certificate the same powers and duties, and be subject to the same liabilities as he would have had or been subject to if letters of administration had been granted to him :

Provided that nothing in this section shall be deemed to require any person holding such certificate,

(a) to file accounts or inventories of the assets of the deceased before any Court or other authority, or

(b) save as provided in section 32 to give any bond for the due administration of the estate.

35. The Administrator-General may revoke a certificate granted under the pro-

Revocation of certificate.

visions of section 31 or section 32 on any of the following grounds, namely :—

Although the Limitation Act nowhere provided that time should cease to run upon a claim being filed or a certificate being issued by the Administrator-General, yet claims covered by such a

certificate containing a memorandum that all debts will be paid as soon as possible, are not barred. 22 I.C. 262 (Cal.).

See. 31.—¹ Substituted by Act XXXII of 1926.

(i) that the certificate was obtained by fraud or misrepresentation made to him,

(ii) that the certificate was obtained by means of an untrue allegation of a fact essential in law to justify the grant though such allegation was made in ignorance or inadvertently.

36. (1) When a certificate is revoked in accordance with the provisions of section 35, the holder thereof shall, on the requisition of the Administrator-General, deliver it up to such Administrator-General, but shall not be entitled to the refund of any fee paid thereon.

Surrender of revoked certificate.

(2) If such person wilfully and without reasonable cause omits to deliver up the certificate, he shall be punishable with imprisonment which may extend to three months, or with fine which may extend to one thousand rupees, or with both.

37. The Administrator-General shall not be bound to take out letters of administration of the estate of any deceased person on account of the assets in respect of which he grants any certificate, under section 31 or section 32, but he may do so if he revokes such certificate under section 35 or ascertains that the value of the estate exceeded [two thousand]¹ rupees.

Administrator-General not bound to take out administration on account of assets for which he has granted certificate.

38. Where a person not having his domicile in British India has died leaving assets in any Presidency and in the country in which he had his domicile at the time of his death, and proceedings for the administration of his estate with respect to assets in any such Presidency have been taken under section 31 or section 32, and there has been a grant of administration in the country of domicile with respect to the assets in that country,

the holder of the certificate granted under section 31 or section 32, or the Administrator-General, as the case may be, after having given the prescribed notice for creditors and others to send in to him their claims against the estate of the deceased, and after having discharged, at the expiration of the time therein named, such lawful claims as he has notice of, may, instead of himself distributing any surplus or residue of the deceased's property to persons residing out of British India who are entitled thereto transfer, with the consent of the executor or administrator, as the case may be, in the country of domicile, the surplus or residue to him for distribution to those persons.

(f) *Liability.*

39. (1) The revenues of the Government [* *] shall be liable to make good all sums required to discharge any liability which the Administrator-General, if he were a private administrator, would be personally liable to discharge, except when the liability is one to which neither the Administrator-General nor any of his officers has in any way contributed, or which neither he nor any of his officers could, by the exercise of reasonable diligence have averted, and in either of those cases the Administrator-General shall not, nor shall the revenues [of the Government or]² of the Government of India, be subject to any liability.

Liability of Government.

(2) Nothing in sub-section (1) shall be deemed to render [the Government or]³ the Government of India or the Administrator-General liable for anything done before the commencement of this Act, by or under the authority of the Administrator-General.

40. (1) If any suit be brought by a creditor against any Administrator-General, such creditor shall be liable to pay the costs of the suit unless he proves that not less than one month previous to the institution of the suit he had applied in writing to the Administrator-General, stating the amount and other particulars of his claim, and had

Creditors' suits against Administrator-General.

Sec. 37.—¹ Substituted by Act XXXII of 1926.

of 1922, S. 6 (a).

Sec. 39.—² The words ' of India ' in 1st bracket omitted and 2nd bracket inserted by Act XXI

³ Inserted by Act XXI of 1922, S. 6 (b).

given such evidence in support thereof as, in the circumstances of the case, the Administrator-General was reasonably entitled to require.

(2) If any such suit is decreed in favour of the creditor, he shall, nevertheless, unless he is a secured creditor, be only entitled to payment out of the assets of the deceased equally and rateably with the other creditors.

41. Nothing in section 80 of the Code of Civil Procedure, 1908, shall apply to any suit against the Administrator-General in which no relief is claimed against him personally.

PART IV.

FEEs.

42. (1) There shall be charged in respect of the duties of the Administrator-General such fees, whether by way of percentage or otherwise, as may be prescribed by the Government :

Fees.

Provided that, in the case of any estate, the administration of which has been committed to the Administrator-General before the commencement of this Act, the fees prescribed under this section shall not exceed the fees leviable in respect of such estate under the Administrator-General's Act, 1874, as subsequently amended :

Provided further that, in respect of the duties of the Administrator-General under the Regimental Debts Act, 1893, the fees prescribed in this section shall be determined in accordance with the provisions of that Act.

(2) The fees under this section may be at different rates for different estates or classes of estates or for different duties, and shall, so far as may be, be arranged so as to produce an amount sufficient to discharge the salaries and all other expenses incidental to the working of this Act (including such sum as Government may determine to be required to insure the revenues of the Government [* *]¹ against loss under this Act).

43. (1) Any expenses which might be retained or paid out of any estate in the charge of the Administrator-General, if he were a private administrator of such estate, shall be so retained or paid and the fees prescribed under section 42 shall be retained or paid in like manner as and in addition to such expenses.

(2) The Administrator-General shall transfer and pay to such authority, in such manner and at such time as the Government may prescribe, all fees received by him under this Act, and the same shall be carried to the account and credit of the Government [* *]²

PART V.

AUDIT OF THE ADMINISTRATOR-GENERAL'S ACCOUNTS.

44. The accounts of every Administrator-General shall be audited at least once annually, and at any other time if the Government so direct, by the prescribed person and in the prescribed manner.

Audit of Administrator-General's accounts.

Auditors to examine accounts and report to Government.

45. The auditors shall examine the accounts and forward to the Government a statement thereof in the prescribed form, together with a report thereon and a certificate signed by them showing—

(a) whether they contain a full and true account of everything which ought to be inserted therein,

Sec. 42.—¹ The words ' of India ' omitted by Act XXI of 1922, S. 7.

Sec. 42.—For the purpose of arriving at the amount of commission payable to the Administrator-General in the administration of an intestate's estate in cases where the administration commenced before April 1914, the value of the assets is to be taken as at the date of their distribution. 43 M. L. J. 347 : 16 L. W. 711 : 74 I.

C. 182. On this section see also 22 Cal. 262 (Cal.), 31 Cal. 572 : 25 Cal. 65 : 4 Cal. 770. Under this section commission not to be charged by executor or Administrator, 6 Cal. 70. Monies retained as fees of Administrator-General are deemed to be assets distributed. See 1 Mad. 148 : 31 Cal. 572.

Sec. 43.—² The words ' of India ' omitted by Act XXI of 1922, S. 7.

(b) whether the books which by any rules made under this Act are directed to be kept by the Administrator-General, have been duly and regularly kept, and

(c) whether the assets and securities have been duly kept and invested and deposited in the manner prescribed by this Act, or by any rules made thereunder, or (as the case may be) that such accounts are deficient, or that the Administrator-General has failed to comply with this Act or the rules made thereunder, in such respects as may be specified in such certificate.

Power of auditors to summon and examine witnesses, and to call for documents.

46. (1) Every auditor shall have the powers of a Civil Court under the Code of Civil Procedure, 1908,

(a) to summon any person whose presence he thinks necessary to attend him from time to time ; and

(b) to examine any person on oath to be by him administered ; and

(c) to issue a commission for the examination on interrogatories or otherwise of any person ; and

(d) to summon any person to produce any document or thing the production of which appears to be necessary for the purpose of such audit or examination.

(2) Any person who when summoned refuses, or without reasonable cause, neglects to attend or to produce any document or thing or attends and refuses to be sworn, or to be examined, shall be deemed to have committed an offence within the meaning of, and punishable under, section 188 of the Indian Penal Code, and the auditor shall report every case of such refusal or neglect to Government.

47. The costs of and incidental to such audit and examination shall be determined in accordance with rules made by the Government, and shall be defrayed in the prescribed manner.

Costs of audit, etc.

PART VI.

MISCELLANEOUS.

General powers of Administration.

48. The Administrator-General may, in addition to and not in derogation of, any other powers of expenditure lawfully exercisable by him, incur expenditure—

(a) on such acts as may be necessary for the proper care and management of any property belonging to any estate in his charge ; and

(b) with the sanction of the High Court at the Presidency-town on such religious, charitable and other object, and on such improvements as may be reasonable and proper in the case of the property.

49. Any person interested in the administration of any estate, which is in the charge of the Administrator-General shall, subject to such conditions and restrictions as may be prescribed, be entitled at all reasonable times to inspect the accounts relating to such estate and the reports and certificates of the auditor, and on payment of the prescribed fee, to copies thereof and extracts therefrom.

Power of person beneficially interested to inspect Administrator-General's account, etc., and take copies.

50. (1) The Government shall make rules¹ for carrying into effect the objects of this Act and for regulating the proceedings of the Administrator-General.

Power to make rules.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for—

(a) the accounts to be kept by the Administrator-General and the audit and inspection thereof,

(b) the safe custody, deposit and investment of assets and securities which come into the hands of the Administrator-General,

(c) the remittance of sums of money in the hands of the Administrator-General in cases in which such remittances are required,

(d) subject to the provisions of this Act, the fees to be paid under this Act, and the collection and accounting for any such fees,

(e) the statements, schedules and other documents to be submitted to the Government or to any other authority by the Administrator-General, and the publication of such statements, schedules or other documents,

(f) the realization of the cost of preparing any such statements, schedules or other such documents [* *],¹

(g) the manner in which and the person by whom the costs of and incidental to any audit under the provisions of this Act are to be determined and defrayed,

(h) the manner in which summonses issued under the provisions of section 46 are to be served and the payment of the expenses of any persons summoned or examined under the provisions of this Act and of any expenditure incidental to such examination, and

(i) any matter in this Act directed to be prescribed.

(3) All rules made under this Act shall be published in the official Gazette and, on such publication, shall have effect as if enacted in this Act.

51. Whoever, during any examination authorised by this Act, makes upon oath

False-evidence. a statement which is false and which he either knows or believes to be false or does not believe to be true, shall be deemed to have intentionally given false evidence in a stage of a judicial proceeding.

52. All assets in the charge of the Administrator-General which have been in

Assets unclaimed for twelve years to be transferred to Government.

his custody for a period of twelve years or upwards whether before or after the commencement of this Act without any application for payment thereof having been made and granted by him shall be transferred, in the prescribed manner, to the account and credit of the Government [* *]²

Provided that this section shall not authorise the transfer of any such assets as aforesaid, if any suit or proceeding is pending in respect thereof in any Court.

53. (1) If any claim is hereafter made to any part of the assets transferred to the account and credit of the Government [* *]² under the

Mode of proceeding by claimant to recover principal money so transferred.

provisions of this Act, or any Act hereby repealed, and if such claim is established to the satisfaction of the prescribed authority, the Government [* *]² shall pay to the claimant the amount of the principal so transferred to its account and credit or so much thereof as appears to be due to the claimant.

(2) If the claim is not established to the satisfaction of the prescribed authority, the claimant may, without prejudice to his right to take any other proceedings for the recovery of such assets, apply by petition to the High Court at the Presidency town against the Secretary of State for India in Council, and such Court, after taking such evidence as it thinks fit, shall make such order in regard to the payment of the whole or any part of the said principal sum as it thinks fit, and such order shall be binding on all parties to the proceeding.

(3) The Court may further direct by whom the whole or any part of the cost of each party shall be paid.

54. (1) Whenever any person, other than an exempted person, dies leaving assets within the limits of the jurisdiction of a District Judge, the District Judge shall report the circumstance without delay to the Administrator-General of the Presidency, stating the following particulars so far as they may be known to him :—

District Judge in certain cases to take charge of property of deceased persons, and to report to Administrator-General.

(a) the amount and nature of the assets,

(b) whether or not the deceased left a will and if so, in whose custody it is,

Sec. 50.—¹ Repealed by Act V of 1917, Sch. "Assets" includes both movable and immovable property. A. I. R. 1926 Mad. 1026 : 97 I. C. 722 : 51 M. L. J. 334. The Ad.-Gl. does

not earn a communion by merely taking out letters of Administration. (*Ibid.*).

Secs. 52 and 53.—² Omitted by Act XXI of 1922, S. 7. See 3 Cal. 340.

(c) the names and addresses of the surviving next-of-kin of the deceased, and, on the lapse of one month from the date of the death,

(d) whether or not any one has applied for probate of the will of the deceased or letters of administration of his estate.

(2) The District Judge shall retain the assets under his charge, or appoint an officer under the provisions of section 239 of the Indian Succession Act, 1865, to take and keep possession of the same until the Administrator-General has obtained letters of administration, or until some other person has obtained probate or such letters or a certificate from the Administrator-General under the provisions of this Act, when the assets shall be delivered over to the holder of such probate, letters of administration or certificate :

Provided that the District Judge may, if he thinks fit, sell any assets which are subject to speedy and natural decay, or which for any other sufficient cause he thinks should be sold, and he shall thereupon credit the proceeds of such sale to the estate.

(3) The District Judge may cause to be paid out of any assets of which he or such officer has charge, or out of the proceeds of such assets or of any part thereof, such sums as may appear to him to be necessary for all or any of the following purposes, namely :—

(a) the payment of the expenses of the funeral of the deceased and of obtaining probate of his will or letters of administration of his estate or a certificate under this Act,

(b) the payment of wages due for services rendered to the deceased within three months next preceding his death by any labourer, artizan or domestic servant,

(c) the relief of the immediate necessities of the family of the deceased, and

(d) such acts as may be necessary for the proper care and management of the assets left by the deceased,

and nothing in section 279, section 280 or section 281 of the Indian Succession Act, 1865, or in any other law for the time being in force with respect to rights of priority of creditors of deceased persons shall be held to affect the validity of any payment so caused to be made.

Succession Act and Companies Act not to affect Administrator-General, and saving of provisions of Presidency Police Acts as to petty estates.

55. (1) Nothing contained in the Indian Succession Act, 1865 or the Indian Companies Act, 1882, shall be taken to supersede or affect the rights, duties and privileges of any Administrator-General.

(2) Nothing contained in the Indian Succession Act, 1865, or in this Act shall be deemed to affect, or to have affected, any law for the time being in force relating to the moveable property under two hundred rupees in value of persons dying intestate within any of the Presidency-towns or in the town of Rangoon, which shall be or has been taken charge of by the police for the purpose of safe custody.

Order of Court to be equivalent to decree.

56. Any order made under this Act by any Court shall have the same effect as a decree.

57. Notwithstanding anything in this Act, or in any other law for the time being

Provision for administration by Consular Officer in case of death in certain circumstances of foreign subject.

in force, the Governor-General in Council may, by general or special order, direct that, where a subject of a foreign State dies in British India, and it appears that there is no one in British India other than the Administrator-General, entitled to apply to a Court of competent jurisdiction for letters of administration of the estate of the deceased, letters of administration shall, on the application to such Court of any Consular Officer of such foreign State, be granted to such Consular Officer on such terms and conditions as the Court may, subject to any rules made in this behalf by the Governor-General in Council by notification in the Gazette of India, think fit to impose.

Division of Presidency into Provinces.

58. (1) Notwithstanding anything in the foregoing provisions of this Act, the Governor-General in Council may, by notification in the Gazette of India,—

(a) remove any of the territories included in the Presidency of Bengal from such Presidency and constitute the same into provinces for the purposes of this Act ;

(b) direct ¹ that for the purposes of this Act any of the territories of any Native State in India shall be included in any province so constituted ; and

(c) appoint any person qualified in accordance with the provisions of sub-section (2) of section 3, or who holds office under Government to be an Administrator-General for any such province to be called the Administrator-General of the Province, and, subject to the provisions of this section, the following consequences shall thereupon ensue, namely :—

(i) the Administrator-General of a Province shall by that name have the like rights, powers, privileges and liabilities, and perform the like duties, in the Province as the Administrator-General of the Presidency within which such territories were included had and performed as Administrator-General therein and shall be deemed to be his successor in office :

(ii) the powers and duties of the Government under this Act shall, as regards the Province, be exercised and discharged by the Governor-General in Council or by such Local Government as the Governor-General in Council may, by notification in the Gazette of India, appoint in this behalf ; and the Gazette of the Government exercising and discharging such powers and duties shall be the official Gazette of the Province for the purposes of this Act :

(iii) the powers and duties assigned by the foregoing provisions of this Act to the High Court shall be exercised and discharged in respect of such province by such Court as the Governor-General in Council may, by notification in the Gazette of India, appoint in this behalf ; and probate or letters of administration granted to the Administrator-General of the Province by the Court so appointed shall have the same effect throughout the Province, or, if the Court so directs, throughout the Presidencies of Bengal, Bombay and Madras, or any part thereof, as probate or letters of administration, granted to the Administrator-General by the High Court at a Presidency-town would or might have had :

(iv) in the foregoing provisions of this Act the word “ Presidency ” shall be deemed to include a Province, and the expression “ Presidency-town ” the place of sitting of the Court appointed by the Governor-General in Council under clause (iii) of this sub-section ;

(v) generally, the provisions of the foregoing sections of this Act with respect to the High Court at a Presidency-town and the provisions of those sections or of any other enactment with respect to the Administrator-General of a Presidency shall, in relation to a Province, be construed, so far as may be, to apply to the Court and Administrator-General, respectively, appointed for the province under this section.

(2) Any proceeding which was commenced before the publication of the notification constituting the Province and, to or in which the Administrator-General of any Presidency within which any of the territories constituted into a Province were situate was a party or was otherwise concerned, shall be continued as if the notification had not been published.

(3) If, by reason of the constitution of Provinces for the purposes of this Act, it appears to the Governor-General in Council that any property vested in the Administrator-General of any Presidency should be vested in the Administrator-General of a province, he may direct that the property shall be so vested, and thereupon it shall vest in the Administrator-General of the Province as fully and effectually for the

Sec. 58.—For notification constituting provinces for the purposes of the Act, and appointing Administrators-General for the said provinces and appointing the Government and the High Court in the different provinces, see Gazette

of India, 1914, Pt. I, p. 365.

¹ For notification under the section in conjunction with section 2 (9) see Gazette of India 1914, Pt. I, p. 781.

purposes of this Act as if probate or letters of administration had been granted to him original.

(4) If in accordance with the provisions of this section territories have been removed from the Presidency of Bengal and constituted a Province for the purposes of this Act, the Governor-General in Council may, by notification in the Gazette of India, direct that as regards the Presidency of Bengal excluding the territories so removed, the powers and duties of the Government under this Act shall be exercised and discharged by the Local Government of Bengal, and that the official Gazette shall be the Calcutta Gazette.

(5) Upon the rescission of a notification constituting a Province under sub-section (1), the territories comprised therein shall again form part of the Presidency within which they were originally included, the office of Administrator-General of the Province shall determine and all properties vested in and all proceedings by or against such Administrator-General pending at the date of the rescission shall vest in and be carried on by or against such Administrator-General or Administrators-General as the Governor-General in Council may direct.

Saving of provisions of Indian Registration Act, 1908.

59. Nothing in this Act shall be deemed to affect the provisions of the Indian Registration Act, 1908.

Repeals.

60. The enactments specified in the Schedule are hereby repealed to the extent specified in the third column thereof :

Provided that any administration, by or in pursuance of any Act hereby repealed, committed to any Administrator-General at the commencement of this Act shall be deemed to be committed to the Administrator-General under this Act.

THE SCHEDULE.

ENACTMENTS REPEALED.

(See section 60.)

Number and year.	Short title.	Extent of repeal.
II of 1874 ..	The Administrator-General's Act, 1874.	So much as has not been repealed.
IX of 1881 ..	The Administrator-General's Act, 1881.	Ditto Ditto.
II of 1890 ..	The Probate and Administration Act, 1890.	So much of the title and Preamble as relates to the Administrator-General's Act, 1874, and sections 10 to 15.
XII of 1891 ..	The Amending Act, 1891.	So much as relates to Act II of 1874.
VII of 1901 ..	The Native Christian Administration of Estates Act, 1901.	In the Preamble the words "to exempt them from . . . are exempted" and section 4.
V of 1902 ..	The Administrators-General and Official Trustees Act, 1902.	So far as it relates to Administrators-General and Deputy Administrators-General.

THE AGRICULTURISTS' LOANS ACT (XII OF 1884).

S. 4 am., Act 3 of 1906 ; Act 4 of 1914.

Rep. except Ss. 1, 4, 5, 6, in taluquas of Nurgur, Albaka and Cherla, Reg. I of 1909,

S. 3 (2).

Declared in force in Upper Burma (except the Shan States), Act 13 of 1898, S. 4.

S. 2 declared in force in British Baluchistan, Reg. 2 of 1913, S. 3.

Declared in force in the Arakan Hill District, Reg. I of 1916, S. 2.

PREFATORY NOTE.—In a country like India where agriculture is the main source of income for the vast majority of the people, and the income from which source contributed by far the largest portion of the revenues of the state, the progress of agriculture is one of the main concerns of Government.

The poverty of the people engaged in agriculture necessitates the advance of loans by the Government to the raiyats engaged in the cultivation of land, for necessary agricultural purposes, as for instance, for purchase of seed and ploughing cattle in proper seasons, and for obtaining other agricultural implements.

The legislature has therefore provided for the granting of such loans on moderate and reasonable rates of interest and for their recovery at small instalments, spread over a number of years. But for such help, these poor raiyats, many of them illiterate, would fall into the hands of greedy and usurious money-lenders. This Act as well as the Northern India Takkavi Act were passed for the purpose of giving relief to agriculturists by grant of loans from Government funds for purposes connected with cultivation.

THE AGRICULTURISTS' LOANS ACT (XII OF 1884).

[24th July, 1884.]

An Act to amend and provide for the extension of the Northern India Takkavi Act, 1879.

WHEREAS it is expedient to amend the Northern India Takkavi Act, 1879, and provide for its extension to any part of British India; it is hereby enacted as follows :—

1. (1) This Act may be called THE AGRICULTURISTS' LOANS ACT, 1884; and

Short title.

Commencement.

(2) It shall come into force on the first day of August, 1884.

Local extent.

2. (1) This section and section 3 extend to the whole of British India.

(2) The rest of this Act extends in the first instance only to the territories respectively administered by the Governor of Bombay in Council, the Lieutenant-Governors of the North-Western Provinces and the Punjab, and the Chief Commissioners of Oudh, the Central Provinces, Assam and Ajmere.

(3) But any other Local Government may, from time to time, by notification in the official Gazette, extend the rest of this Act to the whole or any part of the territories under its administration.¹

3. (1) On and from the day on which this Act comes into force, the Northern India Takkavi Act, 1879, and sections 4 and 5 of the Bombay Revenue Jurisdiction Act, 1880, shall, except as regards the recovery of advances made before this Act comes into force and of the interest thereon, be repealed.

Repeal of Act X of 1879, and sections 4 and 5 of Act XV of 1880.

(2) All rules made under those Acts shall be deemed to be made under this Act.

4. (1) The Local Government² [or in a Province for which there is a Board of Revenue, or Financial Commissioner, such Board or Financial Commissioner subject to the control of the Local Government] may, from time to time, [* * *]³ make rules as to loans to be made to owners and occupiers of arable land for the relief of distress, the purchase of seed or cattle, or any other purpose not specified in the Land Improvement Loans Act, 1883, but connected with agricultural objects.

Power for Local Government to make rules.

¹Sec. 2 (3).—¹ The Act has been declared in force in the whole of Upper Burma (except the Shan States) by the Burma Laws Act, 1898 (XIII of 1898). Bur. Code, S. 2 of the Act was previously declared in force by notification under S. 5 of the Scheduled Districts Act, 1874 (XIV of 1874), see Burma Gazette, 1896, Pt. I, p. 112, and under that section, ss. 4, 5 and 6 of the Act were extended there, see *ibid.*, p. 121.

It has been declared in force in the Angul District by notification under S. 3 (2) of the Angul District Regulations, 1894 (Ben. Code), see Calcutta Gazette, 1896, Pt. I, p. 1231.

²Sec. 4.—² Inserted by Act IV of 1914, S. 4 (1).
³ The words "with the previous sanction of the Governor-General in Council" subsequently altered into "subject to the control" by Act VII of 1906 were omitted by Act IV of 1914.

(2) All such rules shall be published in the local official Gazette.

5. Every loan made in accordance with such rules, all interest (if any) chargeable thereon, and costs (if any) incurred in making or recovering the same, shall, when they become due, be recoverable from the person to whom the loan was made, or from any person who has become surety for the repayment thereof, as if they were arrears of land-revenue or costs incurred in recovering the same due by the person to whom the loan was made or by his surety.

Recovery of loans.

6. When a loan is made under this Act to the members of a village community or to any other persons on such terms that all of them are jointly and severally bound to the Government for the payment of the whole amount payable in respect thereof, and a statement showing the portion of that amount which as among themselves each is bound to contribute is entered upon the order granting the loan and is signed, marked, or sealed by each of them or his agent duly authorized in this behalf and by the officer making the order, that statement shall be conclusive evidence of the portion of that amount which as among themselves each of those persons is bound to contribute.

Liability of joint borrowers as among themselves.

THE APPRENTICES ACT (XIX OF 1850).

Short title given, Act 14 of 1897.

Rep. in pt., Act 14 of 1870, Act 16 of 1874.

Am., Act 12 of 1891.

Declared in force throughout B. I., except as regards the Scheduled Districts, Act 15 of 1874, S. 3; in Upper Burma (except the Shan States), Act 13 of 1898, S. 4.

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SCHEDULES A and B.

[11th April, 1850.]

Concerning the binding of Apprentices.

FOR better enabling children, and especially orphans and poor children brought up by public charity, to learn trades, crafts and employments, by which, when they come to full age, they may

Preamble. gain a livelihood ; It is enacted as follows :—

Sec. 5.—A claim arising out of the collection of a sum of money which is under S. 5 realized as Revenue, is not cognizable by Civil Court, 19 A. L. J. 363 : 62 I. C. 544. Loans may be recovered

even by sale. See 26 All. 540 ; 29 Cal. 537 ; 22 All. 321 and apply the provisions of Revenue Recovery Acts.

1. Any child, above the age of ten, and under the age of eighteen years may be bound apprentice by his or her father or guardian to learn any fit trade, craft or employment, for such term as is set forth in the contract of apprenticeship, not exceeding seven years, so that it be not prolonged beyond the time when such child shall be of the full age of twenty-one years, or, in the case of a female, beyond the time of her marriage.

2. The age set forth in the contracts shall be evidence of the age of the child, in all questions which arise as to the right of the master to the continuance of the service.

3. Any Magistrate or Justice of the Peace may act with all the powers of the guardian under the Act, on behalf of any orphan, or poor child abandoned by its parents, or of any child convicted before him, or any other Magistrate, or vagrancy, or the commission of any petty offence.

4. An orphan or poor child, brought up by any public charity, may be bound apprentice by the governors, directors or managers thereof, as his or her guardians for this purpose.

5. Any such boy may be bound as an apprentice in the sea service¹ to any of Her Majesty's subjects, being the owner of any registered ship belonging to and trading from any port in the territories under the Government of [**]² India [**]² which has been declared to be a registering port under Act X, 1841, to be employed in any such ship the property of such person, commanded by a British subject, and, while so employed, to be taught the craft and duty of a seaman.

6. [Apprenticing of such boy in ship of the East India Company.] Rep. by the Repealing Act, 1870 (XIV of 1870).

7. The master or commander of any ship in which an apprentice bound to the sea service shall be appointed to serve by the party to whom he is bound shall be deemed the agent of such party for the purpose of this Act.

8. Every contract of apprenticeship shall be in writing, according to the form given in the schedule (A) annexed to this Act, or to the like effect, which shall set forth the conditions agreed upon, particularly specifying the age of the apprentice, the term for which he is bound, and what he is to be taught.

9. Every such contract shall be signed by the person to whom the apprentice is bound, and by the person by whom he is bound, and by the apprentice, when he is of the age of fourteen years or more at the time of binding; but when the apprentice is bound by the governors, directors or managers of a public charity, the signature of two of them, or of their secretary or officer shall be sufficient on behalf of the persons binding the apprentice.

10. No such contract shall be valid unless it be executed in the manner aforesaid, nor until it has been deposited in the office of the Chief Magistrate of the place or district where it has been executed, or, if the apprentice is bound to the sea service, in the office of the person appointed under Act X, 1841, to make registry of ships at the port where the apprentice is to begin his service; and the person in whose office any such contract is deposited shall give to each of the parties a copy thereof, certified under his hand, which certified copies

Sec. 5.—¹ As to duty of shipping-masters in this connection, see the Indian Merchant Shipping Act, 1859 (1 of 1859), S. 4.

² The words "the East" and "Company" were repealed by the Repealing Act XVI of 1874.

shall be received as evidence of the contract, without formal proof of the handwriting of the Magistrate or registering officer.

11. The terms of service may be changed at any time during the apprenticeship

Alteration of terms of service and termination of contract.

or the contract may be determined, with the consent of both parties to the contract or their personal representatives, and with the consent of the apprentice if he is above the age of fourteen years : Provided that the changes agreed to or the termination of the contract shall be expressed in writing on the original contract, with the signature of the proper parties according to section [9]¹ of this Act ; and the Magistrate or registering officer shall thereupon make under his hand corresponding endorsements on the office copies, which shall be brought to him at the same time for that purpose.

12. The master of any apprentice bound under this Act may with the consent

Assignment of apprentice to new master.

of the person by whom he was bound and with the consent of the apprentice if he is above the age of fourteen years, assign such apprentice to any other person, who is willing to take him for the residue of his apprenticeship, and subject to the conditions thereof : Provided that such person shall by endorsement under his own hand on the contract, declare his acceptance of such apprentice, and acknowledge himself bound by the agreements and covenants therein mentioned to be performed on the part of the master and that the consent of the other parties aforesaid shall be expressed in writing on the same, and signed by them respectively : And every such assignment shall be certified on the office copies of the contract under the hand of the Magistrate or registering officer according to the form given in schedule (B) annexed to this Act.

13. Upon complaint made to any Magistrate in the said territories by or on

Powers of Magistrate in case of complaint by apprentice against master.

behalf of any apprentice bound under this Act, of refusal or neglect to provide for him, or to teach him according to the contract of apprenticeship, or of cruelty, or other ill-treatment by his master, or by the agent under whom he shall have been placed by his master the Magistrate may summon the master or his agent, as the case may be, if he shall be within jurisdiction, to appear before him at a reasonable time to be stated in the summons, to answer the complaint ;

and at such time, whether the master or his agent be present or not (service of the summons being proved), may examine into the matter of the complaint; and upon proof thereof, may cancel the contract of apprenticeship, and assess upon the offender, whether he shall be the master or his agent, a reasonable sum for behoof of the apprentice not exceeding four times the amount of the premium paid upon the binding or if no premium, or a less premium than fifty rupees was paid not exceeding two hundred rupees :

and, if the offender shall not pay the sum so assessed, may levy the same by distress and sale of his goods and chattels, and if the offender shall not be the master but his agent, by distress and sale of the goods and chattels of the master also.

14. No contract of apprenticeship shall be cancelled, nor shall any master of his

Powers of master or his agent to chastise apprentice.

Liability of master or agent for assault, etc.

agent be liable to any criminal proceeding, on account of such moderate chastisement for misbehaviour, given to any apprentice by his master or the agent or his master, as may lawfully be given by a father to his child; and the provisions for enabling the contract of apprenticeship to be cancelled shall not bar any criminal proceeding against any master or his agent for an assault or other offence committed against his apprentice for which he would be liable to be punished had it been against his child, whether or not any proceedings be taken for cancelling the contract of apprenticeship.

Sec. 11.—¹ The figure "9" was substituted for the figure "8" by Act XII of 1891.

15. Upon complaint made to any Magistrate, by or on behalf of the master of

Power of Magistrate in case of complaint by master against apprentice.

any apprentice bound to him under this Act, of any ill-behaviour of such apprentice, or if such apprentice shall have absconded, the Magistrate may issue his warrant for apprehending such apprentice, and may hear and determine the complaint, and punish the offender by an order for keeping the offender, if a boy, in confinement in any debtor's prison or other suitable place not being a criminal gaol, for any time not exceeding one month, of which one week may be in solitary confinement, during which time such allowance shall be made for his subsistence by the master or his agent as the Magistrate shall order ; and, if the offender be a boy of not more than fourteen years of age, may order him to be privately whipped; or, if the offender be a girl or in the case of any boy, the Magistrate deem any such punishment unfit, he may pass an order empowering the master of the apprentice or his agent to keep the offender in close confinement in his own house, or on board the vessel to which he belongs, upon bread and water, or such other plain food as may be given without injury to the health of the apprentice, for a period not exceeding one month.

16. Upon complaint of wilful and repealed ill-behaviour on the part of the apprentice, and on the demand of the master the Magistrate

Cancelment of contract for misconduct of apprentice.

may order the contract of apprenticeship to be cancelled, whether or not the charge is proved ; but only with the consent of the apprentice and of his father or guardian, if the charge is not proved ; and such cancelling shall be with or without refund of the whole or part of any premium that may have been paid to the master on binding such apprentice, as to the Magistrate seems fit on consideration of the case ; and all sums so refunded shall be applied under the direction of the Magistrate for behoof of the apprentice.

17. The Magistrate may order any sum recovered for behoof of the apprentice

Appropriation of sum recovered for apprentice on cancelment of contract.

on cancelling the contract to be either laid out in binding him to another master, or otherwise for his benefit, or to be paid to the person by whom any premium was paid when he was bound apprentice.

18. No Magistrate shall entertain a complaint on the part of a master against

Limitation of complaint of master against apprentice ;

an apprentice under this Act unless it be brought within one month after the cause of complaint arose, or, if the cause of complaint arose on boardship during a voyage, within one month after the arrival thereof at a port or place in the said territories ; and no Magistrate shall entertain a complaint on the part of an apprentice against his master or the agent of his master under this Act unless it be brought within three months after the cause of complaint arose, or, if the cause of complaint arose on boardship during a voyage, within three months after the arrival thereof at a port or place in the said territories.

19. If the master of any apprentice shall die before the end of the apprenticeship, the contract of apprenticeship shall be thereby determined; and a proportionate part, corresponding to the

Effect of death of master during apprenticeship.

unexpired portion of the term of any premium, which shall have been paid to such master on the binding of the apprentice, to him, shall be returned by the executors or administrators out of the estate of the deceased to the person

Offer by representative of master to continue apprenticeship.

or persons who shall have paid the same ; unless the executors or administrators of the deceased master shall continue the business in which such apprentice shall have been employed, and shall within three months from the death of the late master, make offer in writing to keep the apprentice on the terms of the original contract ; in which case the estate of the deceased shall be discharged from all liabilities on account of such premium.

20. If such offer to keep the apprentice shall be made as aforesaid, the same shall be fully expressed and certified by the executors [or]¹ administrators on the original contract of apprenticeship, and also on the office copies thereof, by the Magistrate or registering officer ; and the apprentice shall be bound to the executors or administrators so keeping him for the remaining term of his apprenticeship.

Offer to be certified on original contract and copies.

Maintenance of apprentice whose master dies.

Apprentice to continue to serve.

death of his master, out of the assets left by him : Provided that during such three months such apprentice, shall continue to live with, and serve as an apprentice, the executors or administrators of such master, or such person as they appoint.

21. Any apprentice bound under this Act, whose master shall die during the apprenticeship, shall be entitled to maintenance for three months from and after the death of his master, out of the assets left by him : Provided that during such three months such apprentice, shall continue to live with, and serve as an apprentice, the executors or administrators of such master, or such person as they appoint.

22. The apprentice of any person against whom a commission of bankruptcy shall be issued, or who shall be adjudged to have committed an act of insolvency, during the apprenticeship, shall be discharged from all obligation under the contract of apprenticeship ; and, if any premium was paid on binding him as an apprentice, he or a person by whom he was bound shall be entitled to claim the amount thereof as a debt against the estate of the bankrupt or insolvent.²

Effect of insolvency of master during apprenticeship.

23. For the purposes of this Act all British subjects, wherever or of whatever parents born, as well as other persons in the territories under the Government of [* *]³ India [*]³ without the towns of Calcutta and Madras and the town and island of Bombay, shall be amenable to the jurisdiction of the Courts and Magistrates of India.

Persons amenable to jurisdiction of Magistrates' Courts.

24. An appeal shall lie from any order passed by any Magistrate without the said towns and island to the Court of Session to which such Magistrate is subordinate, provided the appeal is made within one month from the date of the order.

Appeal from orders of Mufassal Magistrate.

25. In this Act the words "master," "owner," "person", and the pronoun "he" shall be understood to include several persons as well as one person, and females as well as males, and bodies corporate as well as individuals, unless there is something in the context repugnant to such construction.

Interpretation of terms.

SCHEDULE A.

FORM OF AGREEMENT.

This Agreement made the _____ day of _____ in the year _____ between *A. B.*, of _____, and *C. D.*, of _____, witnesseth that the said *A. B.* doth this day bind *E. F.*, a boy (or girl) of the age of _____ years completed, son (or daughter) of the said *A. B.* (or otherwise describing the relation in which *A. B.* and *E. F.* stand), to dwell with and serve the said *C. D.*, as an apprentice, from this day forth for _____ years (in the case of a girl add, or until the time of her marriage, which shall first happen), during all which term the said apprentice shall duly and faithfully serve the said *C. D.*, according to his (or her) skill and ability in all lawful business, and demean and behave himself (or herself) honestly, orderly and obediently, in all things, towards the said *C. D.* and his (or her) family. And the said *C. D.* for himself (or herself) and his (or her) executors and administrators, in consideration [of the premium or sum of _____ paid by the said *A. B.* to the said *C. D.*, the receipt whereof the said *C. D.* hereby acknowledges, and] of the faithful service of the said *E. F.*, doth covenant and agree with the said *A. B.*, his (or her) executors and administrators, that he (or she) will teach or cause to be taught to the said *E. F.*, in the best way and manner that he (or she) can, the trade (craft or employment) of _____ a _____ during the said term ; and will also, during the said term, find and allow unto the said

Sec. 20.—¹ The word "or" was substituted for the word "and" by Act XII of 1891.

Sec. 22.—² Cf. the Bankrupt Law Consolidation Act, 1849 (12 and 13 Vict., c. 106), S. 170.

Sec. 23.—³ The words "the East" before "India" and the word "company" after the word "India" were repealed by Act XVI of 1874.

apprentice good, wholesome and sufficient food, clothes, lodging, washing, and all other things necessary, fit and reasonable for an apprentice : (and further, *here insert any special covenants.*)

In witness whereof the parties have hereunto set their hands and seals the day and year above written.

A. B.

L. S.

C. D.

L. S.

SCHEDULE B.

FORM OF ORDER OF ASSIGNMENT.

(To be endorsed on the Agreement.)

Be it known to all men that on the _____ day of _____ in the year _____ personally appeared before G. H., Magistrate of _____, C. D., of _____ with E. F., his (or her) apprentice and J. K., of _____ and desired that the agreement of apprenticeship whereby the said E. F. was bound to the said C. D. might be assigned and made over to the said J. K., and the said G. H., having satisfied himself, by personal examination of the said E. F., and by other lawful ways and means, that such assignment is for the benefit of the said E. F., and is made with the consent of (the said E. F., and of) all persons whose consent thereunto by-law is required, doth allow such assignment ; and the contract of apprenticeship whereby the said E. F. was on the _____ day of _____ in the year _____ bound to the said C. D. as an apprentice to learn the trade (craft or employment) of a _____ shall henceforth endure, unto the end of the said term, as if the said J. K. had been originally party to the said deed, and had executed the same, in the place and stead of the said C. D., and shall be bound, for himself (or herself), his (or her) executors or administrators, to fulfil the covenants by the said C. D. to be performed, and the said E. F. shall henceforth be bound unto the said J. K., in like manner as he (or she) was by the said agreement bound unto the said C. D.

If E. F. is not above the age of fourteen years, the words between brackets may be omitted.

C. D. E. F. J. K.
In witness whereof the said C. D., E. F., and J. K. have hereunto set their hands before me the day and year above written.

G. H., Magistrate.

THE INDIAN ARBITRATION ACT (IX OF 1899).

S. 3 rep. in pt., Act 7 of 1913.

S. 23 (as to Lower Burma) am, Act 6 of 1900, S. 47.

S. 4 (b) am. (in U. P.) U. P. Act I of 1912.

Application restricted in (Punjab) Pun. Act I of 1911.

S. 2—Am, Act XXXVIII of 1920.

S. 23 (1) Am. Act XI of 1923.

PREFATORY NOTE.—THE INDIAN ARBITRATION ACT has been drawn on the lines of the English Arbitration Act of 1889 and was the outcome of certain representations received from the Chambers of Commerce at Rangoon, Karachi and Cawnpore. The proposal thus made was circulated for opinion and elicited very general support from all including the Bengal. Madras and Bombay Chambers of Commerce, the Bengal National Chamber of Commerce, and the British Indian Association. The case for legislation was based upon the inadequacy of the then existing Law. The provisions on the subject which prior to the present Act were to be found in the Contract and Specific Relief Acts amounted to this, that if a person who had contracted to refer to arbitration any dispute that might arise between him and another, refuses to do so, his contract will be a bar to his afterwards bringing a suit in respect of the matter which he originally agreed so to refer. These provisions were, however, of a negative kind and ineffective in practice, for the recalcitrant party has, as a rule, only to remain inactive in order to be beyond the reach of the other party. The Code of Civil Procedure no doubt aimed at what was required, but the sections in point were defective in that (1) they were held to apply only to disputes which had arisen at the time of the agreement to refer, and not to dispute which might arise in the future and (2) they required the agreement to refer either to name the particular arbitrator or to leave the Court to appoint one. The first of these defects had been to some extent removed by a Full Bench ruling of the Bombay High Court delivered just before the passing of the present Act in the case of *Fazulbhoy Merhal Chinoy v. The Bombay and Persia Steam Navigation Company, Ltd.* (20 B. 232), in which it was held that the Code applied to

future disputes also, but the second defect remained, with the result, that the case of an agreement to refer, for example, to the arbitration of a person to be nominated by the Bengal Chamber of Commerce, was apparently unprovided for. Moreover it was then uncertain whether the other High Courts would follow the Bombay Judges, who had expressed that the provisions of Chapter XXXVII of the Code required revision in view of the many conflicting decisions found regarding them in the Law Reports. To remedy these defects the present Act was passed.

THE INDIAN ARBITRATION ACT (IX OF 1899).

[3rd March, 1899.

An Act to amend the Law relating to Arbitration.

WHEREAS it is expedient to amend the law relating to arbitration by agreement without the intervention of a Court of Justice ; it is hereby enacted as follows :—

Short title, extent and commencement.

1. (1) This Act may be called THE INDIAN ARBITRATION ACT, 1899.

(2) It extent to the whole of British India ; and

(3) It shall come into force on the first day of July, 1899.

2. Subject to the provisions of section 23, this Act shall apply only in cases where, if the subject-matter submitted to arbitration were the subject of a suit, the suit could, whether with leave or otherwise, be instituted in a Presidency-town :

Application.

Provided that the Local Government, [* *]1 may, by notification in the local official Gazette, declare this Act applicable in any other local area as if it were a Presidency-town.

3. The last thirty-seven words of Section 21 of the Specific Relief Act, 1877, and

Exclusion of certain enactments in certain cases where Act applies.

Sections 523 to 526 of the Code of Civil Procedure shall not apply to any submission or arbitration to which the provisions of the Act for the time being apply.

Provided that nothing in this Act shall affect any arbitration pending in a Presidency-town at the commencement of this Act or in any local area at the date of the application thereto of this Act as aforesaid, but shall apply to every arbitration commenced after the commencement of this Act or the date of the application thereof, as the case may be, under any agreement or order previously made :

[* * * * *]2

Sec. 1.—SCOPE OF THE ACT—General.—The Act is an independent enactment, and has no connection with rules relating to appeals under C. P. Code. 2 Bur. L. J. 193 : 76 I. C. 525 (2) : 1 Rang. 661. *See also* 12 Bom. L.R. 852 ; 43 B. 809. 50 I.C. 411. This is an amending Act and must be construed strictly. 50 I.C. 411 : 21 Bom. L. R. 308 : 43 B. 809. The Act does not limit the number of arbitrators nor does it prevent the parties to alter the number by common consent. 43 All. 456 : 19 A.L.J. 348 : 62 I. C. 426. Even Arbitration Courts must act according to the *principles of natural justice* and not deliberately refuse a hearing or take evidence from one side behind the back of the other. *Prima facie* the duties of an umpire are the same as those of the arbitrators. The umpire must hear the evidence if application is made to him to do so by either party notwithstanding that the same evidence had already been adduced before the arbitrators. 64 I. C. 706. *Arbitrators are not bound by strict rules of evidence* and in commercial causes are entitled to act on evidence which would satisfy a reasonable and impartial merchant. 49 I. C. 135 : 12 S. L. R. 55. Statement of arbitrators as to what transpires before them—Conclusiveness of. *See* 17 L. W. 648 : 75 I. C. 850 : 1924 Mad. 274. The Indian law as to arbitration is irrelevant

where the parties agreed in referring to an arbitration to be bound by *English law and procedure*. 49 I. A. 174 : 45 M. 496 : 43 M. L. J. 422 (P.C.). Questions of fact and law upon which the jurisdiction of the arbitrators depends are for the Courts. 20 A. L. J. 377 : 44 All. 472 : 67 I. C. 487 : 1922 All. 219. An application to Court to appoint fresh arbitrators amounts to an abandonment of the previous proceedings. 46 B. 854 : 24 Bom. L. R. 361. The provisions of the C. P. C. as to joinder of claims cannot be strictly applied to arbitration proceedings. 9 I. C. 712 : 4 S. L. R. 196.

Sec. 2.—¹ The words “with the previous sanction of the Governor-General in Council” were omitted by Act XXXVIII of 1920, Pt. I.

APPLICABILITY OF THE ACT.—The Act does not apply to arbitrations in the course of litigation. 49 Cal. 608. But is applicable to suits which can be instituted at Plaintiff's option in a Presidency town or elsewhere. 15 I. C. 402 : 37 P. R. 1912. *See also* 8 S. L. R. 107 : 27 I. C. 129 : 4 S. L. R. 20 : 7 I. C. 593 : 4 S. L. R. 10 : 7 I. C. 588. The Act has been declared applicable to the town of *Karachi*. *See* Bom. Govt. Gaz., 1899, Pt. I, p. 1127.

Sec. 3.—² The proviso repealed by Act VII of 1913.

Definitions.

4. In this Act, unless there is anything repugnant in the subject or context,—

(a) “the Court” means, in the Presidency-towns, the High Court, and, elsewhere, the Court of the District Judge; and

(b) “submission” means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not.

Submission to be irrevocable except by leave of Court.

5. A submission, unless a different intention is expressed therein, shall be irrevocable, except by leave of the Court.

Sec. 4 (a) and (b).—The Dt. Court is specially described as the Arbitration Court under the Act. 52 I. C. 139; 13 S. L. R. 23. A *submission* is a written agreement signed by both parties to submit differences to arbitration; and this agreement may be collected from a series of documents even though connected by parol evidence. 42 All. 525; 59 I. C. 75; 18 A. L. J. 652. The requirements of S. 4 are duly complied with, if the submission is in writing and is binding on both the parties as their agreement or as the equivalent in law to an agreement between them. Their actual signatures are not essential. 49 I. C. 135; 12 S. L. R. 55. See also 19 I. C. 925; 6 S. L. R. 278. But see 53 Cal. 65; 95 I. C. 21; A.I.R. 1926 Cal. 936 what it is held that an agreement to arbitrate should be signed by the parties or their agents. The existence of a “dispute” is essential to the validity of a reference to arbitration under the terms of a contract. A dispute involved the assertion of a right by one party and its denial by the other. 64 I. C. 798; 33 C. L. J. 545. See also 47 Cal. 799; 46 Cal. 534; 54 Ind. Cas. 285; 23 C. W. N. 704. Only matters in dispute between the parties to a litigation which affect private rights can be referred to arbitration. 72 I. C. 1016; 1923 Nag. 112. Withholding of payment is a ‘dispute’ between the parties. 46 Cal. 534; 54 I. C. 285; 23 C. W. N. 304. What amounts to submission to arbitration. See 33 C. 1237; 10 C. W. N. 814; 33 C. 1169. See also 6 S. L. R. 278; 4 S. L. R. 14. The definition of submission in S. 4 covers what is ordinarily termed an arbitration clause as well as what is commonly called a reference. 35 I. C. 536; 10 S. L. R. 1. See also, 71 I. C. 817. Where an association, at the instance of and on a claim by the members against another member, lays the matter before arbitrators and the latter member in his own hand and over his signature sent an answer to the claim, the document constituted a written agreement to submit their difference to arbitrators within Sec. 4 (b). 43 All. 348; 61 I. C. 269; 19 A. L. J. 132. A policy of marine insurance provided, “all disputes must be referred to in England for settlement and no legal proceedings shall be taken to enforce any claim except in England where the under-writers are domiciled and carry on business.” Held, that the clause amounted to a *submission to arbitration*. 26 Bom. L. R. 224; 80 I. C. 523; 1924 Bom. 381. A clause in a Bill of lading that all disputes shall be settled by the British Consul at the port of destination is similar to a submission to arbitration. 15 S. L. R. 88. The petition of compromise in a suit for accounts amounts to a submission to arbitration within the meaning of S. 4. 71 I. C. 817.

WHAT ARE NOT ‘SUBMISSION’ TO ARBITRATION.—A document embodying the terms of an agreement to refer to arbitration, which is not signed by or on behalf of both parties is not a submission as defined in S. 4. 19 I. C. 925; 6 S. L. R. 278. Writing amounting to a bond does not amount to a submission to arbitration. 16 I. C. 861; 6 S. L. R. 89. The words “office dhara” (office terms) do not constitute a written agreement to submit differences to arbitration. They are used merely as symbols to denote that such an agreement had been made and the use of such symbols does not justify the Court in accepting oral evidence of the agreement. 19 I. C. 925; 6 S. L. R. 278.

Who may submit (i) infant (14 C. L. J. 188); (ii) guardian (*Ibid.*); (iii) father, manager of Hindu family (24 Ind. Cas. 863; 10 N. L. R. 74); (iv) mother of minors (29 Ind. Cas. 800; 8 Bur. L. T. 122). What matters may be referred to arbitration. See 24 Ind. Cas. 264; 5 S. L. R. 4. Construction of references to arbitration to be liberal. 15 Ind. Cas. 321. Reference to arbitration and proceedings thereon, how far affected by rules of special bodies or corporations. 42 C. 1140; 19 C. W. N. 820; 20 C. W. N. 365. See also 47 Cal. 849; 61 I. C. 380; 25 C. W. N. 62; 46 C. 534; 54 I. C. 285; 23 C. W. N. 704. Effect of award on oral submission. 33 B. 69; 10 Bom. L. R. 366. Where it was shown that disputes arising between vendor and vendee were agreed to be referred to arbitrators one appointed by each party. Held, the submission was binding on them. 42 All. 525; 59 I. C. 75; 18 A. L. J. 652.

LEGALITY AND BINDING NATURE OF AWARD.—Opportunity to prove to be given to the parties. 65 I. C. 497; 1922 Lah. 149. There cannot be two tribunals each with jurisdiction to insist on deciding the rights of the parties and to compel them in accept its decision. 26 C. W. N. 967; 69 Ind. Cas. 863; 35 C. L. J. 492; 1923 Cal. 135 (2). Abortive award if prevents fresh reference—Courts’ power to decide if there was a valid contract. 20 A. L. J. 377; 44 All. 472; 67 I. C. 487; 1922 All. 219. A decree on an award which is not strictly in accordance with the terms of reference, is not thereby void for want of jurisdiction and the decree will operate as *res judicata* in a subsequent suit on the same cause of action. 59 I. C. 89 (2) (Cal.) Stamp duty on agreement to refer to arbitration. 33 C. 669; 13 C. W. N. 63; 19 B. 32; 40 C. 219. Want of proper stamp when and how can be called in question. 39 C. 669. On this section see also 27 Bom. L. R. 1008; 42 All. 525; 18 A. L. J. 652.

Sec. 5.—SCOPE OF SECTION.—Once a valid submission has been made it is irrevocable with-

6. A submission, unless a different intention is expressed therein, shall be deemed to include the provisions set forth in the First Schedule, in so far as they are applicable to the reference under submission.

Provisions implied in submissions.

Reference to arbitrator to be appointed by third person.

7. The parties to a submission may agree that the reference shall be to an arbitrator or arbitrators to be appointed by a person designated therein.

Such person may be designated either by name or as the holder for the time being of any office or appointment.

Illustration.

The parties to a submission may agree that any dispute arising between them in respect of the subject-matter of the submission shall be referred to an arbitrator to be appointed by the Bengal Chamber of Commerce, or, as the case may be, to an arbitrator to be appointed by the President for the time being of the Bengal Chamber of Commerce.

Power for the Court in certain cases to appoint an arbitrator, umpire or third arbitrator.

8. (1) In any of the following cases :

out the leave of the Court under S. 5 and if the arbitrator refuses or neglects to act, the procedure under S. 8 of the Act should be followed. 44 I. C. 360 : 11 S. L. R. 101 : 20 I. C. 504 : 7 S. L. R. 1.

POWERS OF ARBITRATOR.—An arbitrator has jurisdiction to inquire and decide whether a party to the submission has signed it or whether the signature is that of a partnership and if so, who the individual partners are. 11 I. C. 274 (S.).

PROCEDURE.—The ordinary rule is to refer to a single arbitrator. An intention to refer to more than one arbitrator must be plain and clear. 12 I. C. 662 : 5 S. L. R. 97. An order refusing to set aside an award based purely on evidence recorded by Court itself is not bad in law. 11 I. C. 274 (S.). Grounds justifying revocation. 14 C. L. J. 188 : 15 Ind. Cas. 321 : 27 M. 113 : 20 A. 145 : 15 W. R. 331 : 17 C. 200 : 7 A. 273 : 8 M. H. C. 46 : 12 M. I. A. 112 : 17 B. 129 : 17 O. C. 386 : (1914) M. W. N. 52 : 4 S. L. R. 14.

WHAT ARE PROPER GROUNDS.—Good grounds for revocation (i) Collusion (29 A. 13 : 3 A. L. J. 613 : (1906) A. W. N. 253); (ii) Partiality (29 C. 278 : 6 C. W. N. 235); (iii) Indebtedness of arbitrator to one of the parties (29 C. 278 : 3 C. W. N. 361 : 25 C. 141); (iv) Unreasonable delay (17 C. 200); (v) Neglect of arbitrator (11 S. L. R. 101 : 44 I. C. 360).

WHAT ARE NOT PROPER GROUNDS.—(i) Excess of authority by arbitrator not proper ground. 15 Bom. L. R. 19 (P. C.) : 13 M. L. T. 11 : A. L. J. 42 : (1913) M. W. N. 64 : 17 C. W. N. 269. (ii) Mere delay in making award. 4 Pat. L. J. 394. See also 44 A. 432 : 66 I. C. 907 : 20 A. L. J. 272 : 1922 All. 106 : L. R. 3 A. 227. As to the effect of the death of a party in revoking reference, see 15 C. L. J. 360 : 4 S. L. R. 14 : 7 I. C. 590 : 14 C. W. N. 759 : 10 C. L. J. 449 : 4 Ind. Cas. 370.

"LEAVE OF COURT."—Granted only when there would be failure of justice. 10 Bom. L. R. 351. But see 11 Bom. L. R. 1. Irregularity in reference may be waived. 14 C. L. J. 188. If an award is valid, it is operative, even though neither party has sought to enforce it by a regular suit or by summary procedure. 28 C. W. N. 140 :

72 I. C. 128 : 37 C. L. J. 542 : 1924 Cal. 72. Agreement to refer—Subsequent suit on contract is not maintainable. 45 A. 472 : 21 A. L. J. 380 : 72 I. C. 615 : 1923 A. 518. See also 26 C. W. N. 69 : 69 Ind. Cas. 863 : 35 C. L. J. 482 : 1923 Cal. 135.

Sec. 6.—Reference not signed by party but by son and pleader and ratified by party, is valid. L. R. 4 A. 472.

Sec. 7.—As to power of arbitrators to delegate their powers, see 33 C. 1173.

POWER OF ARBITRATOR.—Once the arbitrator has parted with the award he is *functus officio* and he cannot exercise the power given to him by S. 7 ; none the less the Court is able to remit to him if satisfied that an honest mistake has been made. 1923 A. 31.

Sec. 8.—Scope of section. 43 B. 809. Act does not limit number of arbitrators. 43 A. 456.

APPLICABILITY OF SECTION.—Section is not applicable where a different course is provided by contract. 44 M. 406 : 40 M. L. J. 166. Nor to the case of independent appointments of two arbitrators. 50 I. C. 411 : 21 Bom. L. R. 308 : 43 B. 809. Not to independent appointment of second arbitrator. 1924 S. 29. The question whether S. 8 or S. 9 applies to a case where the reference provides for a single arbitrator or where the question is with reference to the appointment of an Umpire or a third arbitrator depends not upon whether one arbitrator ultimately acts or two but whether the submission provides for the appointment of one arbitrator by the concurrence of both the parties or of two arbitrators one by each party independently of the other. Where the proposal to refer disputes to arbitration and the nomination of first arbitrator were abandoned owing to the assurance of one party to come to an amicable settlement, and as the latter proved futile, there was fresh nomination of an arbitrator. *Held*, that the nomination was not in the place of first arbitrator but an independent one and S. 8 did not apply. A. I. R. 1924 S. 29. When according to the agreement an arbitrator has been nominated and the same is communicated to the other party in clear and unequivocal language, it *ipso facto* confers authority to arbi-

(a) where a submission provides that the reference shall be to a single arbitrator, and all the parties do not, after differences have arisen, concur in the appointment of an arbitrator ;

(b) if an appointed arbitrator neglects or refuses to act, or is incapable of acting, or dies, or is removed, and the submission does not show that it was intended that the vacancy should not be supplied, and the parties do not supply the vacancy ;

(c) where the parties or two arbitrators are at liberty to appoint an umpire or third arbitrator and do not appoint him ;

(d) where an appointed umpire or third arbitrator refuses to act, or is incapable of acting, or dies, or is removed, and the submission does not show that it was intended that the vacancy should not be supplied, and the parties or arbitrators do not supply the vacancy ;

and party may serve the other parties or the arbitrators, as the case may be, with a written notice to concur in appointing an arbitrator, umpire or third arbitrator.

(2) If the appointment is not made within seven clear days after the service of the notice, the Court may, on application by the party who gives the notice, and after giving the other party an opportunity of being heard, appoint an arbitrator, umpire or third arbitrator, who shall have the like power to act in the reference and make an award as if he had been appointed by consent of all parties.

9. Where a submission provides that the reference shall be to two arbitrators, one to be appointed by each party, then, unless a different intention is expressed therein,—

(a) if either of the appointed arbitrators refuses to act, or is incapable of acting, or dies, or is removed, the party who appointed him may appoint a new arbitrator in his place ;

(b) if, on such a reference, one party fails to appoint an arbitrator, either originally or by way of substitution as aforesaid, for seven clear days after the other party, having appointed his arbitrator, has served the party making default with a written notice to make the appointment, the party who has appointed an arbitrator may appoint that arbitrator to act as sole arbitrator in the reference, and his award shall be binding on both parties as if he had been appointed by consent :

trate. If he refuses to act and the submission does not show that it was intended, the vacancy should not be supplied. S. 8 provides for the appointment of another but the right of the party to nominate is exhausted. 76 I. C. 261 : 1925 Sind 12. The Court has no power to appoint new arbitrators in place of those who declined to proceed further in a case submitted to them, when the number of arbitrators is more than two. 50 I. C. 411 : 21 Bom. L. R. 308. Any vacancy is to be filled up by original appointer as mentioned in S. 9. 50 I. C. 411 : 21 Bom. L. R. 308. An application to the Court to act as an arbitrator is not one to make a reference. The award of the Court is a decree and no objection can be raised except by way of appeal. 26 I. C. 355 (M.). Effect of omission by arbitrator to fix time and place of hearing. 13 C. W. N. 63 : 1 I. C. 371. Effect of absence of one arbitrator in violating award. 30 I. C. 384.

OTHER IRREGULARITIES.—13 C.W.N. 297 : 1 I. C. 371 : 36 C. 388.

SECS. 8 AND 9 : DIFFERENCE BETWEEN.—Under S. 8 an application must be made to the Court and the Court appoints an arbitrator while under S. 9 appointment may be made by a party, whether originally or by way of substitution. 100 I. C. 890 : A.I.R. 1927 Sind 177.

Sec. 9.—APPLICABILITY OF SECTION.—Section applies only where a different intention is not

expressed in the submission. 7 S.L.R. 1 : 20 I. C. 504. S. 9 does not apply where the parties by their contract provide that a different course should be adopted if one of the parties fails to nominate an arbitrator as provided in the contract. 40 M. L. J. 166 : 62 I. C. 205 : 14 L. W. 42 : 44 M. 406 see also 100 I. C. 890 : A. I. R. 1927 Sind 177. Official Receiver is not a "party" within this section. 95 I. C. 750 : 19 S.L.R. 24 : A. I. R. 1926 Sind 209. Where the agreement between the parties contained a term that on the default of either party to appoint an arbitrator in time, the chairman of the Trade Association was to appoint one on behalf of the defaulter, held, that Sec. 9 (b) would not apply and an award made by one arbitrator alone, who was appointed by one of the parties was without jurisdiction. 49 I. A. 366 : 70 I. C. 777 : 50 C. 1 : 44 M. L. J. 758 : 27 C. W. N. 660 : 1922 P. C. 374 (P. C.). Where in pursuance of an agreement, both parties appoint an arbitrator each, it is not necessary that there should be a reference in writing or that they should accept the appointment formally in writing. The fact that arbitrators peruse relevant papers in the absence of parties does not amount to misconduct. They are judges of law and fact and an erroneous decision on a point of law will not justify interference. 76 I. C. 36 : 1924 S. 91.

Provided that the Court may set aside any appointment made in pursuance of clause (b) of this section.

10. The arbitrators or umpire acting under a sub-
mission shall, unless a different intention is expressed
herein,—

- (a) have power to administer oaths to the parties and witnesses appearing ;
- (b) have power to state a special case for the opinion of the Court on any question of law involved ; and

Sec. 10.—POWER OF COURT.—Civil Courts have no power to issue a summons or commission to a witness to give evidence in a private arbitration. Consent of parties cannot confer this power. 47 B. 250 : 24 Bom. L. R. 853. Where questions of fact under the Arbitration Act as to the conduct of arbitrators or the umpire, the procedure adopted and the instructions and so forth are raised, the Court should have evidence properly brought before it. 64 I. C. 706 (All.).

As to powers of arbitrators, see 12 Bom. L. R. 352 : 8 I. C. 171 : 10 Bom. L. R. 351. The opinion of the Court is not binding on the arbitrators, nor can it operate as *res judicata*. 19 S. L. R. 1 : A. I. R. 1925 Sind 293. An umpire has discretion to state a special case for the opinion of the Court and if he refuses and decides the point himself, his refusal does not amount to misconduct. 27 C. W. N. 494 : 39 M. L. T. 563. An umpire is not entitled to award interest on the damages awarded by him and if he does so, the award should be returned to him for re-consideration. 27 C. W. N. 494. If the arbitrators have authority to make a partition, they have authority to determine everything incidental or consequential with reference to the mode in which the partition is to be effected and the rights of the female members of the family cannot be disregarded. 10 O. L. J. 226 : 73 I. C. 39 (2) : A. I. R. 1924 Oudh 54. An arbitrator has a wide discretion in the conduct of the proceedings. His award will not be set aside merely because his opinion differs from that of the Court. But where there are irregularities which affect the decision, it will be remitted to him for a fresh decision. In arbitration proceedings, both sides have to be heard in the presence of the other. 66 I. C. 389 : 34 C. L. J. 39. Arbitrators do not exceed their authority when they allow interest after the date of the award. 27 C. W. N. 933 : 1924 Cal. 524. The question whether arbitrator acts within his jurisdiction or not depends solely upon the clause of reference and is to be decided by the Court. 47 Bom. 578 : 44 M. L. J. 706 : 25 Bom. L. R. 588 : 50 I. A. 324 : 1923 P. C. 66 (P. C.). The arbitrators have authority to make a decree for such damages as might have been ascertained by the Court. 27 C. W. N. 933 : 1924 Cal. 524. Arbitrators should give notice of their intention to proceed *ex parte* if one of the parties should not appear. *Ibid.* An arbitrator should not examine a party or his witness in the absence of the other, and failure so to do, is an irregularity which necessitates the remitting back of the proceedings to him for fresh consideration. 66 I. C. 389 : 34 C. L. J. 39.

FORM OF OATH.—See 2 L. W. 320 : 29 I. C. 49 : 17 M. L. T. 241.

PROCEDURE.—Where an umpire is appointed owing to disagreement he must re-hear the evidence if applied to, and failure to do so would be misconduct ; but if no application is made to that effect, he can proceed with the case and decide it on the evidence already produced. 63 I. C. 141 : 15 S. L. R. 68. An award of an umpire without hearing parties is against principles of equity and justice. Award of costs, without mentioning the amount, is bad for uncertainty, and the umpire can award costs only for the reference and award. The costs of obtaining an order from the Court is at the discretion of the Court. 12 I. C. 637 : 5 S. L. R. 89. The party who makes an objection must prove that he objected at the time to the umpire's proceedings in making final award without hearing his witnesses. He cannot, in law, be allowed to question the regularity, subsequently if there was any decision upon merits. 64 I. C. 706 (All.).

Sec. 10, cl. (b).—It does not amount to misconduct on the part of an umpire to proceed with questions of law disregarding the directions of the Court to reserve them. 39 M. L. T. 563 ; the umpire is not bound in law to state a case to the Court on questions of law at the direction of a judge (*Ibid.*) It amounts to misconduct on the part of an umpire to take independent legal opinion on the question in dispute. 39 M. L. T. 563.

EFFECT AND NATURE OF ORDER UNDER S. 10 (b).—Where arbitrators state a case for the opinion of the Court, the order thereon is not necessarily binding on them, as they still remain the final judges of the fact and law. Nor can such order amount to a judgment or operate as *res judicata*. Distinction between the English and Indian Acts pointed out. 79 I. C. 986 : 1925 S. 83.

AMBIGUITY IN AWARD.—In the case of a reference to arbitration the umpire is *functus officio* after he has published his umpirage or award and the document must speak for itself. Where an ambiguity in the award is patent it would not be competent to the court to launch into an inquiry to ascertain which of the two possible interpretations of the document the court should accept. 29 Bom. L. R. 660 : 104 I. C. 94 : A. I. R. 1927 Bom. 428.

INTERFERENCE WITH AWARDS.—It is necessary that Courts should be very cautious in interfering with awards and the grounds on which the Court will remit the matter for reconsideration are :—(1) that the award is bad on the face of it, (2) that there has been misconduct on the part of the arbitrator, (3) that there has been an admitted mistake and the arbitrator asks that the matter may be remitted to him, (4) where additional evidence has been discovered after the making of the award. 69 I. C. 995 : 49 Cal. 646 : 1922 Cal. 447. Mere errors in law unless dis-

(c) have power to correct in an award any clerical mistake or error arising from any accidental slip or omission.

11. (1) When the arbitrators or umpire have made their award, they shall sign it and shall give notice to the parties of the making

Award to be signed and filed.

and signing thereof and of the amount of the fees and charges payable to the arbitrators or umpire in respect of

the arbitration and award.

tinctly appearing on the face of the award or from any document accompanying or forming part of the award are not sufficient ground for remitting an award. 69 I. C. 995 : 49 Cal. 646 : 1922 Cal. 447. The decision of the arbitrators is final. If there is, on the face of the award, a patent inconsistency such as a flat contradiction in measurement, or a mistake of arithmetical calculation the Court to which application is made can send the award back to the arbitrators to correct it before a decree is passed in accordance with it. But anything of this kind cannot be done in execution proceedings. 21 A. L. J. 541 : 74 I. C. 817 : 45 A. 628 : 1924 A. 62. Award beyond reference but with consent of parties is valid—*Arithmetical error does not vitiate award*. 18 A. L. J. 241 : 58 I. G. 585 (2) : 42 A. 277. Award as to divisions of testator's property is not invalid by reason of the pendency of probate proceedings. 25 Bom. L. R. 437 : 73 I. C. 415 : 1923 Bom. 365.

SECS. 10 TO 15. FILING AWARD OF OTHERS THAN ARBITRATOR OR UMPIRE.—Where by an association contract the arbitrator's award was made subject to the decision of the committee in appeal and in the particular case the committee reversed the arbitrators' award and their decision was sought to be filed in court; *Held*, that the award of the committee is not within the terms of the Arbitration Act and cannot be filed under it. 31 C. W. N. 446 : 102 I. C. 395 : A. I. R. 1927 Cal. 391. But see 31 C. W. N. 730 : A. I. R. 1927 Cal. 647.

Per *Pearson, J.*—Ss. 10 to 15 of the Act are general sections applying to all awards under the Act whether the provisions of the first schedule are applicable to the particular arbitration, whether they are excluded by the expressed intention of the parties or not. (*Ibid.*)

Unless therefore the meaning of the word 'umpire' itself in the Act can be enlarged beyond its ordinary meaning, there is no recognition to be found in the Act for an award by a tribunal superior to the umpire. It would be impossible to hold that 'umpire' meant 'umpire or any higher domestic tribunal upon which, the parties may agree' (*Ibid.*).

AGAINST WHOM AWARD CAN BE EXECUTED.—An award obtained against a firm cannot be executed against a party who is alleged to have been a partner in the firm but who was not served either with the notice of arbitration or the filing of the award. 29 Bom. L. R. 660 : 104 I. C. 94 : A. I. R. 1927 Bom. 428.

SEC. 11. SCOPE OF SECTION.—See 76 I. C. 1007.

PER *C. C. Ghose, J.*—"There is nothing to prevent the parties from agreeing to a submission containing in it a further submission to arbitration. No doubt in S. 11 of the Arbitration Act there is not to be found any reference to arbitration by a committee; but it does not matter in the slightest whether the committee is described as a committee of appeal or whether

they are described as a fresh set of arbitrators. The contract contains as it were two submissions or a submission within a submission." 31 C. W. N. 730 : 103 I. C. 648 : A. I. R. 1927 Cal. 647. But see 31 C. W. N. 446 : 102 I. C. 395 : A. I. R. 1927 Cal. 391.

ESSENTIALS.—An award under S. 11 must be in writing and signed. 3 Bur. L. J. 102 : 82 I. C. 802 : 1924 R. 319. See also 7 M. L. T. 355 : 5 I. C. 374. Where a third arbitrator resigned because there was a majority against his view and did not sign the award; *held*, that did not affect the validity of the award. 76 I. C. 1007 : 1923 Lah. 411. Where the arbitrators take a reasonable fee for their services before entering upon their duties with a view to avoid the necessity of suing the parties in Court, their conduct in so doing, does not amount to misconduct and does not vitiate the award. 17 L. W. 648 : 75 I. C. 850 : 1924 Mad. 274. An application to file in Court, a compromise, settling the differences independently of arbitrators appointed, and signed by the parties and arbitrators, cannot be granted inasmuch as such a deed does not amount to an award. 48 P. L. R. 1915 : 28 I. C. 298 : 238 P. W. R. 1915.

NOTICE.—Where an arbitrator proceeds *ex parte* he should give notice to the parties before he so proceeds; otherwise his award is liable to be set aside. 60 I. C. 987 : 47 Cal. 951. See also 47 C. 29. Failure to give notice of filing an award does not by itself vitiate award. 95 I. C. 378 : A. I. R. 1926 Sind 242. Award—Legality of—Ministerial Act—Notice to parties—No necessity for. 17 L. W. 648 : 75 I. C. 850 : 1924 Mad. 274.

AWARD WHEN ENFORCEABLE.—An award becomes enforceable as soon as it is filed in Court and no notice filing need be given to the parties by the arbitrator. 60 I. C. 987 : 47 Cal. 951. See also 5 R. 171 : A. I. R. 1927 Rang. 197. The filing of an award is an act to be done at the instance of an arbitrator, and when it is filed the result is not that there is a suit in which a decree has been passed, but that there is an award enforceable as if it were a decree. 40 Cal. 219 : 18 I. C. 978 : 17 C. W. N. 395.

PROCEDURE.—The provisions of the Act and the requirements of the rules and orders of the High Court must be complied with before the Registrar can file the award and that it is only when the award is legally and properly filed that it will be executable as a decree. 5 R. 171 : 102 I. C. 800 : A. I. R. 1927 Rang. 197. The procedure laid down by the Act seems to be that the various stages to be found in Ss. 11 to 15 are to be followed in the same chronological order as the numerical order of the sections and that an application to set aside is not as a rule within the jurisdiction of the Court, until some application or attempt has been made to file the award or some other similar step is taken to enforce it. A. I. R. 1923 All. 31. There are express provi-

(2) The arbitrators or umpire shall, at the request of any party to the submission or any person claiming under him, and upon payment of the fees and charges due in respect of the arbitration and award, and of the costs and charges of filing the award, cause the award, or a signed copy of it, to be filed in the Court; and notice of the filing shall be given to the parties by the arbitrators or umpire.

(3) Where the arbitrators or umpire state a special case under section 10, clause (b), the Court shall deliver its opinion thereon, and such opinion shall be added to, and shall form part of, the award.

Power for Court to enlarge time for making award.

12. The time for making an award may, from time to time, be enlarged by order of the Court, whether the time for making the award has expired or not.

Power to remit award.

13. (1) The Court may, from time to time, remit the award to the re-consideration of the arbitrators or umpire.

sions to be found in S. 11 of the Act as to what is to be done by an arbitrator, if he has made his award. When the question, when an arbitrator in India becomes *functus officio* comes to be decided, the line will have to be drawn somewhere in the procedure which is laid down in S. 11 for getting the award into Court. It is difficult to hold that an arbitrator if *functus officio*, while there are still express statutory duties laid upon him by the Act. 1923 A. 31. A rule framed by the Court under, but not in accordance with, the Arbitration Act will not be given effect to. 40 Cal. 219 : 18 I.C. 978 : 17 C.W.N. 395.

FILING OF THE AWARD.—Any one of the arbitrators can legally file the award, the filing being a purely ministerial act. 29 I. C. 602 : 8 S. L. R. 302. Irregularities in filing can be rectified by court in exercise of its inherent jurisdiction. 5 R. 171 : 102 I. C. 800 : A.I.R. 1927 Rang. 197.

APPOINTMENT WHEN COMPLETE.—*The appointment of a certain person as arbitrator is not complete*, until such person has accepted the reference and consented to act. 29 I. C. 602 : 8 S. L. R. 302.

POWER OF ARBITRATORS—When a party to arbitration is a firm, the arbitrators can decide whether a person is a partner of the firm, but their decision is open to correction by the Court. 19 I. C. 363 : 6 S. L. R. 127. If the arbitrators had powers under the C.P. Code, personal service on the person might make him personally liable. Where some persons admit liability as members of the firm while others deny their partnership, the arbitrators may determine liability of the firm leaving the personal liability to be determined in execution or by appropriate suit. Denial of partnership raises a question outside the award. *Ibid.*

APPEAL.—An order refusing to set aside an award is a judgment within Letters Patent and is appealable. There is no right of appeal against such an order under S. 104, C.P.C., which has no application to the filing of an award under S. 11, Cl. (2) of the Arbitration Act. 46 I.C. 687 : 45 Cal. 502. No appeal lies unless it is given by law. There can be no appeal from an order setting aside an award. 5 Bur. L. T. 155 : 6 L. B. R. 88.

Sec. 12. POWER OF COURT TO EXTEND TIME.—Under S. 12 of the Arbitration Act, the Court has power to extend the time though the time for making the award is over. The Appellate Court can extend the time under O. 41 : R. 33 of

C.P. Code. 54 I.C. 660 : 40 Cal. 1059. *See also* 19 I. C. 374 : 6 S.L.R. 146 : A. I. R. 1926 Sind 8 : 27 L. W. 51 : (1928) M. W. N. 107 : A. I. R. 1928 Mad. 69 : 54 M. L. J. 49 (F. B.) (18 I. A. 55 Dist.) Power of extending time rests with the Court and not with the arbitrators themselves. 16 L. W. 657 : 70 I. C. 353 : 1923 M. 222. The Court can extend time for making the award under S. 12. 16 I. C. 861 : 6 S. L. R. 89. Before extending the time under S. 12 the Court is bound to consider whether the case is a fit one for the grant of the indulgence asked for and is not confined merely to the consideration of the question whether or not, the arbitrator had been diligent. 22 I. C. 16 : 8 S. L. R. 269. *See also* 78 I. C. 521. An umpire has to make his award within a month of his appointment and when time is not extended and the award is not made within such time, his award is worthless. 64 I. C. 706 (All.) Appeal against order refusing extension of time, 46 C. 1059.

Sec. 13.—AWARD WHEN CAN BE REMITTED.—When the award is set aside for legal and not moral misconduct, it can be remitted to the same arbitrator for further consideration. 25 I. C. 391 : 41 Cal. 313. *See also* 66 I. C. 389 : 34 C. L. J. 39. Ordinarily an Appellate Court will not interfere with the discretion of the first Court in declining to remit an award, but the Appellate Court will interfere where no grounds have been shown. 70 I. C. 353 : 16 L. W. 657 : 1923 Mad. 222. Where an arbitration is made without the intervention of a Court and an application is made to file the award, then if the award is good in part, the Court cannot remit to the arbitrator for amendment or declare valid the part to which no exception is taken even if it is separable from the bad part. 4 Pat. L. J. 669 : 74 I. C. 649 : 1923 P. 470. In the absence of anything to show that the umpire was prejudiced or was otherwise unfitted to hear and determine the case, the Court ought to remit to award to the arbitrators. 70 I. C. 353 : 16 L. W. 657 : 1923 Mad. 222.

AWARD WHEN CANNOT BE REMITTED.—When the misconduct is one justifying the removal of the arbitrator, the Court will not remit the award but will set it aside. 66 I. C. 349 : 34 C. L. J. 39. Order by a Court to arbitrators to make an award anew, is equal to refusal to file an award and is not appealable either under the C.P. Code or the Arbitration Act. 2 Bur. L. J. 193 : 76 I. C. 525 (2) : 1 R. 661 : 1924 Rang. 47.

(2) Where an award is remitted under sub-section (1) the arbitrators or umpire shall, unless the court otherwise directs, make a fresh award within three months after the date of the order remitting the award.

14. Where an arbitrator or umpire has misconducted himself, or an arbitration or award has been improperly procured, the Court may set aside the award.

Sec. 14. SCOPE OF SEC. See 195 L. R. 360—WHAT AMOUNTS TO 'MISCONDUCT'.—The failure on the part of an arbitrator to give a reasonable opportunity to one of the parties to appear before him amount to *misconduct*. Misconduct does not necessarily involve any moral turpitude, dishonesty, partiality or bias on the part of the arbitrator. 76 I. C. 275; 1924 S. 132. An arbitrator who does not give a party an opportunity to put his case before him and does not decide all points of dispute, is guilty of legal misconduct. 25 I. C. 391; 41 Cal. 313. The failure of an arbitrator to sign the award is legal flaw, but when his refusal to sign was at the instance of one of the parties though he had agreed to the award, that party cannot take advantage of the flaw. 20 A. L. J. 392; L. R. 3 A. 299; 66 I. C. 499; 1922 All. 233 (b). Arbitrators not acting together—Award not legal. 10 O. L. J. 29; 74 I. C. 299; 26 O. C. 350; 1923 Oudh 181. When the arbitration was to consist of five members but those who actually took part were three, the decision was not binding. 2 Bur. L. J. 229; 1924 R. 153. Where a reference to arbitration by four named persons without the intervention of Court provides for a decision by all the arbitrators and not merely by a majority of them, the refusal of any of the arbitrators to take part in the arbitration invalidates the award. 8 O L. J. 585; 65 I. C. 339; 1922 Oudh 108. Award is vitiated by the legal misconduct of the umpire, if he proceeds with the reference without giving any notice to the parties of the enquiry by him. 70 I. C. 353; 16 L. W. 657; 1923 Mad. 232. An award given in the absence of one of the parties and without any notice as to the time or the place where the arbitrators would sit to decide the dispute is illegal. 65 I. C. 577; L. R. 3 A. 81. See also 95 I. C. 378; A. I. R. 1926 Sind 242. Irregularities in procedure which amount to no proper hearing of the matters in dispute may amount to misconduct enough to vitiate the award. 66 I. C. 349; 34 C. L. J. 39. An award passed on reference by a guardian and based on information received in the absence of the parties or on the arbitrator's own knowledge of the facts in regard to the matters in issue between the parties would be invalid. 44 M. L. J. 263; 73 I. C. 470; 17 L. W. 71; 1923 Mad. 301. But parties who are *sui juris* may agree to a reference that the arbitrator shall decide the dispute on his own knowledge or that there is no need for him to take any evidence; and they will be bound by such a reference and no legal misconduct can be imputed to the arbitrator, if he based his award on such materials. (*Ibid.*) See also 42 All. 185. Any objection to an award on the ground of misconduct or irregularity on the part of the arbitrator ought no doubt to be taken by motion to set aside the award; but where it is alleged that an arbitrator has acted wholly without jurisdiction, his award can be questioned in a suit brought, for that purpose. 49 I. A. 366; 10 L. W. 537;

50 C. 1; 32 M. L. T. 19; 39 C. L. J. 336; 44 M. L. J. 75; (1923) M. W. N. 372; 27 C. W. N. 660; 70 I. C. 777; 1923 P. C. 374 (P.C.) Where an award by arbitrators is based on grounds, some of which did not justify the exercise of their jurisdiction, and the Court cannot hold with certainty that the arbitrators were exclusively within their jurisdiction the award is null and void. 66 I. C. 342; 34 C. L. J. 253.

AWARD WHEN CAN BE SET ASIDE.—A party to an arbitration can get an *ex parte* award passed against him set aside by a Court if he shows sufficient cause for non-appearance. 27 I. C. 135; 4 S. L. R. 110. See also 29 Bom. L. R. 1087. If one party declines to appear before the arbitrator they may proceed against him *ex parte*. The award so made is a valid award and could not be set aside. 12 I. C. 167; 5 S. L. R. 7 (Note). The arbitration court has exclusive jurisdiction to adjudicate on matters arising under S. 14. 76 I. C. 953. Where an agreement to refer to arbitration is impeached, an *injunction* may be issued to restrain arbitration proceedings. But when the agreement is not impeached and a suit covering the matter referred to arbitration is pending, injunction ought not to be issued. 9 I. C. 707; 8 S. L. R. 187. Under the Act, there must be a submission on matters in difference and a reference. Failure to pay claims is itself a "matter in difference." A general reference to arbitration is enough to bind the parties and it need not state the exact points for determination. 12 I. C. 147; 5 S. L. R. 7 (Note). The principles under which the validity of an arbitration should be judged are more rigid than those which apply to a case of family agreement. Where the parties to it were under a misapprehension as to their legal position and right, the award is bad. 2 Pat. 554; 73 I. C. 542; 1924 P. 49. Where a party wishes to show that the umpire had gone contrary to the established principles of justice and refused him hearing, the onus is upon him to call evidence to establish the fact in answer to the application to file the umpire's award. 64 I. C. 706 (All.). In case of an agreement to allow the disputes to be third by another tribunal, the Court will take into consideration all those grounds as in a case of submission to arbitration. 15 S. L. R. 88. Setting aside award for patent error of law, see 1924 S. 75. An agreement that neither party shall take objection to the award or file an appeal cannot control the unrestricted discretion vested in a Court by statute to set aside the award when it is sought to be filed. The question is not whether a party shall be compelled to carry out the terms of the contract but whether the Court would be exercising a proper discretion in conferring on the award the efficacy of its own decree. 42 I. C. 706; 11 S. L. R. 43. A person dissatisfied with an award, made without the intervention of a court of justice, is entitled to bring an action to set it aside on the ground that no contract provid-

15. (1) An award on a submission, on being filed in the Court in accordance with the foregoing provisions, shall (unless the Court re-

Award when filed to be
enforceable as a decree.
mits it to the reconsideration of the arbitrators or umpire,
or sets it aside) be enforceable as if it were a decree of
the Court.

(2) An award may be conditional or in the alternative.

Illustration.

A dispute concerning the ownership of a diamond ring is referred to arbitration. The award may direct that the party in possession shall pay the other party Rs. 1,000, the said sum to be reduced to Rs. 5 if the ring is returned within fourteen days.

ing for a reference to arbitration was made or that the contract if made was cancelled before the reference in favour of the arbitrator had been executed. 81 I. C. 782 : 1924 S. 25. It is not open to a party to move a Court to set aside an award only on some of his objections and to reserve other objections falling within the scope of S. 14 for a separate suit. The principle of constructive *res judicata* in S. 11, Expl. IV, C.P. Code, will apply. 76 I. C. 953. There is no appeal against an order refusing to set aside an award. 17 I. C. 902 : 5 Bur. L. T. 155 : 6 L. B. R. 88. No appeal lies against the decree passed in accordance with an award on the ground that arbitrator was guilty of misconduct or failed to carry out certain things while performing his duty. 19 I. C. 405 (Cal.).

SEPARATE SUIT WHEN CAN LIE.—Where an award is challenged on the ground that there was no submission to arbitration by the parties, the remedy lies in a regular suit and not in an application under S. 14. 69 I. C. 568 : 47 C. 806. Award is no bar to a suit if suit is not stayed under para. 18 C. P. C. 2nd Sch. or S. 19 of this Act. See 95 I. C. 481 : A. I. R. 1926 Sind 86. When an award under the Act has been made and filed, a party affected thereby can maintain a suit to impeach it on grounds not included within S. 14. 31 C. L. J. 283 : 56 I. C. 541 : 24 C. W. N. 454. Especially when a ground of attack goes to the root of the matter a suit is maintainable for the investigation and determination of the controversy according to the procedure prescribed by law. 31 C. L. J. 283 : 56 I. C. 541 : 24 C. W. N. 454. See also 4 Lah. L. J. 12 : 1922 Lah. 26. Decision beyond terms—Objection disallowed by Court—Revision lies to High Court. 73 I. C. 558 : 1923 Lah. 194 (1). Decision of arbitrator on broad principles cannot be impeached. 2 Lah. 114 : 61 I. C. 628 : 3 Lah. L. J. 394.

Sec. 15. SCOPE OF SECTION.—The fact that an award has been enforced by execution under S. 15 is not a bar to a suit to have it declared void and for consequential relief. S. 15 does not enact that award when filed is to be deemed a decree of Court, but only that it is to be enforceable as if it were a decree. 18 L. W. 537 : 49 I. A. 366 : 50 C. 1 : 32 M. L. T. 19 : 32 C. L. J. 336 : 44 M. L. J. 758 : 27 C. W. N. 660 : 70 I. C. 777 : (1923) M. W. N. 372 : 1922 P. C. 374 (P. C.). When the legislature provided under S. 15 that an award on being filed was enforceable as if it were a decree of Court, its intention was that all the provisions of the C.P. Code applicable to the execution of decree should apply to an award so filed. 27 C. W. N. 666 : 1924 Cal. 117. S. 15 makes an award directly enforceable as a decree

of Court, and therefore an application to execute the award is not an application in execution of an order within S. 22 of the Dek. Agri. R. Act 60 I. C. 942 : 14 S. L. R. 217. Though the filing of an award is the act of the arbitrators, the award does not become enforceable as if it were a decree of the Court immediately on presentation to the Court. 66 I. C. 796 : 1922 S. 6. See also 31 C. W. N. 1097 : 134 I. C. 808 : A. I. R. 1927 Cal. 853.

ENFORCEMENT OF AWARD.—Order of 'Court on an award declaring shares only, though actual partition was to be effected appointing a Commissioner for partition does not mean enforcement. 19 I. C. 374 : 6 S. L. R. 146. Award is not a decree of the court but by virtue of S. 15 is enforceable as if it were a decree. So that an award against a firm cannot be executed in the manner provided by O. 21, R. 50, C. P. Code. 29 Bom. L. R. 660 : 104 I. C. 94 : A. I. R. 1927 Bom. 428.

Limitation. For purposes of execution of an award filed in court it is governed by the period of limitation prescribed for execution of decrees by that court. 31 C. W. N. 1097 : 104 I. C. 808 : A. I. R. 1927 Cal. 853. So, award filed in a High Court is governed by Art. 183, Lim. Act. (*Ibid.*)

NATURE OF PROCEEDING.—A proceeding under the Act is not a suit and does not end in a decree. The Act does not provide for the Court making an order filing or refusing to file an award. The award is filed by the arbitrators under S. 11 and unless it is remitted to them under S. 13 (1) or set aside under S. 14, it becomes enforceable as if it were a decree of Court. The order of a Court in whatever terms it may be expressed under the Act is one setting aside or refusing to set aside an award. 10 I. C. 211 : 5 S. L. R. 61. Provisions of C. P. Code, if apply. 77 I. C. 868 : 1924 C. 117.

STAY OF EXECUTION.—Stay of execution of award cannot be ordered. 12 Bom. L. R. 860 : 8 I. C. 179. (See also notes under S. 19 *infra*.)

FILING OF AWARD.—(i) Procedure for filing award. 15 C. L. J. 110 : 13 C. W. N. 63. (ii) Effect of filing award. 40 C. 219. (iii) Effect of not filing award. 5 I. C. 425. Cost of filing award is in discretion of Court. 27 I. C. 526 : 8 S. L. R. 136.

APPEAL.—No appeal lies against an order under the Arbitration Act as the orders are neither decrees nor appealable orders under Ss. 104 and 146 of the C. P. Code. There can be only a revision under S. 115 of the C. P. Code. 10 I. C. 211 : 5 S. L. R. 61. A decree upon an award stands precisely in the same position with regard to its execution as any other decree of Court. A fresh suit does not lie on the same cause of action. 1922 Cal. 73 (21 W. R. 248 foll.).

Power to remove arbitrator or umpire.

16. Where an arbitrator or umpire has misconducted himself, the Court may remove him.

Costs.

17. Any order made by the Court under this Act may be made on such terms as to costs or otherwise as the

Court thinks fit.

18. The forms set forth in the Second Schedule, or forms similar hereto, with such variations as the circumstances of each case require, may be used for the respective purposes there mentioned, and, if used, shall not be called in question.

19. Where any party to a submission to which this Act applies, or any person claiming under him, commences any legal proceedings against any other party to the submission, or any person claiming under him, in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time after appearance and

Sec. 17.—Costs incurred before umpire or arbitrator are not to be regarded as costs incurred in court. Costs in S. 17 refers to costs incurred in court where there is no valid reference or valid award court has no jurisdiction to award costs. (1928) M.W.N. 228 : A. I. R. 1928 Mad. 370 : 54 M.L.J. 580

Sec. 19. APPLICABILITY OF SECTION.—Where a contract contains a clause for arbitration in case of disputes and a party thereto brought a suit to impeach the clause, *Held*, that as the object of the suit was to impeach the validity of the clause and not in respect of any matter agreed to be referred to arbitration, S. 19 does not apply. 61 I. C. 141 : 14 S.L.R. 223. *See also* 58 I.C. 799 (S.)

MEANING OF TERMS.—The words "a submission to which this Act applies" in S. 19 provide for the case where a suit is filed in an upcountry Court in an area to which the Act has not been applied though part of the cause of action has arisen in a Presidency town. That Court has power to stay the suit, if the suit could with leave or otherwise have been filed in a Presidency town. 31 Bom. 236, diss. 22 Bom. L. R. 242 : 57 I. C. 997 : 45 B. I. The expression "after appearance" in S. 19 is merely directory and the section is intended to prevent a party from filing an application after he has attained to the jurisdiction of the Court. 48 I.C. 434 : 12 S.L.R. 34. An appearance for the purpose of making a stay application may be treated as an appearance in the suit. (*Ibid.*)

"STEP IN PROCEEDINGS," WHAT IS.—An oral application for time to file a written statement by defendant's counsel in answer to a Court's question is taking a step in the proceedings within the meaning of S. 19. 23 C. W. N. 771 : 81 I.C. 846 : 1924 Cal 789. Any application to the Court, even one for time is a "step in the proceedings" within S. 19. 40 I. C. 81 : 10 S. L. R. 190.

BURDEN OF PROOF.—Where parties have agreed to refer disputes to arbitration there is a *prima facie* duty cast on Courts, when a suit is filed in connection with a dispute, to act on such agreement and to stay the suit and the onus is on the plaintiff to show why he should not be bound by the agreement. 75 I.C. 1041 : 1924 S. 49. *See also* 47 Cal. 849 : 61 Ind. Cas. 380 : 25 C. W. N. 62 : 56 Ind. Cas. 76 : 13 S. L. R. 201 : 53 Ind. Cas. 790 (S.). *See also* 48 I. C. 434 : 12 S. L. R. 34. Where a defendant does not plead at the early stages of a trial a subsisting agreement to

refer to arbitration but submits to the jurisdiction of the Court and allows the trial to proceed, he cannot afterwards raise the plea. 20 A. L. J. 975 : L. R. 4 A. 22 : 71 I. C. 144 : 1923 A. 139.

COURT EMPOWERED TO STAY.—It is the Arbitration Court as defined in S. 4 (a) of the Act that is vested with the jurisdiction to stay suits under S. 19. 52 I. C. 130 : 13 S.L.R. 8 (31 Bom. 236 Ref.) *See also* 70 Ind. Cas. 864 : 15 S.L.R. 5 : 1923 Sind 25. "Court" in S. 19 of the Act is the one in which the proceedings or other attempts to bring a suit are in fact instituted. 43 All. 553 : 63 I. C. 813 : 19 A. L. J. 495. As to the Court to which application under the section is to be made, *see* 52 Ind. Cas. 139 : 13 S. L. R. 23.

STAY.—The Court is vested with a discretion either to stay or not to stay the suit ; but the discretion must be guided by judicial principles. 75 I. C. 1041 : 1924 S. 49 : 43 C. L. J. 297 : 94 I. C. 182 : A. I. R. 1926 Cal. 722. An arbitration proceeding is to be stayed when a plff. impeaches a contract on equitable grounds. 55 I. C. 817 : 31 C. L. J. 158. 23 C. W. N. 534, foll. *See also* 1923 Sind 25. A stay of suit can be made under S. 19 only if the suit was instituted in respect of a matter agreed to be referred. 66 I. C. 741 : 34 C. 173. *See also* 107 I. C. 220. As to what must be proved by an applicant before granting his application for stay of suit, *see* 107 I. C. 434 : A.I.R. 1928 Sind 94. Where legal proceedings were for a long time threatened against a person in respect of a contract which provided for all settlement of disputes by arbitration, and when instituted that person applied for a stay of suit pending arbitration he can claim it as a matter of right. His failure to object to the litigation is no ground for refusing stay. 45 M. L. J. 653 : 33 M. L. T. 103 (H. C.) : (1923) M. W. N. 772 : 47 Mad. 164 : 1924 Mad. 336. Stay of suit pending arbitration—Discretion of Court—Charges of fraud. 22 A. L. J. 1031. An order staying a suit is a permanent one unless otherwise provided in the order itself and an order staying suit where the subject-matter was referred to arbitration and a decree was passed in terms of the award is sufficient to finally dispose of the suit. 43 A. 270 : 19 A. L. J. 19 : 59 I.C. 784 : 2 U. P. L. R. (All.) 387. *See also* 61 Ind. Cas. 380 : 25 C. W. N. 62 : 47 Cal. 849. The case would be different if by a reference and award before the suit the rights and

before filing a written statement or taking any other steps in the proceedings, apply to the Court to stay the proceedings; and the Court, if satisfied that there is no

liabilities of the parties had been determined at the date of the suit. 56 I.C. 160 : 13 S.L.R. 193. Where a contract provides for reference to arbitration and a suit is filed on the basis of the contract the award made on such arbitration though commenced before the suit, is ineffective unless it is stayed pending arbitration. If the Court refuses to stay or the deft. abstains from asking for it, the decision of the Court alone binds the parties and not the award. 60 I. C. 895 : 47 Cal. 752. See also 52 Ind. Cas. 130 : 13 S. L. R. 8. If no stay of the suit is obtained, an award made after suit is filed is invalid. An order for stay of the suit is good although made after the award. It is the Court in which the suit is filed which has power to stay the suit under S. 19. 52 I.C. 130 : 13 S.L.R. 8. Suit filed before arbitration began—Award come to during suit—Stay of suit not obtained—Award is not invalid but remains suspended, till stay application is disposed of. 1924 S. 146. Institution of suit after reference to arbitration by one of the parties and omission on the part of the other to apply for stay of suit amounts to waiver of right to arbitration. L. R. 3 A. 96; 44 A. 292 : 20 A. L. J. 128 : 65 I.C. 795 : 1922 A. 48 : 52 Ind. Cas. 130. Provision for reference to two arbitrators—one arbitrator to be named by each party—no provision in case of the refusal by a party to nominate—Suit by party who has not nominated—Stay of suit can be granted. 107 I.C. 434 : A. I. R. 1928 Sind 94.

EVIDENCE.—Before an order staying proceedings, can be made, it must be proved that there is a valid submission, that there is no sufficient reason why the matter should not be referred according to the submission and that the applicant was and is ready to do all things necessary to the proper conduct of the arbitration. 66 I.C. 951 : 47 Cal. 1020. Where one of the parties to a reference files a suit in respect of the same subject matter the proceedings in the suit cannot be stayed under S. 19 of the Arbitration Act but can be stayed under S. 151 of C. P. Code if it be necessary for the ends of justice. The Court should either adjourn the trial of the suit until an award is complete or insist on the plff. obtaining leave of the Court to revoke the reference. 35 I. C. 536 : 10 S. L. R. 61.

POWER OF COURTS.—Whether the parties to a suit refer their disputes to arbitration, the Court has under S. 19 power to stay the suit absolutely and such stay is final and sufficient to dispose of the suit. 43 All. 553 : 63 I.C. 813 : 19 A. L. J. 495. In a suit for breach of a contract the matters were referred to arbitration and the suit was stayed under S. 19. On objection being raised that an alleged custom was inconsistent with the contract and that the arbitrators cannot go into the question, *held*, that the arbitrator had the power. 58 I. C. 506 (S.) Under S. 19 the Court can stay a suit where there is an agreement between the parties to refer a matter to three arbitrators, as a submission providing for a reference to three arbitrators is not outside the scope of the Act. 22 Bom. L. R. 842 : 57 I. C. 997 : 45 B. 1. The Court should exercise its discretion refusing to stay a suit in a sparing and cautious manner. 47 I. C. 783 : 12 S. L. R. 41.

It is largely in the discretion of the Court to make an order staying proceedings in such a matter and when the discretion has been exercised, the Appellate Court will interfere only when a strong case is made out. 60 I. C. 951 : 47 Cal. 1020. A suit is not barred by a reference to arbitration made before, but the award in which is delivered after the suit. 56 I. C. 150 : 13 S. L. R. 193. Arbitrators can decide questions of law and the occurrence of a difficult or complicated question of law is not a sufficient ground to take the matter out of the arbitrator's hands. 56 I. C. 76 : 12 S. L. R. 201 ; or for refusing stay; 48 I. C. 434 : 12 S. L. R. 34. So long as the authority delegated to an arbitrator is not revoked he has the power to make an award and there would be no impropriety of conduct on his part in proceeding with the reference after a suit is filed unless he has notice that there has been an application for leave to revoke the authority conferred on him to some competent Court. 35 I. C. 536 : 10 S. L. R. 1. Though it appears desirable to have the matter tried in Court the proper course is not to ignore the arbitration but to direct the deft. to take necessary steps to revoke the submission. 35 I.C. 536 : 10 S.L.R. 1. See also 11 I.C. 274 (S.). It is highly improper for a party to sign a submission to arbitration and then allow the arbitrators to proceed *ex parte*; if the party objects to the jurisdiction of the arbitrators, the proper procedure is for him to make protest and go on with the case 11 I. C. 274 (S.). A suit by an Official Receiver of the property of an Insolvent guarantee broker against the employer for the balance of the guarantee deposit after setting off the amount of damages settled in insolvency proceedings as due to the employer cannot be referred to arbitration under S. 19 without the leave of the Court under the Prov. Ins. Act. 27 I. C. 138 : 8 S. L. R. 60. An arbitration clause in a contract does not oust the jurisdiction of the Court in case of its breach. 20 I. C. 504 : 7 S. L. R. 1. Where an action has been commenced upon a contract which contains a provision for reference to arbitration then even if a reference to arbitration has taken place before the suit is instituted and if no application is made to stay the suit pending the arbitration, the award is of no effect. 38 C. L. J. 67.

MISCELLANEOUS.—A decision of a Judge as an arbitrator with the consent of the parties is binding on the parties as if it were an award of an arbitrator, even though the Judge, as such, had no jurisdiction over the matter in controversy. But this doctrine cannot apply where the Judge was chosen as arbitrator not voluntarily but under great judicial pressure. 15 C. L. J. 142 : 13 I. C. 898 : 16 C. W. N. 444. An agreement to refer to arbitration is not bad merely for the reason that it included disputes other than that before the Court, if there was a distinct clause to the effect that the arbitrators would only report to the Court their decision on the subject-matter of the suit. 76 I. C. 1007 : 1923 Lah. 411. Where there were a number of matters in difference between the plaintiffs and the various defendants to the suit, it can hardly be suggested that the submission to arbitration is

sufficient reason why the matter should not be referred in accordance with the submission and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings.

Power for High Court to make rules.

20. The High Court may make rules consistent with this Act as to—

- (a) the filing of awards and all proceedings consequent thereon or incidental thereto ;
- (b) the filing and hearing of special cases and all proceedings consequent thereon or incidental thereto ;
- (c) the transfer to Presidency Courts of Small Causes for execution of awards filed, where the sum awarded does not exceed two thousand rupees ;
- (d) the staying of any suit or proceeding in contravention of a submission to arbitration ; and,
- (e) generally, all proceedings in Court under this Act.

21. In section 21 of the Specific Relief Act, 1877, after the words " Code of Civil Procedure" the words and figures " and the Indian Arbitration Act, 1899," shall be inserted, and for the words " a controversy " the words " present or future differences " shall be substituted.

Amendment of section 21, Act I, 1877.

Crown to be bound.

22. The provisions of this Act shall be binding on the Crown.

23. (1) This Act shall apply within the local limits of the ordinary civil jurisdiction of the [High Court of Judicature at Rangoon] in cases where, if the subject-matter submitted to arbitration were the subject of a suit, the suit could, whether with leave or otherwise, be instituted within those local limits.

Special provision as to application of Act to Rangoon.

(2) For the purposes of this Act, the local limits aforesaid shall be deemed to be a Presidency town.

bad on the ground that it does not refer to arbitration all the matters that may be in dispute between the parties. 2 Pat. 777 : 1923 Pat. 225 : 76 I. C. 2 : 2 P. L. R. 76 : 1924 P. 33. Sch. II, para. 1, C. P. Code, in terms provides that where all the parties interested agree that any matter in difference between them shall be referred to arbitration they may apply to the Court for a reference. (*Ibid.*) It may well be that some of the parties are interested in certain of the matters in dispute only, whilst others are interested in other matters and there is no reason why all the parties interested in one or other of the matters in difference between them should not agree to refer their disputes if there are other matters still to be determined in the suit. (*Ibid.*) If that part of the award which deals with the matters outside the reference can be separated from the other part, without affecting the decision on the matters referred, the Court may in such a case modify or correct the award. (*Ibid.*) Where a private information got by an arbitrator was, in the presence of the parties, communicated to the other arbitrators, an award by them is not invalid. Courts proceed very warily in allowing revision in awards. 14 L. W. 394 : 65 I. C. 676 : 41 M. L. J. 276 : (1921) M. W. N. 509. The umpire is not justified in the face of an objection by either party in taking any part of the evidence from the notes

of the arbitration unless there are specific provisions in the submission permitting him to do so. 64 I. C. 706 : 3 U. P. L. R. (All.) 60. When a Court is asked to file an award, it is not sitting as a Court of appeal from the arbitrators ; but the Court can certainly decide if the award sought to be filed is the production of a tribunal duly constituted under the terms of a contract binding on both parties. 44 A. 481 : 20 A. L. J. 385 : L. R. 3 A. 289 : 66 I. C. 691 : 4 U. P. L. R. (A.) 64. Where the Court below had cancelled the reference to arbitration on account of the delay in making the award, it is not competent to the appellate court to look into the award or treat it as if it were the report of a commissioner. 4 Lah. L. J. 48 : 1922 Lah. 194 (2). On this section, see also 39 Cal. 669 (Rules of Bengal Chamber of Commerce) ; 24 I. C. 863 ; 5 L. L. J. 146 : 73 I. C. 459 : 1923 Lah. 453 ; 28 C. W. N. 140 : (1924) Cal. 72 : 27 Bom. L. R. 1898 ; 1925 Bom. 449 ; 38 C. L. J. 67 (specific performance of agreement to refer to arbitration) ; 56 M. L. J. 291 ; 27 Bom. L. R. 568 sole arbitrator appointed by one party).

Sec. 23.—The section was substituted by the Lower Burma Courts Act VI of 1900, S. 47.

The words "High Court of Judicature at Rangoon" were substituted for "Chief Court of Lower Burma" by Act XI of 1923, 1st Schedule.

THE FIRST SCHEDULE.

See Section 6.

PROVISIONS TO BE IMPLIED IN SUBMISSIONS.

I. If no other mode of reference is provided, the reference shall be to a single arbitrator.

II. If the reference is to two arbitrators, the two arbitrators may appoint an umpire at any time within the period during which they have power to make an award.

III. The arbitrators shall make their award in writing within three months after entering on the reference, or after having been called on to act by notice in writing from any party to the submission, or on or before any later day to which the arbitrators, by any writing signed by them, may, from time to time, enlarge the time for making the award.

IV. If the arbitrators have allowed their time or extended time to expire without making an award, or have delivered to any party to the submission, or to the umpire, a notice in writing stating that they cannot agree, the umpire may forthwith enter on the reference in lieu of the arbitrators.

V. The umpire shall make his award within one month after the original or extended time appointed for making the award of the arbitrators has expired, or on or before any later day to which the umpire, by any writing signed by him, may, from time to time, enlarge the time for making his award.

VI. The parties to the reference, and all persons claiming through them respectively, shall, subject to the provisions of any law for the time being in force, submit to be examined by the arbitrators or umpire on oath or affirmation in relation to the matters in dispute, and shall, subject as aforesaid, produce before the arbitrators or umpire, all books, deeds, papers, accounts, writings and documents within their possession or power respectively which may be required or called for, and do all other things which during the proceedings on the reference the arbitrators or umpire may require.

VII. The witnesses on the reference shall, if the arbitrators or umpire think fit, be examined on oath.

VIII. The award to be made by the arbitrators or umpire shall be final and binding on the parties and the persons claiming under them respectively.

IX. The costs of the reference and award shall be in the discretion of the arbitrators or umpire, who may direct to and by whom, and in what manner, those costs or any part thereof shall be paid, and may tax or settle the amount of costs to be so paid or any part thereof, and may award costs to be paid as between solicitor and client.

THE SECOND SCHEDULE.

(See section 18.)

FORM I.

Submission to single arbitrator.

In the matter of the Indian Arbitration Act, 1899 :—

Whereas differences have arisen and are still subsisting between A. B. of _____ and C. D. of _____ concerning _____

Now we, the said A. B. and C. D., do hereby agree to refer the said matters in difference to the award of X. Y.

(Signed) A. B.
C. D.

Dated the _____ 189 .

FORM II.

Submission of particular dispute to single arbitrator.

In the matter of the Indian Arbitration Act, 1899:—

Whereas differences have arisen and are still subsisting between A. B. of _____ and C. D. of _____ concerning _____

Now we, the said A. B. and C. D., do hereby agree to refer the said matters in difference to the award of X. Y.

(Signed) A. B.
C. D.

Dated the _____ 189 .

FORM III.

Appointment of single arbitrator under agreement to refer future differences to arbitration.

In the matter of the Indian Arbitration Act, 1899 :—

Whereas, by an agreement in writing, dated the _____ day of _____, 18____, and made between A. B. of _____ and C. D. of _____, it is provided that differences arising between the parties thereto shall be referred to an arbitrator as therein mentioned ;

And whereas differences within the meaning of the said provision have arisen and are still subsisting between the said parties concerning _____

Now we, the said parties A. B. and C. D., do hereby refer the said matters in difference to the award of X. Y.

(Signed) A. B.
C. D.

Dated the 189 .

FORM IV.

Enlargement of time by arbitrator by endorsement on submission.

In the matter of the Indian Arbitration Act, 1899, and an arbitration between A. B. of and C. D. of :—

I hereby enlarge the time of making my award in respect of the matters in difference referred to me by the within (or above) submission until the day of 189 .

(Signed) X. Y.,
Arbitrator.

Dated the 189 .

FORM V.

Special case.

In the matter of the Indian Arbitration Act, 1899, and an arbitration between A. B. of and C. D. of :—

The following special case is, pursuant to the provisions of section 10, clause (b), of the said Act, stated for the opinion of the :—

(Here state the facts concisely in numbered paragraphs.)

The questions of law for the opinion of the said Court are :—

First, whether.....
.....
Secondly, whether.....
.....

(Signed) X. Y.,
Arbitrator.

Dated the 189 .

FORM VI.

Award.

In the matter of the Indian Arbitration Act, 1899, and an arbitration between A. B. of and C. D. of :—

Whereas in pursuance of an agreement in writing dated the day of 189 , and made between A. B. of and C. D. of , the said A. B. and C. D. have referred to me, X. Y., the matters in difference between them concerning

(or as the case may be) ,

Now I, the said X. Y., having duly considered the matters submitted to me, do hereby make my award as follows:—

I award—

(1) that.....
.....
(2) that.....
.....

(Signed) X. Y.,
Arbitrator.

Dated the 189 .

THE BANKERS' BOOKS EVIDENCE ACT (XVIII OF 1891).

PREFATORY NOTE.—The Hon'ble Sir Alexander Miller in presenting the Report of the Select Committee on the Bill to amend the Law of Evidence with respect to Bankers' Books said:—

" The Select Committee have made several considerable changes in detail, but none which, I think, affects the principle of Bill. The alterations are briefly these. Instead of the elaborate machinery proposed in the Bill in which it is to be proved by a system of affidavits that the books were examined and the extracts verified, we propose to introduce a system of certified copies, exactly analogous to that in the present law in respect to certified copies of public documents and we do not propose to permit any evidence to be given otherwise than by the production of the books themselves, or by the certified copies. We were asked to extend the Act to all kinds of mercantile concerns but that was not desirable. We have omitted all reference to Government Savings Banks and to the Post Office, because we think that the books of these bodies are " public documents " within the meaning of the

¹ Here specify the Court.

Evidence Act. We have, however, introduced a clause enabling the Local Government in any case to extend the provisions of the Act to the books of any company which keeps a regular set of books analogous to the recognized bankers' books and to which the Local Government consider it desirable to extend them. We have also introduced provisions enabling the bank, if it thinks fit, to offer to produce certified copies instead of allowing its books to be examined. We thought there might be very good reasons for this course, and that in the interest of the bank or its clients the clause which proposed to enable any party to obtain authority to look through the books of the bank may offer to give copies of the necessary certificates. There is one point in connection with this matter, which is, that we propose in that case, that the bank should have to certify that it has given all the relevant entries. One of the District Judges has made a note to the effect that it is impossible for a bank to judge what entries are or are not relevant. The answer is that the bank is not bound to take advantage of this provision. If for the purpose of concealing the accounts it chooses to take advantage of it and does not insert all relevant entries, it must act on its own responsibility and at its own risk.

We have inserted no clauses with reference to the payment of any fee to a bank for the supply of certified copies, but we have given a discretionary power to the Court, where the matter comes before it, to award costs to or against the bank as it may think just; and the reason is that we think that in most cases it would be more beneficial to the bank to give these certificates free of costs than to have their books produced, and possibly detained for days, or even weeks, for purposes of legal proceedings but if in any case the bank does not choose to grant these certified copies without payment, the party will have it in his own power either to pay what the bank asks, or to go before the Court and get an order. Probably in many cases an agreement with the bank would be come to in preference to going before the Court, but if the matter does go before the Court, then we give the Court complete power to make any order which it thinks proper as to costs for or against the bank.

The Bill does not contain any express power to the Court to require the production of the books instead of acting on the certified copies.

I think the power is given incidentally, because we say that these certified copies shall be received as *prima facie* evidence of the existence of the entries and also that no officer of a bank shall in proceedings to which the bank is not a party be compelled to produce the books without special order; but I am not quite sure that it may not be desirable to insert a clause to the effect that notwithstanding anything in the Act the Court may order the production of the books themselves whenever it thinks this necessary." (See Proceedings in Council, *Fort St. George Gazette*, 6th October 1891, Supp. pp. 1-2.)

The *Statement of Objects and Reasons* attached to the Amending Bill of 1900 says:—

"It is some time since the Imperial Parliament recognized the great inconvenience which is caused to bankers from their being required to produce their books in Courts of Justice. In the first place, these books are usually of great size and weight, and, in the second place, they are required for entering the daily transactions of the bank. Facilities were provided for proving the contents of bankers' books by means of certified copies, and in the year 1891 an Act was passed for British India upon the same lines. Unfortunately the definition of a company adopted in the Act was too narrow. It failed to provide for banking companies carrying on business in the country but registered or incorporated in the United Kingdom, and in a criminal case which was recently tried in Calcutta it was discovered that the entries in the books of the Delhi and London Bank could not be proved by copies. My learned friend the Advocate-General immediately called attention to this defect in the law and suggested the draft of a Bill for removing it. I now beg to leave to introduce a Bill widening the definition of the company adopted in the Act of 1891.

"I may say that the Bengal Chamber of Commerce has asked us to consider the question of extending the definition so as to include all foreign banks in India; but, after carefully considering the question, the Government of India came to the conclusion that it would be better to leave these foreign banks to be admitted in particular cases one by one under the power of notification given by section 3 of the Act of 1891". (See Proceedings in Council, *Fort St. George Gazette*, 20th July, 1900).

Effect of subsequent legislation:—S. 1 repealed in part by Act X of 1914.

Amended by Act I of 1893.

Amended by Act XII of 1900.

Declared in force—in the Santhal parganas.

LOCAL EXTENT OF THE OPERATION OF THE ACT.—The Act has been extended by notification under S. 5 of the Scheduled Districts Act XIV of 1874 to British Baluchistan, see *Gazette of India*, 1896, Pt. II, p. 1004. It was declared in force in Upper Burma (except the Shan States) by the Burma Laws Act XIII of 1898. It has been declared in force in the Santhal Parganas by S. 3 of Santhal Parganas Settlement Regulation III of 1872 as amended by the Santhal Parganas Justice and Laws Regulation III of 1899. See *Calcutta Gazette*, 1892, Pt. I, p. 448.

THE BANKERS' BOOKS EVIDENCE ACT (XVIII OF 1891).

[1st October, 1891.

An Act to amend the Law of Evidence with respect to Bankers' Books.

WHEREAS it is expedient to amend the Law of Evidence with respect to Bankers' books; It is hereby enacted as follows:—

Title, extent and commencement.

1. (1) This Act may be called THE BANKERS' BOOKS EVIDENCE ACT, 1891.

(2) It extends to the whole of British India.

1[(3) * * * * *]

Definitions.

2. In this Act, unless there is something repugnant in the subject or context—

[(1) "Company" means a company registered under any of the enactments relating to companies for the time being in force in the United Kingdom or in any of the Colonies or Dependencies thereof or in British India or incorporated by an Act of Parliament or of the Governor-General in Council, or by Royal Charter or Letters Patent ;]

(2) "bank" and "banker" mean—

(a) any company carrying on the business of bankers,

(b) any partnership or individual to whose books the provisions of this Act shall have been extended as hereinafter provided,

[(c) any post office savings bank or money order office ;]

(3) "bankers' books" include ledgers, day-books, cash-books, account-books and all other books used in the ordinary business of a bank :

(4) "legal proceeding" means any proceeding or inquiry in which evidence is or may be given, and includes an arbitration :

(5) "the Court" means the person or persons before whom a legal proceeding is held or taken :

(6) "Judge" means a Judge of a High Court :

(7) "trial" means any hearing before the Court at which evidence is taken; and

(8) "certified copy" means a copy of any entry in the books of a bank together with a certificate written at the foot of such copy that it is a true copy of such entry, that such entry is contained in one of the ordinary books of the bank and was made in the usual and ordinary course of business, and that such book is still in the custody of the bank, such certificate being dated and subscribed by the principal accountant or manager of the bank with his name and official title.

3. The Local Government may, from time to time, by notification in the official Gazette, extend the provisions of the Act to the books of any partnership or individual carrying on the business of bankers within the territories under its administration, and keeping a set of not less than three ordinary account books, namely, a cash-book, a day-book or journal, and a ledger, and may in like manner rescind any such notification.

4. Subject to the provisions of this Act, a certified copy of any entry in a banker's book shall in all legal proceedings be received as *prima facie* evidence of the existence of such entry, and shall be admitted as evidence of the matters, transactions and accounts therein recorded in every case where, and to the same extent as, the original entry itself is now by law admissible, but not further or otherwise.

5. No officer of a bank shall in any legal proceeding to which the bank is not a party be compellable to produce any banker's book the contents of which can be proved under this Act, or to appear as a witness to prove the matters, transactions and accounts therein recorded, unless by order of the Court or a Judge made for special cause.

Sec. 1, cl. (3).—¹Repealed by Act X of 1914, Sch. II.

Sec. 2, cl. (1) was substituted by Act XII of 1900, S. 2.

Sec. 2, cl. (2) (c) added by Act I of 1893, S. 2.

Cl. (3) "Bankers' books."—Meaning of : As to whether Loan Register in Public Debt office in Bank of Bengal is a Bankers' book, see 31 C. 284 ; 8 C. W. N. 125.

Sec. 2, cl. (8).—As to who can inspect and obtain *certified copies*, see 31 C. 284 ; 8 C. W. N. 125.

Sec. 3.—For *notifications* see Bom. Govt. Gazette, 1902, Pt. I, p. 1289 and as so Madras—see Mad. R. and O., Vol. I (List).

Sec. 4.—See as to copy of entry in the books of a Bank not falling within the definition of company. 4 C. W. N. 433 ; 18 A. at pp. 94—95. As

6. (1) On the application of any party to a legal proceeding, the Court or a Judge may order that such party be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of such proceeding, or may order the bank to prepare and produce, within a time to be specified in the order, certified copies of all such entries, accompanied by a further certificate that no other entries are to be found in the books of the bank relevant to the matters in issue in such proceeding, and such further certificate shall be dated and subscribed in manner hereinbefore directed in reference to certified copies.

(2) An order under this or the proceeding section may be made either with or without summoning the bank, and shall be served on the bank three clear days (exclusive of bank holidays) before the same is to be obeyed, unless the Court or Judge shall otherwise direct.

(3) The bank may at any time before the time limited for obedience to any such order as aforesaid either offer to produce their books at the trial or give notice of their intention to show cause against such order, and thereupon the same shall not be enforced without further order.

7. (1) The costs of any application to the Court or a Judge under or for the purposes of this Act and the costs of anything done or to be done under an order of the Court or a Judge made under or for the purposes of this Act shall be in the discretion of the Court or Judge, who may further order such costs or any part thereof to be paid to any party by the bank if they have been incurred in consequence of any fault or improper delay on the part of the bank.

(2) Any order made under this section for the payment of costs to or by a bank may be enforced as if the bank were a party to the proceeding.

(3) Any order under this section awarding costs may, on application to any Court of Civil judicature designated in the order, be executed by such Court as if the order were a decree for money passed by itself:

Provided that nothing in this sub-section shall be construed to derogate from any power which the Court or judge making the order may possess for the enforcement of its or his directions with respect to the payment of costs.

THE INDIAN BAR COUNCILS ACT (XXXVIII OF 1926).

[9th September, 1926.]

PREFATORY NOTE.—The necessity for, and the circumstances under which this Act is passed is thus explained in the *Statement of Objects and Reasons*:—The recommendations of the Indian Bar Committee in regard to the constitution of Bar Councils and their functions were as follows:—

1. An all-India Bar or Council is impracticable. Statutory Bar Councils should, however, be established at Calcutta, Madras, Bombay, Allahabad, Patna and Rangoon, but provision should be made permitting the constitution of councils at Lahore, Nagpur, Karachi and Lucknow later on. (Paragraphs 48 and 55.)

2. The Council should consist of 15 members, four of whom should be nominated by the High Court, including, where possible, the Advocate-General or the Government Advocate and the Government Pleader. The remaining eleven, of whom six should be advocates of at least 10 years' standing, should be elected by advocates of the High Court, provided that in Calcutta and Bombay the High Courts should determine how many of the eleven should be advocates entitled to practise on the original side. The nominated members should ordinarily be advocates, but it should be left to the High Courts to nominate Judges past and present. (Paragraphs 57 and 58.)

3. The first Councils should hold office for 3 years, the term of office of subsequent Councils being determined by rules to be framed by the Councils themselves. (Paragraph 57.)

4. A Bar Council should have power to make rules subject to the approval of the High Court in respect of the following matters:—

to who could order production of books—see 32 C. 498.

See 6. —On this section, see 5 Bom. L. R. 865 as to when order under the section can be made

without notice. As to when order for inspection can be given, see 20 M. 189 (196): No revision from order under the section, P. L. R. (1900), p. 237.

(a) the qualifications, admission and certificates of proper persons to be advocates of the High Court,

(b) the powers and duties of advocates,

(c) the conduct of any examination which may be prescribed by it and the fees to be paid for appearing at the same,

(d) legal education including the delivery of lectures to students and the fees to be chargeable therefor,

(e) matters relating to the discipline and professional conduct of advocates,

(f) procedure and practice in cases falling within the disciplinary jurisdiction of the Council,

(g) the method of holding elections of members of the Council and all matters incidental thereto.

(h) the meetings of the Council, the quorum necessary for the transaction of business, the election of a President or other officer and the appointment of committees for special purposes,

(i) the period for which a Council, after the first Council, should hold office and the filling of vacancies occurring between elections,

(j) the terms on which advocates of another High Court may be permitted to appear occasionally in the High Court to which the Council is attached, and

(k) any other matter prescribed by the High Court. (Paragraph 59.)

5. The rules regulating the election of the first Council and the filling of vacancies before rules are made by the Council should be made by the High Court, and it should be provided that no rules shall be made affecting the special provisions suggested for the original sides of the Calcutta and Bombay High Courts so long as those provisions remain in force. (Paragraph 59.)

6. A Bar Council should have power either of its own motion or on complaint or on a reference by the High Court to inquire into all matters of the kind referred to in sections 12 and 13 of the Legal Practitioners Act, 1879, breaches of rules and other improper conduct in which an advocate of the Court is concerned, and make a report to the High Court with a recommendation as to the action, if any, to be taken by the Court.

A Bar Council should also be entitled to be heard in any matter relating to the admission of an advocate or in support of any report made by it to the Court. (Paragraph 60.)

7. The existing disciplinary jurisdiction of the High Court should be maintained, but the Court should be bound before taking disciplinary action against an advocate, except in regard to contempt of Court and the like, to refer the case to the Bar Council for inquiry and report. On receipt of a report from the Bar Council the Court should be empowered itself to make or require the Council to make further inquiry. At the request of a Bar Council or on its own motion a High Court should be authorised to order an inquiry to be held by a local Court. (Paragraph 61.)

8. Provision should be made for procuring with the sanction of the Court the attendance of witnesses and production of documents required by the Council for an inquiry, and witnesses should receive the same protection as when they give evidence before a Court. (Paragraph 61.)

(The paragraphs referred to are paragraphs in the Report.)

The Government of India consulted Local Governments and High Courts upon these recommendations. In certain respect it appeared necessary to amplify them and in some respects to modify them in the light of the views urged by the authorities consulted. It is intended that these recommendations with the amplifications and modifications should be given effect to by or under the Bill.

2. The Bill is intended also to carry out as far as possible the following miscellaneous recommendations of the Committee :—

(a) The ideal to be kept in view should be the disappearance of different grades of legal practitioners so that ultimately there may be a single grade entitled to appear in all Courts. At present the largest degree of unification possible should be effected. (Paragraphs 11 and 17.)

(b) In all High Courts a single grade of practitioners entitled to plead should be enrolled, to be called advocates (not barristers), the grade of High Court Vakils or Pleaders being abolished, and when special conditions are maintained for admission to plead on the original side the only distinction should be within that grade which shall consist of advocates entitled to appear on the original side and advocates not so entitled. (Paragraph 19.)

(c) Advocates of one High Court should be entitled to practise in another High Court subject to conditions to be imposed by the Bar Council of the latter Court or by the Court where there is no Bar Council. (Paragraph 20.)

(d) Where there is a compulsory dual agency system at present it should be allowed to continue. (Paragraph 26.)

(e) The High Courts should retain their power to fix the amount payable by a party in respect of the fees of an adversary's legal practitioner. (Paragraph 61.)

(f) Partnerships between legal practitioners should be permitted wherever all classes of legal practitioners are entitled to act as well as to appear and plead. (Paragraph 69.)

(g) The High Courts, where this is not now permitted, should consider the advisability of allowing Indian barristers applying for enrolment as advocates to read with an approved Indian practitioner instead of reading in chambers in England, at least when it is shewn that the individual cannot obtain entry in suitable chambers in England. (Paragraph 68.)

3. Incidentally it is intended that the provisions of the Bill and the rules which may be made under it shall, in regard to advocates entitled as of right to practise in the High Courts, replace the relevant provisions of the Legal Practitioners Act, the Bombay Pleaders Act and the Letters Patent of the various High Courts of Judicature as well as the rules made under those provisions. In regard to certain matters for which provision has not been made in the Bill it has, however, been necessary to retain the residuary powers of the High Courts of Judicature under their Letters Patent.

In accordance with the recommendation of the Committee in paragraph 56 of their Report the enrolment and control of legal practitioners other than Advocates is left to the High Courts under the legal Practitioners Act and the Bombay Pleaders Act as amended by the Bill.

4. The principal modifications of the Committee's recommendations which are contained in the Bill are as follows:—

(a) the constitution of the Bar Councils differs slightly from the recommendations in that the Advocate General must be a member and the number of members to be elected is ten, instead of eleven;

(b) the rules regarding all elections of the Councils instead of only the election of the first Councils are to be made by the High Courts, the powers of the Councils in this respect being restricted to the making of bye-laws in regard to matters not provided for by the rules made by the High Courts. For the making of these bye-laws, however, the approval of the High Court will not be required;

(c) power is given to the Councils, with the sanction of the High Court, to prescribe fees to be payable to the Councils in respect of admission and enrolment and of the issue of certificates; and

(d) the powers of the Councils to hold inquiries into complaints of unprofessional conduct are restricted to cases referred to the Council by the High Court, and the inquiries are to be held by a Tribunal consisting of members of the Council appointed for the purposes of the inquiry by the Chief Justice or Chief Judge of the High Court. The High Court is, however, required to refer all complaints of unprofessional conduct which it does not dismiss either to the Bar Council or to a subordinate Court for inquiry. Instead of requiring the sanction of the Court for compelling the attendance of witnesses in each case a Tribunal is given power to enforce such attendance. A Tribunal is also given power to administer oaths to witnesses, and the protection of the witnesses who give evidence, which was recommended by the Committee, is secured by applying the provisions of section 132 of the Indian Evidence Act to proceedings before a Tribunal. On the other hand, rules governing the procedure of a Tribunal are to be prescribed by the High Courts instead of by the Councils with the approval of the High Court. (Statement of Objects and Reasons).—[*Gazette of India*, dated 2nd January, 1927, Part V, pages 6, 7 and the Report of the Bar Committee.]

When the Bill was referred to a Select Committee, several other alterations and amendments were made, with reference to which they said:—

"We have made a large number of alterations in the Bill, but we have not radically altered its scope in view of the fact that, although many of the opinions received are in favour of the conferment of much wider powers upon Bar Councils, many others, including some of great weight, reveal considerable opposition to the innovations already proposed. In these circumstances, we think it would be unwise to depart from the present scheme of the Bill as a more or less tentative measure which is intended to be the first step towards the unification and eventual autonomy of the legal profession. With these preliminary remarks we now proceed to refer in detail to the more important amendments which we have made.

Clause 1.—We wish to record a suggestion that the Local Government of the United Provinces and the Chief Judge of the Chief Court of the Oudh might well be consulted as to the desirability of applying the provisions of the Act to that Court.

Clause 4.—We think it desirable to indicate clearly that Judges of the High Court may be represented on the Bar Council, and have provided that two out of the four persons nominated by the Court may be Judges.

Sub-clause (3) of this clause was intended to provide for the representation on the Bar Council of advocates entitled to practise on the Original Side of the two High Courts to which it refers and more especially for the representation of the barrister element among them, an element which will no doubt tend to diminish with the course of time. We have accordingly provided definitely that at least one half of the representation of Original Side advocates on the Bar Councils of these two High Courts shall be Barristers.

We think it is essential, in view of the status of the Advocates-General in the presidency towns, that they should be made *ex-officio* Chairmen of the Bar Councils to which they respectively belong.

Clause 6.—The matters to be dealt with by rules made under this clause are, we think, matters which should ordinarily be dealt with by the Bar Councils themselves. We have accordingly provided that the rules should be made only in the first instance by the High Court and thereafter by the Bar Council with the previous sanction of the High Court. This involves the omission of sub-clause (c) of clause 7, which in the Bill as introduced was not altogether consistent with the provisions of clause 6.

Clause 8.—We have, in the first place, omitted the last part of the proviso to sub-clause (1) of this clause, as we are of opinion that it would not be possible to hold that a person appearing, pleading or acting on his own behalf or by his recognized agent could be held to be "practising".

We are also of opinion that the objection to sub-clause (2) which has been raised by several High Courts, namely, that the preparation and maintenance of the roll of advocates should be entrusted to the High Court instead of to the Bar Council, is well founded. We have accordingly provided for the maintenance of the roll by the High Court and for the maintenance of a copy of it by the Bar Council, principally in order that the election roll of persons entitled to elect members to the Bar Council may be kept up to date. In order to enable this to be done we lay upon the High Court the duty of furnishing a copy of the roll to the Bar Council and of communicating to it all alterations and additions as they are made.

Objection has been taken to the provision for the imposition of a fee in respect of enrolment of persons who are advocates, vakils or pleaders of the High Court at the time when the provisions of the Act come into force in respect thereof. We think that, if only for the purpose of starting the Bar Council in funds, some nominal fee should be payable by such persons and we have fixed this at the sum of Rs. 10. In cases of new entrants the fee payable will be that prescribed by rules made by the Bar Council under the next following clause. We desire to point out that persons who have once been enrolled in a High Court as advocates, vakils or pleaders will not, in view of the provisions of Article 30 in Schedule I to the Indian Stamp Act, 1899, be required to pay stamp duty again in respect of their enrolment under this Act.

We have added to this clause two sub-clauses providing respectively for the seniority of advocates *inter se* and their respective rights of pre-audience. Sub-clause (4) as drafted by us enables the High Court in individual cases to grant precedence to an advocate out of the order of his seniority. We think a provision of this kind might be used to the advantage not only of a rising and successful, but also of a senior and less successful, advocate.

Finally, in view of some of the opinions received, we consider it desirable to point out that clause 1 (3) of the Bill is designed to enable the various provisions of the Bill to be brought into force on different dates and thus to prevent the possibility of any period intervening between the operation of the prohibition contained in sub-clause (1) of clause 8 and the preparation of the new roll.

Clause 9.—Objections were raised to the provisions of sub-clause (4) of this clause in the Bill as introduced which was intended merely to preserve the existing powers of the Chartered High Courts under their Letters Patent to regulate the numbers of admissions and to refuse admission to individuals at their discretion. As, however, no High Court has, we believe, attempted to restrict in any way the numbers of new entrants, we think a provision enabling them to do so is unnecessary. But we do consider it essential that the High Court should have power to refuse admission to any person otherwise qualified if it considers that he would be on other grounds an undesirable addition to the Bar, and have made provision accordingly by means of a proviso to sub-clause (1).

We have added a new sub-clause (4) to this clause to meet a criticism advanced by the High Court of Judicature at Bombay that under the Bill as introduced, the powers of the High Court in respect of admissions to the Original Side were not sufficiently defined. The new sub-clause is intended to make it clear that the powers of the High Courts at Calcutta and Bombay to regulate absolutely the qualifications for admission to practise on the Original Side will remain unimpaired.

Clause 10.—It has been pointed out that the expression "unprofessional conduct" does not cover the whole range of cases in which it may be necessary to take disciplinary action against advocates, and we have made some drafting alterations in this clause to meet this point.

Some misunderstanding appears to have arisen as to the object of providing for a reference of cases of misconduct to Subordinate Courts. Such a provision is necessary as a Tribunal of the Bar Council will not in all cases be in a position to inquire satisfactorily into matters which have occurred in the mofussil. We think that the allocation of inquiries between Subordinate Courts and the Bar Council must be left to the discretion of the High Court, but we have provided that the High Courts shall be bound to consult the Bar Council in any case before referring it to such a Court; and we have further provided that Courts to which such reference may be made shall be the Courts of District Judges.

We have omitted the punishment of fine for which the Bill originally provided.

Clause 12.—The alterations which we have made in this clause provide, firstly, that the Advocate-General shall have notice of, and shall be entitled to appear at the hearing of, every case before the High Court, whether the inquiry has been made by a Tribunal of the Bar Council or by a District Court, and, secondly, that the High Court shall have the power to review its orders. This power will enable it to accept a belated apology, if it thinks fit, and remit or reduce the punishment.

Clause 13.—We have added a proviso to sub-clause (1) to give effect to a suggestion made by the High Court of Judicature at Bombay that the Tribunal should not have unrestricted power to enforce the attendance of judicial officers, a power which might result in dislocation of judicial business and inconvenience to the public. We, therefore, require the Tribunal to obtain the previous sanction of the High Court or of the Local Government, as the case may be, before issuing a summons to the presiding officer of any Court.

We have further thought it advisable to make definite provision as to the manner in which Tribunals may be enabled to utilise the powers conferred by this section.

Clause 14.—We think the provisions of the Bill as introduced were somewhat too stringent in refusing to allow an advocate of one High Court to appear before another unless rules had been made by the latter Court or by the Bar Council, where such exists, regulating the conditions of such appearances. We think it reasonable to give advocates the right of appearing in another High Court unconditionally unless conditions are imposed by such rules, and we have re-drafted the clause accordingly. We have also made an addition to sub-clause (1) to provide for certain cases which have been brought to our notice in which legal practitioners are at present entitled to appear before certain public officers or bodies not legally authorised to take evidence.

Clause 15.—We have given effect to a suggestion that provision should be made for rules to regulate the investment and general management of the funds of the Bar Council. We have also added a clause which will enable rules to be made in respect of other matters which experience may reveal as requiring regulation.

Clause 17.—We have inserted this clause in the usual form to provide indemnity for *bona fide* action taken by Bar Councils and Committees, Tribunals and members of Bar Councils."—[*Gazette of India*, dated 21st August, 1926, Pt. V, pp. 119-121.]

THE INDIAN BAR COUNCILS ACT (XXXVIII OF 1926).

An Act to provide for the constitution of Bar Councils in British India and for other purposes.

WHEREAS it is expedient to provide for the constitution and incorporation of Bar Councils for certain Courts in British India, to confer powers and impose duties on such Bar Councils, and to consolidate and amend the law relating to legal practitioners entitled to practise in such Courts ; It is hereby enacted as follows :—

Preliminary.

Short title, extent, application and commencement.

1. (1) This Act may be called THE INDIAN BAR COUNCILS ACT, 1926.

(2) It extends to the whole of British India, and shall apply to the High Court of Judicature at Fort William in Bengal, and at Madras, Bombay, Allahabad, Patna and Rangoon and to such other High Courts within the meaning of clause (24) of section 3 of the General Clauses Act, 1897, as the Governor-General in Council may, by notification in the *Gazette of India*, declare to be High Courts to which this Act applies.

(3) This sections and section 2, 17, 18 and 19 shall come into force at once ; and the Governor-General in Council may, by notification in the *Gazette of India* direct that the other provisions of this Act, or any provision thereof specified in the notification, shall come into force in respect of any High Court to which this Act applies on such date as he may by the notification appoint.

Interpretation.

2. In this Act, unless there is anything repugnant in the subject or context,—

(a) “ advocate ” means an advocate entered in the roll of advocates of a High Court under the provisions of this Act ;

(b) “ Advocate-General ” includes, where there is no Advocate-General, the Government Advocate and, where there is no Advocate-General or Government Advocate, such officer as the Local Government may declare to be the Advocate-General for the purposes of this Act ;

(c) “ High Court ” means a High Court to which this Act applies and

(d) “ prescribed ” means prescribed by rules made under this Act.

Constitution of Bar Councils.

Constitution and incorporation of Bar Councils.

3. (1) For every High Court a Bar Council shall be constituted in the manner hereinafter provided.

(2) Every Bar Council so constituted shall be a body corporate having perpetual succession and a common seal with power to acquire and hold property, both moveable and immovable, and to contract, and shall by the name of the Bar Council of the High Court for which it has been constituted sue and be sued.

Composition of Bar Councils.

4. (1) Every Bar Council shall consist of fifteen members, of whom—

(a) one shall be the Advocate-General ;

(b) four shall be persons nominated by the High Court, of whom not more than two may be Judges of that Court ; and

(c) ten shall be elected by the advocates of the High Court from amongst their number.

(2) Of the elected members of every Bar Council not less than five shall be persons who have for not less than ten years been entitled as of right to practise in the High Court for which the Bar Council has been constituted.

(3) Of the elected members of the Bar Councils to be constituted for the High Courts of Judicature at Fort William in Bengal and at Bombay such proportion as the High Court may direct in each case shall be persons who have, for such minimum period as the High Court may determine, been entitled to practise in the High Court in the exercise of its original jurisdiction, and such number as may be fixed by the

High Court out of the said proportion shall be barristers of England or Ireland or members of the Faculty of Advocates in Scotland.

(4) There shall be a Chairman and Vice-Chairman of each Bar Council elected by the Council in such manner as may be prescribed ;

Provided that the Advocates-General of Bengal, Madras and Bombay shall be Chairman *ex-officio*, respectively, of the Bar Councils constituted for the High Courts of Judicature at Fort William in Bengal, at Madras and at Bombay.

5. (1) Notwithstanding anything contained in clause (c) of sub-section (1) of section 4, the elected members of the first Bar Council constituted under this Act for any High Court shall be elected by and from amongst the advocates, vakils and pleaders who are on the date of the election entitled as of right to practise in the High Court.

Special provisions regarding constitution of first Bar Councils.

(2) The terms of office of the nominated and elected members of any such first Bar Council shall be three years from the date of the first meeting of the Council.

Power to make rules regarding constitution and procedure of Bar Councils.

6. (1) Rules, consistent with this Act, may be made provide for the following matters, namely :—

(a) the manner in which elections of members of the Bar Council shall be held ; the method of determining ; in accordance with the provisions of sub-sections (2) and (3) of section 4, the candidates who shall be declared to have been elected ; the manner in which the result of elections shall be published ; and the manner in which and the authority by which doubts and disputes as to the validity of an election shall be finally decided ;

(b) the terms of office of nominated and elected members of the Council ;

(c) the filling of casual vacancies in the Council ;

(d) the convening of meetings of the Council, and the quorum necessary for the transaction of business thereat ;

(e) the manner of election and the respective terms of office of the Chairmen, in cases where the Chairman is to be elected, and of the Vice-Chairman ; and

(f) any matter incidental or ancillary to any of the foregoing matters.

(2) The first rules under this section shall be made by the High Court, but the Bar Council may thereafter, with the previous sanction of the High Court, add to, amend or rescind any rules so made.

(3) No election of a member or members to the Council shall be called in question on the ground that due notice thereof has not been given to any person entitled to vote thereat, if notice of the date fixed for the election has, not less than thirty day before that date, been published in the local official Gazette of the province, or of each province, as the case may be, in which the High Court exercises jurisdiction.

(4) Rules made under clause (b) of sub-section (1) may provide for the retirement of members from office by rotation and for the manner in which the order of such retirement shall be determined.

Power of Bar Councils to make by-laws.

7. The Bar Council may make by-laws consistent with this Act and any rules made thereunder to provide for any of the following matters, namely :—

(a) the appointment of such ministerial officers and servants as the Bar Council may deem necessary, and the pay and allowances and other conditions of service of such officers and servants ; and

(b) the appointment and constitution of Committees of the Council, the procedure of such Committees, and the determination of the powers or duties of the Council which may be delegated to such Committees.

Admission and enrolment of advocates.

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

Enrolment of advocates.

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

(2) The High Court shall prepare and maintain a roll of advocates of the High Court in which shall be entered the names of—

(a) all persons who were, as advocates, vakils or pleaders, entitled as of right to practise in the High Court immediately before the date on which this section comes into force in respect thereof ; and

(b) all other persons who have been admitted to be advocates of the High Court under this Act :

Provided that such persons shall have paid in respect of enrolment the stamp-duty, if any, chargeable under the Indian Stamp Act, 1899, and a fee, payable to the Bar Council, which shall be ten rupees in the case of the persons referred to in clause (a) and in other cases such amount as may be prescribed.

[" (3) Entries in the roll shall be made in the order of seniority, and such seniority shall be determined as follows, namely :—

(a) all such persons as are referred to in clause (a) of sub-section (2) shall be entered first in the order in which they were respectively entitled to seniority *inter se* immediately before the date on which this section comes into force in respect of the High Court ; and

(b) the seniority of any other person admitted to be an advocate of the High Court under this Act after the date shall be determined by the date of his admission or, if he is a barrister, by the date of his admission or the date on which he was called to the Bar, whichever date is earlier :

Provided that, for the purposes of clause (b), the seniority of a person who before his admission to be an advocate was entitled as of right to practise in another High Court shall be determined by the date on which he became so entitled.

(4) The respective rights of pre-audience of advocates of the High Court shall be determined by seniority :

Provided that the Advocate-General shall have pre-audience over all other advocates, and King's Counsel shall have pre-audience over all advocates except the Advocate-General."]¹

(5) The High Court shall issue a certificate of enrolment to every person enrolled under this section.

(6) The High Court shall send to the Bar Council a copy of the roll as prepared under this section, and shall thereafter communicate to the Bar Council all alterations in, and additions to, the roll as soon as the same have been made.

(7) The Bar Council shall enter in the copy of the roll all alterations and additions so communicated to it.

9. (1) The Bar Council may, with the previous sanction of the High Court, make rules to regulate the admission of persons to be advocates of the High Court :

Qualifications and admission of advocates. Provided that such rules shall not limit or in any way affect the power of the High Court to refuse admission to any person at its discretion.

(2) In particular and without prejudice to the generality of the foregoing power, such rules shall provide for the following matters, namely :—

(a) the qualifications to be possessed by persons applying for admission as advocates ;

(b) the form and manner in which applications shall be made to the High Court for admission ;

(c) the giving of notice by the High Court to the Bar Council of all such applications ;

(d) the hearing by the High Court of any objection preferred on behalf of the Bar Council to the admission of any applicant ; and

(e) the charging of fees payable to the Bar Council in respect of enrolment.

¹ Sec. 8.—¹ Sub-Secs. 3 and 4 inserted and sub-Secs. (5), (6) and (7) re-numbered by Act XIII of 1927.

(3) Rules made under this section shall provide that no woman shall be disqualified for admission to be an advocate by reason only of her sex.

(4) Nothing in this section or in any other provision of this Act shall be deemed to limit or in any way affect the powers of the High Courts of Judicature at Fort William in Bengal and at Bombay to prescribe the qualifications to be possessed by persons applying to practice in those High Courts respectively in the exercise of their original jurisdiction or the powers of those High Courts to grant or refuse, as they think fit, any such application or to prescribe the conditions under which such persons shall be entitled to practice or plead].¹

Misconduct.

10. (1) The High Court may, in the manner herein-after provided, reprimand, suspend or remove from practice any advocate of the High Court whom it finds guilty of professional or other misconduct.

(2) Upon receipt of a complaint made to it by any Court or by the Bar Council or by any other person that any such advocate has been guilty of misconduct, the High Court shall, if it does not summarily reject the complaint, refer the case for inquiry either to the Bar Council or, after consultation with the Bar Council, to the Court of a District Judge (hereinafter referred to as a District Court) and may of its own motion so refer any case in which it has otherwise reason to believe that any such advocate has been so guilty.

11. (1) Where any case is referred for inquiry to the Bar Council under section 10, the case shall be inquired into by a Committee of the Bar Council (hereinafter referred to as the Tribunal).

(2) The Tribunal shall consist of not less than three and not more than five members of the Bar Council appointed for the purpose of the inquiry by the Chief Justice or Chief Judge of the High Court, and one of the members so appointed shall be appointed to be the President of the Tribunal.

12. (1) The High Court shall make rules to prescribe the procedure to be followed by Tribunals and by District Courts, respectively, in the conduct of inquiries referred under section 10.

(2) The finding of a Tribunal on an inquiry referred to the Bar Council under section 10 shall be forwarded to the High Court through the Bar Council, and the finding of a District Court on such an inquiry shall be forwarded direct to the High Court which shall cause a copy thereof to be sent to the Bar Council.

(3) On receipt of the finding, the High Court shall fix a date for the hearing of the case and shall cause notice of the day so fixed to be given to the Advocate concerned and to the Bar Council and to the Advocate-General, and shall afford the advocate concerned and the Bar Council and the Advocate-General an opportunity of being heard before orders are passed in the case.

(4) The High Court may thereafter either pass such final orders in the case as it thinks fit or refer it back for further inquiry to the Tribunal through the Bar Council or to the District Court, as the case may be, and, upon receipt of the finding after such further inquiry, deal with the case in the manner provided in sub-section (3) and pass final orders thereon.

(5) In passing final orders the High Court may pass such order as regards the payment of the costs of the inquiry and of the hearing in the High Court as it thinks fit.

(6) The High Court may, of its own motion or on application made to it in this behalf, review any order passed under sub-section (4) or sub-section (5) and maintain, vary or rescind the same, as it thinks fit.

(7) When any advocate is reprimanded or suspended under this Act, a record of the punishment shall be entered against his name in the roll of advocates of the High Court, and when an advocate is removed from practice his name shall forthwith be struck off the roll; and the certificate of any advocate so suspended or removed shall be recalled.

13. (1) For the purposes of any such inquiry as aforesaid, a Tribunal or a District Court shall have the same powers as are vested in a Court under the Code of Civil Procedure, 1908, in respect of the following matters, namely :—

Powers of the Tribunal and Courts in inquiries.

- (a) enforcing the attendance of any person and examining him upon oath,
- (b) compelling the production of documents, and
- (c) issuing commissions for the examination of witnesses :

Provided that the Tribunal shall not have power to require the attendance of the presiding officer of any Court save with the previous sanction of the High Court or, in the case of an officer of a Criminal or Revenue Court, of the Local Government.

(2) Every such inquiry shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228 of the Indian Penal Code ; and a Tribunal shall be deemed to be a Civil Court for the purposes of sections 480, 482 and 485 of the Code of Criminal Procedure, 1898.

(3) For the purpose of enforcing the attendance of any person and examining him upon oath or of compelling the production of documents or of issuing commissions—

(a) the local limits of the jurisdiction of a Tribunal shall be those of the jurisdiction of the High Court by which the Tribunal has been constituted ; and

(b) a Tribunal may send to any Civil Court having jurisdiction in the place where the Tribunal is sitting any summons or other process for the attendance of a witness or the production of a document required by the Tribunal, or any commission which it desires to issue, and the Civil Court shall serve such process or issue such commission, as the case may be, and may enforce any such process as if it were a process for attendance or production before itself.

(4) Proceedings before a Tribunal or a District Court in any such inquiry shall be deemed to be civil proceedings for the purposes of section 132 of the Indian Evidence Act, 1872, and the provisions of that section shall apply accordingly.

Miscellaneous.

Right of advocates to practise.

14. (1) An advocate shall be entitled as of right to practise—

(a) subject to the provisions of sub-section (4) of section 9, in the High Court of which he is an advocate, and

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

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

(2) Where rules have been made by any High Court within the meaning of clause (24) of section 3 of the General Clauses Act, 1897, or in the case of a High Court for which a Bar Council has been constituted under this Act, by such Bar Council under section 15, regulating the conditions subject to which advocates of other High Courts may be permitted to practise in the High Court, such advocates shall not be entitled to practise therein otherwise than subject to such conditions.

(3) Nothing in this section shall be deemed to limit or in any way affect the power of the High Court of Judicature at Fort William in Bengal or of the High Court of Judicature at Bombay to make rules determining the persons who shall be entitled respectively to plead and to act in the High Court in the exercise of its original jurisdiction.

15. A Bar Council may, with the previous sanction of the High Court for which it is constituted, make rules consistent with this Act to provide for and regulate any of the following matters, namely :—

(a) the rights and duties of the advocates of the High Court and their discipline and professional conduct ;

(b) the conditions subject to which advocates of other High Courts may be permitted to practise in the High Court ;

General power of Bar Councils to make rules.

(c) the giving of facilities for legal education and training and the holding and conduct of examinations by the Bar Council ;

(d) the charging of fees payable to the Bar Council in respect of the enjoyment of educational facilities provided, or of the right to appear at examinations held, by the Bar Council ;

(e) the investment and management of the funds of the Bar Council ; and

(f) any other matter in respect of which the High Court may require rules to be made under this section.

16. The High Court shall make rules for fixing and regulating by taxation or otherwise the fees payable as costs by any party in respect of the fees of his adversary's advocate upon all proceedings in the High Court or in any Court subordinate thereto.

Power to fix fees payable as costs.

17. No suit or other legal proceeding shall lie against a Bar Council or any Committee, Tribunal or member of a Bar Council for any act in good faith done or intended to be done in pursuance of the provisions of this Act or of any rule made thereunder.

Indemnity against legal proceedings.

18. All rules made under this Act shall be published in the local official Gazette of the province, or of each province, as the case may be, in which the High Court by which or with whose sanction the rules are made exercises jurisdiction.

Publication of rules.

19. (1) When sections 8 to 16 come into force in respect of any High Court, any enactment mentioned in the first column of the Schedule which is in force in any province in which the High Court exercises jurisdiction shall, for the purpose of its application to that province, be amended to the extent and in the manner specified in the second column of the Schedule.

Amendment of enactments, etc.

(2) When sections 8 to 16 come into force in respect of any High Court of Judicature established by Letters Patent, this Act shall have effect in respect of such Court notwithstanding anything contained in such Letters Patent, and such Letters Patent shall, in so far as they are inconsistent with this Act or any rules made thereunder, be deemed to have been repealed.

(3) When sections 8 to 16 come into force in respect of the High Court of Judicature at Bombay, the Bombay Pleaders' Act, 1920, except section 7 thereof, shall cease to apply to or in respect of any person enrolled as an advocate of the High Court under this Act, and nothing in that Act shall be deemed to authorize the admission or enrolment of any person as a vakil or pleader of the High Court.

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

THE SCHEDULE.

(See section 19.)

AMENDMENT OF ENACTMENTS.

Enactments amended.
The Legal Practitioners Act,
1879.

Extent and manner of amendment.

- (1) In section 4, after the words " with the permission of the Court " the words and figures " or, in the case of a High Court in respect of which the Indian Bar Councils Act, 1926, is in force, subject to rules made under that Act " shall be inserted.
- (2) In section 6 clauses (a) and (b) after the words " Royal Charter " the words and figures " in respect of which the Indian Bar Councils Act, 1926, is not in force " shall be inserted.
- (3) To section 38 the following words and figures shall be added, namely :—

"and, except as provided by section 36, nothing in this Act applies to persons enrolled as advocates of any High Court under the Indian Bar Councils Act, 1926."

- (4) In section 41, sub-section (1), after the words "Royal Charter" the words and figures "in respect of which the Indian Bar Councils Act, 1926, is not in force" shall be inserted.

The Indian Stamp Act, 1899.	In Article 30 of the First Schedule after the words "High Court", where they first occur, the words and figures "under the Indian Bar Councils Act, 1926, or" shall be inserted.
The Madras Stamp (Amendment) Act, 1922.	In Article 25 of Schedule 1-A, after the words "High Court," where they first occur, the words and figures "under the Indian Bar Councils Act, 1926, or" shall be inserted.
The Bengal Stamp (Amendment) Act, 1922.	In Article 30 of Schedule 1-A, after the words "High Court," where they first occur, the words and figures "under the Indian Bar Councils Act, 1926, or" shall be inserted.
The Indian Stamp (Punjab Amendment) Act, 1922.	In Article 30 of Schedule 1-A, after the words "High Court," where they first occur, the words and figures "under the Indian Bar Councils Act, 1926, or" shall be inserted.
The Assam Stamp (Amendment) Act, 1922.	In Article 30 of Schedule 1-A, after the words "High Court" where they first occur, the words and figures "under the Indian Bar Councils Act, 1926, or" shall be inserted.

Rules and Notification under the Bar Councils Act.

NOTIFICATION BY GOVERNMENT OF INDIA.

In pursuance of sub-section (3) of section 1 of the Indian Bar Councils Act, 1926 (XXXVIII of 1926), the Governor-General in Council is pleased to appoint the 16th day of July, 1928, as the date on which the provisions of the said Act not yet in operation shall come into force in respect of the High Court of Judicature at Madras.—No. F. 994-27- Judicial, Home Department.

27th March, 1928.

NOTIFICATION BY THE MADRAS HIGH COURT.

Notice is hereby given with reference to section 8, sub-section (2) of the Indian Bar Councils Act, 1926, that all persons, who are advocates or vakils entitled as of right to practise in the High Court, Madras, and who wish to have their names entered in the roll of Advocates to be maintained under the Act, shall pay on or before the 2nd July, 1928, the fee of ten rupees payable to the Bar Council to the Registrar of the High Court, who shall be the Secretary to the Council for the time being.

2. The fee can be paid to the accountant of the High Court, on days on which the High Court will be open for the transaction of urgent business during the vacation, i.e., on Mondays and Tuesdays every week.—R. O. C. No. 1401 B-1-28.

3rd May, 1928.

The following rules having been framed by the High Court of Judicature at Madras in exercise of the power vested in it by clause (2) of section 6 of the Indian Bar Councils Act, 1926 (XXXVIII of 1926), read with section 22 of the General Clauses Act, 1897 (X of 1897), are published for general information. The rules shall come into force from the 16th July, 1928.

RULES.

1. In these rules unless there is anything repugnant in the subject or context and subject to the provisions of Rule 42:—

- (i) "Act" means the Indian Bar Councils Act.
- (ii) "Advocate-General" means the Advocate-General of Madras.
- (iii) "Bar Council" means the Bar Council to be constituted for the High Court.
- (iv) "Barrister" means a barrister of England or Ireland or a member of the Faculty of Advocates in Scotland.
- (v) "Chairman" means the Chairman of the Bar Council or in his absence the Vice-Chairman as provided by section 4 (4) of the Act.
- (vi) The "High Court" means the High Court of Judicature at Madras.
- (vii) "Secretary" means the Secretary or other person to be appointed by the Bar Council to perform the duties of a Secretary however designated and shall include any person appointed under Rule 11.

(viii) "Voter" means any person whose name is entered on the roll of Advocates maintained by the High Court under section 8 (2) of the Act and who is resident in India at the time of the election.

2. The Bar Council shall be the accredited representative of the Bar and its duty shall be to deal with all matters affecting the profession and to take such action thereon as provided for by the Act.

3. The Bar Council shall consist of (i) the Advocate-General for the time being, (ii) four persons nominated by the High Court in accordance with section 4, clause 1 (b) of the Act and (iii) ten persons elected from among the Advocates and Vakils who are on the date of the election entitled as of right to practise in the High Court.

4. Elections to the Bar Council shall be held at such place and on such day and within such hours as the Chairman may appoint, but not later than one month after the term of office of elected members who shall vacate office shall expire.

5. (i) Notice of such time and place shall be given by publication in the *Fort St. George Gazette*, over the signature of the Secretary not less than 30 days before the date of the election.

(ii) Copies of such notice shall also be sent by the Secretary to the Advocate-General and to the Presidents of the Vakils and Bar Associations, Madras, to be affixed as they may direct.

6. Every candidate for election as a member of the Bar Council shall be proposed by five voters by letter addressed to the secretary and signed by each of such voters and delivered to the Secretary not less than 15 and not more than 30 days before the date fixed for election.

7. The Secretary may submit to the Advocate General any proposal as to the validity of which he may have any doubt and subject to provisions of Rules 22, 23, 25 and 26, the decision of the Advocate-General shall be final.

8. In the event of the Advocate General deciding that a proposal is invalid, the fact shall be notified forthwith to the candidate by the Secretary and the candidate may thereupon submit another proposal within the time prescribed by Rule 6. In no event shall the candidate be entitled to submit a proposal after the time prescribed by Rule 6.

9. Any person proposed may, by writing, withdraw his name as a Candidate at any time before the voting papers are printed and his name shall be at once omitted from the printed lists.

10. Not less than seven days before the date fixed for the election the Secretary shall cause a list of the names of all candidates duly proposed to be posted on a notice-board in the Court House and shall send copies of such list to the Vakils and Bar Associations in Madras and to all the Civil Courts and Vakils' Associations in the Presidency.

11. Elections and all matters relating thereto provided for by these rules shall be conducted by the Secretary or such person as the Bar Council may appoint to discharge the duties of the Secretary under these rules and the Secretary or such person may with the approval of the Chairman appoint any person or persons to assist him in the conduct thereof.

12. If ten or less than ten candidates are proposed and nominated for elections, they shall be deemed to be elected and if the number of candidates so proposed and nominated be less than ten, the Bar Council as elected, shall have power to fill up the remaining vacancies in the manner provided for filling a casual vacancy.

If more than ten candidates are proposed, the election shall be by voting papers as provided in the succeeding rules.

13. A roll of Advocates and Vakils entitled as of right to practise in the High Court shall be prepared consisting of two parts: those who are of more than 10 years' standing and those who are of less than 10 years' standing with the address of each member. Any person who desires to change his address shall notify his intended change of address to the Secretary of the Bar Council.

14. A voting paper will be issued to every voter, but any person entitled to vote who has not entered his name and address shall not be supplied with a voting paper except on a written application to the Secretary.

15. Every voting paper shall be in the following printed form and shall, when issued, have written thereon the name of the voter for whose use it intended and shall only be counted when signed by such voter.

Form of Voting Paper.

Madras Bar Council Election,

Name of Voter.....

Mark Showing

Choice

Name of candidate.

Signature of voter.

16. All voting papers when filled in and signed shall be delivered or sent by post to the Secretary so as to be received by him on or before 12 noon of the day fixed for election and any voting paper received thereafter shall be rejected.

17. (i) A voter shall vote by placing a cross against the name of any candidate for whom he desires to vote. He shall not place a cross against more names than the number of members to be elected. He shall not give more than one vote to one candidate. In the event of any erasures or alterations on the voting paper or of an excessive number of votes purporting to have been given, the voting paper shall be deemed to have been defaced and no votes purporting to have been given thereby shall be counted.

(ii) The decision of the Advocate-General whether a voting paper has or has not been defaced shall be final.

18. At the conclusion of the voting the votes shall be counted and the voting paper shall thereupon be placed in a box and sealed and the names of the candidates shall be set out in a list which shall specify the number of votes obtained by each.

19. The number of candidates who shall be declared to have been elected shall be the first ten who obtain the highest number of votes.

In the event of an equality of votes, the Secretary shall draw lots in the presence of the Advocate-General for the purpose of deciding the priority between the candidates having the same number of votes.

20. The ten elected members of the first Council shall all of them be Advocates or Vakils of not less than 10 years' standing entitled as of right to practise in the High Court.

21. A list of candidates declared elected to the Bar Council shall be prepared and signed by the Secretary and submitted by him to the Advocate-General who shall certify the same by his signature and the same shall be filed as of record by the Secretary. Copies thereof shall be published in the *Fort St. George Gazette* and sent to the Advocate-General and the Bar and Vakils' Associations, Madras, to be affixed as they may direct and to all the Civil Courts in the Presidency.

22. A candidate may contest the validity of the election of a candidate declared to have been elected to the Bar Council by letter signed by him and addressed to the Secretary. Such letter shall state the grounds upon which the validity of such election is contested and shall be delivered to the Secretary within seven days of the date of the publication in the *Fort St. George Gazette* of the list required by Rule 21 to be so published and after the expiry of seven days from the date of such publication the validity of the election shall not be challenged by a candidate on any ground whatever.

23. At any time within 30 days from the date of the publication aforesaid of the said list the Advocate-General may refer in writing to the Committee constituted by Rule 25 any question relating to the validity of a candidate declared to have been elected to the Bar Council.

24. At the expiry of 40 days from the publication aforesaid of the said list the election shall be final and the voting papers shall be destroyed provided that in the event of the validity of an election being challenged under Rule 22 or of a reference under Rule 23 the voting papers shall be preserved and dealt with as the Committee appointed under Rule 25 may direct.

25. All matters arising under Rules 22 and 23 shall be decided by a Committee of three Judges to be nominated by the Chief Justice and the said Committee shall be at liberty to hold such enquiry and in such manner as it may see fit. The decision of a majority of the said Committee shall be final as to any question that may arise at the said enquiry and in relation thereto and upon any matter referred to or to be enquired into by them under these rules.

26. If the said Committee shall decide that a candidate has not been validly elected the vacant place on the Bar Council shall be filled as hereinafter provided in the case of a casual vacancy.

27. Elected members going out of office shall be eligible for re-election. No elected member who by reason of his retirement or under Rule 30 has caused a casual vacancy shall be eligible for re-election at the next election.

28. Nominated members shall go out of office at the expiry of three years from the date of the first meeting of the Bar Council and annually thereafter on the further expiry of one year from the said date but shall be eligible for re-nomination.

The term of office of the elected members shall be three years from the constitution of the Bar Council.

29. Casual vacancies which may occur among the elected members may be filled up by the Bar Council and the person filling up a vacancy shall go out of office with the end of the term of that Bar Council. In the event of two or more candidates having received the same number of votes, the Chairman shall have a casting vote.

30. Any elected member of the Bar Council who fails to attend three consecutive meetings of the Bar Council shall be deemed to have vacated his seat and the same shall be deemed a casual vacancy and he shall not be eligible for appointment under Rule 27.

31. The Bar Council shall be deemed duly constituted notwithstanding any vacancy in elected or nominated members.

32. Meetings of the Bar Council shall be convened by the Secretary under the direction of the Chairman, or, in his absence from Madras, of the Vice-Chairman, who shall determine the time and place thereof, provided that no meeting shall be convened for any date falling within a vacation of the High Court.

33. Notices of meetings of the Bar Council shall be given as the Bar Council may from time to time determine.

34. The Bar Council shall elect from among their members a Vice-Chairman at a meeting held for the purpose. Any candidate for the office of Vice-Chairman shall be proposed and seconded by members of the Bar Council.

35. The election of the Vice-Chairman shall be by ballot to be held in such manner as the Chairman shall determine. If the votes are equal, the Chairman shall have a casting vote.

36. The quorum of the Bar Council shall be five. Each member of the Bar Council shall have a vote and the Chairman shall have a casting vote.

37. No matter determined by a resolution of the Bar Council shall be re-considered or re-opened within six months from the date of such resolution and the Chairman shall decide if a matter is within this rule and his decision shall be final.

38. The Bar Council shall have power to appoint a Secretary, Treasurer, officers and servants as may be necessary as provided for in the by-laws of the Bar Council under the Act.

39. The funds received by the Bar Council shall be at its disposal for the payment of such salaries and other expenses as the Bar Council may incur in promoting the objects for which it is constituted.

40. The Bar Council shall have power to appoint Standing Committees if it thinks fit and delegate to them such powers or duties of the Bar Council as may seem desirable.

41. The Bar Council may make such rules of business as it may think fit not inconsistent with the Act or the rules.

42. For the purposes of the first election to be held under the Act and these rules :—

(i) In Rules 5, 6, 7, 8, 10, 11, 13, 14, 16, 19 (i), 21 and 22 "Registrar" shall be substituted for "Secretary".

(ii) In Rule 4 "Chief Justice of Madras" shall be substituted for "Chairman."

(iii) In Rules 7, 8 and 17 (ii) the words "such Judge of the High Court as the Chief Justice may appoint" shall be substituted for the words "the Advocate-General."

(iv) From Rule 11 the words "or such person as the Bar Council may appoint to discharge the duties of the Secretary under these rules" and the words "or such person" and the words "with the approval of the Chairman" shall be deleted.

(v) To Rule 18 the words "and a copy sent to the Chairman of the Bar Council when constituted" shall be added.

(vi) From Rule 19 (i) the words "in the presence of the Advocate-General" shall be deleted.

(vii) From Rule 21 the words "and submitted by him to the Advocate-General who shall certify the same by his signature" shall be deleted.

(viii) "Registrar" means the Registrar of the High Court and shall include any person appointed by him under Rule 11.

NOTIFICATIONS BY THE CALCUTTA HIGH COURT.

The following rules having been framed by the High Court of Judicature at Fort William in Bengal, in exercise of the power vested in it by clause (2) of section 6 of the Indian Bar Councils Act, 1926 (XXXVIII of 1926), read with section 22 of the General Clauses Act, 1897 (X of 1897), are published for general information. The rules shall not take effect until the Governor-General in Council, by notification in the *Gazette of India*, directs that the provisions of section 6 of the Indian Bar Councils Act come into force.

RULES.

1. In these rules unless there is anything repugnant in the subject or context and subject to the provisions of rule 36—

(i) "Act" means the Indian Bar Councils Act, 1926.

(ii) "Advocate-General" means the Advocate-General of Bengal,

(iii) "Bar Council" means the Bar Council to be constituted for the High Court.

(iv) "Barrister" means a barrister of England or Ireland or a member of the Faculty of Advocates in Scotland.

(v) "Chairman" means the Chairman of the Bar Council as provided by section 4 (4) of the Act.

(vi) "The High Court" means the High Court of Judicature at Fort William in Bengal.

(vii) "Secretary" means the Secretary or other person to be appointed by the Bar Council to perform the duties of a Secretary however designated and shall include any person appointed under rule 8.

(viii) "Voter" means any person entitled by virtue of the Act to vote at elections to the Bar Council.

2. Elections of members of the Bar Council shall be held at such place and on such day and within such hours as the Chairman may appoint, but not later than one month after the terms of office of elected members who shall next vacate office shall expire.

3. (i) Notice of such time and place shall be given by publication in the Calcutta and Assam Gazettes over the signature of the Secretary upon a date not less than 30 days before the date of the election.

(ii) Copies of such notice shall also be sent by the Secretary to the Advocate-General and to the President of the Vakils' Association to be affixed as they may direct.

4. Every candidate for election as a member of the Bar Council shall be proposed by ten voters by letter addressed to the Secretary and signed by each of such voters and delivered to the Secretary not less than 15 days and not more than 30 days before the date fixed for the election.

5. The Secretary may submit to the Advocate-General any proposal as to the validity of which he may have any doubt and subject to the provisions of rules 15, 16, 18 and 19 the decision of the Advocate-General shall be final.

6. In the event of the Advocate-General deciding that a proposal is invalid the fact shall be notified forthwith to the candidate by the Secretary and the candidate may thereupon submit another proposal within the time prescribed by rule 4 but in default of the candidate being so notified, he shall not be entitled to submit another proposal after the time prescribed by rule 4.

7. Not less than 7 days before the date fixed for the election the Secretary shall cause the names of all candidates duly proposed to be posted on a notice board in the Court house and shall send lists of the said names to the Advocate-General and the President of the Vakils' Association to be affixed as they may direct.

8. Elections and all matters relating thereto provided for by these rules shall be conducted by the Secretary or such person as the Bar Council may appoint to discharge the duties of the Secretary under these rules and the Secretary or such person may, with the approval of the Chairman, appoint any person or persons to assist him in the conduct thereof.

9. On the day and time and at the place appointed for the election a voting paper bearing the names of all candidates duly proposed and stating the number of members to be elected shall be handed by the Secretary to each voter who shall apply in person therefor.

10. (i) A voter shall vote by placing a cross against the name of any candidate for whom he desires to vote. He shall not place a cross against more names than the number of members to be elected. He shall not give more than one vote to one candidate. The voting paper shall not be signed by the voter. In the event of any erasures, obliterations or alterations on the voting paper or of an excessive number of votes purporting to have been given or of the voting paper purporting to have been signed by the voter the voting paper shall be deemed to have been defaced and no votes purporting to have been given thereby shall be counted.

(ii) The decision of the Advocate-General whether a voting paper has or has not been defaced shall be final.

11. The voter after voting shall personally return the voting paper to the Secretary who shall place it in a sealed box and the name of the voter shall be struck off the list of voters.

12. At the conclusion of the voting the votes shall be counted and the voting papers shall thereupon be placed in a box and sealed and the names of the candidates shall be set out in a list which shall specify the number of votes obtained by each and which of such candidates are barristers and which of such candidates not being barristers have been entitled to practise in the High Court in the exercise of its original jurisdiction for the period determined under Section 4 (3) of the Act. The list so prepared shall be filed by the Secretary as of record.

13. (i) The number of candidates who shall be declared to have been elected shall be as many as shall with members, if any, who do not go out of office complete the total number of ten elected members.

Such candidates shall be ascertained by taking one by one from the list prepared under rule 12 :—

Firstly, as many candidates with most votes qualified under the Resolution of the High Court, dated the day of 1928 as will with members, if any, who do not go out of office complete the proportion and number required by the said resolution of members qualified thereunder.

Secondly, if the number required by section 4 (2) on the Act of members qualified as therein provided is not then complete with members, if any, who do not go out of office, as many candidates with most votes so qualified next in the said list as will complete that number of members so qualified ; and

Thirdly, as many candidates with most votes as many then be required with members if any, who do not go out of office, to make the number of elected members up to ten.

(ii) In the event of an equality of votes the Secretary shall draw lots in the presence of the Advocate-General for the purpose deciding the priority between the candidates having the same number of votes.

14. A list of candidates declared elected to the Bar Council shall be prepared and signed by the Secretary and submitted by him to the Advocate-General who shall certify the same by his signature and the same shall be filed as of record by the Secretary. Copies thereof shall be published in the Calcutta and Assam Gazettes and sent to the Advocate-General and President of the Vakils' Association to be affixed as they may direct.

15. A candidate may contest the validity of the election of a candidate declared to have been elected to the Bar Council by the letter signed by him and addressed to the Secretary. Such letter shall state the grounds upon which the validity of such election is contested and shall be delivered to the Secretary within seven days of the date of the publication in the Calcutta Gazette of the list required by rule 14 to be so published and after the expiry of seven days from the date of such publication the validity of the election of a candidate shall not be challenged by a candidate on any ground whatever.

16. At any time within 30 days from the date of the publication aforesaid of the said list the Advocate-General may refer in writing to the Committee constituted by rule 18 any question relating to the validity of the election of a candidate declared to have been elected to the Bar Council.

17. At the expiry of 40 days from the publication aforesaid of the said list the election shall be final and the voting paper shall be destroyed provided that in the event of the validity of an election being challenged under rule 15 or of a reference under rule 16 the voting papers shall be preserved and dealt with as the Committee appointed under rule 18 may direct.

18. All matters arising under rule 15 or 16 shall be decided by a Committee of three Judges of the High Court to be nominated by the Chief Justice and the said Committee shall be at liberty to hold such enquiry and in such manner as it may see fit.

The decision of a majority of the said Committee shall be final as to any question that may arise at the said enquiry—and in relation thereto and upon any matter referred to or to be enquired into by them under these rules.

19. If the said Committee shall decide that a candidate has not been validly elected, the vacant place on the Bar Council shall be filled as hereinafter provided in the case of a casual vacancy.

20. (i) On the expiry of three years from the date of the first meeting of the Bar Council and annually at the further expiry of one year from the said date one half of the elected members of the Bar Council shall go out of office.

(ii) A casual vacancy unfilled on the date upon which elected members go out of office as aforesaid shall be deemed going out of office for the purpose of this rule and a member who prior to the said date shall have stated that he will not seek re-election who shall be recorded by the Secretary shall be deemed to go out of office and members ceasing to be members by virtue of rule, 24 shall be deemed to go out of office.

(iii) The members to go out of office or the balance of such members, as the case may be, shall be ascertained on the first occasion by drawing lots which shall be done by the Council under the direction of the Chairman before the expiry of three years from the said date, and in subsequent years the elected members to go out of office shall be those who have been longest in office since their last election. If such number shall exceed five, the Council shall draw lots under the direction of the Chairman as to who shall go out of office.

(iv) Elected members going out of office shall be eligible for re-election. No elected member who by reason of his retirement or under rule 25 has caused a casual vacancy shall be eligible for re-election at the next election.

21. Nominated members shall go out of office at the expiry of three years from the date of the first meeting of the Bar Council and annually thereafter on the further expiry of one year from the said date but shall be eligible for re-nomination.

22. A casual vacancy among nominated members of the Bar Council shall be filled by nomination by the High Court.

23. A casual vacancy among elected members of the Bar Council shall be filled by the Council appointing the candidate with most votes not being already a member of the Bar Council who failed at the last preceding election to secure election subject to the maintenance of the proportion and of the number thereof of Barristers directed and fixed respectively under Section 4 (3) being preserved. In the event of two or more candidates having received the same number of votes the Council shall draw lots under the direction of the Chairman. Should there be no such candidates qualified to fill the vacancy the Council shall elect a duly qualified advocate thereto in such manner as the Chairman may determine provided that any advocate put forward the election shall have been proposed by one and seconded by another member of the Council.

24. A member of the Bar Council who became a member thereof under the provisions of the last preceding rule shall cease to be a member of the Bar Council on the date following upon which members shall go out of office under the provisions of rules 20 and 21 but shall be eligible for re-election.

25. Any elected member of the Bar Council who shall fail to attend three consecutive meetings of the Bar Council or two consecutive meetings held within a period of two months shall be deemed to have vacated his seat and the same shall be deemed a casual vacancy and he shall not be eligible for appointment under rule 23: Provided that an elected member may obtain leave of absence from the Council for a period not more than three months once during his term of office which may be granted to him retrospectively.

26. The Bar Council shall be deemed duly constituted notwithstanding any vacancy in elected or nominated members.

27. Meetings of the Bar Council shall be convened by the Secretary under the direction of the Chairman, or, in his absence from Calcutta, of the Vice-Chairman who shall determine the time and place thereof, provided that no meeting shall be convened for any date falling within a vacation of the High Court.

28. Notices of meetings of the Bar Council shall be given as the Bar Council may from time to time determine.

29. The Bar Council shall elect from among their members a Vice-Chairman who shall hold office until he shall resign the Bar Council or until another Vice-Chairman shall be elected.

30. The election of the Vice-Chairman shall be by ballot to be held in such manner as the Chairman may determine: Provided that no member of the Bar Council shall be deemed to have been duly elected as Vice-Chairman unless he shall have secured a majority of votes of the members present.

31. The election of the Vice-Chairman shall be held at the first meeting of the Bar Council convened after an election of members: Provided that the Chairman may adjourn the election should no member have secured a majority of votes as provided by rule 30.

32. At all meetings of the Bar Council five members present shall form a quorum.

33. Resolutions of the Bar Council shall be by show of hands. Each member present shall have one vote and the Chairman of the meeting shall have a casting vote.

34. No matter determined by a resolution of the Bar Council shall be reconsidered or reopened within six months from the date of such resolution and the chairman shall decide if a matter is within this rule and his decision shall be final.

35. The Bar Council may make such rules of business as it may think fit inconsistent with the Act or these rules.

36. For the purposes of the first election to be held under the Act and these rules:—

(i) In rules 3, 4, 5, 6, 7, 8, 9, 11, 12, 13, 14, and 15 "Registrar" shall be substituted for "Secretary".

(ii) In rule 2 "Chief Justice of Bengal" shall be substituted for "Chairman".

(iii) In rules 5, 6, and 10 (ii) the words "such Judge of the High Court as the Chief Judge may appoint" shall be substituted for the words "the Advocate-General".

(iv) From rule 8 the words "or such person as the Bar Council may appoint to discharge the duties of the Secretary under these rules" and the words "or such person" and the words "with the approval of the chairman" shall be deleted.

(v) To rule 12 the words "and a copy sent to the Chairman of the Bar Council when constituted" shall be added.

(vi) From rule 13 (ii) the words "in the presence of the Advocate-General" shall be deleted.

(vii) From rule 14 the words "and submitted by him to the Advocate-General who shall certify the same by his signature" shall be deleted.

(viii) "Registrar" means the Registrar, Appellate Side of the High Court, and shall include any person appointed by him under rule 8.

The following resolution passed by the High Court of Judicature at Fort William in Bengal, on the 8th day of February, 1928, with reference to the provisions of Section 4 of the Indian Bar Councils Act, 1926 (XXXVIII of 1926), is published for general information:—

Resolution.

It is hereby resolved that of the ten elected members of the Bar Council to be constituted for the High Court of Judicature at Fort William in Bengal, one half shall be persons who have, for the minimum period of ten years, been entitled to practice in the High Court in the exercise of its original jurisdiction, and four out of the said one half, shall be barristers of England or Ireland or members of the Faculty of Advocates in Scotland.

By order of the High Court,
(Sd.) H. C. Stork,

Registrar.

THE INDIAN BILLS OF LADING ACT (IX OF 1856).¹

Short title given, Act XIV of 1897.

Declared in force throughout B. I., except as regards the Scheduled Districts, Act XV of 1874, S. 3.

[11th April, 1856.

ACT IX OF 1856 IS BASED ON THE BILLS OF LADING ACT, 1855.

(18 and 19 VICT., C. 111).

An Act to amend the law relating to Bills of Lading.

WHEREAS by the custom of merchants a bill of lading of goods being transferable by endorsement, the property in the goods may there-
Preamble. by pass to the endorsee, but nevertheless all rights in respect of the contract contained in the bill of lading continue in the original shipper or owner and it is expedient that such rights should pass with the property; And whereas it frequently happens that the goods in respect of which bills of lading purport to be signed have not been laden on board, and it is proper that such bills of lading in the hands of a *bona fide* holder for value should not be questioned by the master or other person signing the same, on the ground of the goods not having been laden as aforesaid; It is enacted as follows:—

¹ Short title, "The Indian Bills of Lading of 1897). Act, 1856" See the Indian Short Titles Act (XIV

1. Every consignee of goods named in a bill of lading, and every endorsee of a bill of lading to whom the property in the goods therein mentioned shall pass, upon or by reason of such consignment or endorsement shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself.

2. Nothing herein contained shall prejudice or affect any right of stoppage *in transitu*, or any right to claim freight against the original shipper or owner, or any liability of the consignee or endorsee by reason or in consequence of his being such consignee or endorsee, or of his receipt of the goods by reason or in consequence of such consignment or endorsement.

3. Every bill of lading in the hands of a consignee or endorsee for valuable consideration, representing goods to have been shipped on board a vessel, shall be conclusive evidence of such shipment as against the master or other person signing the same, notwithstanding that such goods or some part thereof may not have been so shipped, unless such holder of the bill of lading shall have had actual notice at the time of receiving the same that the goods had not in fact been laden on board :

Provided that the master or other person so signing may exonerate himself, in respect of such misrepresentation, by showing that it was caused without any default on his part, and wholly by the fraud of the shipper, or of the holder or some person under whom the holder claims.

THE BIRTHS, DEATHS AND MARRIAGES REGISTRATION ACT (VI OF 1886).

Effect of subsequent Legislation.—Rep. in pt., Act 2 of 1891, S. 4 (2), Act 12 of 1891.

Am., Act 16 of 1890.

Rep. in pt. and am., Act 9 of 1911.

Ss. 13, 24 (2), 32, 33 (1), (2), 35-A (1) am. Act XXXVIII of 1920.

Declared in force in the Sonthal Parganas, Reg. 3 of 1872, S. 3, as amended by Reg. 3 of 1899, S. 3 ;

in British Baluchistan, Reg. 2 of 1913, S. 3 ;

in Upper Burma (except the Shan States, Act 13 of 1893), S. 4 ;

in the Arakan Hill District, Reg. 1 of 1916, S. 2.

PREFATORY NOTE.—The following is the *statement of objects and reasons* appended to the Births, Deaths and Marriages Registration Bill :—It is proposed by this Act (1) to establish a system of voluntary registration of births and deaths for the benefit of such classes of the community as would be likely to avail themselves of registration, (2) to establish general registry offices for keeping registers of the births and deaths so registered and of marriages registered under Act III of 1872 or the Indian Christian Marriage Act (XV of 1872), and (3) to provide a machinery for giving evidential value to certain existing registers of births, baptisms, deaths, burials and marriages, which have been kept under no law. The subject of the registration of births and deaths among Europeans in India had been frequently long under the consideration of the Government, whose attention had moreover been frequently directed to it by memorials from various Christian religious bodies, urging very strongly the need for legislation. The Indian Statute book contained at that time no general law for

Secs. 1-3.—The *object of a bill of lading* is to provide for the rights and liabilities of the parties in reference to the contract to carry, and it is not concerned with liabilities to contribution in general average. The question whether an exemption clause covers the liability to contribution in general average in a case of proper jettison depends on the intention of the parties. If the ship-owner wishes to relieve himself, he must do so in clear words. 78 I. C. 972. Where a bill of lading contains the *usual exemption clause* as regards the liability for acts of God King's enemies and the *perils of the sea*, in a suit by the consignee for damages for loss of goods, etc., the defendant ship-owner must plead and prove "perils of the sea" if that is his defence. If he

makes out a *prima facie* case plaintiff can rebut it by proving negligence on the part of the defendant. 47 Mad. 610 : 20 L. W. 91 : 80 I. C. 154 : (1924) M. W. N. 648 : 47 M. L. J. 150 : 1924 M. 773. "At merchants' Risk" meaning of, 78 I. C. 972. S. 3 of the Bills of Lading Act is limited to the master or the person signing the bills, 1925 S. 221. The general rule as to *burden of proof* is that it is on the plaintiff to prove by evidence *aliunde* that articles bearing particular marks are actually handed over to the shipping Company. *Ibid.* On this section see also 92 I. C. 206 : A. I. R. 1926 Sind 221.

Sec. 3.—See 9 B. H. C. 321 ; See also 45 I. C. 168 (Liability of carrier under bill of lading),

the registration of births and deaths. There were, indeed, enactments which provided for the registration of births and deaths within certain specified areas, principally municipalities and cantonments, but, in the first place, these enactments were strictly local in their nature, leaving the greater portion of the country unprovided for, and in the next place, their provisions being directed primarily to statistical purposes were not of such a nature as to make the registers of births and deaths kept under them of value for purposes of evidence. As to the numerous registers of baptisms and burials which were kept by ministers of religion in all parts of the country, it was doubtful how far they could be relied on for giving accurately the requisite particulars as to births and deaths, and most of them were, moreover, inadmissible in evidence. Such being the state of the law and considering the importance of the subject generally and having regard to the fact that references were frequently made to the Secretary of State for India and to the Government of India for proof of age or of death in connections with questions involving large individual interest, such as rights to property, the Government of India was of opinion that it was expedient to enact a permissible law under which full facilities for registering births and deaths should be given to persons valuing unimpeachable evidence of these events. As to the second object of the Bill, it was obvious that no system of registration of births and deaths could be complete or of practical value unless it provided for the establishment, at certain centres of general offices where the information registered at the various local offices should be collected and so arranged as to be readily available for public reference. In this connection the attention of the Government of India has been directed to the unsatisfactory nature of the system of registration of marriages under the Indian Christian Marriage Act, 1872 and Act III of 1872. Documentary evidence of all marriages under the former Act was, by the provisions of the Act or the orders thereunder, sent to the Secretary to the Local Government, who was also empowered to grant certified copies which were receivable in evidence. It would seem, therefore, at first sight that nothing further was required. But, as a matter of fact, not only were no arrangements made for maintaining an index to the marriages, the records of which were retained in the local Secretariate, but the greater portion of the marriage records which were received in the local Secretariate had, under section 81 of the Act and the orders in force, to be sent on in original to the Government of India in the Home Department for transmission to the Secretary of State; so that the greater number of the marriage records which reached the local Secretariate did not remain there for purposes of reference, and such as did remain were, owing to the absence of an index, practically valueless. As to Act III of 1872, this Act made no provisions for the marriages solemnized under it being reported to any central authority. The marriage certificate books for which it provided were retained by the Registrar, who was not even required to index them. Their value as records of the marriages to which they referred was accordingly much diminished. The Government of India had, therefore, availed themselves of the opportunity of the proposed legislation for the registration of births and deaths to remove those defects in the marriages registration-law by providing for general registry offices for keeping registers not only for the births and deaths which may be registered under the proposed law, but also of marriages which may be registered under Act III of 1872 or the Christian Marriage Act, 1872. (*See Statement of Objects and Reasons.*)

THE BIRTHS, DEATHS AND MARRIAGES REGISTRATION ACT (VI OF 1886).

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THE BIRTHS, DEATHS AND MARRIAGES REGISTRATION ACT (VI OF 1886).¹

[The 8th March, 1886.

An Act to provide for the voluntary Registration of certain Births and Deaths, for the establishment of General Registry Offices for keeping Registers of certain Births, Deaths and Marriages, and for certain other purposes.

WHEREAS it is expedient to provide for the voluntary registration of births and deaths among certain classes of persons, for the more effectual registration of those births and deaths and of the marriages registered under Act III of 1872, or the Indian Christian Marriage Act, 1872, and of certain marriages registered under the Parsi Marriage and Divorce Act, 1865, and for the establishment of general registry offices for keeping registers of those births, deaths and marriages ;

And whereas it is also expedient to provide for the authentication and custody of certain existing registers made otherwise than in the performance of a duty specially enjoined by the law of the country in which the registers were kept, and to declare that copies of the entries in those registers shall be admissible in evidence ;

It is hereby enacted as follows:—

CHAPTER I.

PRELIMINARY.

Short title and commencement.
and

1. (1) This Act may be called THE BIRTHS, DEATHS AND MARRIAGES REGISTRATION ACT, 1886 ;

(2) It shall come into force on such day² as the Governor-General in Council, by notification in the *Gazette of India*, directs. [* * *]

2. This Act extends to the whole of British India and applies also, within the dominions of Princes and States in alliance with Her Majesty, to British subjects in those dominions.

Local extent.

¹ For Statement of Objects and Reasons, see *Gazette of India*, 1885, Pt. V, p. 12 ; for Report of the Select Committee, see *ibid.*, 1886, Pt. IV, p. 103, and for proceedings in Council, see *ibid.*, 1885, Supplement, pp. 14 and 87, and *ibid.*, 1886, p. 290.

² Sec. 1.—²The 1st October, 1888, see *Gazette of India*, 1888, Pt. I, p. 336.

Sub-sec. (3) of S. 1, which was repealed by the Repealing and Amending Act (XII of 1891), was as follows:—

“(3) Any power conferred by the Act to make rules or to issue orders may be exercised at any

time after the passing of this Act ; but a rule or order so made or issued shall not take effect until the Act comes into force.”

Sec. 2.—The Act has been declared in force in the Sonthal Parganas by S. 3 of the Sonthal Parganas Settlement Regulation (III of 1872), as amended by the Sonthal Parganas Justice and Laws Regulation (III of 1899), Ben. Code. It has been declared in force in British Baluchistan by the British Baluchistan Laws Regulation (I of 1880), S. 3 and Schedule, Bal. Code.

The Act has been declared in force in Upper Burma (except the Shan States) by the Burma

Definitions.

3. In this Act, unless there is something repugnant in the subject or context,—

“sign” includes mark, when the person making the mark is unable to write his name :

“prescribed” means prescribed by a rule made by the Governor-General in Council under this Act : and

“Registrar of Births and Deaths” means a Registrar of Births and Deaths appointed under this Act.

4. Nothing in this Act, or in any rule made under this Act, shall affect any law heretofore or hereafter passed providing for the registration of births and deaths within particular local areas.

Saving of local laws.

Powers exercisable from time to time.

5. All powers conferred by this Act may be exercised from time to time as occasion requires.

CHAPTER II.

GENERAL REGISTRY OFFICES OF BIRTHS, DEATHS AND MARRIAGES.

Establishment of general registry offices and appointment of Registrars-General.

6. (1) Each Local Government—

(a) shall establish a general registry office for keeping such certified copies of registers of births and deaths registered under this Act, or marriages registered under Act III of 1872 (*to provide a form of marriage in certain cases*) or the Indian Christian Marriage Act, 1872, or beyond the local limits of the ordinary original civil jurisdiction of the High Court of Judicature at Bombay, under the Parsi marriage and Divorce Act, 1865, as may be sent to it under this Act, or under any of the three last mentioned Acts, as amended by this Act ; and

(b) may appoint to the charge of that office an officer, to be called the Registrar-General of Births, Deaths and Marriages for the territories under its administration :

(2) Provided that the Governor of Bombay in Council may, with the previous sanction of the Governor-General in Council, establish two general registry offices and appoint two Registrars-General of Births, Deaths and Marriages for the territories under his administration ; one of such general registry offices and of such Registrars-General being established and appointed for Sind and the other for the other territories under the administration of the Governor of Bombay in Council.

7. Each Registrar-General of Births, Deaths and Marriages shall cause indexes of all the certified copies of registers sent to his office under this Act, or under Act III of 1872, the Indian Christian Marriage Act, 1872, or the Parsi Marriage and Divorce Act, 1865, as amended by this Act, to be made and kept in his office in the prescribed form.

8. Subject to the payment of the prescribed fees, the indexes so made shall be at all reasonable times open to inspection by any person applying to inspect them, and copies of entries in the certified copies of the registers to which the indexes relate shall be given to all persons applying for them.

9. A copy of an entry given under the last foregoing section shall be certified by the Registrar-General of Births, Deaths and Marriages, or by an officer authorized in this behalf by the Local Government, and shall be admissible in evidence for the purpose of proving the birth, death or marriage to which the entry relates.

Copies of entries to be admissible in evidence.

10. Each Registrar-General of Births, Deaths and Marriages shall exercise a general superintendence over the Registrars of Births and Deaths in the territories for which he is appointed.

CHAPTER III.

REGISTRATION OF BIRTHS AND DEATHS.

A.—Application of this Chapter.

Persons whose births and deaths are registrable

11. (1) The persons whose births and deaths shall, in the first instance, be registrable under this Chapter are the following, namely :—

(a) in British India, the members of every race, sect or tribe to which the Indian Succession Act, 1865 applies, and in respect of which an order under section 332 of that Act is not for the time being in force, and all persons professing the Christian religion;

(b) in the dominions of Princes and States in India in alliance with Her Majesty, British subjects being members of a like race, sect or tribe, or professing the Christian religion :

(2) But the Local Government, by notification in the official Gazette, may [* * * * *]¹ extend the operation of this Chapter to any other class or persons either generally or in any local area.

B.—Registration Establishment.

12. The Local Government may appoint, either by name or by virtue of their office, so many persons as it thinks necessary to be Registrars of Births and Deaths for such local areas within the territories under its administration as it may define and, if it sees fit, for any class of persons within any part of those territories.

13. The Governor-General in Council may, by notification in the *Gazette of India*, appoint, either by name or by virtue of their office, so many persons as he thinks necessary to be Registrars of Births and Deaths for such local areas within the dominions of any Prince or State in India in alliance with Her Majesty as he may define and, if he sees fit, for any class of persons within any part of those dominions.

Provided that the powers and functions exercisable by the Governor-General in Council under this section shall, in the case of any such dominions which are within the political charge of a Local Government, be exercised by that Local Government by notification in the local official Gazette.

14. Every Registrar of Births and Deaths shall be deemed to be a public servant within the meaning of the Indian Penal Code.

15. (1) The Local Government or the Governor-General in Council, as the case may be, may suspend, remove or dismiss any Registrar of Births and Deaths.

(2) A Registrar of Births and Deaths may resign by notifying in writing to the Local Government or to the Governor-General in Council, as the case may be, his intention to do so, and, on his resignation being accepted by the Local Government or the Governor-General in Council, he shall be deemed to have vacated his office.

16. (1) Every Registrar of Births and Deaths shall have an office in the local area, or within the part of the territories or dominions for which he is appointed.

Sec. 11.—¹In cl. 2 of S. 11 the words "with the previous approval of the Governor-General in Council" were omitted by Act XXXVIII of 1920, Sch. 1.

Sec. 13.—Proviso to S. 13 was added by Act XXXVIII of 1920.

(2) Every Registrar of Births and Deaths to whom the Local Government may direct this sub-section to apply shall attend at his office for the purpose of registering births and deaths on such days and at such hours as the Registrar-General of Births, Deaths and Marriages may direct, and shall cause to be placed in some conspicuous place on or near the outer door of his office his name, with the addition of Registrar of Births and Deaths for the local area or class for which he is appointed, and the days and hours of his attendance.

17. (1) When any Registrar of Births and Deaths to whom the Local Government may direct this section to apply, not being a Registrar of Births and Deaths for a local area in the town of Calcutta, Madras or Bombay, is absent, or when his office is temporarily vacant, any person whom the Registrar-General of Births, Deaths and Marriages appoints in this behalf, or, in default of such appointment, the Judge of the District Court within the local limits of whose jurisdiction the Registrar's office is situate, or such other officer as the Local Government appoints in this behalf, shall be the Registrar of Births and Deaths during such absence or until the Local Government fills the vacancy.

(2) When any such Registrar of Births and Deaths for a local area in the town of Calcutta, Madras or Bombay is absent, or when his office is temporarily vacant, any person whom the Registrar-General of Births, Deaths and Marriages appoints in this behalf shall be the Registrar of Births and Deaths during such absence or until the Local Government fills the vacancy.

(3) The Registrar-General of Births, Deaths and Marriages shall report to the Local Government all appointments made by him under this section.

18. The Local Government shall supply every Registrar of Births and Deaths with a sufficient number of register books of births and of register books of deaths, and shall make suitable provision for the preservation of the records connected with the registration of births and deaths.

Register books to be supplied and preservation of records to be provided for.

C.—Mode of Registration.

19. Every Registrar of Births and Deaths, on receipt of notice of a birth or death within the local area or among the class for which he is appointed, shall, if the notice is given within the prescribed time and in the prescribed mode by a person authorized by this Act to give the notice, forthwith make an entry of the birth or death in the proper register book :

Provided that—

(a) if he has reason to believe the notice to be in any respect false, he may refuse to register the birth or death until he receives an order from the Judge of the District Court directing him to make the entry and prescribing the manner in which the entry is to be made ; and

(b) he shall not enter in the register the name of any person as father of an illegitimate child, unless at the request of the mother and of the person acknowledging himself to be the father of the child.

Persons authorized to give notice of birth.

20. Any of the following persons may give notice of a birth, namely :—

- (a) the father or mother of the child ;
- (b) any person present at the birth ;
- (c) any person occupying, at the time of the birth, any part of the house where in the child was born and having knowledge of the child having been born in the house ;
- (d) any medical practitioner in attendance after the birth and having personal knowledge of the birth having occurred ;
- (e) any person having charge of the child.

Sec. 17 (1).—The section has been declared by the Government of Madras to apply to all Registrars appointed by that Government under the notification issued under S. 12, *see* Mad. R. and O.

Persons authorized to give notice of death.

21. Any of the following persons may give notice of a death, namely :—

- (a) any relative of the deceased having knowledge of any of the particulars required to be registered concerning the death ;
- (b) any person present at the death ;
- (c) any person occupying, at the time of the death, any part of the house where in the death occurred and having knowledge of the deceased having died in the house ;
- (d) any person in attendance during the last illness of the deceased ;
- (e) any person who has seen the body of the deceased after death.

22. (1) When an entry of a birth or death has been made by the Registrar of Births and Deaths under section 19, the person giving notice of the birth or death must sign the entry in the register in the presence of the Registrar.

Entry of birth or death to be signed by person giving notice.

(2) Until the entry has been so signed, the birth or death shall not be deemed to be registered under this Act.

(3) When the birth of an illegitimate child is registered, and the mother and the person acknowledging himself to be the father of the child jointly request that that person may be registered as the father, the mother and that person must both sign the entry in the register in the presence of the Registrar.

23. The Registrar of Births and Deaths shall, on application made at the time of registering any birth or death by the person giving notice of the birth or death, and on payment by him of the prescribed fee,¹ give to the applicant a certificate in the prescribed form, signed by the Registrar, of having registered the birth or death.

Grant of certificate of registration of birth or death.

24. (1) Every Registrar of Births and Deaths in British India shall send to the Registrar-General of Births, Deaths and Marriages for the territories within which the local area or class for which he is appointed is situate or resides, at the prescribed intervals, a true copy certified by him, in the prescribed form, of all the entries of births and deaths in the register book kept by him since the last of those intervals.

Duty of Registrars as to sending certified copies of entries in register books to Registrar-General.

Provided that in the case of Registrars of Births and Deaths who are clergymen of the Churches of England, Rome and Scotland, the Registrar may, if so directed by his ecclesiastical superior, send the certified copies in the first instance to that superior, who shall send them to the proper Registrar-General of Births, Deaths and Marriages.

In this sub-section "Church of England" and "Church of Scotland" mean the Church of England and the Church of Scotland as by law established respectively ; and "Church of Rome" means the Church which regards the Pope of Rome as its spiritual head.

(2) The provisions of sub-section (1) shall apply to every Registrar of Births and Deaths in the dominions of any Prince or State in India in alliance with Her Majesty, with this modification that the certified copies referred to in that sub-section shall be sent to such one of the Registrars-General of Births, Deaths and Marriages as the Governor-General in Council, by notification² in the *Gazette of India* appoints in this behalf :

Provided that such certified copies shall, in the case of any such dominions which are within the political charge of a Local Government, be sent to the Registrar-General of Births, Deaths and Marriages for the territories under the administration of that Local Government.³

Sec. 23.—¹ As to stamps in which such fees are to be paid, see *Gazette of India*, 1899, Pt. I, p. 82, paragraph 14 (c) of Notification No. 786 S. R.

Sec. 24.—² For an instance of such notification, see *Gazette of India*, 1899, Pt. I, p. 424.

³ The proviso was added by Act XXXVIII of 1920, Sch. I.

25. (1) Every Registrar of Births and Deaths shall, on payment of the prescribed fees, at all reasonable times, allow searches to be made in the register books kept by him, and give a copy of any entry in the same.

Searches and copies of entries in register books.

(2) Every copy of an entry in a register book given under this section shall be certified by the Registrar of Births and Deaths and shall be admissible in evidence for the purpose of proving the birth or death to which the entry relates.

26. Notwithstanding anything in section 19, the Governor-General in Council may make rules authorising Registrars of Births and Deaths, on conditions and in circumstances to be specified in the rules, to register births and deaths occurring outside the local areas or classes for which they are appointed.

Exceptional provision for registration of certain births and deaths.

D.—Penalty for False Information.

27. If any person wilfully makes, or causes to be made for the purpose of being inserted in any register of births or deaths, any false statement in connection with any notice of a birth or death under this Act, he shall be punished with imprisonment for a term which may extend to three years, or with fine, or with both.

Penalty for wilfully giving false information.

E.—Correction of Errors.

28. (1) If it is proved to the satisfaction of a Registrar of Births and Deaths that any entry of a birth or death in any register kept by him under this Act is erroneous in form or substance, he may, subject to such rules¹ as may be made by the Governor-General in Council with respect to the conditions and circumstances on and in which errors may be corrected, correct the error by entry in the margin, without any alteration of the original entry, and shall sign the marginal entry and add thereto the date of the correction.

Correction of entry in register of births or deaths.

(2) If a certified copy of the entry has already been sent to the Registrar-General of Births, Deaths and Marriages, the Registrar of Births and Deaths shall make and send a separate certified copy of the original erroneous entry and of the marginal correction therein made.

CHAPTER IV.

AMENDMENT OF MARRIAGE ACTS.

Addition of new section after section 13, Act III of 1872.

29. After section 13 of Act III of 1872 (*to provide a form of marriage in certain cases*) the following section shall be inserted, namely:—

“ 13-A. The Registrar shall send to the Registrar-General of Births, Deaths and Marriages for the territories within which his district is situate, at such intervals as the Governor-General in Council from time to time, directs, a true copy certified by him, in such form as the Governor-General in Council from time to time, prescribes, of all entries made by him in the said marriage certificate book since the last of such intervals.”

Transmission of certified copies of entries in marriage certificate book to the Registrar-General of Births Deaths and Marriages.

Amendment of the Indian Christian Marriage Act, 1872.

30. In the Indian Christian Marriage Act, 1872, the following amendments shall be made, namely:—

(a) at the end of section 3, the words “ Registrar-General of Births, Deaths and Marriages, means a Registrar-General of Births, Deaths and Marriages appointed under the Births, Deaths and Marriages Registration Act, 1886,” shall be added;

(b) for the words “ Secretary to the Local Government ” wherever they occur, and for the words “ Secretary to a Local Government ” in section 79, the words “ Registrar-General of Births, Deaths and Marriages ” shall be substituted ;²

¹ See 29.—¹ For rules made under S. 26 conjointly with Ss. 28 and 36, see *Gazette of India*, 1888, Pt. I, p. 336, and *ibid.*, 1894, Pt. I, p. 436.

² See 30.—² Cl. (c) which amended S. 62 of the Indian Christian Marriage Act (XV of 1872 was repealed by the Indian Christian Marriage

(c) in section 81, after the words "Registrar-General of Births, Deaths and Marriages" the words "in England" shall be added.

Addition of new section after section 8 of the Parsi Marriage and Divorce Act, 1865.

31. After section 8 of the Parsi Marriage and Divorce Act, 1865, the following section shall be inserted, namely :—

"8-A. Every Registrar, except the Registrar appointed by the Chief Justice of the High Court of Judicature at Bombay, shall, at such intervals as the Governor-General in Council from time to time directs, send to the Registrar-General of Births, Deaths and Marriages for the territories administered by the Local Government by which he was appointed a true copy certified by him, in such form as the Governor-General from time to time prescribes, of all certificates entered by him in the said register of marriages since the last of such intervals."

CHAPTER V.

SPECIAL PROVISIONS AS TO CERTAIN EXISTING REGISTERS.

32. If any person in British India, or in the dominions of any Prince or State in

Permission to persons having custody of certain records to send them within one year to Registrar-General.

India in alliance with Her Majesty, has for the time being the custody of any register or record of birth, baptism, naming, dedication, death or burial of any persons of the classes referred to in section 2, sub-section (1), or of any register or record of marriage of any persons of the classes to which Act III of 1872 or the Indian Christian Marriage Act, 1872, or the Parsi Marriage and Divorce Act, 1865, applies, and if such register or record has been made otherwise than in performance of a duty specially enjoined by the law of the country in which the register or record was kept, he may, [at any time before the first day of April, 1891],¹ send the register or record to the office of the Registrar-General of Births, Deaths and Marriages for the territories within which he resides, or, if he resides within the dominions of any such Prince or State as aforesaid, to such one of the Registrars-General as aforesaid as the Governor-General in Council, by notification² in the *Gazette of India*, directs in this behalf.

Provided that such register or record shall, in the case of any such dominions which are within the political charge of a Local Government, be sent to the Registrar-General of Births, Deaths and Marriages for the territories under the administration of that Local Government.³

33. (1) Any Local Government, in the case of registers or records sent under section 32 to the Registrar-General for the territories under its

Appointment of Commissioners to examine registers.

administration, and the Governor-General in Council, in the case of registers or records so sent to any other Registrar-General appointed by him under the said section, may appoint so many persons as it or he, as the case may be, thinks fit to be Commissioners for examining such registers or records.

(2) The Commissioners so appointed shall hold office for such period as the [authority appointing them] by the order of appointment, or any subsequent order, directs.

Act (1872) Amendment Act (II of 1891), S. 4 (2).

Sec. 32.—¹ These words were substituted for the words "within one year from the date on which this Act comes into force" by the Births, Deaths and Marriages Registration Act (1886), Amendment Act (XVI of 1890), S. 1.

² For an instance of such notification, see *Gazette of India*, 1899, Pt. I, p. 424.

³ To S. 32 the proviso was added by Act XXXVIII of 1920, Sch. I.

Sec. 33.—Sub-sec. (1) to S. 33 was substituted by Act XXXVIII of 1920, Sch. I.

In S. 33 (2) the words "authority appointing them" were substituted for the words "Governor-General in Council" by Act XXXVIII of 1920, Sch. I.

34. (1) The Commissioners appointed under the last foregoing section shall enquire into the state, custody and authenticity of every such register or record as may be sent to the Registrar-General of Births, Deaths and Marriages under section 32 ;

Duties of Commissioners.

and shall deliver to the Registrar-General a descriptive list or descriptive lists of all such registers or records, or portions of registers or records, as they find to be accurate and faithful.

(2) The list or lists shall contain the prescribed particulars and refer to the registers or records, or to the portions of the registers or records, in the prescribed manner.

(3) The Commissioners shall also certify in writing, upon some part of every separate book or volume containing any such register or record, or portion of a register or record, as is referred to in any list or lists made by the Commissioners, that it is one of the registers or records, or portions of registers or records, referred to in the said list or lists.

35. (1) Subject to the payment of the prescribed fees, the descriptive list or lists of registers or records, or portions of registers or records, delivered by the Commissioners to the Registrar-General of Births, Deaths and Marriages shall be, at all reasonable times, open to inspection by any person applying to inspect it or them, and copies of entries in those registers or records shall be given to all persons applying for them.

Searches of lists prepared by Commissioners and grant of certified copies of entries.

(2) A copy of an entry given under this section shall be certified by the Registrar-General of Births, Deaths and Marriages, or by an officer or person authorized in this behalf by the Local Government, and shall be admissible in evidence for the purpose of proving the birth, baptism, naming, dedication death, burial or marriage to which the entry relates.

35-A. (1) The Governor-General in Council or the Local Government, if he or it thinks fit, may, by notification in the *Gazette of India* or the local official Gazette, as the case may be, appoint more commissions than one for the purposes of section 33, each such commission consisting of so many and such members, and having its functions restricted to the disposal, under this Act and the rules thereunder, of such registers and records sent under section 32 to the Registrar-General, as may be specified in the notification.

Constitution of additional commissions for purposes of this Chapter.

¹ (2) If more commissions than one are appointed in exercise of the power conferred by sub-section (1), then references in this Act to the Commissioners shall be construed as references to the members constituting a commission so appointed.

CHAPTER VI.

RULES.

Power for Governor-General in Council to make rules.

36. In addition to any other power to make rules impliedly or expressly conferred by this Act, the Governor-General in Council may make rules—

(a) to fix the fees payable under this Act ;²

(b) to prescribe the forms required for the purposes of this Act ;

(c) to prescribe the time within which, and the mode in which, persons authorized under this Act to give notice of a birth or death to a Registrar of Births and Deaths must give the notice ;

Sec. 35-A.—Sub-sec. (1) was substituted by Act XXXVIII of 1920, Sch. I.

¹ Sub-sec. (2) was added by the Births, Deaths and Marriages Registration Act (1886), Amendment Act (1890), S. 2.

Sec. 36.—As to rules made under this section conjointly with Ss. 26 and 28, see foot-note to S. 28, *supra*.

² For fees prescribed for attendance at private residences in—(1) Burma, see notification quoted in Bur. R. M. (2) Madras, see Mad. R. and O.

For rules framed by the Government of India under this clause as to fees, see *Gazette of India*, 1894, Pt. I, p. 580.

(d) to prescribe the registers to be kept and the form and manner in which Registrars of Births and Deaths are to register births and deaths under this Act, and the intervals at which they are to send to the Registrar-General of Births, Deaths and Marriages true copies of the entries of births and deaths in the registers kept by them ;

¹ (e) to prescribe the particulars which the descriptive list or lists to be prepared by the Commissioners appointed under Chapter V are to contain, and the manner in which they are to refer to the registers or records, or portions of registers or records, to which they relate ;

² (f) to prescribe the custody in which those registers or records are to be kept ; and,

² (g) generally, to carry out the purposes of this Act.

Procedure for making and publication of rules.

37 [* * * * *] 3

CARRIAGE OF GOODS BY SEA ACT (XXVI OF 1925).

[The 21st September, 1925.]

An Act to amend the law with respect to the carriage of goods by sea.

WHEREAS at the International Conference on Maritime Law held at Brussels in October, 1922, the delegates at the Conference, including the delegates representing His Majesty, agreed unanimously to recommend their respective Governments to adopt as the basis of a convention a draft convention for the unification of certain rules relating to bills of lading ;

And whereas at a meeting held at Brussels in October, 1923, the rules contained in the said draft convention were amended by the Committee appointed by the said Conference ;

And whereas provision has been made by the Carriage of Goods by Sea Act, 1924, that the said rules as so amended and as set out with modifications in the schedule shall, subject to the provisions of that Act, have the force of law with a view to establishing the responsibilities, liabilities, rights and immunities attaching to carriers under bills of lading ;

And whereas it is expedient that like provision should be made in British India ; It is hereby enacted as follows :—

1. (1) This Act may be called THE INDIAN CARRIAGE OF GOODS BY SEA ACT, 1925.

Short title and extent.

(2) It extends to the whole of British India.

2. Subject to the provisions of this Act, the rules set out in the schedule (hereinafter referred to as "the rules") shall have effect in

Application of rules.

relation to and in connection with the carriage of goods by sea in ships carrying goods from any port in British India to any other port whether in or outside British India.

Absolute warranty of seaworthiness not to be implied in contracts to which rules apply.

3. There shall not be implied in any contract for the carriage of goods by sea to which the rules apply any absolute undertaking by the carrier of the goods to provide a seaworthy ship.

4. Every bill of lading, or similar document of title, issued in British India which contains or is evidence of any contract to which the rules apply, shall contain an express statement that it is to have effect subject to the provisions of the said rules as applied by this Act.

Statement as to application of Rules to be included in bills of lading.

¹ For rules for the guidance of Commissioners appointed under Chapter V, see *Gazette of India*, 1890, Pt. I, 745.

² For rules for the guidance of Commissioners appointed under Chapter V, framed with

regard to the powers conferred by these clauses, see *Gazette of India*, 1890 and 1892, Pt. I, pp. 745 and 123, respectively.

Sec. 37.—³ Repealed by Act IX of 1911.

Modification of Article VI of Rules in relation to goods carried in sailing ships and by prescribed routes.

5. Article VI of the Rules shall, in relation to—
(a) the carriage of goods by sea in sailing ships carrying goods from any port in British India to any other port whether in or outside British India, and

(b) the carriage of goods by sea in ships carrying goods from a port in British India notified in this behalf in the *Gazette of India* by the Governor-General in Council to a port in Ceylon specified in the said notification, have effect as though the said Article referred to goods of any class instead of to particular goods and as though the proviso to the second paragraph of the said Article were omitted.

6. Where under the custom of any trade the weight of any bulk cargo inserted in the bill of lading is a weight ascertained or accepted by a third party other than the carrier or the shipper and the fact that the weight is so ascertained or accepted is stated in the bill of lading, then, notwithstanding anything in the rules, the bill of lading shall not be deemed to be *prima facie* evidence against the carrier of the receipt of goods of the weight so inserted in the bill of lading, and the accuracy thereof at the time of shipment shall not be deemed to have been guaranteed by the shipper.

7. (1) Nothing in this Act shall affect the operation of sections four hundred and forty-six to four hundred and fifty, both inclusive, five hundred and two, and five hundred and three of the Merchant Shipping Act, 1894, as amended by any subsequent enactments, or the operation of any other enactment for the time being in force limiting the liability of the owners of seagoing vessels.

(2) The rules shall not by virtue of this Act apply to any contract for the carriage of goods by sea before such day, not being earlier than the first day of January 1926, as the Governor-General in Council may, by notification in the *Gazette of India*, appoint, nor to any bill of lading or similar document of title issued, whether before or after such day as aforesaid, in pursuance of any such contract as aforesaid.

SCHEDULE.

RULES RELATING TO BILLS OF LADING.

ARTICLE I.

Definitions.

In these rules the following expressions have the meanings hereby assigned to them respectively that is to say—

(a) "Carrier" includes the owner or the charterer who enters into a contract of carriage with a shipper;

(b) "Contract of carriage" applies only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by sea, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charterparty from the moment at which such bill of lading or similar document of title regulates the relations between carrier and a holder of the same;

(c) "Goods" includes goods, wares, merchandises, and articles of every kind whatsoever, except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried;

(d) "ship" means any vessel used for the carriage of goods by sea;

(e) "Carriage of goods" covers the period from the time when the goods are loaded on to the time when they are discharged from the ship.

ARTICLE II.

Risks.

Subject to the provisions of Article VI, under every contract of carriage of goods by sea the carrier, in relation to the loading, handling, stowage, carriage, custody, care, and discharge of such goods, shall be subject to the responsibilities and liabilities, and entitled to the rights and immunities hereinafter set forth.

ARTICLE III.

Responsibilities and Liabilities.

1. The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to—

(a) Make the ship seaworthy ;
 (b) Properly man, equip, and supply the ship ;
 (c) Make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.

2. Subject to the provisions of Article IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried.

3. After receiving the goods into his charge, the carrier, or the master or agent of the carrier, shall, on demand of the shipper issue to the shipper a bill of lading showing among other things—

(a) The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or no the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage :

(b) Either the number of packages or pieces, or the quantity, or weight, as the case may be, as furnished in writing by the shipper ;

(c) The apparent order and condition of the goods :

Provided that no carrier, master or agent of the carrier, shall be bound to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonable grounds for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking.

4. Such a bill of lading shall be *prima facie* evidence of the receipt by the carrier of the goods as therein described in accordance with paragraph 3 (a), (b) and (c).

5. The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity and weight, as furnished by him, and the shipper shall indemnify the carrier against all loss, damages and expenses arising or resulting from inaccuracies in such particulars. The right of the carrier to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper.

6. Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, or, if the loss or damage be not apparent, within three days, such removal shall be *prima facie* evidence of the delivery by the carrier of the goods as described in the bill of lading.

The notice in writing need not be given if the state of the goods has at the time of their receipt been the subject of joint survey or inspection.

In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered.

In the case of any actual or apprehended loss or damage the carrier and the receiver shall give all reasonable facilities to each other for inspecting and tallying the goods.

7. After the goods are loaded the bill of lading to be issued by the carrier, master or agent of the carrier, to the shipper shall, if the shipper so demands, be a " shipped " bill of lading, provided that if the shipper shall have previously taken up any document of title to such goods, he shall surrender the same as against the issue of the " shipped " bill of lading, but at the option of the carrier, such document of title may be noted at the port of shipment by the carrier, master or agent with the name or names of the ship or ships upon which the goods have been shipped and the date or dates of shipment, and when so noted the same shall for the purpose of this Article be deemed to constitute a " shipped " bill of lading.

8. Any clause, covenant or agreement in a contract of a carriage relieving the carrier or the ship from liability for loss or damage to or in connexion with goods arising from negligence, fault or failure in the duties and obligations provided in this Article or lessening such liability otherwise than as provided in these rules, shall be null and void and of no effect.

A benefit of insurance or similar clause shall be deemed to be a clause relieving the carrier from liability.

ARTICLE IV.

Rights and Immunities.

1. Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned equipped and supplied, and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of paragraph 1 of Article III.

Whenever loss or damage had resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this section.

2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

(a) act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship ;

(b) fire, unless caused by the actual fault or privity of the carrier ;

(c) perils, dangers and accidents of the sea or other navigable waters ;

(d) act of God;
 (e) act of war;
 (f) act of public enemies;
 (g) arrest or restraint of princes, rulers or people, or seizure under legal process;
 (h) quarantine restriction;
 (i) act or omission of the shipper or owner of the goods, his agent, or representative;
 (j) strikes or lock-outs or stoppage, or restraint of labour from whatever cause, whether partial or general;
 (k) riots and civil commotions;
 (l) saving or attempting to save life or property at sea;
 (m) wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods;
 (n) insufficiency of packing;
 (o) insufficiency or inadequacy of marks;
 (p) latent defects not discoverable by due diligence;
 (q) any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

3. The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault or neglect of the shipper his agents or his servants.

4. Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of these rules or of the contract of carriage and the carrier shall not be liable for any loss or damage resulting therefrom.

5. Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connexion with goods in an amount exceeding 100*l.* per package or unit, or the equivalent of that sum in other currency unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.

This declaration if embodied in the bill of lading shall be *prima facie* evidence, but shall not be binding or conclusive on the carrier.

By agreement between the carrier, master or agent of the carrier and the shipper another maximum amount than that mentioned in this paragraph may be fixed, provided that such maximum shall not be less than the figure above named.

Neither the carrier nor the ship shall be responsible in any event for loss or damage to or in connexion with goods if the nature or value thereof has been knowingly mis-stated by the shipper in the bill of lading.

6. Goods of an inflammable explosive or dangerous nature to the shipment whereof the carrier, master or agent of the carrier, has not consented, with knowledge of their nature and character may at any time before discharge be landed at any place or destroyed or rendered innocuous by the carrier without compensation, and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment.

If any such goods shipped with such knowledge and consent shall become a danger to the ship or cargo, they may in like manner be landed at any place or destroyed or rendered innocuous by the carrier without liability on the part of the carrier except to general average, if any.

ARTICLE V.

Surrender of Rights and Immunities, and Increase of Responsibilities and Liabilities.

A carrier shall be at liberty to surrender in whole or in part all or any of his rights and immunities or to increase any of his responsibilities and liabilities under the rules contained in any of these Articles, provided such surrender or increase shall be embodied in the bill of lading issued to the shipper.

The provisions of these rules shall not be applicable to charterparties, but if bills of lading are issued in the case of a ship under a charterparty they shall comply with the terms of these rules. Nothing in these rules shall be held to prevent the insertion in a bill of lading of any lawful provision regarding general average.

ARTICLE VI.

Special Conditions.

Notwithstanding the provisions of the preceding Articles, a carrier, master or agent of the carrier, and a shipper shall in regard to any particular goods be at liberty to enter into any agreement in any terms as to the responsibility and liability of the carrier for such goods, and as to the rights and immunities of the carrier in respect of such goods, or his obligation as to seaworthiness, so far as this stipulation is not contrary to public policy, or the care or diligence of his servants or agents in regard to the loading, handling, stowage, carriage, custody, care, and discharge of the goods carried by sea, provided that in this case no bill of lading has been or shall be issued and that the terms agreed shall be embodied in a receipt which shall be a non-negotiable document and shall be marked as such.

Any agreement so entered into shall have full legal effect:

Provided that this Article shall not apply to ordinary commercial shipments made in the ordinary course of trade, but only to other shipments where the character or condition of the property to be carried or the circumstances, terms and conditions under which the carriage is to be performed, are such as reasonably to justify a special agreement.

ARTICLE VII.

Limitations on the Application of the Rules.

Nothing herein contained shall prevent a carrier or a shipper from entering into any agreement stipulation, condition, reservation or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to or in connexion with the custody and care and handling of goods prior to the loading on and subsequent to the discharge from the ship on which the goods are carried by sea.

ARTICLE VIII.

Limitation of Liability.

The provisions of these Rules shall not affect the rights and obligations of the carrier under any statute for the time being in force relating to the limitation of the liability of owners of sea-going vessels.

ARTICLE IX.

The monetary units mentioned in these Rules are to be taken to be gold value.

THE CARRIERS ACT (III OF 1865).

EFFECT OF SUBSEQUENT LEGISLATION.—Repealed in part by Act IX of 1890.

Section 2 repealed in part by Act X of 1914.

Repealed (as to carriers by rail), Act by IV of 1879.

Amended by Act X of 1899, S. 2; Amended by Act XIII of 1921.

Declared in force—

throughout British India except as regards the Scheduled Districts Act XV of 1874, S. 3; in the Sonthal Parganas, Reg. III of 1872, S. 3, as amended by Reg. III of 1899, S. 3; in Upper Burma (except the Shan States), Act XIII of 1898, S. 4.

PREFATORY NOTE : DEFINITION AND KINDS OF CARRIERS.—A carrier is one who undertakes the transportation of persons or moveable property, and the authorities, both elementary and judicial, recognize two kinds of classes of carriers, *vis.*, 'private carriers' and 'common carriers'. While a common carrier has been defined as one who holds himself out to the public to carry persons or freight for hire, the term did not, at the common law, embrace a carrier of passengers, and is commonly confined to carriers of goods, as distinguished from common carriers of passengers. (See the definition in S. 2). A private carrier is one who, without being engaged in such business as a public employment, undertakes to deliver goods in a particular case for hire or reward. A common carrier differs from a private carrier in two important respects : (1) In respect of duty, he being obliged by law to undertake the charge of transportation, which no other person, without a special agreement, is. (2) In respect of risk, the former being regarded by the law as an insurer, the latter being liable like ordinary bailees.

APPLICABILITY OF LAW OF BAILMENTS.—(1) **TO CARRIAGE OF GOODS.**—The rules of liability applicable to private carriers of goods are those which are in general applicable to ordinary bailees, and the law as to common carriers of goods is a branch of the law covering the subject of bailments. That is, the carrier of goods is a bailee, and, aside from any considerations of public policy which effect the liability of a carrier conducting a public employment, his duties and liabilities are in general those of an ordinary bailee; but these considerations of public policy have led to the recognition by the Courts, from an early period in the history of the common law, of rules respecting the duty of the common carrier as to serving the public, and as to liability for goods entrusted to his care which do not apply to private carriers of goods.

(2) **TO CARRIAGE OF PASSENGERS.**—A carrier of passengers is not, as to the person of the passenger, a bailee, and in this respect the law of carriers of passengers is not a part of the subject of bailments; but inasmuch as those who hold themselves out as prosecuting the business of carrying passengers for hire are regarded as undertaking a public duty, they are properly classed in this respect with public carriers of goods, and it is proper to treat them under the general heading of "Carriers". Moreover public carriers of passengers are deemed common carriers as to the baggage accepted by them for transportation as a part of the business of transporting passengers.

WHO ARE COMMON CARRIERS OF GOODS.—A common carrier has been defined as "one who undertakes for hire or reward, to transport the goods of such as choose to employ him from place to place."

RIGHTS AND LIABILITIES OF COMMON CARRIERS.—"A common carrier must carry all goods that are tendered to him for carrying without insisting upon and unreasonable condition, provided they are of the description which he professes to carry, [*Garton v. Bristol and Exeter Railway*, (1861) 1 B. and S. 162; *Great Western Railway v. Sutton*, (1868) L.R. 4 H.L. 226], he has accommodation for the goods [*Jackson v. Rogers*, (1863) 2 Show 327], and reasonable payment of their carriage is offered [*Wyld v. Pickford*, (1841) 8 Mec. and W. 443; 58 B.R. 773], and the sender is ready and willing to pay it (Bullen and Leake, 3rd Ed., p. 277), and also provided that the goods are brought neither too late for the journey by which they are to go [see *Pickford v. Grand Junction Railway*, (1844) 12 Mec. and W. 766], nor too long a time before the journey is to begin [*Lane v. Cotton*, (1701)

1 Raym. (Ld.), at p. 652 ; see *Great Western Railway v. Bunch*, (1888) 13 App. Cas. 31]. But the carrier may apparently) refuse to take goods which will subject him to exceptional danger [*Edwards v. Sherratt*, (1801) 1 East 604, per Hale, C.J., *Morse v. Slue*, (1672) 1 Vent. 238]. Unless otherwise agreed, he must deliver within a reasonable time, having regard to the circumstances of the case (*Taylor v. Great Northern Railway*, (1866) L.R. 1 C.P. 385 ; *Hales v. London and North Western Railway*, (1863) 4 B and S. 661] and by the route which he professes to be his route [*Foster v. G.W.Ry.*, (1904) 2 K.B. 306 distinguishing *Mallet v. G.E.Ry.*, (1899) 1 Q.B. 309, See Ency. of Laws of England, Vol. II, p. 580]. The liability of a common carrier was the subject of a decision in a recent case before the Privy Council. It was held that a carrier is liable for injury arising from negligence in the execution of his contract to carry, unless he has effectively stipulated that he shall be free from such liability. If the contract is one which deprives the passenger of the benefit of a duty or care which he is *prima facie* entitled to expect that the Railway Company has accepted, the latter must discharge the burden of proving that the passenger assented to the special terms imposed. This he may show to have been done either in person or through the agency of another. Such agency will be held to have been established when he is shown to have authorised antecedently or by way of ratification the making of the contract under circumstances in which he must be taken to have left everything to his agent. In such a case, it is sufficient to prove that he has been content to accept the risk of allowing terms to be made without taking the trouble to learn what was being agreed to. In such cases the Railway Company may infer his intention from his conduct. Where, therefore, a passenger who is to be carried upon special conditions at a reduced fare has allowed terms to be made for him by an agent, the presumption is that the passenger was content to accept the risk without enquiring what the terms agreed upon by his agent were. See *Grand Trunk Railway Co. of Canada v. Robinson*, 31 I.C. 684 : 19 C. W. N. 905 (P.C.) ; See also 54 Cal. 430 : A. I. R. 1927 C. 394.

THE CARRIERS ACT (III OF 1865)¹.

[The 14th February, 1865.

An Act relating to the rights and liabilities of Common Carriers.

Preamble.

WHEREAS it is expedient not only to enable common carriers to limit their liability for loss of or damage to property delivered to them to be carried but also to declare their liability for loss of or damage to such property occasioned by the negligence or criminal acts of themselves, their servants or agents ; It is enacted as follows :—

Short title.

1. This Act may be cited as THE CARRIERS ACT, 1865.

¹ For Statement of Objects and Reasons of the Bill which was passed into law as Act III of 1865, see *Gazette of India* Extraordinary, dated 1st August, 1864 and for Proceedings relating to the Bill, see *ibid.*, Supplement, p. 497, and *ibid.*, 1865, pp. 51, 64 and 65.

The Act has been declared to be in force in the whole of British India, except as regards the Scheduled Districts, by the Laws Local Extent Act (XV of 1874), S. 3, Genl. Acts, Vol. II.

Sec. 1.—ACT IS NOT EXHAUSTIVE. THE LIABILITY OF THE COMMON CARRIERS IS GOVERNED BY THE ENGLISH COMMON LAW AS MODIFIED BY THE CARRIERS ACT.—A common carrier is subject to two distinct classes of liability, the one as insurer, in which the element of default is absent, the other for losses, as he is under an obligation to carry safely, in which that element is present. The Carriers Act modifies this by providing that the liability as insurer for goods not mentioned in the schedule may be limited by special contract where the loss is due to negligence. 38 Cal. 28 ; 9 I. C. 364 : 15 C. W. N. 226.

ACT NOT AFFECTED BY CONTRACT ACT.—3 B. 109 ; 18 C. 620 ; 20 Ind. Cas. 546 ; see also 32 P. W.R. 1911 ; 38 C. 28 ; 15 C.W.N. 226 : 3 M. 107.

WHO ARE COMMON CARRIERS.—Owners of seagoing merchant ships (26 C. 562) ; owners of steamships plying periodically (3 M. 107) ; carriers

by water generally (38 M. 941 : 20 I.C. 546). See also 28 M. 400 ; 6 C. 227.

LIABILITY OF COMMON CARRIER.—A common carrier does not cease to fill that character if he enters into a special contract limiting his liability both under the Carriers Act and under the Indian Railways Act. 31 I. C. 474 : 11 N. L. R. 174. Carrier is ordinarily the agent of the buyer not only to take delivery but also to assent to appropriation, 12 I. C. 662 : 5 S. L. R. 27. A common carrier in India is liable as an insurer. He is responsible for safety of goods entrusted to him except when loss or injury arises from act of God or King's enemies. But this liability may be varied by contract. 29 I. C. 260 : 21 C. L. J. 565. In India carriers by sea do not get the benefit of the Act 40 Bom. 529 : 33 I. C. 536 : 18 Bom. L.R. 126. Carriers by sea for hire are common carriers though the Carriers Act of 1865 does not apply to them. 38 Mad. 941 : 20 I. C. 546 : (1913) M. W. N. 558 ; 14 M. I. T. 137 : 25 M. L. J. 162. (28 Mad. 400 foll.) The duties and liabilities of a common carrier are governed in India by the principles of the *English Common Law* on the subject except where they have been departed from by the Carriers Act, or by the Railways Act. (*Ibid.*) As to liability of common carriers see 6 P. R. 1897 : 3 B. 109 ; 18 C. 620. A common carrier's responsibility is not within the Contract Act, (*Ibid.*) [18 Cal. 620 (P.C.) Foll.] There is

Interpretation clause.

2. In this Act, unless there be something repugnant in the subject or context—

“common carrier” denotes a person, other than the Government, engaged in the business of transporting for hire property from place to place, by land or inland navigation, for all persons indiscriminately:

“Person.”

1 “person” includes any association or body of persons, whether incorporated or not.

[* * * * *] 2

3. No common carrier shall be liable for the loss of or damage to property delivered to him to be carried exceeding in value one hundred rupees and of the description contained in the schedule to this Act, unless the person delivering such property to be carried, or some person duly authorized in that behalf, shall have expressly declared to such carrier or his agent the value and description thereof.³

Carriers not to be liable for loss of certain goods above one hundred rupees in value, unless delivered as such.

4. Every such carrier may require payment for the risk undertaken in carrying property exceeding in value one hundred rupees and of the description aforesaid, at such rate of charge as he may fix:

For carrying such property, payment may be required at rates fixed by carrier.

Provided that, to entitle such carrier to payment at a rate higher than his ordinary rate of charge, he shall have caused to be exhibited in the place where he carries on the business of receiving property to be carried, notice of the higher rate of charge required, printed or

Proviso.

no implied warranty of seaworthiness for lighters and boats, etc., employed to land goods. (*Ibid.*) Under Indian Law, a common carrier by sea can contract out of the Common Law liability for negligence of himself and his servants provided the saving clause is expressed in clear and unambiguous terms. 62 I. C. 378; 10 L. B. R. 292 (F. B.) Where the bill of lading contained the clause “At shipper’s risk with option of carrying on deck,” and the goods (betel leaves) went bad for want of ventilation, *held*, that the carrier was not liable in damages, being exempted by the special clause. 8 Bur. L. T. 273; 30 I. C. 939 (1). 8 L. B. R. 293. Stipulations exempting the carrier from liability will be held to limit his liability as insurer and not his liability for negligence unless negligence is expressly included. 17 I. C. 37; 6 S. L. R. 103. (32 Mad. 9 foll.) The burden of proving absence of negligence is on the common carrier, loss or damage being deemed *prima facie* proof of negligence. 29 I. C. 260; 21 C. L. J. 565. In a contract to carry a load from one place to another where no fixed route is settled upon, the more convenient route may be followed though it is a longer one and carriage cost should be calculated on the same. 11 I. C. 43 (Cal.) The definition of a “Common Carrier” in S. 2 is framed without reference to the extent of his liability. 31 I. C. 474; 11 N. L. R. 174. A carrier in its general sense means a person or company which undertakes to transport the goods of another person from one place to another for hire 34 M. L. J. 553; 45 I. C. 485; 8 L. W. 46; 24 M. L. T. 175. *Where goods have to be carried with the aid of different agencies to arrive at the destination*, the carrier with whom the contract is made at one end is, in the absence of a contract limiting his liability to his

own transport system, liable for loss or destruction of the goods beyond his own system or in consequence of act done by or default of persons other than his own servant. (*Ibid.*) See also 54 Cal. 430; 31 C. W. N. 359; A. I. R. 1927 Cal. 394.

Secs. 2 and 6.—Duties and liabilities of Common carriers in India are governed by English Common Law and Carriers Act and not by the law relating to bailees under the Contract Act. 50 I. C. 562; 3 U.B.R. (1918) 120. Common carriers are liable as insurers and not merely as bailees protected by statute or special contract. 50 I. C. 562; 3 U.B. R. (1913) 120. *A licensee of a ferry* is a Common Carrier. 50 I. C. 562; 3 U.B.R. (1918) 120.

¹ Cf. definition in S. 3 (39) of the General Clauses Act (X of 1897).

Sec. 2.—² Repealed by Act X of 1914.

Secs. 3 and 4.—The liability for loss or damage is not defeated by the fact that the goods delivered as luggage are in fact merchandise. 41 Cal. 80; 19 I. C. 756; 17 C. W. N. 970. (19 I. C. 756 Ref.) Liability for loss of goods in case of through booking by steamer and rail, see 11 C. W. N. 1076; on this section see also 44 C. 419; 13 P. R. 1866; 41 C. 80; 17 C. W. N. 970; 19 Ind. Cas. 758; 29 P. R. 1872; 91 P. R. 1868. Early Anglo-Indian Legislation extended to India the principle embodied in the Carriers Act (1830) (II Geo. IV and I Wm. IV c. 68). See Statement of Objects and Reasons. See also 38 C. 28; 9 Ind. Cas. 364; 10 C. 166 (F. B.); 13 C. L. R. 342; 40 C. 716; 17 B. 417; 17 C. 39; 19 C. 538; 18 C. 620; 18 I. A. 121 (P. C.).

Sec. 3.—³ The earlier sections extend to India the principle embodied in the Carriers Act, 1830 (II Geo. IV and I Wm. IV, c. 68). See Statement of Objects and Reasons quoted *supra*.

written in English and in the vernacular language of the country wherein he carries on such business.

5. In case of the loss or damage to property exceeding in value one hundred rupees and of the description aforesaid, delivered to such carrier to be carried, when the value and description thereof shall have been declared and payment shall have been required in manner provided for by this Act, the person entitled to recover in respect of such loss or damage shall also be entitled to recover any money actually paid to such carrier in consideration of such risk as aforesaid.

The person entitled to recover in respect of property lost or damaged may also recover money paid for its carriage.

rupees and of the description aforesaid, delivered to such carrier to be carried, when the value and description thereof shall have been declared and payment shall have been required in manner provided for by this Act, the person entitled to recover in respect of such loss or damage shall also be entitled to recover any money actually paid to such carrier in consideration of such risk as aforesaid.

6. The liability of any common carrier for the loss of or damage to any property delivered to him to be carried, not being of the description contained in the Schedule to this Act, shall not be deemed to be limited or affected by any public notice ; but any such carrier, not being the owner of a railroad or tramroad constructed under the provisions of Act XXII of 1863 (to provide for taking land for works of public utility to be constructed by private persons or Companies and for regulating the construction and use of works on land so taken) may,

In respect of what property liability of carrier not limited or affected by public notice. Carriers, with certain exceptions, may limit liability by special contract.

delivered to him to be carried, not being of the description contained in the Schedule to this Act, shall not be deemed to be limited or affected by any public notice ; but any such carrier, not being the owner of a railroad or tramroad constructed under the provisions of Act XXII of 1863 (to provide for taking land for works of public utility to be constructed by private persons or Companies and for regulating the construction and use of works on land so taken) may,

Sec. 6.—See now the Land Acquisition Act (I of 1894), S. 2.

Sec. 6 to 8.—A carrier is liable for injury arising from negligence in the execution of his contract to carry unless he has effectively stipulated that he shall be free from such liability. 31 I.C. 684 : 19 C. W. N. 905 (P. C.). Nature of negligence for which owner of railroad or tramroad liable, see 11 M. L. J. 156. Unless there is a contract to the contrary, the consignor cannot hold the company with whom he did not contract, liable for the loss, when all that is complained of, is *nonfeasance*. 34 M. L. J. 553 : 45 I. C. 485 : 8 L. W. 46 : 24 M. L. T. 175. Where there is, an agreement between two companies constituting one as the agent of the other and both are working for joint benefit, either Company may be sued. (*Ibid.*) Goods consigned to a Railway Company for carriage were, during transmission, destroyed by a severe cyclone. *Held*, in a suit for value of the goods that the company was not liable. 38 I.C. 702 : 25 C. L. J. 37. When an extraordinary cause co-operating with the negligence of a person produces injury to some other person, the negligent person is not liable. (*Ibid.*) Liability of railway in case loss of goods by fire caused by erroneous description of goods, see 3 B. 120. See also 3 B. 109 : 5 B. 371 : 13 P. R. 1866 : 28 M. 400 : 17 M. 445 : 11 C. W. N. 1076. Burden of proof as to negligence. 24 C. 786 : 1 C. W. N. 200 : 26 C. 398 : 3 C. W. N. 145 : 24 C. 786. A contract of carriage by a shipping company is at an end when it delivers the goods to the Port Commissioners. 25 I. C. 885 : 41 Cal. 703. Whether the goods are to be delivered to the consignee at his house or at the termination of the journey depends on agreement and on the usual course of business. 44 I. C. 401 : 2 Bom. L. R. 591. It is the duty of the consignee to ascertain when the goods will arrive and to be ready to take delivery. 25 I. C. 885 : 41 Cal. 703. At the time of delivery a Railway Company is not bound to give after re-weighing, a certificate of shortage. Refusal on the part of the consignee to take delivery in consequence of the refusal to give a certificate is sufficient to throw the loss arising

from deterioration of the goods on the consignee 45 I. C. 933 : 22 C. W. N. 902. The act of the Company in sending out notice of arrival and issuing a delivery order to a person, whom, they *bona fide* believed to be the person entitled to the goods was not an act for which they could be made liable, 25 I. C. 885 : 41 Cal. 703. Notice of suit and liability for loss before suit, see 8 C. L. J. 192 : 41 Ind. Cas. 919. Waiver of notice 38 C. 50 : 9 Ind. Cas. 960. Where freight is paid in advance for the carriage of goods by sea to a shipowner, he gets it absolutely and the shipper of goods, cannot recover it. 44 Mad. 145 : 40 M. L. J. 57 : 62 I. C. 372 : 13 L. W. 273 : (1921) M. W. N. 38 : 29 M. L. T. 85. A clause in a contract of carriage agreeing to hold the carriers indemnified from and against all claims which may be insured against them nevertheless is governed by S. 8 and does not relieve the carriers of liability arising from the negligence of their servants. It is not a separate contract of indemnity but part of the contract of carriage 15 C. W. N. 226 : 9 I. C. 364 38 Cal. 28. Where by a special contract, a Steamer Company, common carriers, were exempted from liability for any loss or damage unless it arose from their negligence or criminal act of their servants or agents *Held*, that if the carriers seek exemption from liability they must prove that the loss must have been occasioned otherwise than by the negligence or criminal act of themselves, their servants or agents. The loss of goods is *prima facie* evidence of the negligence or criminal act of the carriers, their servants or agents. 40 Cal. 716 : 19 I. C. 245 : 17 C. L. J. 639. Where by an arrangement with Railway Company goods delivered to it were to be transported by a Steamship Company and the goods were destroyed on board a steamer *Held*, that although there was no contract between it and the plaintiff, the Steamship Company was nevertheless liable as a common carrier for the loss. 47 Cal. 6 : 47 I. C. 406 : 23 C. W. N. 998.

BILL OF LADING.—Special clause against liability—Shipper cannot sue. 62 I. C. 709 : 30 M. L. T. 18 (H. C.).

by special contract, signed by the owner of such property so delivered as last aforesaid or by some person duly authorized in that behalf by such owner, limit his liability in respect of the same.

7. The liability of the owner of any railroad or tramroad constructed under the provisions of the said Act XXII of 1863, for the loss of or damage to any property delivered to him to be carried, not being of the description contained in the Schedule to this Act, shall not be deemed to be limited or affected by any special contract; but the owner of such railroad or tramroad shall be liable for the loss of or damage to property delivered to him to be carried only when such loss or damage shall have been caused by negligence or a criminal

act on his part or on that of his agents or servants.

8. Notwithstanding anything hereinbefore contained, every common carrier shall be liable to the owner for loss of or damage to any property delivered to such carrier to be carried where such loss or damage shall have arisen from the [* *]¹ criminal act of the carrier or any of his agents or servants [and shall also be liable to the owner for loss or damage to

any such property, other than property to which the provisions of section 3 apply and in respect of which the declaration required by that section has not been made, where such loss or damage has arisen from the negligence of the carrier or any of his agents or servants.]

9. In any suit brought against a common carrier for the loss, damage or non-delivery of goods entrusted to him for carriage, it shall not be necessary for the plaintiff to prove that such loss, damage or non-delivery was owing to the negligence or criminal act of the carrier, his servants or agents.

10. No suit shall be instituted against a common carrier for the loss of, or injury to goods entrusted to him for carriage, unless notice in writing of the loss or injury has been given to him before the institution of the suit and within six months of the time when the loss or injury first came to the knowledge of the plaintiff.

Sec. 7.—S. 7 (so far as it relates to railways) has been repealed by the Indian Railways Act (IX of 1890), Ch. VII, S. 72.

Sec. 8.—¹ The words "negligence or" were omitted and the words within brackets at the end of the section were added by Act XIII of 1921, S. 2 (1).

Secs. 8 and 9.—The Act makes a common carrier liable to the owner of the goods as such, though not as insurers. 47 Cal. 6 : 57 I. C. 406 : 23 C. W. N. 998. The loss or damage to the goods is *prima facie* proof of a negligence and under S. 9 the burden of proof as to the absence of negligence is thrown upon the common carrier. 44 Cal. 1027 : 51 I. C. 14 : 33 C. L. J. 72. The onus of proving negligence of the carrier is not upon the plaintiff. 41 Cal. 80 : 19 I. C. 556 : 17 C. W. N. 970.

CARRIER'S LIABILITY.—Injuries of goods—Through booking of goods—Negligence—Onus of proof—Non-feasance and misfeasance. 47 Cal. 7 : 57 I. C. 406 : 23 C. W. N. 988. Goods delivered to Steamship co-Carriage by Railway Companies—Loss during transit in railway—Liability of Steamship Co.—Burden of proof. 54 Cal. 430 : 31 C. W. N. 359 : 100 I. C. 903 : A. I. R. 1927 Cal. 394.

Sec. 10.—S. 10 was added by the Indian Carriers Act (X of 1899), S. 2. The original section repealed by the Indian Railways Act (IX of 1897) That section was as follows :—

"Nothing in this Act shall affect the provision contained in the ninth, tenth, and eleventh sections of Act XVIII of 1854 (relating to Railways in India)".

Notice to maintain a suit for damages for short delivery against a Common Carrier, a notice of claim under S. 10 must be given even though the carrier came to know of the claim *aliunde* within six months' time and had no difficulty in tracing the goods. 41 I. C. 919 : 27 C. L. J. 294. The essential of a good notice under S. 10 is that it should reach the person who is liable to make good the loss. 54 Cal. 430 : 31 C. W. N. 359 : 100 I. C. 905 : A. I. R. 1927 Cal. 394. It is necessary that notice should be given by the plaintiff to the carrier before institution of the suit. It is not sufficient that the carrier is aware of the loss from some other source. 9 I. C. 960 : 38 Cal. 50. Notice to a joint agent of the carriers would be good and valid notice. 54 Cal. 430 : 31 C. W. N. 359 : A. I. R. 1927 Cal. 394.

Power to Governor-General in Council to add to the Schedule.

11. The Governor-General in Council may, by notification in the *Gazette of India*, add to the list of articles contained in the Schedule to this Act, and the Schedule shall, on the issue of any such notification, be deemed to have been amended accordingly.

SCHEDULE.

Gold and silver coin.
Gold and silver in a manufactured or unmanufactured state.
Precious stones and pearls.
Jewellery.
Time-pieces of any description.
Trinkets.
Bills and hundis.
Currency notes of the Government of India, or notes of any Banks, or securities for payment of money, English or Foreign.
Stamps and stamped paper.
Maps, prints, and works of art.
Writings.
Title-deeds.
Gold or silver plate or plated articles.
Glass.
China.
Silk in a manufactured or unmanufactured state, and whether wrought up or not wrought up with other materials.
Shawls and lace.
Cloths and tissues embroidered with the precious metals or of which such metals form part.
Articles of ivory, ebony or sandalwood.

THE CASTE DISABILITIES REMOVAL ACT (XXI OF 1850).

Effect of subsequent legislation. Short title given by Act XIV of 1827.

Declared in force—throughout British India except as regards the Scheduled Districts, Act XV of 1874, S. 3; in the Sonthal Parganas, Reg. III of 1872, S. 3, as amended by Reg. III of 1899, S. 3.

PREFATORY NOTE.—When Warren Hastings became the Governor of Bengal, one of his first acts was to lay down a plan for the administration of civil justice in the interior of Bengal. With respect to civil rights, Warren Hastings' plan of 1772 directed by his twenty-third rule, that "in all suits regarding marriage, inheritance and caste and other religious usage and institutions, the laws of the Koran with respect to Mahomedans, and those of Shaster with respect to Gentus (Hindus) shall be invariably adhered to." Moulvies or Brahmins were directed to attend the courts for the purpose of expounding the law and giving assistance in framing the decrees. The principle laid down by the above rule of Warren Hastings was recognised and confirmed by the code of regulations issued by the Government of Bengal in 1780, as also by the British Parliament in 1881 by the provision contained in S. 18 of 21 Geo. III, c. 70. Enactments to the same effect have been introduced into numerous subsequent English and Indian enactments. A Bengal regulation of 1832 (VII of 1832), whilst re-enacting the rules of Warren Hastings which had been embodied in previous regulations qualified their application by a provision which attracted little attention at the time, but afterwards became the subject of considerable discussion. It declared that these rules are intended and shall be held to apply to such person as *bona fide* professes those religions at the time of the application of the law to the case, and were designed for the protection of the rights of such persons, not for the deprivation of the rights of others. Where, therefore, in any civil suit the parties to such suits may be of different persuasion, where one party shall be of the Hindu and the other of the Mahomedan persuasion, or where one or more of the parties to such suit shall not be either of the Mahomedan or Hindu persuasion the laws of those religions shall not be permitted to operate to deprive such party or parties of any property to which, but for the operation of such laws, they would have been entitled. In all such cases the decision shall be governed by the principles of justice and equity, and this provision shall not be considered as justifying the introduction of the English or any foreign law or the application to such cases of any rules not sanctioned by those principles. In the year 1850 the Government of India passed the law (XXI of 1850) of which the object was to extend the principle of this regulation throughout the territories subject to the Government of the East India Company. This Act, which was at the time of its passing, known as the Lex Loci Act, excited considerable opposition among orthodox Hindus as unduly favouring converts and has been criticised from the Hindu point of view with respect to its operation on the guardianship of children in a case where one of two parents had been converted from Hinduism to Mahomedanism. It will have been observed that Warren Hastings' rule and the enactment based upon it apply to Hindus and Mahomedans. There are, of course, many natives of India who are neither Hindus nor Mahomedans, such as the Portuguese and American Christians, the Parsis, the Sikhs, the

Jains, the Buddhists of Burma and elsewhere and the Jews. The tendency of the Courts and of the legislature has been to apply to these classes the spirit of Warren Hastings' rule and to leave them in the enjoyment of family law, except so far as they have shown a disposition to place themselves under English Law." (*See Ilbert's Government of India*, 2nd Ed., 1907, pp. 323, 329). This Act was originally known as the *Lex Loci Act*, and is even now generally cited under the same designation. The title is, however, a misnomer. It was properly applied to other provisions which were subsequently dropped (*See* the evidence of Mr. Cameron before the Select Committee of the House of Lords in 1852; *Ilbert's Government of India*, 2nd Ed., 1907, p. 328 Note.)

THE CASTE DISABILITIES REMOVAL ACT (XXI OF 1850).¹

[The 11th April, 1850.]

An Act for extending the principle of section 9, Regulation VII, 1832, of the Bengal Code throughout the Territories subject to the Government of the East India Company.

WHEREAS it is enacted by section 9, Regulation VII, 1832, of the Bengal Code² that " whenever in any civil suit the parties to
Preamble. such suit may be of different persuasions, when one party shall be of the Hindu and the other of the Muhammadan persuasion, or where one or more of the parties to the suit shall not be either of the Muhammadan or Hindu persuasions, the laws of those religions shall not be permitted to operate to deprive such party or parties of any property to which, but for the operation of such laws, they would have been entitled ; and whereas it will be beneficial to extend the principle of that enactment throughout the territories subject to the government of the East India Company ; It is enacted as follows :—

¹Short title, " The Caste Disabilities Removal Act, 1850." *See* the Indian Short Titles Act (XIV of 1897), Genl. Acts, Vol. IV.

²Ben. Reg. VII of 1832 was repealed by the Bengal Civil Courts Act (VI of 1871) which was repealed by Act XII of 1887.

This Act is not retrospective (4 A.L.J. 365). As to effect of conversion before this Act on rights of inheritance, *see* 21 M. L. J. 645 ; 15 C. W. N. 545 (P. C.) ; 8 A. L. J. 552 ; 13 Bom. L. R. 427 ; 13 C. L. J. 575 ; 10 M. L. T. 25 ; 35 A. 356 (1911) M.W.N. 432 ; 10 Ind. Cas. 477. SCOPE OF ACT *see* 52 P.W.R. 1907 ; 23 M. 171 ; 1 Bom. 559 ; 32 Cal. 871. Regulation VII of 1882 or Act XXI of 1850 can held to be applicable to the province of Oudh from the date of annexation at the earliest, that is the year 1856. 4 O. W. N. 1243 ; A. L. R. 1928 Oudh 138.

OBJECT OF THE ACT.—19 W. R. 367 (406) ; construction of this Act (*ibid.*) conflict to be avoided in construing Act. 77 P. R. 1907 ; 11 A. 100.

APPLICATION OF ACT.—Act applies to all cases of ex-communication from caste—cause of ex-communication being immaterial. 2 N.-W. P. 446 ; ex-communication of Hindu widow for unchastity causes no forfeiture of rights, 1 B. 559 ; 32 C. 871 ; 19 W. R. 367 (379). Application of Act to heirs of convert, *see* 21 P. L. K. 1903 ; 32 C. 871 ; 9 C. W.N. 1003, 2 C.L. J. 97 ; 77 P. W. R. 1907 ; 11 A. 100 ; 8 S. L. R. 156 ; 2 Agra 311 ; 104 P. R. 1902 ; 36 P. R. 1909.

EFFECT OF APOSTASY THE ACT.—Act XXI of 1850 secures after apostasy the same rights to indivi-

duals in property as they enjoyed before apostasy. 31 I. C. 476 ; 98 P. R. 1915 S. 1 merely removes the personal disability of the person who has changed his religion from enforcing his rights which he possessed prior to the change. It does not lay down that if any ancestor of the *propositus* in any degree of ascent has changed his religion the Act would apply in determining the status of an heir to such a *propositus*. The removal of the penalty which the preamble bears out is clearly intended for the benefit of the party who has incurred the penalty and not for others. The Act has no application to a case where the claimant of rights either of one class or of the other has neither renounced nor has been excluded from the communion of any religion or been deprived of caste. 4 O. W. N. 1243 ; A. I. R. 1928 Oudh 138 Degradation by apostasy does not dissolve marriage among Hindus, 9 M. 466 (470) ; 18 C. 264 ; 17 M. 235 ; 23 M. 171 ; 25-B. 644 ; 49 P. R. 1907 ; 4 B. 330 ; 4 M. 243 ; 8 M. 169 ; 2 N.-W. P. 300 ; as to restitution of conjugal rights *see* 8 A. 78. Hindu widow remarrying after conversion—effect on her rights of inheritance, 23 M. L. J. 81 ; 19 C. 289 ; 35 A. 466 ; 20 Ind. Cas. 335. Act does not affect usage of Hindu temple or other religious institution. 13 M. 293 ; 13 I. A. 105 ; 11 M. I. A. 405. Loss of caste does not involve loss of right of guardianship. 167 P. L. R. 1901 ; 1 A. 549 ; 14 M. I. A. 309 ; 10 B. L. R. 125 ; 28 A. 233 ; 1905 A. W. N. 205 ; 2 A. L. J. 663 or right to give Hindu son in adoption. 25 B. 551 ; 35 Bom. L. R. 89.

3. The Governor-General in Council may make rules for the purpose of regulating the transaction of business by the Central Board of Revenue, and every order made or act done in accordance with such rules shall be deemed to be the order or act, as the case may be, of the Central Board of Revenue.

4. The enactments specified in the Schedule are hereby amended to the extent and in the manner mentioned in the fourth column thereof :

Provided that, where the power to make any appointment, or issue any notification, order, scheme or rule, or prescribe any form, is transferred by the operation of this Act from any authority to the Central Board of Revenue or any other authority, any such appointment, notification, order, scheme, rule, or form made, issued or prescribed by the first-mentioned authority before the commencement of this Act shall continue in force and be deemed to have been made, issued or prescribed by the Central Board of Revenue or such other authority, as the case may be, unless and until it is superseded by an appointment, notification, order, scheme, rule, or form made, issued or prescribed by the said Board or authority.

THE SCHEDULE.

ENACTMENTS AMENDED.

(See Section 4.)

Year.	No.	Short title.	Amendments.
1878	VIII	The Sea Customs Act, 1878.	1. In section 63— (1) for clause (a) the following clause shall be substituted, namely :— “(a) ‘Chief Customs-authority’ means the Central Board of Revenue constituted under the Central Board of Revenue Act, 1924, and includes, in relation to any power or duty which the Governor-General in Council may, by notification in the <i>Gazette of India</i>, transfer from the Central Board of Revenue to a Local Government, the Local Government or such officer as the Local Government may appoint in that behalf”; and (2) after clause (i) the following clause shall be inserted, namely :— “(k) ‘official Gazette’ means in relation to a notification issued by a Local Government, the local official Gazette, and in relation to a notification issued by the Central Board of Revenue, the <i>Gazette of India</i>.” 2. For section 6 the following section shall be substituted, namely :— “6. The Governor-General in Council may appoint such persons as he thinks fit to be officers of Customs-officers. Customs, and to exercise the powers conferred, and perform the duties imposed, by this Act on such officers.” 3. For section 7 the following section shall be substituted, namely :—

Year.	No.	Short title.	Amendments.
1878	VIII	The Sea Customs Act, 1878—(Contd.)	"7. The Governor-General in Council may delegate to any Local Government or to the Chief Customs-authority any power conferred upon him by section 6, and the Local Government or the Chief Customs-authority may delegate to any officer of Customs any power so delegated to it." 4. In sections 11, 12 and 14, for the words "The Local Government or, if so authorised by the Local Government, the Chief Customs-authority" the words "The Chief Customs-authority" shall be substituted, and, in section 11, the words "within the territories administered by it" shall be omitted. 5. In section 23, for the words "The Local Government" the words "The Chief Customs-authority" shall be substituted. 6. In sections 53, 74, 76, 79, 85, 96, 116, 128, 133 and 147, the word "local" wherever it occurs in the expression "local official Gazette" shall be omitted. 7. In section 88, for the words "the Local Government may from time to time direct" the words "the Chief Customs-authority may, with the concurrence of the Local Government, direct" shall be substituted. 8. In section 128, for the words "the Local Government" the words "the Chief Customs-authority" shall be substituted. 9. In section 133, for the words "the Local Government, subject to the control of the Governor-General in Council," the words "the Chief Customs-authority" shall be substituted. 10. In section 155, after the words "the Local Government may" the words "with the previous sanction of the Governor-General in Council" shall be inserted, and for the words "by its own officers" the words "by officers of Government" shall be substituted. 11. In section 157, for the words "The Local Government" the words "The Governor-General in Council" shall be substituted. 12. In section 188, for the words "the Local Government" in both places where they occur, the words "the Governor-General in Council" shall be substituted. 13. In section 191, for the words "The Local Government" the words "The Governor-General in Council" shall be substituted. 14. After section 204 the following section shall be inserted, namely :— "205. Any notification published in the <i>Gazette of India</i> by the Chief Customs-authority under section 53, section 74, section 76, section 79, section 85, section 96, section 116, section 128, section Publication of notifications in local official Gazettes.

Year.	No.	Short title.	Amendments.
1878	VII I	The Sea Customs Act, 1878—(Contd.)	133 or section 147 shall forthwith be re-published in the local official Gazette of each province to which it relates."
1896	II	The Cotton Duties Act, 1896.	1. For clause (2) of section 3 the following clause shall be substituted, namely :— " (2) ' Chief Customs-authority' means the Central Board of Revenue constituted under the Central Board of Revenue Act, 1924, and includes in relation to any power or duty which the Governor-General in Council may, by notification in the <i>Gazette of India</i>, transfer from the Central Board of Revenue to a Local Government, the Local Government or such officer as the Local Government may appoint in that behalf." 2. In sub-clauses (b) and (c) of clause (3) of section 3 and in section 4, for the words " the Local Government " the words " the Chief Customs-authority " shall be substituted. 3. In section 33, for the words " The Local Government " the words " The Governor-General in Council, or, if so empowered by the Governor-General in Council, the Local Government " shall be substituted.
1908	X	The Indian Salt-duties Act, 1908.	In section 2, for the words " the Local Government " the words and figures " if so empowered by the Governor-General in Council, the Local Government or the Central Board of Revenue constituted under the Central Board of Revenue Act, 1924," shall be substituted.
914	III	The Indian Copyright Act, 1914.	In sub-section (2) of section 6, for the words "the Local Government" the words " the Chief Customs-authority " shall be substituted.
922	XI	The Indian Income-tax Act, 1922.	1. After clause (4) of section 2 the following clause shall be inserted, namely :— " (4-A) ' the Central Board of Revenue' means the Central Board of Revenue constituted under the Central Board of Revenue Act, 1924." 2. In section 5-- (i) in clause (a) of sub-section (1), for the words " a Board of Inland Revenue " the words " the Central Board of Revenue " shall be substituted ; and (ii) sub-section (2) shall be omitted. 3. In clauses (6) and (11) of section 2, in sub-section (5) of section 5, in sub-section (6) of section 18, in sub-section (5) of section 46, in sub-section (1) of section 59, and in sub-section (3) of section 64, for the words " the Board of Inland Revenue " the words " the Central Board of Revenue " shall be substituted.

THE CHARITABLE ENDOWMENTS ACT (VI OF 1890).¹

Repealed in part (as to Burma) by Act XIII of 1898.

Ss. 3 (1), 4 (3) (a), 11, 13 amended by Act XXXVIII of 1920.

¹ For Statement of Objects and Reasons, see *Gazette of India*, 1889, Pt. V, p. 137 ; for Report of the Select Committee, see *ibid.*, 1890, p. 65 ; and for Proceedings in Council, see *ibid.*, 1889,

Declared in force—

in the Sonthal Parganas, Reg. III of 1872, S. 3, as amended by Reg. III of 1899, S. 3;
in Upper Burma (except the Shan States), Act XIII of 1898, S. 4.

THE CHARITABLE ENDOWMENTS ACT (VI OF 1890).

[7th March, 1890.

An Act to provide for the Vesting and Administration of Property held in trust for charitable purposes.

WHEREAS it is expedient to provide for the vesting and administration of property held in trust for charitable purposes; it is hereby enacted as follows:—

Title, extent and commencement.

1. (1) This Act may be called THE CHARITABLE ENDOWMENTS ACT, 1890.

(2) It extends to the whole of British India, inclusive of [* * *] 1 British Baluchistan; and

(3) It shall come into force on the first day of October, 1890.

2. In this Act "charitable purpose" includes relief of the poor, education, medical relief and the advancement of any other object of general public utility, but does not include a purpose which relates exclusively to religious teaching or worship.

Definition.

Appointment and incorporation of Treasurer of charitable endowments.

3. (1) The Governor-General in Council may appoint an officer of the Government by the name of his office to be Treasurer of Charitable Endowments for the territories subject to any Local Government.

(2) Such Treasurer shall, for the purposes of taking, holding and transferring moveable or immoveable property under the authority of this Act, be a corporation sole by the name of the Treasurer of Charitable Endowments for the territories subject to the Local Government, and, as such Treasurer, shall have perpetual succession and a corporate seal, and may sue and be sued in his corporate name.

4. (1) Where any property is held or is to be applied in trust for a charitable purpose, the Local Government, if it thinks fit, may, on application made as hereinafter mentioned, and subject to the other provisions of this section, order, by notification² in the official Gazette, that the property be vested in the Treasurer of Charitable Endowments on such terms as to the application of the property or the income thereof as may be agreed on between the Local Government and the person or persons making the application, and the property shall thereupon so vest accordingly.

(2) When any property has vested under this section in a Treasurer of Charitable Endowments, he is entitled to all documents of title relating thereto.

(3) A Local Government shall not make an order under sub-section (1) for the vesting in a Treasurer of Charitable Endowments of any securities for money, except the following, namely:—

Pt. VI, pp. 117 and 190, and 1890, *ibid.*, Pt. VI, p. 37.

The Act has been declared in force in Upper Burma (except the Shan States) by the Burma Laws Act (XIII of 1898), Burma Code.

The Act has been declared in force in the Sonthal Parganas under S. 3 of the Sonthal Parganas Settlement Regulation (III of 1872) as amended by the Sonthal Parganas Justice and Laws Regulation (III of 1899), Ben. Code, Vol. I.

Sec. 1.—¹ The words "Upper Burma, and" were repealed by the Fifth Schedule of the Burma Laws Act (XIII of 1898), Burma Code.

Sec. 3.—² For officers appointed under the powers conferred by this section, see Genl. Stat.

R. & O., Vol. III.

For notification appointing the Accountant-General, Punjab, to be the Treasurer of Charitable Endowments for the North-West Frontier Province, see *Gazette of India*, 1901, Pt. I, p. 936.

Sec. 4 (1).—³ For notifications issued under this section in conjunction with S. 5 for—

(1) Bengal, see Ben. Stat. R. & O., Vol. II.
(2) Bombay, see Bom. R. & O., Vol. I. (3) Madras, see Mad. R. & O., Vol. I. (4) Punjab, see Punj. List of Local R. & O. (5) The United Provinces of Agra and Oudh, see U. P. List of Local R. & O., Vol. I, Pt. I. See also note under S. 7 (1).

(a) promissory notes, debentures, stock and other securities of the Government of India, or of the United Kingdom of Great Britain and Ireland ;

(b) bonds, debentures and annuities charged by the Imperial Parliament on the revenues of India ;

(c) stock or debentures of, or shares in, Railway or other Companies, the interest whereon has been guaranteed by the Secretary of State for India in Council ;

(d) debentures or other securities for money issued by or on behalf of any local authority in exercise of powers conferred by an Act of a legislature established in British India ;

(e) a security expressly authorised by any order which the Governor-General in Council may make in this behalf.

(4) An order under this section vesting property in a Treasurer of Charitable Endowments shall not require or be deemed to require him to administer the property, or impose or be deemed to impose upon him the duty of a trustee with respect to the administration thereof.

5. (1) On application made as hereinafter mentioned, and with the concurrence of the person or persons making the application, the

Schemes for administration of property vested in the Treasurer.

Local Government, if it thinks fit, may settle a scheme for the administration of any property which has been or is to be vested in the Treasurer of Charitable Endowments, and

may in such scheme appoint, by name or office, a person or persons, not being or including such Treasurer, to administer the property.

(2) On application made as hereinafter mentioned, and with the concurrence of the person or persons making the application, the Local Government may, if it thinks fit, modify any scheme settled under this section or substitute another scheme in its stead.

(3) A scheme settled, modified or substituted under this section shall, subject to the other provisions of this section, come into operation on a day to be appointed by the Local Government in this behalf, and shall remain in force so long as the property to which it relates continues to be vested in the Treasurer of Charitable Endowments or until it has been modified or another such scheme has been substituted in its stead.

(4) Such a scheme, when it comes into operation, shall supersede any decree or direction relating to the subject-matter thereof in so far as such decree or direction is in any way repugnant thereto, and its validity shall not be questioned in any Court, nor shall any Court give, in contravention of the provisions of the scheme or in any way contrary or in addition thereto a decree or direction regarding the administration of the property to which the scheme relates.

(5) In the settlement of such a scheme effect shall be given to the wishes of the author of the trust so far as they can be ascertained, and, in the opinion of the Local Government, effect can reasonably be given to them.

(6) Where a scheme has been settled under this section for the administration of property not already vested in the Treasurer of Charitable Endowments, it shall not come into operation until the property has become so vested.

Mode of applying for vesting orders and schemes.

6. (1) The application referred to in the two last foregoing sections must be made,—

(a) if the property is already held in trust for a charitable purpose, then by the person acting in the administration of the trust, or, where there are more persons than one so acting, then by those persons or a majority of them ; and

(b) if the property is to be applied in trust for such a purpose, then by the person or persons proposing so to apply it.

(2) For the purposes of this section the executor or administrator of a deceased trustee of property held in trust for a charitable purpose shall be deemed to be a person acting in the administration of the trust.

Exercise by Governor-General in Council of powers of Local Government.

7. (1) The Governor-General in Council may¹ exercise all or any of the powers conferred on the Local Government by sections 4 and 5.

(2) When the Governor-General in Council has signified to the Local Government his intention of exercising any of those powers with respect to any property, that Government shall not, without his previous sanction, exercise them with respect thereto.

8. (1) Subject to the provisions of this Act, a Treasurer of Charitable Endowments shall not, as such Treasurer, act in the administration of any trust whereof any of the property is for the time being vested in him under this Act.

(2) Such Treasurer shall keep a separate account of each property for the time being so vested in so far as the property consists of securities for money, and shall apply the property or the income thereof in accordance with the provision made in that behalf in the vesting order under section 4 or in the scheme, if any, under section 5, or in both those documents.

(3) In the case of any property so vested other than securities for money, such Treasurer shall, subject to any special order which he may receive from the authority by whose order the property became vested in him, permit the persons acting in the administration of the trust to have the possession, management and control of the property, and the application of the income thereof, as if the property had been vested in them.

9. A Treasure of Charitable Endowments shall cause to be published annually in the local official Gazette, at such time as the Local Government may direct, a list of all properties for the time being vested in him under this Act and an abstract of all accounts kept by him under sub-section (2) of the last foregoing section.

10. (1) A Treasurer of Charitable Endowments shall always be a sole trustee and shall not, as such Treasurer, take or hold any property otherwise than under the provisions of this Act, or subject to those provisions, transfer any property vested in him except in obedience to a decree divesting him of the property, or in compliance with a direction in that behalf issuing from the authority by whose order the property became vested in him.

(2) Such a direction may require the Treasurer to sell or otherwise dispose of any property vested in him, and, with the sanction of the authority issuing the direction, to invest the proceeds of the sale or other disposal of the property in any such security for money as is mentioned in section 4, sub-section (3), clause (a), (b), (c), (d) or (e), or in the purchase of immoveable property.

(3) When a Treasurer of Charitable Endowments is divested, by a direction of the Local Government or the Governor-General in Council under this section, of any property, it shall vest in the person or persons acting in the administration thereof and be held by him or them on the same trusts as those on which it was held by such Treasurer.

11. If the office held by an officer of the Government who has been appointed to be a Treasurer of Charitable Endowments is abolished or its name is changed, the Governor-General in Council may appoint the same or another officer of the Government by the name of his office to be such Treasurer, and

Provision for continuance of office of Treasurer in certain contingencies.

Sec. 7.—¹ For notification in exercise of power conferred by S. 7 in conjunction with S. 4, as to the Indian People's Famine Trust and rules for the administration of the Fund, see Genl. Stat. R. & O., Vol. III.

Secs. 10 and 11.—Under S. 10 the defendant has the option either to deposit money or to furnish security. The Court can order him to do one of these two things but cannot specify which

he is to do. 69 I.C. 658. The security furnished under S. 10 however relates to the expenditure actually incurred or likely to be incurred by the plaintiff which is quite a different matter from the costs of the suit. The Court cannot direct payment of this expenditure otherwise than in accordance with that section, and when security has been furnished the Court is incompetent to order execution against the surety. (*Ibid.*)

thereupon, the holder of the latter office shall be deemed for the purposes of this Act to be the successor in office of the holder of the former office.

12. If by reason of an alteration of the limits of the territories subject to Local Government, or for any other reason, it appears the Governor-General in Council that any property vested in a Treasurer of Charitable Endowments shall be vested in another such Treasurer, he may direct that the property shall be so vested, and thereupon it shall vest in that other Treasurer and his successors as fully and effectually for the purposes of this Act as if it had been originally vested in him under this Act.

13. (1) [The Governor-General in Council may prescribe forms for any proceedings under this Act and may make rules consistent with this Act for prescribing the Local Government which is to exercise the powers conferred by this Act in the case of property which is, or is situated, in territories subject to two or more Local Governments.]²

(2) The Local Government may make rules consistent with this Act for—

(a) prescribing the fees to be paid to the Government in respect of any property vested under this Act in a Treasurer of Charitable Endowments ;

(b) regulating the cases and mode in which schemes or any modification thereof are to be published before they are settled or made under section 5 ;

(c) prescribing the forms in which accounts are to be kept by Treasurers of Charitable Endowments, and the mode in which such accounts are to be audited ; and

(d) generally, carrying into effect the purposes of this Act.

14. No suit shall be instituted against the Government in respect of anything done or purporting to be done under this Act, or in respect of any alleged neglect or omission to perform any duty devolving on the Government under this Act, or in respect of the exercise of, or the failure to exercise, any power conferred by this Act on the Government, nor shall any suit be instituted against a Treasurer of Charitable Endowments except for divesting him of property on the ground of its not being subject to a trust for a charitable purpose, or for making him chargeable with or accountable for the loss or misapplication of any property vested in him, or the income thereon where the loss or misapplication has been occasioned by or through his wilful neglect or default.

15. Nothing in this Act shall be construed to impair the operation of section 11 of the Statute 53 George III, Chapter 155, or of any other enactment for the time being in force, respecting the authority of an Advocate-General at a presidency to act with respect to any charity, or of sections 8, 9, 10 and 11 of Act⁴ No. XVII of 1864 (*an Act to constitute an Office of Official Trustees*) respecting the vesting of property in trust for a charitable purpose in an Official Trustee.

16. [* * * * *] ⁵

¹ See 12.—¹ For instance of a notification issued under this section, see Punj. List of Local R. & O.

² See 13.—² Sec. 13 was substituted by Act XXXVIII of 1920, Sch. I.

³ See 14.—³ The administration of the property of a hospital was vested in the Treasurer of Charitable Endowments under S. 3 of the Charitable Endowments Act. Hence a suit could not be filed against the Secretary alone as representing the Committee. See 26 O. C. 333—A. I. R. 1924 Oudh 128. Suit for property vested in the

treasurer of Charitable Endowments—Settlor alleged to have only life interest—Suit based on title paramount to the settlors—Maintainability See 13 O. L. J. 762 = 3 O. W. N. (Sup.) 56 = 2 O. C. 176 = 96 I. C. 47 = A. I. R. 1926 Oudh 431.

⁴ See 15.—⁴ The East India Company Act 1813 (Coll. Stats. Ind. Vol. I).

⁵ The Official Trustees Act, 1864 (Genl. Act Vol. I).

⁶ See 16.—⁵ Sec. 16 was omitted by Act XXXVIII of 1920, Sch. I.

5. 5] THE CHARITABLE AND RELIGIOUS TRUSTS ACT (XIV OF 1920).

THE CHARITABLE AND RELIGIOUS TRUSTS ACT (XIV OF 1920).

[Section 2 amended by Act XLI of 1923, Sec. 2.]

[20th March, 1920.]

An Act to provide more effectual control over the administration of Charitable and Religious Trusts.

WHEREAS it is expedient to provide facilities for the obtaining of information regarding trusts created for public purposes of a charitable or religious nature, and to enable the trustees of such trusts to obtain the directions of a Court on certain matters, and to make special provision for the payment of the expenditure incurred in certain suits against the trustees of such trusts ; It is hereby enacted as follows :—

Short title and extent.

1. (1) This Act may be called THE CHARITABLE AND RELIGIOUS TRUSTS ACT, 1920.

(2) It extends to the whole of British India :

Provided that the Governor-General in Council may, by notification in the *Gazette of India*, direct that this Act, or any specified part thereof, shall not extend to any specified Province or area, or to any specified trust or class of trusts.

Interpretation.

2. In this Act, unless there is anything repugnant in the subject or context, "the Court" means the Court of the District Judge [or any other Court empowered in that behalf by the Local Government]¹ and includes the High Court in the exercise of its ordinary original civil jurisdiction.

3. Save as hereinafter provided in this Act, any person having an interest in any express or constructive trust created or existing for a public purpose of a charitable or religious nature may apply by petition to the Court within the local limits of whose jurisdiction any substantial part of the subject-matter of the trust is situate to obtain an order embodying all or any of the following directions, namely :—

(1) directing the trustee to furnish the petitioner through the Court with particulars as to the nature and objects of the trust, and of the value, condition, management and application of the subject-matter of the trust, and of the income belonging thereto, or as to any of these matters, and

(2) directing that the accounts of the trust shall be examined and audited :

Provided that no person shall apply for any such direction in respect of accounts relating to a period more than three years prior to the date of the petition.

Contents and verification of petition.

4. (1) The petition shall show in what way the petitioner claims to be interested in the trust, and shall specify, as far as may be, the particulars and the audit

which he seeks to obtain.

(2) The petition shall be in writing and shall be signed and verified in the manner prescribed by the Code of Civil Procedure, 1908, for signing and verifying plaints.

Procedure on petition.

5. (1) If the Court on receipt of a petition under section 3, after taking such evidence and making such inquiry, if any, as it may consider necessary, is of opinion that the trust to which the

Secs. 1 and 3.—The Act does not cease to apply to a case where the trustee has parted with the entire trust property. 78 I. C. 174. Persons who claim adversely to the trust and who are not liable under Sec. 3 are not proper parties to an application for directing the trustee to produce the accounts. (*Ibid.*) As to applicability of the Act to property on condition of holding so long as temple listed—No direction as to appropriation of income—Public trust, if constituted. See 5 O. W. N. 50.

Secs. 3 and 5. Scope of Secs. 3 to 5.—The Act intended to provide more effectual control over

the administration of charitable and religious trust and provision is made therein for obtaining an order calling on the trustee to give particulars of the object of the trust and if the trust is denied to file a suit. No such provision is made in the Mussajman Wakf Act of 1923. 8 P. L. T. 233 = 101 I. C. 207 = A. I. R. 1927 Pat. 189. Application under—No notice to all the trustees—Notice served on three trustees only—Legality of order, (1944) M. W. N. 515 = 82 I. C. 733 = 35 M. L. T. (H. C.) 51.

¹ These words were added after the word "District Judge" by Act XLI of 1923, Sec. 2.

petition relates is a trust to which this Act applies, and that the petitioner has an interest therein, it shall fix a date for the hearing of the petition, and shall cause a copy thereof, together with notice of the date so fixed, to be served on the trustee and upon any other person to whom in its opinion notice of the petition should be given.

(2) On the date fixed for the hearing of the petition, or on any subsequent date to which the hearing may be adjourned, the Court shall proceed to hear the petitioner and the trustee, if he appears, and any other person who has appeared in consequence of the notice, or who it considers ought to be heard, and shall make such further inquiries, if any, as it thinks fit. The trustee may and, if so required by the Court, shall at the time of the first hearing or within such time as the Court may permit present a written statement of his case. If he does present a written statement, the statement shall be signed and verified in the manner prescribed by the Code of Civil Procedure, 1908, for signing and verifying pleadings.

(3) If any person appears at the hearing of the petition and either denies the existence of the trust or denies that it is a trust to which this Act applies, and undertakes to institute within three months a suit for a declaration to that effect and for any other appropriate relief, the Court shall order a stay of the proceedings and, if such suit is so instituted, shall continue the stay until the suit is finally decided.

(4) If no such undertaking is given, or if after the expiry of the three months no such suit has been instituted, the Court shall itself decide the question.

(5) On completion of the inquiry provided for in sub-section (2), the Court shall either dismiss the petition or pass thereon such other order as it thinks fit :

Provided that, where a suit has been instituted in accordance with the provisions of sub-section (3), no order shall be passed by the Court which conflicts with the final decision therein.

(6) Save as provided in this section, the Court shall not try or determine any question of title between the petitioner and any person claiming title adversely to the trust.

6. If a trustee without reasonable excuse fails to comply with an order made under sub-section (5) of section 5, such trustee shall, without prejudice to any other penalty or liability which he may incur under any law for the time being in force, be deemed to have committed a breach of trust affording ground for a suit under the provisions of section 92 of the Code of Civil Procedure, 1908 ; and any such suit may, so far as it is based on such failure, be instituted without the previous consent of the Advocate-General.

7. (1) Save as hereinafter provided in this Act, any trustee of an express or constructive trust created or existing for a public purpose of a charitable or religious nature may apply by petition to the Court, within the local limits of whose jurisdiction any substantial part of the subject-matter of the trust is situate, for the opinion, advice or direction of the Court on any question affecting the management or administration of the trust property, and the Court shall give its opinion, advice or direction, as the case may be, thereon :

Failure of trustee to comply with order under section 5.
Powers of trustees to apply for directions.

Provided that the Court shall not be bound to give such opinion, advice or direction on any question which it considers to be a question not proper for summary disposal.

(2) The Court, on a petition under sub-section (1), may either give its opinion, advice or direction thereon forthwith, or fix a date for the hearing of the petition, and may direct a copy thereof, together with notice of the date so fixed, to be served on such of the persons interested in the trust, or to be published for information in such manner, as it thinks fit.

(3) On any date fixed under sub-section (2) or on any subsequent date to which the hearing may be adjourned, the Court, before giving any opinion, advice or direction shall afford a reasonable opportunity of being heard to all persons appearing in connection with the petition.

(4) A trustee stating in good faith the facts of any matter relating to the trust in a petition under sub-section (1), and acting upon the opinion, advice or direction of the Court given thereon, shall be deemed, as far as his own responsibility is concerned, to have discharged his duty as such trustee in the matter in respect of which the petition was made.

8. The costs, charges and expenses of and incidental to any petition, and all proceedings in connection therewith, under the foregoing provisions of this Act shall be in the discretion of the Court, which may direct the whole or any part of any such costs, charges and expenses to be met from the property or income of the trust in respect of which the petition is made, or to be borne and paid in such manner and by such persons as it thinks fit :

Provided that no such order shall be made against any person (other than the petitioner) who has not received notice of the petition and had a reasonable opportunity of being heard thereon.

9. No petition under the foregoing provision of this Act in relation to any trust shall be entertained in any of the following circumstances, namely :—

(a) if a suit instituted in accordance with the provisions of section 92 of the Code of Civil Procedure, 1908, is pending in respect of the trust in question ;

(b) if the trust property is vested in the Treasurer of Charitable Endowments, the Administrator-General, the Official Trustee or any society registered under the Societies Registration Act, 1860 ; or

(c) if a scheme for the administration of the trust property has been settled or approved by any Court of competent jurisdiction, or by any other authority acting under the provisions of any enactment.

10. (1) In any suit instituted under section 14 of the Religious Endowments Act, 1863, or under Section 92 of the Code of Civil Procedure, 1908, the Court trying such suit may if, on application of the plaintiff and after hearing the defendant and making such inquiry as it thinks fit, it is satisfied that such an order is necessary in the public interest, direct the defendant either to furnish security for any expenditure incurred, or likely to be incurred, by the plaintiff in instituting and maintaining such suit, or to deposit from any money in his hands as trustee of the trust to which the suit relates such sum as such Court considers sufficient to meet such expenditure in whole or in part.

(2) When any money has been deposited in accordance with an order made under sub-section (1), the Court may make over to the plaintiff the whole or any part of such sum for the conduct of the suit. Before making over any sum to the plaintiff, the Court shall take security from the plaintiff for the refund of the same in the event of such refund being subsequently ordered by the Court.

Provisions of the Code of Civil Procedure to apply. **11. (1)** The provisions of the Code of Civil Procedure, 1908, relating to

(a) the proof of facts by affidavit,
(b) the enforcing of the attendance of any person and his examination on oath,
(c) the enforcing of the production of documents, and
(d) the issuing of commissions

shall apply to all proceedings under this Act, and the provisions relating to the service of summonses shall apply to the service of notices thereunder.

(2) The provisions of the said Code relating to the execution of decrees shall, so far as they are applicable, apply to the execution of order under this Act.

12. No appeal shall lie from any order passed or against any opinion, advice or direction given under this Act.

Barring of appeals.

THE INDIAN CHRISTIAN MARRIAGE ACT (XV OF 1872).

EFFECT OF SUBSEQUENT LEGISLATION.—Repealed in part by Act XVI of 1872

Repealed in part and amended by Act XII of 1891.

Amended by Act VI of 1886, S. 30, cls. (a), (b), (d), and II of 1891.

Section 82 and Sch. II, amended by Act I of 1903.

Section 81 substituted by Act XIII of 1911.

Section 86 amended by Act X of 1914; Sec. 86 amended by Act XXXVIII of 1920

Declared in force—

in the Sonthal Parganas, Reg. III of 1872, S. 3; as amended by Reg. III of 1899, S. 3 ;

in the Arakan Hill District, Reg. I of 1916, S. 2 ;

in Upper Burma (except the Shan States), Act XIII of 1898, S. 4;

in British Baluchistan, Reg. II of 1913, S. 3.

PREFATORY NOTE.—Mr. Ritchie, to whom the task of drafting the Christian Marriage Bill and getting it passed in the Legislative Council was entrusted, thus explained the object of the Bill:—
 'The object of the Bill is to put an end to the state of uncertainty which now exists in regard to marriages in India of persons, one or both of whom are of the Christian religion, but which are solemnized in any of the modes expressly recognized by the law as valid. These modes are three in number, two of them being generally applicable to all persons of whatever denomination of the Christian religion, and one being applicable only to a particular class. The first consists in the performance of the marriage ceremony by a clergyman in Holy orders, according to the sense in which the English Law understands that term, that is a clergyman who has been episcopally ordained. No particular rite or religious ceremony is legally requisite to this form of marriage, but the presence of a clergyman in Orders at the time of the mutual promise to become man and wife is essential. The clergyman need not be of the same religious denomination as either of the parties. But the clergyman of denomination which does not recognise episcopacy, and who has not been ordained by a Bishop confers no special privilege by his presence, and stands on the same footing in this respect as a layman. This was the only form of marriage recognised by the English Common Law as valid, as was decided in 1844 in the House of Lords in the well-known case of the *Queen v. Mills*. In 1843 it was provided by an Act of Parliament (58 Geo. III, c. 84) that marriages between persons one or both of whom were of the Church of Scotland solemnized by ordained ministers of that church as by law established or by a chaplain of the East India Company in India should be of the same force and effect as if they were solemnized by ordained clergyman of the Church of England according to the rites and ceremonies of the Church of England. The privilege was subsequently extended by the Legislative Council to ordained Ministers of the Church of Scotland other than Government Chaplains (see Act XXIV of 1860). Until the reign of Queen Victoria no other positive law regarding the solemnization of marriages existed in India. But there was a general impression in consequence of Lord Stowell's famous decision in *Darby v. Darby*, that the presence of a Clergyman in Orders required by the English Marriage Act was not essential to the validity of a marriage in any part of the British Dominions beyond the operation of these Acts: and that a simple contract of marriage in words showing that it was to take effect at once would suffice. The House of Lords in *Mills case* decided upon the opinion of the English Judges, that the English Common Law of marriage as above stated obtained in Ireland, though the Marriage Act did not extend there, and that the presence of ordained Clergyman in orders was thus essential. In consequence of the doubt thus thrown upon the validity of the marriages in India the absence of a Clergyman in Orders, the Statute 14 and 15 Vict. c. 40 commonly called the Indian Marriage Act, was passed. This was followed by Act V of 1852 which gave effect to the provisions of the Statute. Under these Acts, marriages in the presence of a Marriage Registrar were legalized. No religious ceremony was necessary, but it was optional to the parties to go through any religious ceremony they please. The Act of Parliament legalized all past marriages solemnized in India by persons not in Holy Orders, not being otherwise invalid, by declaring them valid in law to all intents and purposes. But the doubt which existed as to the validity of such marriages at Common Law was not cleared up in regard to marriages contracted after the Statute. For it was provided that "nothing in the Act shall invalidate any marriage which might be solemnized in India by any person in Holy Orders, or under the Statute of the George III already cited, or any other marriage which under the law in force for the time being in India might have been there solemnized if the Act had not been passed, provided that the Governor-General in Council might provide by laws and Regulations for the registration of such marriages." The doubt thus left open as to marriages contracted since 1851 still existed in 1872. On the one hand Sir Erskine Perry when Chief Justice of Bombay, and Doctor Lushington, as Dean of the Arches, had held that the principle laid down in *Queen v. Mills* could not be applied to a country such as India or Australia in which on the first introduction of English laws and institutions, there were clergymen in Holy Orders before whom marriage could be celebrated (see the case of *Malcolm v. Cristall*, *Perry's Oriental Cases* 75; Indian Decisions, Old Series, Vol. IV, p. 69) and the House of Lords by passing a Divorce Bill founded on Sir Erskine Perry's decision, has, to some extent, though by no means conclusively, sanctioned that view. On the other hand the Court of Exchequer had held that the decision in question extended to invalidate a marriage performed between British subjects in Beyrout solemnized before a British clergyman not in Orders. And the Statute of 1848, and the Act of 1860, in favour of marriages performed by Ministers of the Scotch Church, seemed to show that the legislatures both in England and in India considered that the English Common Law applied to Indian marriages. It was almost impossible to determine which of these views was correct though it might be the former was right in principle. But the result of the doubt was, that there was a distressing degree of uncertainty as to the validity of many marriages solemnized since 1857, and that.

a great deal of fraud with regard to the performance of a sham marriage ceremony by persons having no special qualifications but pretending to be qualified has passed unpunished. In 1854 it was brought to the notice of the Government, that a person who had once been a school master but had never been ordained to the ministry in any way, professed to have authority to marry, and did perform the ceremony of marriage between several couples of Native Christians in the Backergunge District. Similar practices had been found to have prevailed in other districts, but as the person officiating did not profess to be a Marriage Registrar, but only to have authority to marry, and as according to the view of the law the marriages thus solemnized were legal, and the persons referred to therefore, as a witness, did assist in rendering the marriages effectual, it was found impossible to punish him for his imposition. It was felt by the Government of India to be time to put an end to the uncertainty which then surrounded the question and which, on so important a subject as the validity of marriages, ought not to be allowed to continue for a day longer than could be avoided. One ground upon which it was supposed that the Legislature in India left the question unsettled for some year prior to 1872, was that a law effectually dealing with the subject of Christian marriage must, to some extent effect, or interfere with the provisions of the English Statute of 1851; which it was then beyond the power of the Legislative Council as then constituted, to touch. The difficulty was removed as the Indian Councils Act contained no restriction upon the interference with the Act of Parliament passed in the year above mentioned, and the proposed change of the law was quite within the competency of the Council as was constituted, after the Indian Councils Act. The only effectual mode of dealing with the question appeared to be to pass a law declaring that after the passing of the proposed Christian Marriage Act no marriage between persons, both or one of whom shall profess the Christian religion, shall be valid in law unless it be celebrated in one of the modes expressly declared and recognized by law (see Secs. 4 and 5 of the Act). There was then no hardship in thus declaring the law in 1872. For the Marriage Acts of 1851-52 had been previously for over 10 years in operation. Their provisions were generally well known throughout India and the facilities for contracting marriage under those Acts had been, rendered great by the appointment of Registrars at every place of any importance, both in the British Dominions and in those foreign States in alliance with Great Britain. In regard to past marriages it was proposed to declare that all marriages previously contracted in the presence of persons not in Holy Orders, if not otherwise invalid, should be deemed good and valid. This was the course which had been adopted on occasions on which Parliament has prescribed a stricter rule for the future than that which had previously existed, or had been supposed to exist in regard to marriages. (See *Proceedings in Council and Statement of Objects and Reasons*).

THE INDIAN CHRISTIAN MARRIAGE (ACT XV OF 1872).

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THE INDIAN CHRISTIAN MARRIAGE ACT (XV OF 1872)¹.

[18th July, 1872.

An Act to consolidate and amend the law relating to the solemnization in India of the marriages of Christians,

WHEREAS it is expedient to consolidate and amend the law relating to the solemnization in India of the marriages of persons professing the Christian religion; It is hereby enacted as follows :—

PRELIMINARY.

Short title.

1. This Act may be called THE INDIAN CHRISTIAN MARRIAGE ACT, 1872.

Extent.

It extends to the whole of British India,² and, so far only as regards Christian subjects of Her Majesty, to the territories of Native Princes and States in alliance with Her Majesty.

[Commencement.] Repealed by the Repealing Act, 1874 (XVI of 1874).

Enactments repealed.

2. The enactments specified in the fifth schedule hereto annexed are repealed but not so as to invalidate any marriage confirmed by, or solemnized under, any such enactment.

And all appointments made, licences granted, consents given, certificates issued, and other things duly done under any such enactment shall be deemed to be respectively made, granted, given, issued and done under this Act.

For clause xxiv of section 19 of the Court-fees Act, 1870, the following shall be substituted :—

"xxiv. Petitions under the Indian Christian Marriage Act, 1872, sections 45 and 48."

Interpretation-clause.

3. In this Act, unless there is something repugnant in the subject or context,—

"Church of England" and "Anglican" mean and apply to the Church of England as by law established;

"Church of Scotland" means the Church of Scotland as by law established;

¹ For the Statement of Objects and Reasons, see *Gazette of India*, 1871, Pt. V, p. 473; for Proceedings in Council, see *ibid.*, 1870, Supplement, p. 1077; *ibid.*, 1871, Supplement, pp. 1426, 1643; *ibid.*, 1802, Supplement, pp. 257, 728, 742, 805, 813 and 858. This Act is based on 14 and 15 Vict., c. 40, and 58 Geo. III. c. 84 (both Statutes relate to marriages in India and are now no longer in force), and Acts V of 1852 and V of 1865; the last two Acts were repealed by this Act.

Sec. 1.—²Act XV of 1872 has been declared in force in Upper Burma generally (except the Shan States) by the Burma Laws Act (XIII of 1898), S. 4 (1), and Sch. I, Bar. Code; in the Hill District of Arakan by the Arakan Hill District Laws Regulation (IX of 1874), S. 3 *ibid.*; in British Baluchistan by the Baluchistan

Laws Regulation (I of 1890), S. 3, Bal. Code; and in the Sonthal Parganas by the Sonthal Parganas Settlement Regulation (III of 1872), as amended by the Sonthal Parganas Justice and Laws Regulation (III of 1899), Ben. Code; also by notification under S. 3 of the Scheduled Districts Act (XIV of 1874), *infra*, in the following Scheduled Districts namely:—the Districts of Hazaribagh, Lohardaga and Manbhum, and Pargana Dhalbhum and the Kolhan in the District of Singhbhum [see *Gazette of India*, 1881, Pt. I, p. 504]; and the North-Western Provinces Tarai [see *ibid.*, 1876, Pt. I, p. 505]. The District of Lohardaga now called the Ranchi District (see *Calcutta Gazette*, 1899, Pt. I, p. 44) included at this time the Palamau District, which was separated in 1894.

"Church of Rome" and "Roman Catholic" mean and apply to the Church which regards the Pope of Rome as its spiritual head ;

"Church" includes any chapel or other building generally used for public Christian worship ;

"minor" means a person who has not completed the age of twenty-one years and who is not a widower or a widow ;

"Native State" means the territories of any Native Prince or State in alliance with Her Majesty ;

the expression "Christians" means persons professing the Christian religion ; and the expression "Native Christians" includes the Christian descendants of Natives of India converted to Christianity, as well as such converts ;

1["Registrar-General of Births, Deaths and Marriages" means a Registrar-General of Births, Deaths and Marriages appointed under the Births, Deaths and Marriages Registration Act, 1886.]

PART I.

THE PERSONS BY WHOM MARRIAGES MAY BE SOLEMNIZED.

4. Every marriage between persons, one or both of whom is ²[or are] a Christian or Christians, shall be solemnized in accordance with the provisions of the next following section ; and any such marriage solemnized otherwise than in accordance with such provisions shall be void.

Persons by whom marriages may be solemnized.

5. Marriages may be solemnized in India—

(1) by any person who has received episcopal ordination, provided that the marriage be solemnized according to the rules, rites, ceremonies and customs of the Church of which he is a Minister ;

(2) by any Clergyman of the Church of Scotland, provided that such marriage be solemnized according to the rules, rites, ceremonies and customs of the Church of Scotland ;

(3) by any Minister of religion licensed under this Act to solemnize marriages ;

(4) by, or in the presence of, a Marriage Registrar appointed under this Act ;

(5) by any person licensed under this Act to grant certificates of marriage between Native Christians.

6. The Local Government, so far as regards the territories under its administration, and the Governor-General in Council, so far as regards any Native State, may, by notification in the local official Gazette or in the *Gazette of India*, as the case may be, grant licences³ to Ministers of Religion to solemnize marriages within such territories and State, respectively, and may, by a like notification, revoke such licences.

Sec. 3.—The word "means" in this section is an inclusive term. See 40 All. 393 noted under S. 68 *infra*. "Christian," see 18 Mad. 230 ; "Native Christian," 40 All. 393 ; 45 I. C. 519 ; 16 A. L. J. 414.

¹ This paragraph was added by the Births, Deaths and Marriages Registration Act (VI of 1886), S. 30, cl. (a).

Sec. 4.—² These words were inserted by the Repealing and Amending Act (XII of 1891), Sch. II.

Secs. 4 and 5.—Validity of marriage of Christian with non-Christian, see U. B. R. (1897-1901), Vol. II, p. 488 at 491. As to scope and applicability of the section, see 40 All. 393 ; 14 Mad. 342 ; 11 Bur. L. T. 69 = 47 Ind. Cas. 344 ; 19 Mad. 273. As to persons authorized to perform marriages, see also 32 Ind. Cas. 897. A Hindu, by religion performing a marriage accord-

ing to the Hindu mode between two persons one of whom is a Christian commits an offence under S. 68, see 40 Mad. 1030 = 33 M. L. J. 148 = 6 L. W. 126 = 22 M. L. T. 163 = 41 I. C. 664 = 18 Cr. L. J. 840 = (1917) M. W. N. 589.

Sec. 6.—This section was substituted for the original S. 6 by the Indian Christian Marriage Act (1872) Amendment Act (II of 1891), S. 2 (r).

For notifications in the North-Western Provinces and Oudh, under the powers conferred by Ss. 6, 7, 9, 62, 82, 83 and 85, see North-Western Provinces and Oudh District of Local Rules and Orders, Ed. 1894, p. 22.

³ As to validation of licences granted under former Acts, see the Indian Christian Marriage Act (1872), Amendment Act (II of 1891), S. 1 (2) and (3).

7. The Local Government may appoint one or more Christians, either by name or as holding any office for the time being, to be the Marriage Registrars. Marriage Registrar or Marriage Registrars¹ for any district subject to its administration.

Where there are more Marriage Registrars than one in any district, the Local Government shall appoint one of them to be the Senior Marriage Registrar. Marriage Registrar.

When there is only one Marriage Registrar in a district, and such Registrar is absent from such district, or ill, or when his office is temporarily vacant, the Magistrate of the district shall act as, and be, Marriage Registrar thereof during such absence, illness or temporary vacancy. Magistrate when to be Marriage Registrar.

8. The Governor-General in Council may, by notification in the *Gazette of India*, appoint any Christian, either by name or as holding any office for the time being, to be a Marriage Registrar in respect of any district or place within the territories of any Native Prince or State in alliance with Her Majesty. Marriage Registrars in Native States.

The Governor-General in Council may, by like notification, revoke any such appointment.

9. The Local Government² or (so far as regards any Native State) the Governor-General in Council may grant a licence to any Christian, either by name or as holding any office for the time being, authorizing him to grant certificates of marriage between Native Christians. Licensing of persons to grant certificates of marriage between Native Christians.

Any such licence may be revoked by the authority by which it was granted, and every such grant or revocation shall be notified in the official Gazette.

PART II.

TIME AND PLACE AT WHICH MARRIAGES MAY BE SOLEMNIZED.

10. Every marriage under this Act shall be solemnized between the hours of six in the morning and seven in the evening : Time for solemnizing marriage.

Exceptions.

Provided that nothing in this section shall apply to—

(1) a Clergyman of the Church of England solemnizing a marriage under a special licence permitting him to do so at any hour other than between six in the morning and seven in the evening, under the hand and seal of the Anglican Bishop of the Diocese or his Commissary, or

(2) a Clergyman of the Church of Rome solemnizing a marriage between the hours of seven in the evening and six in the morning, when he has received a general or special licence in that behalf from the Roman Catholic Bishop of the Diocese or Vicariate in which such marriage is so solemnized, or from such person as the same Bishop has authorized to grant such licence, ³[or

(3) a Clergyman of the Church of Scotland solemnizing a marriage according to the rules, rites, ceremonies and customs of the Church of Scotland].

Sec. 7.—¹ For notifications under the powers conferred by this section in—(1) Ajmer-Merwara see *Aj. R. & O.*; (2) Bombay, see *Bom. R. & O.*; (3) British Baluchistan, see *Gazette of India*, 1892, Pt. II, p. 53; (4) Burma, see *Bur. R. M.*; (5) Central Provinces, see *C. P. R. & O.*; (6) Punjab, see *Punj. R. & O.*; (7) The United Provinces of Agra and Oudh, see *North-Western*

Provinces and Oudh List of Local Rules and Orders, Ed. 1894, p. 42.

Sec. 9.—² For instances of such licences granted in Burma see *Burma Gazette*, 1899, Pt. I, p. 284.

Sec. 10.—³ This portion was added by the Indian Christian Marriage Act (1872), Amendment Act (II of 1891), S. 2.

11. No Clergyman of the Church of England shall solemnize a marriage in any place other than a church¹ [where worship is generally held according to the forms of the Church of England],

unless there is no ²[such] church within five miles distance by the shortest road from such place, or

unless he has received a special licence authorizing him to do so under the hand and seal of the Anglican Bishop of the Diocese or his Commissary.

Fee for special licence. For such special licence, the Registrar of the Diocese may charge such additional fee as the said Bishop from time to time authorizes.

PART III.

MARRIAGES SOLEMNIZED BY MINISTERS OF RELIGION LICENSED UNDER THIS ACT.

12. Whenever a marriage is intended to be solemnized by a Minister of Religion licensed to solemnize marriages under this Act—

one of the persons intending marriage shall give notice in writing, according to the form contained in the first schedule hereto annexed, or to the like effect, to the Minister of Religion whom he or she desires to solemnize the marriage, and shall state therein—

(a) the name and surname, and the profession or condition, of each of the persons intending marriage,

(b) the dwelling-place of each of them,

(c) the time during which each has dwelt there, and

(d) the church or private dwelling in which the marriage is to be solemnized :

Provided that, if either of such persons has dwelt in the place mentioned in the notice during more than one month, it may be stated therein that he or she has dwelt there one month and upwards.

13. If the persons intending marriage desire it to be solemnized in a particular church, and if the Minister of Religion to whom such notice has been delivered been entitled to officiate therein, he shall cause the notice to be affixed in some conspicuous part of such church.

But if he is not entitled to officiate as a Minister in such church, he shall, at his option, either return the notice to the person who delivered it to him, or deliver it to some other Minister entitled to officiate therein, who shall thereupon cause the notice to be affixed as aforesaid.

14. If it be intended that the marriage shall be solemnized in a private dwelling, the Minister of Religion, on receiving the notice prescribed in section 12, shall forward it to the Marriage Registrar of the district, who shall affix the same to some conspicuous place in his own office.

15. When one of the persons intending marriage is a minor, every Minister receiving such notice shall, unless within twenty-four hours after its receipt he returns the same under the provisions of section 13, send by the post or otherwise a copy of such notice to the Marriage Registrar of the district, or, if there be more than one Registrar of such district, to the Senior Marriage Registrar.

¹Sec. 11.—These words were added by the Indian Christian Marriage Act (1872) Amendment Act (II of 1891), S. 3.

²The word "such" was inserted by the Indian

Christian Marriage Act (1872) Amendment Act (II of 1891), S. 3.

³Sec. 12.—19 Mad. 273.

16. The Marriage Registrar or Senior Marriage Registrar, as the case may be, on receiving any such notice, shall affix it to some conspicuous place in his own office, and the latter shall further cause a copy of the said notice to be sent to each of the other Marriage Registrars in the same district, who shall likewise publish the same in the manner above directed.

17. Any Minister of Religion consenting or intending to solemnize any such marriage as aforesaid, shall, on being required so to do by or on behalf of the person by whom the notice was given, and upon one of the persons intending marriage making the declaration hereinafter required, issue under his hand a certificate of such notice having been given and of such declaration having been made :

Proviso.

Provided—

(1) that no such certificate shall be issued until the expiration of four days after the date of the receipt of the notice by such Minister ;

(2) that no lawful impediment be shown to his satisfaction why such certificate should not issue ; and

(3) that the issue of such certificate has not been forbidden, in manner herein-after mentioned, by any person authorized in that behalf.

18. The certificate mentioned in section 17 shall not be issued until one of the persons intending marriage has appeared personally before the Minister and made a solemn declaration—

(a) that he or she believes that there is not any impediment of kindred or affinity or other lawful hindrance to the said marriage,

and, when either or both of the parties is or are a minor or minors,

(b) that the consent or consents required by law has or have been obtained thereto, or that there is no person resident in India having authority to give such consent, as the case may be.

19. The father, if living, of any minor, or, if the father be dead, the guardian of the person of such minor, and, in case there be no such guardian, then the mother of such minor, may give consent to the minor's marriage, and such consent is hereby required for the same marriage, unless no person authorized to give such consent be resident in India.

20. Every person whose consent to a marriage is required under section 19 is hereby authorized to prohibit the issue of the certificate by any Minister, at any time before the issue of the same, by notice in writing to such Minister, subscribed by the person so authorized with his or her name and place of abode and position with respect to either of the persons intending marriage, by reason of which he or she is so authorized as aforesaid.

21. If any such notice be received by such Minister, he shall not issue his certificate and shall not solemnize the said marriage until he has examined into the matter of the said prohibition, and is satisfied that the person prohibiting the marriage has no lawful authority for such prohibition,

or until the said notice is withdrawn by the person who gave it.

22. When either of the persons intending marriage is a minor, and the Minister is not satisfied that the consent of the person whose consent to such marriage is required by section 19 has been obtained, such Minister shall not issue such certificate until the expiration of fourteen days after the receipt by him of the notice of marriage.

23. When any Native Christian about to be married takes a notice of marriage to a Minister of Religion, or applies for a certificate from such Minister under section 17, such Minister shall, before issuing the certificate, ascertain whether such Native Christian is cognizant of the purport and effect of the said notice or certificate, as the case may be, and, if not, shall translate or cause to be translated the notice or certificate to such Native Christian into some language which he understands.

24. The certificate to be issued by such Minister shall be in the form contained in the second schedule hereto annexed, or to the like effect.

25. After the issue of the certificate by the Minister, marriage may be solemnized between the persons therein described according to such form or ceremony as the Minister thinks fit to adopt :

Provided that the marriage be solemnized in the presence of at least two witnesses besides the Minister.

26. Whenever a marriage is not solemnized within two months after the date of the certificate issued by such Minister as aforesaid, such certificate and all proceedings (if any,) thereon shall be void,

and no person shall proceed to solemnize the said marriage until new notice has been given and a certificate thereof issued in manner aforesaid.

PART IV.

REGISTRATION OF MARRIAGES SOLEMNIZED BY MINISTERS OF RELIGION.

27. All marriages hereafter solemnized in India between persons one or both of whom professes or profess the Christian religion, except marriages solemnized under Part V or Part VI of this Act, shall be registered¹ in manner hereinafter prescribed.

28. Every Clergyman of the Church of England shall keep a register of marriages and shall register therein according to the tabular form set forth in the third schedule hereto annexed, every marriage which he solemnizes under this Act.

29. Every Clergyman of the Church of England shall send four times in every year returns in duplicate, authenticated by his signature, of the entries in the register of marriages solemnized at any place where he has any spiritual charge, to the Registrar of the Archdeaconry to which he is subject, or within the limits of which such place is situate.

Such quarterly returns shall contain all the entries of marriages contained in the said register from the first day of January to the thirty-first day of March, from the first day of April to the thirtieth day of June, from the first day of July to the thirtieth day of September, and from the first day of October to the thirty-first day of December, of each year respectively, and shall be sent by such Clergyman within two weeks from the expiration of each of the quarters above specified.

The said Registrar upon receiving the said returns shall send one copy thereof to the ² [Registrar-General of Births, Deaths and Marriages].

30. Every marriage solemnized by a Clergyman of the Church of Rome shall be registered by the person and according to the form directed to that behalf by the Roman Catholic Bishop of the Diocese or Vicariate in which such marriage is solemnized,

Sec. 27.—¹ As to the establishment of general registry offices of births, deaths and marriages, see the Births, Deaths and Marriages Registration Act (VI of 1886), Ch. II.

Sec. 29.—² These words were substituted for the words "Secretary to the Local Government" by the Births, Deaths and Marriages Registration Act (VI of 1886), S. 30, cl. (d).

and such person shall forward quarterly to the ¹ [Registrar-General of Births, Deaths and Marriages] returns of the entries of all marriages registered by him during the three months next preceding.

Registration and returns of marriages solemnized by Clergymen of Church of Scotland.

31. Every Clergyman of the Church of Scotland shall keep a register of marriages,

and shall register therein, according to the tabular form set forth in the third schedule hereto annexed, every marriage which he solemnizes under this Act,

and shall forward quarterly to the ¹ [Registrar-General of Births, Deaths and Marriages], through the Senior Chaplain of the Church of Scotland, returns, similar to those prescribed in section 29, of all such marriages.

32. Every marriage solemnized by any person who has received episcopal ordination, but who is not a Clergyman of the Church of England, or of the Church of Rome, or by any Minister of Religion licensed under this Act to solemnize marriages, shall, immediately after the solemnization thereof, be registered in duplicate by the person solemnizing the same; (that is to say) in a marriage-register-book to be kept by him for that purpose, according to the form contained in the fourth schedule hereto annexed, and also in a certificate attached to the marriage-register-book as a counterfoil.

Certain marriages to be registered in duplicate.

33. The entry of such marriage in both the certificate and marriage-register-book shall be signed by the person solemnizing the marriage, and also by the persons married, and shall be attested by two credible witnesses, other than the person solemnizing the marriage, present at its solemnization.

Entries of such marriages to be signed and attested.

Every such entry shall be made in order from the beginning to the end of the book, and the number of the certificate shall correspond with that of the entry in the marriage-register-book.

34. The person solemnizing the marriage shall forthwith separate the certificate from the marriage-register-book and send it, within one month from the time of the solemnization, to the Marriage Registrar of the district in which the marriage was solemnized, or, if there be more Marriage Registrars than one, to the Senior Marriage Registrar,

Certificate to be forwarded to Marriage Registrar, copied and sent to Registrar-General.

who shall cause such certificate to be copied into a book to be kept by him for that purpose,

and shall send all the certificates which he has received during the month, with such number and signature or initials added thereto as are hereinafter required, to the ¹ [Registrar-General of Births, Deaths and Marriages].

35. Such copies shall be entered in order from the beginning to the end of the said book, and shall bear both the number of the certificate as copied, and also a number to be entered by the Marriage Registrar, indicating the number of the entry of the said copy in the said book, according to the order in which he receives each certificate.

Copies of certificates to be entered and numbered.

36. The Marriage Registrar shall also add such last-mentioned number of the entry of the copy in the book to the certificate, with his signature or initials, and shall, at the end of every month, send the same to the ¹ [Registrar-General of Births, Deaths and Marriages].

Registrar to add number of entry to certificate, and send to Registrar-General.

Sec. 29.—¹These words were substituted for the words "Secretary to the Local Government" by the Births, Deaths and Marriages Registration Act (VI of 1886), S. 30, cl. (d).

37. When any marriage between Native Christians is solemnized under Part I or Part III of this Act, the person solemnizing the same shall, instead of proceeding in the manner provided by sections 28 to 36, both inclusive, register the marriage in a separate register-book, and shall keep it safely until it is filled, or if he leave the district in which he solemnized the marriage before the said book is filled, shall make over the same to the person succeeding to his duties in the said district.

Whoever has the control of the book at the time when it is filled shall send it to the Marriage Registrar of the district, or, if there be more Marriage Registrars than one, to the Senior Marriage Registrar, who shall send it to the ¹[Registrar-General of Births, Deaths and Marriages,] to be kept by him with the records of his office.

PART V.

MARRIAGES SOLEMNIZED BY, OR IN THE PRESENCE OF, A MARRIAGE REGISTRAR.

38. When a marriage is intended to be solemnized by, or in the presence of, a Marriage Registrar, one of the parties to such marriage shall give notice in writing in the form contained in the first schedule hereto annexed, or to the like effect, to any Marriage Registrar of the District within which the parties have dwelt ; or, if the parties dwell in different districts, shall give the like notice to a Marriage Registrar of each district, and shall state therein the name and surname, and the profession or condition of each of the parties intending marriage, the dwelling-place of each of them, the time during which each has dwelt therein, and the place at which the marriage is to be solemnized :

Provided that, if either party has dwelt in the place stated in the notice for more than one month, it may be stated therein that he or she has dwelt there one month and upwards.

39. Every marriage Registrar shall, on receiving any such notice, cause a copy thereof to be affixed in some conspicuous place in his office.

When one of the parties intending marriage is a minor, every Marriage Registrar shall, within twenty-four hours after the receipt by him of the notice of such marriage, send, by post or otherwise, a copy of such notice to each of the other Marriage Registrars (if any) in the same district, who shall likewise affix the copy in some conspicuous place in his own office.

40. The Marriage Registrar shall file all such notices and keep them with the records of his office,

and shall also forthwith enter a true copy of all such notices in a book to be furnished to him for that purpose by the Local Government, and to be called the "Marriage

Notice-Book ;"

and the Marriage-Notice-Book shall be open at all reasonable times, without fee, to all persons desirous of inspecting the same.

41. If the party by whom the notice was given request the Marriage Registrar to issue the certificate next herein after mentioned, and if one of the parties intending marriage has made oath as hereinafter required, the marriage Registrar shall issue under his hand a certificate of such notice having been given and of such oath having been made :

¹ See 37.—These words were substituted for the words "Secretary to the Local Government" by the Births, Deaths and Marriages Registration Act (VI of 1886), S. 30, cl. (d).

See 41. and 42.—As to the meaning of "oath"

see the General Clauses Act (X of 1897), S. 3, cl. (36) and S. 4. See 16 C. W. N. 417 = 15 I. C. 398 (marriage between a Christian husband and a Jewess divorced according to Jewish law).

Proviso.

Provided—

that no lawful impediment be shown to his satisfaction why such certificate should not issue ;

that the issue of such certificate has not been forbidden, in manner hereinafter mentioned, by any person authorised in that behalf by this Act;

that four days after the receipt of the notice have expired ; and further,

that where, by such oath, it appears that one of the parties intending marriage is a minor, fourteen days after the entry of such notice have expired.

Oath before issue of certificate.

42. The certificate mentioned in section 41 shall not be issued by any Marriage Registrar, until one of the parties intending marriage appears personally before such Marriage Registrar, and makes oath—

(a) that he or she believes that there is not any impediment of kindred or affinity, or other lawful hindrance, to the said marriage, and

(b) that both the parties have, or (where they have dwelt in the districts of different Marriage Registrars) that the party making such oath has, had their, his or her usual place of abode within the district of such Marriage Registrar,

and, where either or each of the parties is a minor,—

(c) that the consent or consents to such marriage required by law has or have been obtained thereto, or that there is no person resident in India authorized to give such consent, as the case may be.

43. When one of the parties intending marriage is a minor, and both such parties

Petition to High Court to order certificate in less than fourteen days.

are at the time resident in any of the towns of Calcutta, Madras and Bombay, and are desirous of being married in less than fourteen days after the entry of such notice as aforesaid, they may apply by petition to a Judge of the

High Court, for an order upon the Marriage Registrar to whom the notice of marriage has been given, directing him to issue his certificate before the expiration of the said fourteen days required by section 41.

And, on sufficient cause being shown, the said Judge may, in his discretion, make an order upon such Marriage Registrar, directing him to

Order on petition.

issue his certificate at any time to be mentioned in the said order before the expiration of the fourteen days so required.

And the said Marriage Registrar, on receipt of the said order, shall issue his certificate in accordance therewith.

Consent of father or guardian.

44. The provisions of section 19 apply to every marriage under this Part, either of the parties to which is a minor ;

and any person whose consent to such marriage would be required thereunder may enter a protest against the issue of the Marriage

Protest against issue of certificate.

Registrar's certificate, by writing, at any time before the issue of such certificate, the word "forbidden" opposite to the entry of the notice of such intended marriage in the

Marriage-Notice-Book, and by subscribing thereto his or her name and place of abode, and his or her position with respect to either of the parties, by reason of which he or she is so authorised.

When such protest has been entered, no certificate shall issue until the Marriage Registrar has examined into the matter of the protest, and

Effect of protest.

is satisfied that it ought not to obstruct the issue of the certificate for the said marriage, or until the protest be

withdrawn by the person who entered it.

Petition where person whose consent is necessary is insane or unjustly withholds consent.

45. If any person whose consent is necessary to any marriage under this Part is of unsound mind,

or if any such person (other than the father) without just cause withholds his consent to the marriage,

the parties intending marriage may apply by petition, where the person whose consent is necessary is resident within any of the towns of Calcutta, Madras and Bombay, to a Judge of the High Court, or if he is not resident within any of the said towns, then to the District Judge :

Procedure on petition.

And the said Judge of the High Court, or District Judge, as the case may be, may examine the allegations of the petition in a summary way :

and, if upon examination such marriage appears proper, such Judge of the High Court or District Judge, as the case may be shall declare the marriage to be a proper marriage.

Such declaration shall be as effectual as if the person whose consent was needed had consented to the marriage ;

and, if he has forbidden the issue of the Marriage Registrar's certificate, such certificate shall be issued and the like proceedings may be had under this Part in relation to the marriage as if the issue of such certificate had not been forbidden.

46. Whenever a Marriage Registrar refuses to issue a certificate under this Part, either of the parties intending marriage may apply by petition, where the district of such Registrar is within any of the towns of Calcutta, Madras and Bombay, to a Judge of the High Court, or if such district is not within any of the said towns, then to the District Judge.

Procedure on petition.

The said Judge of the High Court, or District Judge, as the case may be, may examine the allegations of the petition in a summary way, and shall decide thereon.

The decision of such Judge of the High Court or District Judge, as the case may be, shall be final, and the Marriage Registrar to whom the application for the issue of a certificate was originally made shall proceed in accordance therewith.

Petition when Marriage Registrar in Native State refuses certificate.

47. Whenever a Marriage Registrar resident in any Native State refuses to issue his certificate, either of the parties intending marriage may apply by petition to the Governor-General in Council, who shall decide thereon.

Such decision shall be final, and the Marriage Registrar to whom the application was originally made shall proceed in accordance therewith.

48. Whenever a Marriage Registrar, acting under the provisions of section 44, is not satisfied that the person forbidding the issue of the certificate is authorized by law so to do, the said Marriage Registrar shall apply by petition, where his district is within any of the towns of Calcutta, Madras and Bombay, to a Judge of the High Court, or, if such district be not within any of the said towns, then to the District Judge.

Procedure on petition.

The said petition shall state all the circumstances of the case, and pray for the order and direction of the Court concerning the same,

and the said Judge of the High Court or District Judge, as the case may be, shall examine into the allegations of the petition and the circumstances of the case ;

and if, upon such examination, it appears that the person forbidding the issue of such certificate is not authorized by law so to do, such Judge of the High Court or District Judge, as the case may be, shall declare that the person forbidding the issue of such certificate is not authorized as aforesaid,

and thereupon such certificate shall be issued, and the like proceedings may be had in relation to such marriage as if the issue had not been forbidden.

Whenever a Marriage Registrar appointed under section 8 to act within any Native State is not satisfied that the person forbidding the issue of the certificate is authorized by law so to do, the said Marriage Registrar shall send a statement of all the circumstances of the case, together with all documents relating thereto, to the Governor-General in Council.

Reference when Marriage Registrar in Native State doubts authority of person forbidding.

If it appears to the Governor-General in Council that the person forbidding the issue of such certificate is not authorized by law so to do, the Governor-General in Council shall declare that the person forbidding the issue of such certificate is not authorized as aforesaid,

and thereupon such certificate shall be issued, and the like proceedings may be had in relation to such marriage, as if the issue of the certificate had not been forbidden.

49. Every person entering a protest with the Marriage Registrar, under this Part, against the issue of any certificate, on grounds which such Marriage Registrar, under section 44, or a Judge of the High Court or the District Judge, under section 45 or 46, declares to be frivolous and such as ought not to obstruct the issue of the certificate, shall be liable for the costs of all proceedings in relation thereto and for damages, to be recovered by suit by the person against whose marriage such protest was entered.

50. The certificate to be issued by the Marriage Registrar under the provisions of section 41 shall be in the form contained in the second schedule to this Act annexed or to the like effect, and the Local Government shall furnish to every Marriage Registrar a sufficient number of forms of certificate.

51. After the issue of the certificate of the Marriage Registrar,

or, where notice is required to be given under this Act to the Marriage Registrars for different districts, after the issue of the certificates of the Marriage Registrars for such districts,

marriage may, if there be no lawful impediment to the marriage of the parties described in such certificate or certificates, be solemnized between them, according to such form and ceremony as they think fit to adopt.

But every such marriage shall be solemnized in the presence of some Marriage Registrar (to whom shall be delivered such certificate or certificates as aforesaid), and of two or more credible witnesses besides the Marriage Registrar.

And in some part of the ceremony each of the parties shall declare as follows, or to the like effect :—

“ I do solemnly declare that I know not of any lawful impediment why I, A. B., may not be joined in matrimony to C. D.”

And each of the parties shall say to the other as follows or to the like effect :—“ I call upon these persons here present to witness that I, A. B., do take thee, C. D., to be my lawful wedded wife [or husband].”

52. Whenever a marriage is not solemnized within two months after the copy of the notice has been entered by the Marriage Registrar, as required by section 40, the notice and the certificate, if any, issued thereupon, and all other proceedings thereupon, shall be void ;

and no person shall proceed to solemnize the marriage, nor shall any Marriage Registrar enter the same, until new notice has been given, and entry made, and certificate thereof given, at the time and in the manner aforesaid.

53. A Marriage Registrar before whom any marriage is solemnized under this Part may ask of the persons to be married the several particulars required to be registered touching such marriage.

54. After the solemnization of any marriage under this Part, the Marriage Registrar present at such solemnization shall forthwith register the marriage in duplicate; that is to say, in a marriage-register-book, according to the form of the fourth schedule hereto annexed, and also in a certificate attached to the marriage-register-book as a counterfoil.

The entry of such marriage in both the certificate and the marriage-register-book shall be signed by the person by or before whom the marriage has been solemnized, if there be any such person, and by the Marriage Registrar present at such marriage, whether or not it is solemnized by him, and also by the parties married, and attested by two credible witnesses other than the Marriage Registrar and person solemnizing the marriage.

Every such entry shall be made in order from the beginning to the end of the book, and the number of the certificate shall correspond with that of the entry in the marriage-register-book.

Certificates to be sent monthly to Registrar-General.

55. The Marriage Registrar shall forthwith separate the certificate from the marriage-register-book and send it, at the end of every month, to the ¹[Registrar-General of Births, Deaths and Marriages].

The Marriage Registrar shall keep safely the said register-book until it is filled, and shall then send it to the ¹[Registrar-General of Births, Deaths and Marriages], to be kept by him with the records of his office.

Officers to whom Registrars in Native States shall send certificates.

56. The Marriage Registrars in Native States shall send the certificates mentioned in section 54 to such officers as the Governor-General in Council from time to time, by notification in the *Gazette of India*, appoints in this behalf.²

57. When any Native Christian about to be married gives a notice of marriage, or applies for a certificate from a Marriage Registrar, such Marriage Registrar shall ascertain whether the said Native Christian understands the English language, and, if he does not, the Marriage-Registrar shall translate, or cause to be translated, such notice or certificate or both of them, as the case may be, to such Native Christian into a language which he understands;

or the Marriage Registrar shall otherwise ascertain whether the Native Christian is cognizant of the purport and effect of the said notice and certificate.

58. When any Native Christian is married under the provisions of this Part, the person solemnizing the marriage shall ascertain whether such Native Christian understands the English language, and, if he does not, the person solemnizing the marriage shall, at the time of the solemnization, translate, or cause to be translated, to such Native Christian, into a language which he understands, the declarations made at such marriage in accordance with the provisions of this Act.

Registration of marriages between Native Christians.

59. The registration of marriages between Native Christians under this Part shall be made in conformity with the rules laid down in section 37 (so far as they are applicable), and not otherwise.

¹ See 55.—¹ These words were substituted for the words "Secretary to the Local Government" by the Births, Deaths and Marriages Registration Act (VI of 1886), S. 30 (b).

² See 56.—² Cf. S. 24 (2) of the Births, Deaths and Marriages Registration Act (VI of 1886).

The Commissioner of Ajmer-Merwara has been appointed under this section for the Rajputana

States, see Aj. R. O.; the Agent, Governor General, Central India Agency, for States in Central India, see Brit. Enact. N. S. (C. I.) Ed. 1899, p. 45; the Registrar-General of Births, Deaths and Marriages, Madras, for the Mysore State, see *ibid.* (Mad. and Mys.) p. 47; the First Assistant to the Resident for the Hyderabad State, see *ibid.* (Hyd.), p. 26.

PART VI.¹

MARRIAGE OF NATIVE CHRISTIANS.

60. Every marriage between Native Christians applying for a certificate shall, without the preliminary notice required under Part III, be certified under this Part, if the following conditions be fulfilled, and not otherwise :—

On what conditions marriages of Native Christians may be cetificated.

wise :—

(1) the age of the man intending to be married shall exceed sixteen years, and the age of the woman intending to be married shall exceed thirteen years :

(2) neither of the persons intending to be married shall have a wife or husband still living ;

(3) in the presence of a person licensed under section 9, and of at least two credible witnesses other than such person, each of the parties shall say to the other—

“ I call upon these persons here present to witness that I, A. B., in the presence of Almighty God, and in the name of our Lord Jesus Christ, do take thee, C. D., to be my lawful wedded wife [*or husband*]” or words to the like effect :

Provided that no marriage shall be certified under this Part when either of the parties intending to be married has not completed his or her eighteenth year, unless such consent as is mentioned in section 19 has been given to the intended marriage, or unless it appears that there is no person living authorized to give such consent.

61. When, in respect to any marriage solemnized under this Part, the conditions prescribed in section 60 have been fulfilled, the person licensed as aforesaid, in whose presence the said declaration has been made, shall, on the application of either of the parties to such marriage, and on the payment of a fee of four annas, grant a certificate of the marriage.

The certificate shall be signed by such licensed person, and shall be received in any suit touching the validity of such marriage as conclusive proof of its having been performed.

62. (1) Every person licensed under section 9 shall keep in English, or in the vernacular language in ordinary use in the district or State in which the marriage was solemnized, and in such form as the Local Government by which he was licensed may from time to time prescribe, ^{2a} a register-book of all marriages solemnized under this Part in his presence, and shall deposit in the office of the Registrar-General of Births, Deaths and Marriages for the territories under the administration of the said Local Government, in such form and at such intervals as that Government may prescribe, true and duly authenticated extracts from his register-book of all entries made therein since the last of those intervals.

(2) Where the person keeping the register-book was licensed as regards a Native State by the Governor-General in Council, references in sub-section (1) to the Local Government therein mentioned shall be read as references to the Local Government to whose Registrar-General of Births, Deaths and Marriages certified copies of entries in registers of births and deaths are for the time being required to be sent under section 24, sub-section (2), of the Births, Deaths and Marriages Registration Act, 1886.

Part VI.—¹As to validation of past marriages solemnized under Part VI between persons of whom one only was a Native Christian, and penalty for solemnizing such Marriages under Part VI in future, see the Marriages Validation Act (II of 1892).

Sec. 62.—This section was substituted for the original S. 62 (relating to the keeping and form of the register-book) by the Indian Christian Marriage Act (1872) Amendment Act (II of 1891), S. 4.

² For notifications issued under the powers

conferred by this section in—(1) Assam, see Assam Gazette, 1901, Pt. II, p. 397 ; (2) Bengal, see Ben. R. & O. ; (3) Burma, see Bur. R. M. ; (4) the Central Provinces, see C. P. R. & O. ; (5) Punjab, see Punj. R. & O. ; (6) the United Provinces of Agra and Oudh, see North-Western Provinces and Oudh List of Local Rules and Orders, Ed. 1894, p. 42. For notifications in the United Provinces of Agra and Oudh, under the powers conferred by Ss. 62, 6, 7, 9, 82, 83 and 85, see North-Western Provinces and Oudh List of Local Rules and Orders, Ed. 1894, p. 42.

63. Every person licensed under this Act to grant certificates of marriage, and keeping a marriage-register-book under section 62, shall, at all reasonable times, allow search to be made in such book, and shall, on payment of the proper fee, give a copy, certified under his hand, of an entry therein.

Searches in register-book and copies of entries.

Books in which marriages of Native Christians under Part I or Part III are registered.

64. The provisions of sections 62 and 63, as to the form of the register-book, depositing extracts therefrom, allowing searches thereof, and giving copies of the entries therein, shall, *mutatis mutandis*, apply to the books kept

under section 37.

65. This Part of this Act, except so much of sections 62 and 63 as are referred to in section 64, shall not apply to marriages between Roman Catholics. But nothing herein contained shall invalidate any marriage celebrated between Roman Catholics under the provisions of Part V of Act No. XXV of 1864 previous to the twenty-third day of February, 1865.

Part VI not to apply to Roman Catholics Saving of certain marriages.

PART VII.

PENALTIES.

False oath, declaration, notice or certificate for procuring marriage.

66. Whoever, for the purpose of procuring a marriage or licence of marriage, intentionally,—

(a) where an oath or declaration is required by this Act, or by any rule or custom of a Church according to the rites and ceremonies of which a marriage is intended to be solemnized, such Church being the Church of England or of Scotland or of Rome, makes a false oath or declaration, or,

(b) where a notice or certificate is required by this Act, signs a false notice or certificate,

shall be deemed to have committed the offence punishable under section 193 of the Indian Penal Code with imprisonment of either description for a term which may extend to three years and, at the discretion of the Court, with fine.

67. Whoever forbids the issue, by a Marriage Registrar, of a certificate, by falsely representing himself to be a person whose consent to the marriage is required by law, knowing or believing such representation to be false, or not having reason to believe it to be true, shall be deemed guilty of the offence described in section 205 of the Indian Penal Code.

Forbidding, by false personation, issue of certificate by Marriage Registrar.

68. Whoever, not being authorized by section 5 of this Act to solemnize marriages, solemnizes or professes to solemnize in the absence of a Marriage Registrar of the district in which the ceremony takes place, a marriage between persons one or both of whom is or are a Christian or Christians, shall be punished with imprisonment which may extend to ten years, or (in lieu of a sentence of imprisonment for seven years or upwards) with transportation for a term of not less than seven years, and not exceeding ten years,

Solemnizing marriage without due authority.

Sec. 65—¹Act XXV of 1864 was repealed by Act V of 1865, which was repealed by this Act.

Sec. 66.—This section was substituted for the original S. 66 by the Indian Christian Marriage Act (1872), Amendment Act (II of 1891), S. 5.

Secs. 66 and 68.—*See* 16 All. 212; 40 All. 393; 14 Mad. 342; 17 Mad. 391; 18 Mad. 230; 19 Mad. 273; 20 Mad. 12; 6 Mad. H. C. Rep. Ap. 20. No one except a person who professes the Christian religion comes under S. 68 of the Act. The mere fact that a person was baptized as an infant or that he is attending a Christian school or he is dressing as a Christian is not sufficient to treat him as such. There is no express prohibition preventing a person professing Christianity from doing violence to his faith and marrying a non-Christian, by a non-Christian ceremony. S. 68 does not make it penal for a Christian to marry by a ceremony which is void under S. 4 of the Act. 40 A. 393; 45 I. C. 519; 16 A. L. J. 414; 19 Cr. L. J. 615. A Hindu by religion performing a marriage according to the Hindu mode, between two persons one of whom is a Christian, commits an offence under S. 68. 40 M. 1030; 33 M. L. J. 148; 6 L. W. 126; 22 M. L. T. 163; 41 I. C. 664; 18 Cr. L. J. 840; (1917) M. W. N. 589.

Sec. 68.—This section was substituted for the original S. 68 by Act II of 1891, S. 6.

or, if the offender is an European or American, with penal servitude according to the provisions of Act XXIV of 1855 (*to substitute penal servitude for the punishment of transportation in respect of European and American convicts* [* *]¹ and shall also be liable to fine.

69. Whoever knowingly and wilfully solemnizes a marriage between persons one or both of whom is or are a Christian or Christians, at any time other than between the hours of six in the morning and seven in the evening, or in the absence of at least two credible witnesses other than the person solemnizing the marriage, shall be punished with imprisonment for a term which may extend to three years, and shall also be liable to fine.

This section does not apply to marriages solemnized under special licences granted by the Anglican Bishop of the Diocese or by his Commissary, nor to marriages performed between the hours of seven in the evening and six in the morning by a Clergyman of the Church of Rome, when he has received the general or special licence in that behalf mentioned in section 10.

[Nor does this section apply to marriages solemnized by a Clergyman of the Church of Scotland according to the rules, rites, ceremonies and customs of the Church of Scotland.]

70. Any Minister of Religion licensed to solemnize marriages under this Act who, without a notice in writing, or when one of the parties to the marriage is a minor, and the required consent of the parents or guardians to such marriage has not been obtained, within fourteen days after the receipt by him of notice of such marriage, knowingly and wilfully solemnizes a marriage under Part III, shall be punished with imprisonment for a term which may extend to three years, and shall also be liable to fine.

Solemnizing, without notice or within fourteen days after notice marriage with minor.

71. A Marriage Registrar under this Act, who commits any of the following offences :—

(1) knowingly and wilfully issues any certificate for marriage, or solemnizes any marriage, without publishing the notice of such marriage as directed by this Act ;

(2) [after the expiration of two months after the copy of the notice has been entered as required by section 40 in respect of any marriage, solemnizes such marriage ;]

(3) solemnizes, without any order of a competent Court authorizing him to do so, any marriage, when one of the parties is a minor, before the expiration of fourteen days after the receipt of the notice of such marriage, or without sending, by the post or otherwise, a copy of such notice to the Senior Marriage Registrar of the district if there be more Marriage Registrars of the district than one, and if he himself be not the Senior Marriage Registrar ;

(4) issues any certificate the issue of which has been prohibited, as in this Act provided, by any person authorized to prohibit the issue thereof,

shall be punished with imprisonment for a term which may extend to five years, and shall also be liable to fine.

¹ The words " and to amend the law relating to the removal of such convicts " were repealed by the Repealing and Amending Act (II of 1891).

Sec. 69.—Last paragraph was added by S. 7

of the Indian Christian Marriage Act (1872), Amendment Act (II of 1891).

Sec 71.—The clause (2) was substituted for the original cl. (2) by Act II of 1891, S. 8 (1).

Issuing certificate after expiry of notice, or in, case of minor, within fourteen days after notice, or against authorized prohibition.

72. Any Marriage Registrar knowingly and wilfully issuing any certificate for marriage after the expiration of ¹[two months] after the notice has been entered by him as aforesaid,

or knowingly and wilfully issuing, without the order of a competent Court authorizing him so to do, any certificate for marriage, where one of the parties intending marriage is a minor, before the expiration of fourteen days after the entry of such notice, or any certificate the issue of which has been forbidden as aforesaid by any person authorized in this behalf,

shall be deemed to have committed an offence under section 166 of the Indian Penal Code.

Persons authorized to solemnize marriage (other than Clergy of Churches of England, Scotland or Rome);

73. Whoever, being authorized under this Act to solemnize a marriage,

and not being a Clergyman of the Church of England, solemnizing a marriage after due publication of banns, or under a licence from the Anglican Bishop of the Diocese or a Surrogate duly authorized in that behalf,

or, not being a Clergyman of the Church of Scotland, solemnizing a marriage according to the rules, rites, ceremonies and customs of that church,

or, not being a Clergyman of the Church of Rome, solemnizing a marriage according to the rites, rules, ceremonies and customs of that church,

knowingly and wilfully issues any certificate for marriage under this Act, or solemnizes any marriage between such persons as aforesaid, without publishing, or causing to be affixed, the notice of such marriage as directed in Part III of this Act, or after the expiration of two months after the certificate has been issued by him :

or knowingly and wilfully issues any certificate for marriage, or solemnizes a marriage between such persons when one of the persons intending marriage is a minor, before the expiration of fourteen days after the receipt of notice of such marriage, or without sending, by the post or otherwise, a copy of such notice to the Marriage Registrar, or, if there be more Marriage Registrars than one, to the Senior Marriage Registrar of the district :

issuing certificate authorizedly forbidden ; or knowingly and wilfully issues any certificate the issue of which has been forbidden, under this Act, by any person authorized to forbid the issue :

solemnizing marriage authorizedly forbidden. or knowingly and wilfully solemnizes any marriage forbidden by any person authorized to forbid the same ;

shall be punished with imprisonment for a term which may extend to four years, and shall also be liable to fine.

74. Whoever, not being licensed to grant a certificate of marriage under Part VI of this Act, grants such certificate intending thereby to make it appear that he is so licensed, shall be punished with imprisonment for a term which may extend to five years, and shall also be liable to fine.

[Whoever, being licensed to grant certificates of marriage under Part VI of this Act, without just cause refuses, or wilfully neglects or omits, to perform any of the duties imposed upon him by that Part shall be punished with fine which may extend to one hundred rupees.]

Sec. 72.—¹The words within brackets were substituted for the words " three months " by S. 8 (2) of the Indian Christian Marriage Act (1872) Amendment Act (II of 1891).

Sec. 74.—The last paragraph was added by S. 9 of the Indian Christian Marriage Act (1872) Amendment Act (II of 1891).

Destroying or falsifying register-books.

75. Whoever, by himself or another, wilfully destroys or injures any register-book or the counterfoil certificates thereof, or any part thereof, or any authenticated extract

herefrom,

or falsely makes or counterfeits any part of such register-book or counterfoil certificates,

or wilfully inserts any false entry in any such register-book or counterfoil certificate or authenticated extract,

shall be punished with imprisonment for a term which may extend to seven years, and shall also be liable to fine.

Limitation of prosecutions under Act.

76. The prosecution for every offence punishable under this Act shall be commenced within two years after the offence is committed.

PART VIII.

MISCELLANEOUS.

What matters need not be proved in respect of marriage in accordance with Act.

77. Whenever any marriage has been solemnized in accordance with the provisions of sections 4 and 5, it shall not be void merely on account of any irregularity in respect of any of the following matters, namely :—

(1) any statement made in regard to the dwelling of the persons married, or to the consent of any person whose consent to such marriage is required by law :

(2) the notice of the marriage;

(3) the certificate or translation thereof :

(4) the time and place at which the marriage has been solemnized :

(5) the registration of the marriage.

78. Every person charged with the duty of registering any marriage, who discovers any error in the form or substance of any such entry may, within one month next after the discovery of such error, in the presence of the persons married, or, in case of their death or absence, in the presence of two other credible witnesses, correct the error, by entry in the margin, without any alteration of the original entry, and shall sign the marginal entry, and add thereto the date of such correction, and such person shall make the like marginal entry in the certificate thereof.

And every entry made under this section shall be attested by the witnesses in whose presence it was made.

And in case such certificate has been already sent to the ¹[Registrar-General of Births, Deaths and Marriages], such person shall make and send in like manner a separate certificate of the original erroneous entry, and of the marginal correction therein made.

Searches and copies of entries.

79. Every person solemnizing a marriage under this Act, and hereby required to register the same,

and every Marriage Registrar or ¹[Registrar-General of Births, Deaths and Marriages] having the custody for the time being any register of marriages, or of any certificate, or duplicate, or copies of certificate, under this Act,

shall, on payment of the proper fees, at all reasonable times, allow searches to be made in such register, or for such certificate, or duplicate, or copies, and give a copy under his hand of any entry in the same.

80. Every certified copy, purporting to be signed by the person entrusted under this Act with the custody of any marriage-register or certificate, or duplicate, required to be kept or delivered under this Act, of an entry of a marriage in such register, or of any such certificate or duplicate, shall be received as evidence of the marriage purporting to be so entered, or of the facts purporting to be so certified therein, without further proof of such register or certificate or duplicate, or of any entry therein, respectively, or of such copy.

Certified copy of entry in marriage-register, etc., to be evidence.

Sec. 78.—¹The words within brackets were substituted for the words "Secretary to the Local

Government" by S. 30 (d) of the Births, Deaths and Marriages Registration Act (VI of 1886).

81. The ¹[Registrar-General of Births, Deaths and Marriages] and the officers appointed under section 56 shall, at the end of every quarter in each year, select, from the certificates of marriages forwarded to them respectively during such quarter, the certificates of the marriages of which the

Sending certificates of certain marriages to Secretary of State for India.

Governor-General in Council may desire that evidence shall be transmitted to England, and shall send the same certificates, signed by them respectively, to the Secretary to the Government of India the Home Department, for the purpose of being forwarded to the Secretary of State for India and delivered to the Registrar-General of Births, Deaths and Marriages ²[in England];

Provided that, in the case of the Governments of Madras and Bombay, the said certificates shall be forwarded by such Governments respectively directly to the Secretary of State for India.

Local Government to prescribe fees.

82 Fees shall be chargeable under this Act for—

receiving and publishing notice of marriages ;

issuing ³[certificates for marriage] by Marriage Registrars, and registering marriages by the same ;

entering protests against, or prohibitions of, the issue of ⁴[certificates for marriage,] by the said Registrars ;

searching register-books or certificates, or duplicates of copies thereof ;

giving copies of entries in the same under sections 63 and 79.

The Local Government shall fix the amount of such fees respectively,

and may from time to time vary or remit them either generally or in special cases, as to it may seem fit.

83. The Local Government may make rules in regard to the disposal of the fees mentioned in section 82 the supply of register-books, and the preparation and submission of returns of marriages

Power to make rules.

solemnized under this Act.

Power to prescribe fees and rules for Native States.

Power to declare who shall be District Judge.

[86. (1) The powers

Powers and functions exercisable as regards Native States.

tion by any Local Government of powers and functions under sections 6, 8, 9 and 56 shall be by notification in the local official Gazette.

(2) The powers and functions exercisable under this Act by the Governor-General in Council may be delegated to, and exercised by, such officers as he may from time to time appoint in this behalf.]

Saving of Consular marriages.

according to the laws of such State.

Non-validation of marriages within prohibited degrees.

87. Nothing in this Act applies to any marriage performed by any Minister, Consul or Consular Agent between subjects of the State which he represents and

88. Nothing in this Act shall be deemed to validate any marriage which the personal law applicable to either of the parties forbids him or her to enter into.

Sec. 81.—¹The words within brackets were substituted for the words " Secretary to the Local Government " by S. 30 (b) of the Births, Deaths and Marriages Registration Act (VI of 1886).

²The words within brackets were added by S. 30 (d) of the Births, Deaths and Marriages Registration Act (VI of 1886).

Sec. 82.—³The words " certificates for marriage " were substituted for the words " certifi-

cate of marriages " by the Repealing and Amending Act (I of 1903), S. 3 and Sch. II.

⁴The words within brackets were substituted for the words " marriage certificates " by the Repealing and Amending Act (I of 1903), S. 3 and Sch. II.

Sec. 86.—S. 86 was substituted by Act XXXVIII of 1920, Sch. I.

SCHEDULE I.

(See sections 12 and 38.)

NOTICE OF MARRIAGE.

To _____ a Minister [or Registrar] of _____
 I hereby give you notice that a marriage is intended to be had, within three calendar months from the date hereof, between me and the other party herein named and described (that is to say) :

Names.	Condition.	Rank or profession.	Age.	Dwelling place.	Length of residence.	Church, chapel or place of worship in which the marriage is to be solemnized.	District in which the other party resides, when the parties dwell in different districts.
<i>James Smith.</i>	<i>Widower.</i>	<i>Carpenter</i>	<i>Of full age.</i>	<i>16, Clive Street.</i>	<i>23 days.</i>	<i>Free Church of Scotland Church, Calcutta.</i>	
<i>Martha Green.</i>	<i>Spinner.</i>	<i>.....</i>	<i>Minor.</i>	<i>20, Hastings Street.</i>	<i>More than a month.</i>		

Witness my hand, this

day of

seventy-two.(Signed) *JAMES SMITH.*

[The *italics* in this schedule are to be filled up, as the case may be, and the blank division thereof is only to be filled up when one of the parties lives in another district.]

SCHEDULE II.

(See sections 24 and 50).

CERTIFICATE OF RECEIPT OF NOTICE.

I, _____ do hereby certify that, on the _____ day of _____, notice was duly entered in my Marriage Notice Book of the marriage intended between the parties therein named and described, delivered under the hand of _____ one of the parties (that is to say) :—

Names.	Condition.	Rank or profession.	Age.	Dwelling place.	Length of residence.	Church, chapel or place of worship in which the marriage is to be solemnized.	District in which the other party resides, when the parties dwell in different districts.
<i>James Smith.</i>	<i>Widower.</i>	<i>Carpenter.</i>	<i>Of full age.</i>	<i>16, Clive Street.</i>	<i>23 days.</i>	<i>Free Church of Scotland Church, Calcutta.</i>	
<i>Martha Green.</i>	<i>Spinner.</i>	<i>.....</i>	<i>Minor.</i>	<i>20, Hastings Street.</i>	<i>More than a month.</i>		

and that the declaration, ¹ [or oath] required by section 17 or 41 of the Indian Christian Marriage Act, 1872, has been duly made by the said (*James Smith*).

Date of notice entered { The issue of this certificate has not been prohibited by any
Date of certificate given { person authorized to forbid the issue thereof.
Witness my hand, this day of seventy-two.

(Signed).

This certificate will be void, unless the marriage is solemnized on or before the day of

[The *italics* in the schedule are to be filled up, as the case may be, and the blank division hereof is only to be filled up when one of the parties lives in another district.]

SCHEDULE III.

(See sections 28 and 31²).

FORM OF REGISTER OF MARRIAGES.

Quarterly Returns

of

MARRIAGES

for

The Archdeaconry of { *Calcutta.*
Madras.
Bombay.

I, _____, Registrar of the Archdeaconry of { *Calcutta,*
Madras,
Bombay, } do hereby

certify that the annexed are correct copies of the originals and Official Quarterly Returns of Marriage within the Archdeaconry of { *Calcutta,*
Madras,
Bombay, } as made and transmitted to me for the quarter commencing the day of ending the day of in the year of Our Lord

[Signature of Registrar.]

Registrar of the Archdeaconry of { *Calcutta,*
Madras,
Bombay,

MARRIAGES solemnized at { *Allahabad,*
Barrackpore,
Barcilly,
Calcutta, etc., etc.

WHEN MARRIED			NAMES OF PARTIES.																
Year.	Month.	Day.	Christian.	Surname.	Age.	Conditions.	Rank of profession.	Residence at the time of marriage	Father's name and surname.	By banns or licence.	Signatures of the parties.	Signatures of two or more witnesses present.	Signature of the person solemnizing the marriage						

¹ These words were added by the Repealing and Amending Act (I of 1903), S. 3.

² This reference was substituted for the original reference by Act XII of 1891, Second Schedule.

SCHEDULE IV.

(See sections 32 and 54.)

MARRIAGE-REGISTER-BOOK.

Number.	When married.			Names of Parties.		Age.	Condition.	Rank or profes- sion.	Residence at the time of marriage.	Father's name and surname.
				Christian name.	Sur- name.					
	Day.	Month.	Year.							
				James	White	26 years.	Widow er.	Car- penter.	Agra	William White.
				Martha	Dun- can	17 years.	Spinster	... Agra	Agra	John Duncan.

Married in the

This marriage was solemnized between us { James White, } in the presence of us { John Smith }
 { Martha Duncan }

CERTIFICATE OF MARRIAGE.

Number.	When married.			Names of Parties.		Age.	Condition	Rank or profes- sion.	Residence at the time of marriage.	Father's name and surname.
				Christian name.	Sur- name.					
	Day.	Month	Year.							
				James	White	26 years.	Widow- er.	Car- penter.	Agra	William White.
				Martha	Dun- can.	17 years.	Spinster	....	Agra	John Duncan.

Married in the

This marriage was solemnized between us { James White, } in the presence of us { John Smith }
 { Martha Duncan }

SCHEDULE V.

(See Section 2.)

ENACTMENTS REPEALED.

Number and year.	Title.	Extent of Repeal.
Statute 58 Geo. 3, cap. 84.	An Act to remove doubts as to the validity of certain marriages had and solemnized within the British territories in India.	The whole.

Number and year.	Title.	Extent of Repeal.
Statute 14 & 15 Vict., cap. 40.	An Act for marriages in India	The whole.
Act No. V of 1852.	An Act for giving effect to the provisions of an Act of Parliament, passed in the 15th year of the reign of Her present Majesty, intituled "An Act for Marriages in India".	So much as has not been repealed.
Act No. V of 1865.	The Indian Marriage Act, 1865	The whole Act, except so far as it relates to the Straits Settlements.
Act No. XXII of 1866 ..	An Act to extend the Indian Marriage Act, 1865, to the Hyderabad Assigned Districts, and the Cantonments of Secunderabad, Trimulgherry and Aurangabad.	The whole.

THE CODE OF CIVIL PROCEDURE (V OF 1908).

STATEMENT OF REPEALS AND AMENDMENTS.

S. 5 rep. in part, Act XXXVIII of 1920, S. 2 and Sch. I, Pt. I.	S. 125 am., Act XXXVIII of 1920, S. 2 and Sch. I, Pt. I.
S. 7 am., Act I of 1926.	S. 126 am., Act XIII of 1916, S. 2 and Sch.
S. 8 am., Act I of 1914, S. 2.	S. 127 am., Act XXIV of 1917, S. 2 and Sch. I.
S. 35-A inserted, Act IX of 1922, S. 2.	S. 129 am., Act XIII of 1916, S. 2 and Sch.
S. 55 am., Act III of 1921, S. 2.	S. 130 am., Act XIII of 1916, S. 2 and Sch.
S. 66 rep. in part, Act X of 1914, S. 3 and Sch. II.	S. 130 am., Act XXIV of 1917, S. 2 and Sch.
S. 60 am., Act XXVI of 1923, S. 2.	S. 138 am., Act IV of 1914, S. 2 and Sch., Pt. I.
S. 61 rep. in part, Act XXXVIII of 1920, S. 2 and Sch. I, Pt. I.	S. 143 rep. in part, Act XXXVIII of 1920, S. 2 and Sch. I, Pt. I.
S. 67 am., Act I of 1914, S. 3.	S. 156 rep., Act XVII of 1914, S. 3 and Sch. II.
S. 67 rep. in part, Act XXXVIII of 1920, S. 2 and Sch. I, Pt. I.	Sch. I, Order III, Rr. 1 and 4 am., Act XXII of 1926.
S. 68 rep. in part, Act XXXVIII of 1920, S. 2 and Sch. I, Pt. I.	Sch. I, Order V am., XVII of 1914, S. 2 and Sch. I.
S. 103 am., Act VI of 1926, S. 2.	Sch. I, Order IX am., Act XXIV of 1920, S. 2.
S. 104 am., Act IX of 1922, S. 3.	Sch. I, Order XXI am., Act XXIX of 1923, Ss. 2 and 3.
S. 111 am., Act XIII of 1916, S. 2 and Sch.	Sch. I, Order XXXVIII am., Act I of 1926, S. 4--addition of Rule 13.
S. 116 am., Act XIII of 1916, S. 2 and Sch.	Sch. I, Order XLI am., Act IX of 1922, S. 4
S. 120 rep. in part, Act III of 1909, S. 127 and Sch. III (Repealed).	Sch. I, Order XLV am., Act XXVI of 1920, Ss. 3, 4 and 5.
S. 122 am., Act XIII of 1916, S. 2 and Sch.	Sch. I, Appendix E am., Act X of 1914, S. 2 and Sch. I.
S. 122 am., Act XVIII of 1919, S. 2 and Sch. I.	Sch. I, Appendix F am., Act X of 1914, S. 2 and Sch. I.
S. 122 rep. in part, Act XI of 1923, S. 3 and Sch. II.	Sch. V rep., Act XVII of 1914, S. 3 and Sch. II.
S. 123 am., Act XIII of 1916, S. 2 and Sch.	
S. 123 am., Act XVIII of 1919, S. 2 and Sch. I.	
S. 123 rep. in part, Act XI of 1923, S. 3 and Sch. II.	

Some local modifications in former Codes, which are to be read into the present Code by virtue of S. 158 of the latter :—

Ajmere, Reg. I of 1877, S. 28.

Central Provinces, Act XX of 1875, Ss. 11, 12 (added by Act II of 1879, S. 2).

Coorg, Reg. I of 1901, Ss. 11, 12.

Lower Burma, Act VI of 1900, S. 16 (3).

N. W. Frontier Province, Reg. VII of 1901, Ss. 46, 78, 84 (3).

Ondh, Act XVIII of 1876, Ss. 19, 22.

Sonthal Parganas, Reg. V of 1893, S. 10.

Declared in force—

(Except certain portions) in British Baluchistan, Reg. II of 1913, S. 3.

in the Angul District, Reg. III of 1913, S. 3.

(certain portions) in the Arakan Hill District, Reg. I of 1916, S. 2.

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PRELIMINARY.

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THE CODE OF CIVIL PROCEDURE (V OF 1908).

[21st March, 1908.

An Act to consolidate and amend the laws relating to the Procedure of the Courts of Civil Judicature.

WHEREAS it is expedient to consolidate and amend the laws relating to the procedure of the Courts of Civil Judicature; It is hereby enacted as follows:—

PRELIMINARY.

Short title commencement,
and extent.

1. [S. 1.] (1) This Act may be cited as THE
CODE OF CIVIL PROCEDURE, 1908.

(2) It shall come into force on the first day of January, 1909.

(3) This section and sections 155 to 158 extend to the whole of British India: the rest of the Code extends to the whole of British India, except the Scheduled Districts.

Definitions.

2. [S. 2.] In this Act, unless there is anything
repugnant in the subject or context,—

(1) "Code" includes rules:

Sec. 1.—For Statement of Objects and Reasons, see *Gazette of India*, 1907, Pt. V, p. 179; for Report of Select Committee, see *ibid.*, 1908, Pt. V, p. 35, and for Proceedings in Council, see *ibid.*, 1907, Pt. VI, p. 135; *ibid.*, 1908, pp. 8, 12 and 212.

¹ The figures within square brackets [] represent the corresponding section of the old Act XIV of 1882.

Sec. 1: SCOPE AND OPERATION OF THE CODE.—The Code is not exhaustive. A point on which it is silent must be determined upon general principles. 2 Pat. L. J. 306=39 I. C. 779=1917 Pat. 137; 33 C. 927; 1921 Pat. 205; 1 Lah. 339=59 I. C. 748; 36 Cal. 193=1 Ind. Cas. 913. But Code to be deemed to be exhaustive on points specifically dealt with therein. 24 M.L.J. 235=18 Ind. Cas. 360; to C.L.J. 527. Where there is no specific provision in the Code it is its duty to act according to justice, equity and good conscience. 33 C. 927 (932). As it embodies the law of procedure, the new Code applies to all cases which were pending at the time it came into force. 9 I. C. 815. See also 19 C. L.J. 545. But an appellate Court could not reverse an order of the Court of first instance because a different rule has been enacted since then. 12 I. C. 553=(1911) 2 M. W. N. 386. See also 36 All. 350 (P. C.). The Code is inapplicable to Village Munsifs' Courts. 29 M.L.J. 474=31 I. C. 59. The provisions of the Code do not apply, *en bloc*, to proceedings in Revenue Courts. 48 I. C. 119=21 O. C. 220. As to applicability of the Code to proceedings under Probate and Administration Act, see 20 Ind. Cas. 281=6 Bur. L. T. 87; to Revenue Courts, see 21 Cal. 428; 14 Bom. L. R. 947. A Municipal election tribunal should be guided wherever possible by the provisions of this Code. 91 I. C. 450=A.I.R. 1926 Mad. 1043 (F.B.). In cases where the Criminal Procedure Code pres-

cribes no procedure a magistrate may well follow procedure laid down in this Code (as in proceedings under S. 202, Cr. P. Code. 52 Cal. 670=29 C. W. N. 817=1925 Cal. 934.

DIVISION OF THE CODE INTO SECTIONS AND RULES.—RULES OF CONSTRUCTION.—The body of the Code creates jurisdiction and the rules indicate the mode in which that jurisdiction is to be exercised and they must be read together. 44 Cal. 929=21 C. W. N. 877 (F. B.); 41 Cal. 108=20 I. C. 39=18 C. L. J. 613. See also 33 I. C. 329=43 Cal. 148. Provisions of this Code and Limitation Act are to be read and interpreted together. See 85 I. C. 29=6 Pat. L. T. 729.

Forms given in Schedule cannot control the clear words of the Code itself. 40 I. C. 816=21 C. W. N. 1147. Where there is a conflict between the body of the Code and Schedule, the latter must yield to the former. 22 I. C. 690. Effect of new Code are rules *ultra vires* under old Code. See 29 M. L. J. 766. For definition of "British India," see S. 3, cl. 17 of the General Clauses Act. 'British India' includes British Burma. 13 C. 221; Aden, also cantonment of Wadhwan, 9 B. 244. The Code does not apply to Agency tracts. 13 M.L.J. 15; nor to tributary mahals of Orissa, 29 C. 400. As to application of Code to Sonthal Parganas; see 18 C. 133; 42 C. 116 (P.C.). For a list of Scheduled Districts, see Schedule I to the Scheduled Districts Act XIV of 1874. Under the powers conferred by S. 5 of the said Act, the Code has been extended to several Scheduled Districts, including Sind, Ajmere, Merwara and the Scheduled Districts of the Punjab.

FOREIGNERS.—Code extends to the whole of British India and foreigners are not excepted from the jurisdiction of British Indian Courts. 49 All. 669=25 A.L.J. 356=101 I. C. 673=A. I. R. 1927 All. 413, following 22 Cal. 222 (P. C.).

(2) "decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within section 47 or section 144, but shall not include—

Sec. 2, cl. (2) : DECREE.—'FORMAL EXPRESSION OF AN ADJUDICATION'.—Unless and until a decree is formally drawn up in terms of the judgment there can be neither appeal nor execution. 15 I. C. 935=8 N.L.R. 22. See also 25 Bom. L. R. 826=76 I. C. 763 and 1014=1924 Bom. 33. Decree includes Revenue Court decree. L. R. 6 A. 63=85 I. C. 660=1925 All. 264. Orders and decrees distinguished. L. R. 6 A. 245 (Rev.) See also 26 Punj. L. R. 32=86 I. C. 104=7 Lah. L. J. 149=1925 Lah. 456 (Order on application for setting aside order of abatement.

"MATTERS IN CONTROVERSY IN THE SUIT."

—The expression must not be understood as relating solely to the merits of the case. It would cover any question relating to the character and status of a party suing, to the jurisdiction of the Court, to the maintainability of a suit and to other preliminary matters which necessitate an adjudication before a suit is enquired into. It does not include proceedings preliminary to institution of suit (e.g.) an application for leave to sue as a pauper and proceedings passed in execution as well as orders granting day costs. 2 L. W. 519=29 I. C. 393=17 M.L.T. 447 nor an order of punishment for contempt. 27 A. 380. The term 'suit' does not include an application under S. 73, Civil Procedure Code, and an order under the section is not a decree. 1 Pat. L. T. 296=57 I. C. 421=5 Pat. L. J. 415.

WHAT ARE DECREES.—The decision of a District Court on appeal that the Court below has no jurisdiction, is a decree. 54 I. C. 749=11 L. W. 3. A decision as to possession in a suit for possession and mesne profits is a preliminary decree. 25 I. C. 436=19 C. L. J. 346. Where one issue is settled and the case remanded to the lower Court for the determination of another issue, the order is a decree. L. R. 5 A. 156 (Rev.); 45 I. C. 100=3 Pat. L. J. 99. An order of abatement of a suit is a decree. 45 C. 94=33 M. L. J. 486=44 I. A. 218 (P.C.); 1 Lah. 493=57 I. C. 137; 34 I. C. 822=128 P.R. 1916 (F.B.) (a formal order recognising the abatement which is an accomplished fact, is not a decree); 38 M. L. J. 266=54 I. C. 565=11 L. W. 139; 31 I. C. 4 Mad. (abatement owing to the cause of action not surviving). As to order dismissing appeal under O. 41, R. 11 see 30 C. W. N. 334=93 I. C. 909=A.I.R. 1926 Cal. 638. Order refusing to admit appeal as time barred is decree. 30 C. W. N. 926=44 C. L. J. 44=A. I. R. 1926 Cal. 1105. Finding in a remand judgment clearly adjudicating of parties is a decree, 105 I. C. 567.

WHAT ARE NOT DECREES.—An order granting leave to sue under S. 18 of the Religious Endowments Act is not a decree. 34 C. 584; also an order rejecting an application for leave to sue as a pauper, 21 A. 133; also an order under the Trust Act refusing to remove a trustee, 19 A. 131; also a decision on a petition under the Religious Endowments Act, 11 M. 26 (35)=14 I. A. 160; also an order under S. 4 of Bengal Regulation V of 1799, 9 I. C. 994=18 C. L. J. 877.

Order as to costs in application for transfer under S. 15 of the Upper Burma Civil Court Regulation, is not a decree. 44 I. C. 690=(1917) 3 U. B.R. 61; also an order raising attachment of a residential house of the insolvent in insolvency proceedings under the special provisions of the Punjab Laws Act, as the latter do not amount to a suit, 67 I. C. 794=3 Lah. L. J. 338. An order overruling a plea against the maintainability of a suit is not a decree, 8 L.B.R. 213=33 I. C. 664=9 Bur. L. T. 195; also a decision in plaintiff's favour on an issue as to his *locus standi* to sue, 20 C. L. J. 476=27 I. C. 317=19 C. W. N. 755. Order of remand 7 Pat. L. T. 535=97 I. C. 105=A.I.R. 1926 Pat. 457. A decision on a preliminary issue such as limitation and *res judicata* merely enabling the plaintiff to go on with the suit is not a preliminary decree. 36 I. C. 431=9 Bur. L. T. 119; 21 I. C. 387=18 C. L. J. 78. See also 39 I. C. 100=7 P. R. 1917. Decision on a preliminary issue of *res judicata* is not a preliminary decree. 15 I. C. 566=10 A. L. J. 78; 39 B. 421=28 I. C. 461=17 Bom. L. R. 271; 15 I. C. 563=16 P.R. 1913. But see 8 Lah. L. J. 361=97 I. C. 780=A.I.R. 1926 Lah. 638. An order appointing a Commissioner to take accounts is not a decree. 38 B. 302=23 I. C. 889=16 Bom. L. R. 206. Order referring a partnership suit to the Official Referee for determining shares is neither a decree nor a 'judgment.' 73 I. C. 903. An order granting leave to withdraw a suit with permission to sue again is not a decree. 65 I. C. 719=1922 Lah. 267; 27 L. W. 286=A.I.R. 1928 Mad. 416; 51 I. C. 766; 11 I. C. 830; 51 I. C. 69=6 O. L. J. 151 (order also directing payment of costs by plaintiff); 17 A. 97; 18 C. 322; 27 C. 362; 15 B. 370. But an order allowing a party to withdraw a partition suit after a preliminary decree affects the rights of the parties and is appealable as a decree. (1912) M. W. N. 494=14 I. C. 259. An order declaring that an appeal has abated is not a decree. 20 A. L. J. 214=65 I. C. 838=1922 All. 113 (17 A. 172, *fol.*). A decision on an application to file a private award is not a decree. 66 P. R. 1915=31 I. C. 80. See also 107 I. C. 756=A.I.R. 1928 Lah. 137. Also an order overruling objections to an award. 1 P. L. R. 1911=9 I. C. 385=12 P. W. R. 1911.

"RIGHTS OF PARTIES."—The words mean rights of parties *inter se* in the subject-matter of the suit. 13 I. C. 800=82 P. R. 1911. It includes general rights, such as those relating to status, jurisdiction, limitation, framing suits, accounts, etc., which if decided must have a general effect upon the proceedings in the suit. 38 B. 392=23 I. C. 889=16 Bom. L. R. 206; 13 I. C. 800=82 P. R. 1911. The word "parties" includes only those that are joined as plaintiffs or defendants. 20 I. C. 898=16 O. C. 350. The determination of the right of one party to an account is a decree, 1 Pat. L. W. 781=40 I. C. 579=3 Pat. L. J. 67 (23 A. 152 (P.C.) *fol.*). Also an order striking out the name of a deft. and dismissing suit as against him, 42 M. 219=49 I. C. 835=

- (a) any adjudication from which an appeal lies as an appeal from an order, or
 (b) any order of dismissal for default.

36 M. L. J. 169=25 M. L. T. 184=9 L. W. 329. Also an order finally deciding that a particular defendant is not liable for mesne profits. 1923 Cal. 308. Also an order dismissing an application for final decree for sale in a mortgage suit. 42 M. 52=35 M. L. J. 552=48 I. C. 298. See also 33 C. L. J. 115=59 I. C. 177=25 C. W. N. 595. Also an order refusing to make a decree under O. 34, R. 6. 40 A. 553=47 I. C. 561=16 A. L. J. 488. But an order rejecting the application of one of two claimants not parties to suit, is not a decree. 47 M. L. J. 3=35 M. L. T. (H.C.) 82=80 I. C. 942=(1924) M. W. N. 768=1924 Mad. 813. An order rejecting an application to be added as a party to the suit is not a decree. 13 C. 100. An order dismissing application to be brought on record as legal representative, is not a decree. 72 P. W. R. 1921; 1 Lah. 493=57 I. C. 137=2 Lah. I. J. 638; 20 I. C. 808=16 O. C. 350; 62 I. C. 303=17 N. L. R. 45 (a suit for declaration is not barred by the order), 38 I. C. 833=13 N. L. R. 32. But see 39 M. L. J. 218=58 I. C. 498=43 M. 812 where it has been held that such an order is an adjudication on the applicant's claims and hence is a decree. (42 M. 219 Appl. 39 M. 488 *dist.*). Where one of several applicants was brought on record as legal representative, there is no abatement within the meaning of O. 43, R. 1 (k) nor any decree within the meaning of S. 2, cl. (2). 79 I. C. 860=1924 Mad. 622=46 M. L. J. 129. An order directing a surety to pay the debt of a judgment-debtor is not a decree except for purposes of an appeal under S. 145. 2 Pat. L. J. 197=39 I. C. 648=3 Pat. L. W. 414.

"CONCLUSIVELY DETERMINES."—To constitute a decree, there must be final adjudication. No particular form is necessary. 12 M. L. T. 309=16 I. C. 45=(1912) M. W. N. 1122. Decree becomes final when there is no appeal and appeal time expires. 23 A. L. J. 215=86 I. C. 957=47 All. 533=1925 All. 291. An order disposing of the debt's claim to set off is not a decree; the decision could be attacked in an appeal against the final order. 65 P. W. R. 1917=39 I. C. 508=62 P. R. 1917. An interlocutory order to be decree must conclusively determine the rights of the parties. So an order accepting security for stay of execution proceedings is not a decree. 41 C. 160=20 I. C. 72=17 C. W. N. 1240; also an order directing assessment of mesne profits. 15 I. C. 573; also an order refusing leave to bid, to a decree-holder under O. 21, R. 72. 38 C. 717=15 C. W. N. 862=11 I. C. 543=14 C. L. J. 241=8 A. L. J. 1117=6 L. B. R. 26=4 Bur. L. T. 257 (P. C.). Also an order under S. 148 extending time. 35 A. 582=21 I. C. 585=11 A. L. J. 950. Also an order directing partition in a particular manner passed after the confirmation in appeal of a preliminary decree for partition and before the final decree. 35 A. 159=18 I. C. 701=11 A. L. J. 120. Also an order extending time for payment of mortgage money under a decree. 39 M. 876=2 L. W. 1074=29 M. L. J. 708=31 I. C. 240=18 M. L. T. 486. But see 14 A. 520; also an order disallowing interrogatories. 58 I. C. 721=14 S. L. R. 28.

REJECTION OF PLAINT, ETC.—(a) *What orders are decrees.*—Order rejecting plaintiff for non-payment of Court fee is a decree. 67 I. C. 901=3 Lah. L. J. 237. Also dismissal of suit for deficient Court-fee. 54 I. C. 733=22 O. C. 289. An order dismissing an appeal for deficiency in Court-fee is a decree. 15 N. L. R. 15=67 I. C. 225=1922 Nag. 62. See also 63 I. C. 99=1921 Pat. 337; 51 I. C. 114, 98 I. C. 661=A. I. R. 1927 Nag. 100. Also an order rejecting an appeal memorandum. 16 M. 285; 22 M. 157. Also an order rejecting an appeal as time-barred. 98 I. C. 748; 13 M. L. J. 300; 19 I. C. 931=17 C. W. N. 807. Order dismissing suit under O. 17, R. 3, C. P. C. 101 I. C. 618=6 Bur. L. J. 77=A. I. R. 1927 R. 148. Rejection of an application for a final decree for sale in a mortgage suit, is a decree and not an order under S. 47. 42 M. 52=35 M. L. J. 552=48 I. C. 298. As to order directing defaulting bidder to make good loss on resale. See 23 N. L. R. 14.

(b) *What orders are not decrees.*—But an order returning plaintiff for amendment is not a decree. 96 P. R. 1911=143 P. W. R. 1911=11 I. C. 231=216 P. L. R. 1911. Also an order returning a memorandum of appeal for presentation to proper Court is not a decree, 13 A. 320. As to order of remand. See 103 I. C. 864; 6 P. 381.

ORDERS IN EXECUTION PROCEEDINGS.—(See also notes under S. 47).—Every order in execution proceedings is not a decree. An order granting or refusing process for examination of a witness or determining a point of law arising incidentally and not granting or refusing any relief is not a decree. 115 P. L. R. 1920=55 I. C. 173; 99 I. C. 455=A. I. R. 1927 All. 208. A decision under S. 47 is not a decree unless it determines the rights of the parties with regard to all or any of the matters in controversy. A decision on a question of the valuation to be inserted in a sale proclamation is not a decree. 5 Pat. L. J. 270=55 I. C. 452=1 Pat. L. T. 645=1920 P. 227. Order under O. 21, R. 66 (proclamation of sale) is not a decree. 59 I. C. 282=1 Pat. L. T. 647. An order in proceedings for recovery of the loss caused by re-sale owing of the default of the prior purchaser in depositing the purchase money is a decree. 44 A. 266=65 I. C. 813=20 A. L. J. 105=L. R. 3 A. 117=1922 All. 200 (1 A. 181; 18 M. 439; 25 C. 99; 20 B. 329 *fol.*) As to order for security to stay execution see 5 R. 534=6 Bur. L. J. 155=104 I. C. 324=A. I. R. 1927 Rang. 317.

DISMISSAL FOR DEFAULT.—An order dismissing a suit for default is not a decree. 12 M. L. J. 473; 29 C. 60; 18 C. L. J. 128=20 I. C. 1=18 C. W. N. 604; also an order dismissing an appeal for default. 15 C. L. J. 334=14 I. C. 823 (1); 39 C. 241; 23 C. 115; 23 C. 827; 22 M. L. J. 284; 47 I. C. 125=5 O. L. J. 252; 2 Pat. 739=75 I. C. 284=1923 P. 514. 101 I. C. 618=6 Bur. L. J. 77=A. I. R. 1927 Rang. 148. Dismissal for default of an objection of a judgment-debtor in execution proceedings, is not a decree, 1 O. W. N. 854; See also 53 Cal. 679=96 I. C. 705=30 C. W. N. 570=A. I. R. 1926 Cal. 773; 94 I. C. 1=A. I. R. 1926 All. 401.

Explanation.—A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final ;

(3) "decree-holder" means any person in whose favour a decree has been passed or an order capable of execution has been made ;

(4) "district" means the local limits of the jurisdiction of a principal Civil Court of original jurisdiction (hereinafter called a "District Court"), and includes the local limits of the ordinary original civil jurisdiction of a High Court ;

(5) "foreign Court" means a Court situate beyond the limits of British India which has no authority in British India and is not established or continued by the Governor-General in Council ;

(6) "foreign judgment" means the judgment of a foreign Court ;

(7) "Government Pleader" includes any officer appointed by the Local Government to perform all or any of the functions expressly imposed by this Code on the Government Pleader and also any pleader acting under the directions of the Government Pleader ;

(8) "Judge" means the presiding officer of a Civil Court ;

(9) "judgment" means the statement given by the Judge of the grounds of a decree or order ;

DECREE—PRELIMINARY AND FINAL.—The preliminary decree is not dependant on the final one but the latter is dependant and subordinate to the former, and does not extinguish it but gives effect to it. 21 C. W. N. 1174 = 1 Pat. L. J. 406 = 35 I. C. 873 (F.B.) (Failure to deposit commission fee after preliminary decree in partition suit—Dismissal of suit is not decree—No appeal lies, but only revision. 6 P. L. T. 152 = 86 I. C. 785 = 1925 Pat. 433). A preliminary decree ascertains what is to be done while the final decree states the result achieved by means of the preliminary decree. The cases where the legislature contemplates a preliminary decree are specified in O. 20, Rr. 12 to 18. 20 C. L. J. 476 = 27 I. C. 317 = 19 C. W. N. 755. There should be only one preliminary decree in a suit to be followed by one final final decree (*Ibid.*). Second preliminary decree in a suit for partition is not impossible where there are facts or circumstances alleged to have come into existence after the passing of the first. 15 I. C. 372 = 11 A. L. J. 120. *See also* 1925 Pat. 433. In a partnership suit order granting directions to commissioner does not amount to a preliminary decree. 107 I. C. 214. Where, in a suit for accounts, the Court after passing a preliminary decree for accounts, passed a further order fixing the mode of taking accounts and the period for which it should be done, the latter is also preliminary decree. 27 C. W. N. 989 = 38 C. L. J. 255 = 74 I. C. 373 = 1924 Cal. 160. Mere omission to style an order a preliminary decree or to embody it as such does not negative the party's right to appeal. 20 C. L. J. 476 = 27 I. C. 317 = 19 C. W. N. 755. A finding whether a party is an agriculturist under the Dekhan Agriculturists Relief Act is not a preliminary decree. 45 B. 627 = 10 I. C. 885 = 23 Bom. L. R. 92 ; 70 I. C. 428 = 1922 B. 336 (2) ; but *see also* 70 I. C. 768 = 1922 Bom. 336 (1). But if the finding necessarily involves a direction for the taking of an account in the manner provided by S. 13 of the Dekhan Agriculturists Relief Act it amounts to a preliminary decree. 39 B. 422 = 28 I. C. 589 = 17 Bom. L. R. 324. A decree for accounts is not a mere direction to report but is one determining the rights of the party and is a final decree.

13 I. C. 374 = 14 C. L. J. 603. An adjudication cannot be partly a decree and partly an order not amounting to a decree. 42 Cal. 914 = 29 M. L. J. 70 = 28 I. C. 710 = 42 I. A. 91 = 19 C. W. N. 449 = 2 L. W. 377 = 21 C. L. J. 419 (P.C.). An order in a suit for taking accounts of a partnership declaring the partnership as dissolved from a particular date and ordering an enquiry by the referee as to who were the partners is a decree in so far as it declares the rights of the parties. It does not cease to be so, because a part of it might have been separately made as an order. So the whole decree cannot be challenged in an appeal against the final decree, not being itself appealed against. (*Ibid.*) The decree in appeal is decree in suit, for appeal is a continuation of the suit. (1916) 1 M. W. N. 223 = 30 M. L. J. 379 = 33 I. C. 9 = 19 M. L. T. 268.

CONSENT DECREE.—'Decree' includes a compromise or a consent decree. 34 C. L. J. 96 = 66 I. C. 273 (2) = 1922 Cal. 158.

Cl. (3) : 'DECREE-HOLDER.'—[*See under Decree.*] Decree for specific performance can be executed by the defendants as well as by the plaintiff. 24 Bom. L. R. 496 = 67 I. C. 667 = 46 Bom. 990 = 1923 Bom. 26. An attaching creditor is not a decree-holder. 80 I. C. 947 = L. R. 5 A. 629 = 1925 All. 123. *Bona fide* auction-purchaser is not a party and order refusing restitution against him is not appealable. 1925 Lah. 176.

Cl. (4) : DISTRICT COURT.—Though the word "District" in the C. P. Code does include the local limits of a High Court in its Ordinary Original Civil Jurisdiction, still it is not legitimate to construe the words "District Court" wherever they appear to mean and include a High Court in its Ordinary Original Civil Jurisdiction. 45 C. L. J. 71 = 100 I. C. 331 = A. I. R. 1927 Cal. 290.

Cl. 5 : FOREIGN COURT.—Privy Council is not within the definition. 8 Bom. 571 (574). All other Courts in England are foreign Courts. 8 B. 571 ; 31 C. 274. The Ceylon Court is a foreign Court. 32 M. 469 (471).

Cl. (9) : JUDGMENT.—Necessity for containing reasons—Applicability to original side of High Court. *See* 29 Bom. L. R. 126.

(10) "judgment-debtor" means any person against whom a decree has been passed or an order capable of execution has been made ;

(11) "legal representative" means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued.

[S. 211, Expl.] (12) "mesne profits" of property means those profits which the person in wrongful possession of such property actually received or might with

Cl. (10): JUDGMENT-DEBTOR.—Definition does not include assignee. 11 M. L. T. 144 = 13 I. C. 649 = (1912) M. W. N. 176.

Cl. (11): LEGAL REPRESENTATIVE.—In this new Code, the Legislature wants to bring the definition in conformity with the law prevailing in England. 11 O. & A. L. R. 1 = 87 I. C. 892 = 28 O. C. 177 = 12 O. L. J. 37 = 1925 Oudh 330. The expression means a person who in law represents the estate of a deceased person and not necessarily the beneficial owner thereof. 42 Mad. 76 = 35 M. L. J. 632 = 49 I. C. 11. See also 79 I. C. 670 = 1925 Lah. 2 ; 1923 Oudh 330. A person in possession is a representative of the estate. 31 M. L. J. 222 = 35 I. C. 124 = (1916) 2 M. W. N. 233 ; 69 I. C. 179. See also 1924 Cal. 362 ; 9 N. L. J. 183 = 96 I. C. 963 = A. I. R. 1926 Nag. 476 ; 2 O. W. N. 407 = 89 I. C. 534 = 12 O. L. J. 512 = 1925 Oudh 515 (Muhammadan widow in possession in lieu of dower is legal representative). An intermeddler is within the definition. 1924 A. 717. The definition includes an intermeddler with even a part of the estate. 115 P. R. 1913 = 22 I. C. 242 = 39 P. L. R. 1914. See also 29 Bom. L. R. 900. But the definition is only for purpose of procedure and an intermeddler is not the representative for purposes of succession. So the decree passed in a suit in which an intermeddler is impleaded, will not bind the real heir who is not party thereto. 1924 A. 717. The surviving members of a Hindu joint family are not legal representatives. 2 Lah. 114 = 61 I. C. 628. So a decree for injunction against a Hindu father cannot be executed against his sons who had formed a joint family with him. 42 Bom. 504 = 46 I. C. 745 = 20 Bom. L. R. 660. Succeeding manager of a joint Hindu family is legal representative of previous manager. 21 L. W. 21 = 86 I. C. 178 = 1925 Mad. 456. Succeeding trustee is legal representative. 92 I. C. 520 = A. I. R. 1926 Mad 540. As to executor *de son tort*, see 30 C. W. N. 565 = 96 I. C. 605 = A. I. R. 1926 Cal. 825. Hindu reversioners can continue a suit for possession brought by a Hindu widow as her legal representatives after her death. 39 Mad. 382 = 27 I. C. 1001. In a suit for declaration of the invalidity of an adoption or alienation by a Hindu widow instituted by the presumptive reversioner, the next presumptive reversioner can continue the suit as legal representative after the former's death. 38 Mad. 406 = 42 I. A. 125 = 28 M. L. J. 535 (P. C.). In a later Madras case it has been held that he is not a 'legal representative' within the definition but can be added as a party in a representative action under O. 1, Rr. 1, 8 and 10. 9 L. W. 166 = 49 I. C. 268. A Zamindar, to whom the house and grove in possession of his tenant, escheat on the death of the latter, is not his legal representative. 23 I. C. 969 = 1 O. L. J. 86. A person who is added as a legal representative of a deceased defendant cannot and need not set

up in defence pleas which are open to him only personally. 1925 Mad. 59. See also notes under S. 50.

LIABILITY OF LEGAL REPRESENTATIVE.—Where a party is sued in a representative character, the legal representative is the person on whom the estate devolves. It is not necessary that for his character as legal representative he should be in possession of any property of the deceased. All that is necessary is that he should be a person on whom the estate would devolve. 49 A. 645 = 101 I. C. 507 = 25 A. L. J. 359 = A. I. R. 1927 All. 459.

Cl. 12. 'MESNE PROFITS'.—When a plaintiff succeeds in establishing that he was kept out of possession, he is entitled to mesne profits. 53 I. C. 124. See also 47 Mad. 800 = 1925 Mad. 140 ; also a plaintiff who has obtained a decree under S. 9 ; Specific Relief Act. A. I. R. 1927 Nag. 9 = 97 I. C. 1028 ; 24 All. 501. As to co-sharers see 94 I. C. 255 = A. I. R. 1926 Cal. 860. Parties in possession are liable for mesne profits although there may be no *mala fides* on their part. 10 W. R. 486. See also 70 I. C. 6 = 34 C. L. J. 415 ; 8 W. R. 479 ; 1 A. 518 ; 21 C. 14. A wrong-doer is liable only to the extent of the wrong he has done. 24 C. 413. As to the extent of the liability of trespasser to pay mesne profits. see 94 I. C. 118 = A. I. R. 1926 Cal. 847. The defendant is wrongful possession is liable only for the time he was actually in possession. If he was excluded from possession, he cannot be said to have been in wrongful possession. (*Ibid.*) Defendant not actually in possession is not liable for mesne profits. 38 I. C. 660 = 26 C. L. J. 140. See also 6 Pat. L. J. 166 = 61 I. C. 754 = 1921 Pat. 294 ; 39 C. L. J. 447 = 51 Cal. 853 = 1924 Cal. 1010 ; 24 C. 413 = 10 C. 785 ; 55 I. C. 48. (Defendant would be liable if he has abetted the trespass by the person in actual possession) As against a wrong doer, possession relates back to the time when the right to enter accrued. 21 I. C. 590 = 9 N. L. R. 145 (34 M. 269, foll.) As to the maintainability of claim for mesne profits between date of decree for possession conditions on payment of money and date of payment, see 1928 M. W. N. 51.

ASSESSMENT OF MESNE PROFITS.—Mesne profits are in the nature of compensation or damages. The proper measure to be awarded is to be determined by what the party in possession actually receives except in cases where it is shown that what has been actually received falls below what would have been received with due diligence. 47 M. L. J. 730. See also 25 A. 266 ; 24 C. 413 ; 11 I. C. 504 = 15 C. W. N. 825 = 15 I. C. 1 ; 19 I. C. 974 = 17 C. W. N. 984 ; 46 I. C. 624 ; 61 I. C. 425 = 1 Pat. L. J. 235. But see also 16 I. C. 126 = 9 A. L. J. 774. Where the basis was held to be what the plaintiff would have made out of the land but for the defendant's unlawful tres-

ordinary diligence have received therefrom, together with interest on such profits, but shall not include profits due to improvements made by the person in wrongful possession :

(13) "moveable property" includes growing crops ;

(14) "order" means the formal expression of any decision of a Civil Court which is not a decree ;

pass and not what the defendant has done. *See also* 30 M. L. J. 326=28 I. C. 1 ; 69 I. C. 560=1923 Nag. 64 (1)=4 C. 882. Rental value of land is the only fair basis for calculation of mesne profits. 5 Bur. L. J. 236=101 I. C. 371=A. I. R. 1927 Rang. 116. *See also* 44 C. L. J. 182=A. I. R. 1926 Cal. 1233=94 I. C. 255=A. I. R. 1926 Cal. 860. The correct principle for the assessment of mesne profits is that the letting value of the property should be determined and not what the defendant actually gained 10 I. C. 312=16 C. L. J. 93. But where the person dispossessed is himself a cultivator of the land in dispute, he is entitled to such profits as the trespasser might have obtained by actual cultivation with due diligence and not merely to what he has really obtained by subletting the land. 43 I. C. 53 ; 20 N. L. R. 112=1924 Nag. 427 ; *see also* 15 W. R. 428=47 M. L. J. 730=1925 Mad. 297 ; 99 I. C. 923=44 C. L. J. 559 ; 53 Cal. 992=31 C. W. N. 112=A. I. R. 1927 Cal. 182. The principles which would ordinarily guide a Court in determining the mesne profits are : Wrongful trespasser should not profit by it ; restoration of status before dispossession financially ; and (3) use to which decree-holder would have put land if he was himself in possession. 1 Pat. L. W. 421=39 I. C. 516=1917 Pat. 146. Assessment can be based by local inspection and crop-cutting experiments conducted by a Commissioner. 47 M. 800. Deductions should be made for cost of cultivation and seasonal fluctuations. 99 I. C. 923=44 C. L. J. 559. *See also* where lands are subject to floods, deductions ought to be made on that account. 5 Bur. L. J. 236=101 I. C. 371=A. I. R. 1927 Rang. 116.

CASH RENT AND PRODUCE RENT.—Where it is shown that a portion of the suit land had been let out at a produce rent, the Court will be justified in presuming that the entire land was so let out. 53 C. 992=31 C. W. N. 112=99 I. C. 428=A. I. R. 1927 Cal. 182. *See also* 99 I. C. 923=44 C. L. J. 559.

COMPENSATION FOR IMPROVEMENTS.—The person dispossessed is entitled to compensation for improvements effected. 26 C. W. N. 257=35 C. L. J. 121 ; 42 M. L. J. 243. He is also entitled to compensation for all sums spent by him in managing the property but not for infructuous litigation in connection with the management. 11 M. L. T. 90=22 M. L. J. 253=14 I. C. 390=(1912) M. W. N. 101. All such payments made by the defendant as the plaintiff would have been bound to make if he had been in possession towards rent, revenue or cesses should be deducted from the gross earnings. 17 B. 35 ; 21 C. 142=20 I. A. 160 ; 20 N. L. R. 112=1924 Nag. 427 ; *see also* 33 I. C. 520. But the Court should not allow the expenses of collecting the profits unless the defendant entered on the property in the exercise of a *bona fide* claim of right. 20 N. L. R.

112=1924 Nag. 427 ; 70 I. C. 6=34 C. L. J. 415 ; 16 J. C. 866 ; 22 A. 262 ; 24 A. 376. Cultivation expenses incurred by the trespasser should be deducted, but not costs of collecting rents due from persons in occupation. (1913) M. W. N. 804=18 I. C. 615=24 M. L. J. 30. *See also* 51 I. C. 747=4 Pat. L. J. 301.

INTEREST ON MESNE PROFITS.—Interest should ordinarily be allowed on mesne profits, though the interest as well as the mesne profits are in the discretion of the Court. 70 I. C. 6=34 C. L. J. 415 ; *see also* 10 C. 785 ; 27 C. 951 at 969 (P. C.) ; (1927) M. W. N. 661 ; 44 C. L. J. 182=A. I. R. 1926 Cal. 1237. A decree-holder cannot claim interest when the decree for mesne profits is silent as to interest. 53 I. C. 227=30 C. L. J. 205 (27 C. 951, *fol.*) *See also* 21 A. 425 (F. B.). The words "together with interest on such profits" do not refer to interest due after the ascertainment of the amount of mesne profits due under the decree. They contemplate that interest should form a separate item in the calculation of the amount due as mesne profits. 30 C. 506. *See also* 25 A. 275. Mesne profits include interest. Where a decree is silent as to interest on mesne profits, it must be deemed to carry interest at the Court rate of 6 per cent. and executed accordingly. 20 A. L. J. 348=44 A. 579 ; 17 I. C. 915=10 A. L. J. 533. *See also* 68 I. C. 807=27 C. 951 (P. C.) ; 33 C. 329. Interests should not be allowed for more than three years from the decree or until possession within that time. 27 C. 951 (P. C.). The Court has a discretion whether to allow interest on mesne profits after 3 years or not. 31 I. C. 387=2 L. W. 1129. Mesne profits carry interest from the date of the preliminary decree awarding the same. 46 A. 842=22 A. L. J. 768=82 I. C. 312 ; 33 C. 29. **Liability**—Joint wrong doer for mesne profits. *See* 53 Cal. 992=31 C. W. N. 112=99 I. C. 428=A. I. R. 1927 Cal. 182.

BURDEN OF PROOF.—When mesne profits are claimed, the onus of proving what profits might with diligence have been received in any year lies upon the party claiming mesne profits but the onus of proving what profits the person in wrongful possession actually received lies on the person in possession. 47 M. L. J. 730. *See also* 47 M. 800.

PRACTICE.—Mesne profits should be determined in the suit itself and not by way of execution for a fixed sum of money. 39 C. 220. Transfer to higher Court of protracted proceedings on account of the mesne profits accruing during pendency of litigation swelling up to an amount beyond the pecuniary jurisdiction of the original Court is not an interruption so as to make the subsequent proceedings in the higher Court a different suit. 58 I. C. 179=24 C. W. N. 342.

Gl. (14) : *See also* notes under sec. 2, cl. (2). As to nature of order for alimony pending suit for divorce, *see* 32 C. W. N. 179.

(15) "pleader" means any person entitled to appear and plead for another in Court, and includes an advocate, a vakil and an attorney of a High Court ;

(16) "prescribed" means prescribed by rules ;

(17) "public officer" means a person falling under any of the following descriptions, namely :—

(a) every Judge ;

(b) every member of the Indian Civil Service ;

(c) every commissioned or gazetted officer in the military or naval forces of His Majesty, including His Majesty's Indian Marine Service, while serving under the Government ;

(d) every officer of a Court of Justice whose duty it is, as such officer, to investigate or report on any matter of law or fact, or to make, authenticate or keep any document, or to take charge or dispose of any property, or to execute any judicial process, or to administer any oath, or to interpret or to preserve order, in the Court, and every person especially authorized by a Court of Justice to perform any of such duties ;

(e) every person who holds any office by virtue of which he is empowered to place or keep any person in confinement ;

(f) every officer of the Government whose duty it is, as such officer, to prevent offences, to give information of offences, to bring offenders to justice, or to protect the public health, safety or convenience ;

(g) every officer whose duty it is, as such officer, to take, receive, keep or expend any property on behalf of the Government, or to make any survey, assessment or contract on behalf of the Government, or to execute any revenue-process, or to investigate, or to report on any matter affecting the pecuniary interests of the Government, or to make, authenticate or keep any document relating to the pecuniary interests of the Government, or to prevent the infraction of any law for the protection of the pecuniary interests of the Government ; and

(h) every officer in the service or pay of the Government, or remunerated by fees or commission for the performance of any public duty ;

(18) "rules" means rules and forms contained in the First Schedule or made under section 122 or section 125 ;

(19) "share in a corporation" shall be deemed to include stock, debenture stock, debentures or bonds ; and

(20) "signed," save in the case of a judgment or decree, includes stamped.

3. [S. 2.] For the purposes of this Code, the District Court is subordinate to the High Court, and every Civil Court of a grade inferior to that of a District Court and every Court of Small Causes is subordinate to the High Court and District Court.

Subordination of Courts.

4. [S. 4.] (1) In the absence of any specific provision to the contrary, nothing in this Code shall be deemed to limit or otherwise affect any special or local law now in force or any special jurisdiction or power conferred, or any special form of procedure prescribed by or under any other law for the time being in force.

Savings.

(2) In particular and without prejudice to the generality of the proposition contained in sub-section (1), nothing in this Code shall be deemed to limit or other-

01. (17) : The following persons have been held to be public officers within S. 2 (17) :— Receiver under the Prov. Insolvency Act (22 Bom. L. R. 987=58 I. C. 411=44 B. 895) ; a British officer in Indian army (50 I. C. 683=21 Bom. L. R. 143) ; a village headman (2 Bur. L. J. 29=1923 Rang. 250) ; officers holding commissioned rank in the Indian Subordinate Medical Service (23 I. C. 985=17 O. C. 99) ; a common manager appointed under the T. P. Act (24 C. W. N. 138=70 C. L. J. 279) ; official assignee (49 Bom. 638=27 Bom. L. R. 545). The Manager of Court of Wards not a public servant (55 I. C. 515). See also 105 I. C. 729.

Sec. 3.—The list of Subordinate Courts in the

section is not exhaustive and does not exclude all other Courts from being subordinate to the High Court. 37 Bom. 114=14 Bom. L. R. 947 and Judge should follow the rulings of the High Court to which he is subject. 17 B. 555 ; 10 C. 82 ; 15 B. 419 ; 6 M. 424 ; 19 C. W. N. 841=4 P. L. J. 565 ; 29 M. L. J. 63=42 I. A. 155=37 A. 359 (P. C.). A decision of the Privy Council is binding on Courts of India though delivered in an appeal not coming from an Indian Court. 38 M. 941=25 M. L. J. 162 (P. C.).

Sec. 4.—In view of S. 4, the law applicable to soldiers is the Army Act and it overrides S. 60 of the Code. 43 B. 368=21 Bom. L. R. 137.

wise affect any remedy which a landholder or landlord may have under any law for the time being in force for the recovery of rent of agricultural land from the produce of such land.

5. [S. 4-A.] (1) Where any Revenue Courts are governed by the provisions of

Application of the Code to
Revenue Courts.

this Code in those matters of procedure upon which any special enactment applicable to them is silent, the Local Government, [* * * * *]¹ may, by

notification in the local official Gazette, declare that any portions of those provisions which are not expressly made applicable by this Code shall not apply to those Courts, or shall only apply to them with such modifications as the Local Government, [* * *]¹ may prescribe.

(2) "Revenue Court" in sub-section (1) means a Court having jurisdiction under any local law to entertain suits or other proceedings relating to the rent, revenue or profits of land used for agricultural purposes, but does not include a Civil Court having original jurisdiction under this Code to try such suits or proceedings as being suits or proceedings of a civil nature.

6. [S. 6 last para.]

Pecuniary jurisdiction.

Save in so far as is otherwise expressly provided, nothing herein contained shall operate to give any Court jurisdiction over suits the amount or value of the subject-matter of which exceeds the pecuniary limits (if any) of its ordinary jurisdiction.

7. [S. 5.]

Provincial Small Cause
Courts.

The following provisions shall not extend to Courts constituted under the Provincial Small Causes Courts Act, 1887, or to Courts exercising the jurisdiction of a Court of Small Causes under that Act, that is to say,—

(a) so much of the body of the Code as relates to—

(i) suits excepted from the cognizance of a Court of Small Causes ;

(ii) the execution of decrees in such suits ;

(iii) the execution of decrees against immoveable property ; and

(b) the following sections, that is to say,—

section 9,

sections 91 and 92,

sections 94 and 95 [so far as they authorize or relate to (i) orders for attachment of immoveable property, (ii) injunctions, (iii) the appointment of a receiver of immoveable property, or (iv) the interlocutory orders referred to in cl. (e) of section 94]² and

sections 96 to 112 and 115.

8. [S. 8.] Save as provided in sections 24, 38 to 41, 75, clauses (a), (b) and (c),

Presidency Small Cause
Courts.

76, 77 and 155 to 158, and by the Presidency Small Cause Courts Act, 1882, the provisions in the body of this Code shall not extend to any suit or proceeding in any Court of Small Causes established in the towns of Calcutta,

Madras and Bombay.

[¹ Provided that—

Sec. 5.—¹The words "with the previous sanction of the Governor-General in Council" and the words "with the sanction aforesaid" were omitted by Act XXXVIII of 1920.

Sec. 6.—A Court cannot execute a decree sent to it for execution, where the decree has been passed in a suit, the value of which exceeds the pecuniary limits of its jurisdiction. 16 C. 457 ; 17 C. 465 ; 37 C. 574 ; 12 B. 155. But see 7 M. 397 ; 17 M. 300 (*contra*). As to applicability of section to proceedings before the Calcutta Improvement Tribunal, see 31 C. W. N. 142 = 94 I. C. 170 = A. I. R. 1926 Cal. 853.

Sec. 7: POWERS OF SMALL CAUSE COURT IN EXECUTION.—See 44 I. C. 252 (can attach and sell a preliminary decree for foreclosure), 16

I. C. 816 (can attach a mortgage debt. 10 N. L. R. 17 (cannot attach a share of joint family property). 46 C. 717 = 31 C. L. J. 179 (can attach moveables before judgment). Cl. (b) : *Injunctions and interlocutory orders* refer only to the orders under S. 39 and can mean only applications for injunction and interlocutory orders on such applications. 26 I. C. 359 (Mad.).

Sec. 7.—² These words were substituted for the words "so far as they relate to injunctions and interlocutory orders" by Act I of 1926, S. 3.

Secs. 7 and 8.—Decree of Madras Small Cause Court transferred to mofussil District Munsif for execution.—District Judge can hear appeal from order in execution proceedings. 1925 Mad. 1179 = 49 M. L. J. 104.

(1) the High Courts of Judicature at Fort William, Madras and Bombay, as the case may be, may, from time to time, by notification in the local official Gazette, direct that any such provisions not inconsistent with the express provisions of the Presidency Small Cause Courts Act, 1882, and with such modifications and adaptations as may be specified in the notification, shall extend to suits or proceedings or any class of suits or proceedings in such Court.

(2) All rules heretofore made by any of the said High Courts under section 9 of the Presidency Small Cause Courts Act, 1882, shall be deemed to have been validly made].¹

PART I.

SUITS IN GENERAL.

Jurisdiction of the Courts and Res judicata.

9. [S. 11.] The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.

Sec. 8.—¹ The provisos were added to the section by Act I of 1914, S. 2.

Sec. 9. SCOPE OF THE SECTION.—S. 9 empowers Civil Courts to try only suits of a civil nature and the explanation shows that they cannot try questions as to religious rites or ceremonies, and religious honours, except when they are attached to an office as emoluments. 13 M. L. T. 340 = 19 I. C. 257. Burden of proof is on the party who seeks to oust jurisdiction of civil courts A. I. R. 1928 Lah. 121 (F. B.). The Court will not decide mere question of religious rites or ceremonies nor will it pronounce on any religious doctrine unless it is necessary to do so in determining rights to property or to office. 24 Bom. L. R. 1060 (5 B. 80, foll.); see also 30 M. 15; 11 B. 534; 32 C. 1072; 19 B. 507; 84 I. C. 759; 1925 Bom. 209.

FRANCHISE.—Question relating to *See* A. I. R. 1926 Cal. 279.

MARRIAGE.—Declaring a *pat* marriage invalid. 22 N. I. R. 134 = 9 N. L. J. 160 = A. I. R. 1926 Nag. 488.

INSOLVENCY.—Suit on debt incurred after adjudication not barred. 22 N. L. R. 118.

ELECTRICITY ACT—Suit against licensee for damages for failure to supply electrical energy. 97 I. C. 537 = A. I. R. 1926 Lah. 349.

CASTE QUESTIONS.—The power of a Civil Court to decide questions relating to caste disputes is fully considered by Chandavarkar, J., in 26 B. 174. See also 27 Bom. L. R. 1503. In the matter of caste customs over which the ecclesiastical chief has jurisdiction, the Civil Court cannot interfere. 17 M. 222. As to suits relating to caste property see 50 Bom. 124 = A. I. R. 1926 Bom. 69. Refusal to invite a member of caste on auspicious occasions does not give rise to a cause of action in a Civil Court. 17 I. C. 527 = (1912) M. W. N. 1220. See also 15 B. 599; 10 B. 661. A suit will lie to determine whether plaintiff's expulsion from caste is valid or not. 10 M. 133. See also 21 C. 463; 23 B. 122; 24 B. 13; 12 M. 495; 17 M. 222. Temporary exclusion of some members of a caste from social intercourse with other families on account of infringement of caste rules at the instance of the panchayat is not for the Civil Court. 23 I. C. 801 = 12 A. L. J. 522; see also 15 B. 599. Civil Courts may deal with a caste question where the character of a member has been unjustly injured.

28 M. L. J. 58 = 2 L. W. 446. Suits in respect of caste property not maintainable in Civil Courts. 5 B. 83. So also suits for inspection of accounts of caste property. 34 B. 467. A claim by five of the members of a caste to use the *Wadi* and the vessels is one of a civil nature. 1924 Bom. 22.

RIGHT TO OFFICE (SECULAR).—The existence of an office involves the existence of some duties to be performed by the holder of the office. 28 I. C. 459. Where the plaintiff's services as an honorary Secretary to an Association are voluntary and gratuitous, and there is no question of any contract between him and the Association, the Civil Court has no jurisdiction. 37 A. 313 = 29 I. C. 53. Though an honorary lectureship in a University is an office of consequence, yet there is no injury to the personal right of the lecturer on account of no arrangements being made by the University for the delivery of lectures. 41 C. 518 = 18 C. W. N. 830. A suit by one director against the other directors of a limited Company to restrain the latter from preventing him from acting as such, is maintainable. 51 C. 916 = 28 C. W. N. 803.

RIGHT TO OFFICE (RELIGIOUS).—Suit by a body of Brahmins that they have a right to recite vedas, etc., in a temple is maintainable. 98 I. C. 229 = A. I. R. 1927 Mad. 131. See also 54 Cal. 614. Right to the office of hereditary priest to which fees are attached is property and a suit is maintainable in respect thereof. 36 B. 94 = 13 Bom. L. R. 1171. See also 22 Bom. L. R. 1202 = 45 B. 234; 54 Cal. 614. But see 19 M. 62. Also a suit for exclusive right to officiate as a purohit to pilgrims to Rameswaram. 9 M. I. A. 348. It is not necessary that any emoluments should attach to the office. 15 C. 159 at 162. A suit lies for the enforcement of a right to officiate as priest at a certain sacred spot though no fixed fees are attached to it. 27 C. 30. See also 13 B. 429; 13 B. 548; 16 B. 281. Where claim is confined to rights in religious ceremonies as a right to recite sacred texts, the same is not cognizable. 28 M. 23; 19 M. 62. See also 32 A. 527 (right to perform Ramilla). The right to hold a certain office in a certain place at a certain season of the year confers upon the holder thereof a legal character so as to enable him to bring a suit to maintain such right. 1 Pat. L. J. 381 = 35 I. C. 345. The gains made by officiating as priest at the bath, etc., to the pilgrims at chaukis on the

Explanation.—A suit in which the right to property or to an office is contested is a suit of a civil nature, notwithstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonies.

banks of a sacred river are property in law and a suit for a share in such business is one of a civil nature. 27 O. C. 114 = 1024 Oudh 252 (43 A. 581, Ref.). A Gayawal priest can sue for declaration and possession in respect of his gaddi whether it is an office or a business. 42 I. C. 478 = 2 Pat. L. J. 705. Where there is a specific duty of being present at the performance of religious ceremonies, with emoluments attached to it, it must be regarded as an office, in respect of which suit will lie in a civil court. A. I. R. 1928 Mad. 377.

SUITS TO RECOVER FEES AND EMOLUMENTS ATTACHED TO OFFICES.—The payments made to a *vatandar* barber for officiating at some ceremonies are not gratuitous but are customary fees and therefore can be recovered from another barber who, without any right, performs them. 22 Bom. L. R. 410 = 44 B. 733. Where however a donor makes a gift personally to the defendant Maha Brahmin on a day which belonged to the turn of the plaintiff, the plaintiff could not recover the same, as it was made to the defendant in his individual capacity. 35 A. 412. See also 26 C. 356.

SUITS FOR A SHARE IN OFFERINGS.—Right to share in temple offerings is a civil right. 45 A. 437 = 1923 A. 426; 17 C. 906; 27 C. 30; 13 B. 548. A suit for definite amount due to a plaintiff as a co-sharer of the voluntary offerings in a temple realised by the defendant is maintainable in the civil court. 26 P. R. 1919 = 51 I. C. 236 (26 C. 356, *dist.*) 17 M. L. J. 493.

RIGHT TO RELIGIOUS HONOUR.—A right to religious honour is not cognizable, unless it is an emolument attached to an office. 45 I. C. 959 = 7 L. W. 614; 12 L. W. 480 = 53 I. C. 483; 10 I. C. 110 = (1911) 1 M. W. N. 353; 16 I. C. 338 = 14 Bom. L. R. 543. See also 32 M. 291. A suit does not lie for a mere honour or dignity unconnected with fees, profits or emoluments. 2 B. 476; 51 I. C. 905; 7 M. 91; 10 B. 233; 19 M. 62; 41 M. L. J. 287. Suit for declaration and injunction in respect of a right to be carried in a palanquin on certain days through public streets is not maintainable. 45 B. 590. See also 3 M. I. A. 198. Courts will not decide disputes as to precedence or privileges between purely religious functionaries. 45 B. 590. See also 7 M. 91; 10 B. 233; 32 B. 278. But see 32 M. 291.

SUITS IN RESPECT OF TEMPLE PROPERTY.—Hindu idols being property, the right to deal with them is cognizable in a Civil Court. 4 M. 315. See also 3 C. 390. Removal or alteration of *namams* or sacred marks in a temple amounts to an interference with property and will afford a ground of action in a Civil Court. 30 M. 158 = 17 M. L. J. 1. A suit between two Buddhist priests to recover possession of certain lands and religious manuscripts is one of a civil nature. 8 Bur. L. T. 62 = 27 I. C. 112. A worshipper who is not prevented from worshipping an idol cannot sue its custodians to locate it in a particular temple instead of another. 32 C. 1072.

RIGHT TO WORSHIP, ETC.—A suit to establish the right to worship in a temple according to the worshipper's belief is a suit of a civil nature. 44

B. 410. See also 76 I. C. 629. A right to worship in a particular manner and with particular incidents attached to it is a civil right. The right of a person to exclusively conduct a *mandahapadi* on the first day of a festival, paying all the expenses himself and receiving all honours and emoluments of that right, is a civil right. 31 M. L. J. 758 = 4 L. W. 562. See also 35 I. C. 88 = 3 L. W. 512. A suit to establish a person's right to enter a religious place is entertainable. 21 C. 463. Also a suit to restrain the defendant from entering a place of worship. 7 B. 323; 23 B. 122; 13 M. 293.

SUITS AGAINST MUNICIPALITIES.—A suit lies for a declaration that plaintiff has a right to vote and to stand as a candidate at a Municipal election. 24 C. 107. See also 24 C. W. N. 969 = 48 C. 378. As to power of Criminal Court to question action taken by Municipality, see 93 I. C. 827 = A. I. R. 1926 Lah. 461. A Municipality has direction to issue such orders as it thinks proper with reference to a proposed building. Civil Courts cannot interfere with that discretion unless it is exercised in a capricious, wanton and oppressive manner. 12 Bom. 490. Where powers are given to a public body of acquiring property for purposes of an Act, misuse of the powers by attempting to acquire land merely for the purposes of exacting exemption fee from the owners is actionable in a Civil Court. 47 C. 500 = 47 I. A. 45 = 38 M. L. J. 511 (P. C.). [Affirming 44 C. L. J. 219.] The Civil Court has jurisdiction to entertain a suit for declaration that the owner of certain land sought to be acquired by the corporation is entitled to compensation. 44 C. 87 = 43 I. A. 243 = 32 M. L. J. 631 (P. C.). Refusal of licence by Municipality is not justified and a Civil Court can interfere. 20 Cr. L. J. 705 = 17 A. L. J. 976 = 52 I. C. 785. As to jurisdiction of Civil Court to decide questions of franchise, see 52 Cal. 943.

OTHER RIGHTS OF A CIVIL NATURE—Right to go in procession in a public street is a civil right. 29 M. L. J. 91 = 29 I. C. 248; 44 B. 410 = 22 Bom. L. R. 307. See also 24 C. 524 = 18 B. 693. A Mahomedan's right to slaughter cattle is a Common Law right. 17 O. C. 354 = 25 I. C. 908. So also a suit to establish a claim to perform *urus* ceremony and to manage the offerings thereat. 50 Bom. 148 = 28 Bom. I. L. R. 60 = A. I. R. 1926 Bom. 161. A suit to declare the election of a candidate as void being contrary to law, is one of a civil nature. 39 A. 308. See also 52 Cal. 943. Suit to set aside award is maintainable. 3 Lah. 296. A suit for recovery of carcases of dead animals by Mahars is not maintainable in a Civil Court. 24 Bom. L. R. 917 = 47 B. 95. See also 15 I. C. 108.

JURISDICTION OF CIVIL COURTS IN GENERAL.—Every presumption should be made in favour of the jurisdiction of a Civil Court, which can be taken away only by express words or by necessary implication. 17 C. W. N. 408 = 17 C. L. J. 239; 33 M. 208. The jurisdiction of Courts depends upon the allegations made in the plaint and not upon those which may be ultimately found to be true. 1922 Nag. 10 = 18 N. L. R. 121.

10. [S. 12.] No Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim litigating under the same title where

Courts have power in any matter of spiritual and temporal character to enquire into the laws or rules of the tribunal or authority which has inflicted the alleged injury. 39 M. 1056=30 M.L.J. 423. A Court will interfere in a case of dismissal of an officer of a Trust Corporation, where the relationship between the officer and the corporation is one of trust and *cestui que trust* but will not, where the relationship is a contractual one. 41 C. 19=17 C. W. N. 1045. The question of propriety of any fine inflicted by the Dharmakartha on an inferior spiritual dignitary is within the competence of the Civil Court. 21 M. L. J. 730. The Civil Court can question the appointment of a trustee by the Dewasthanam Committee if it is not made reasonably and in good faith. 42 M. 668.

'EXPRESSLY OR IMPLIEDLY BARRED.'—The jurisdiction of Civil Courts is expressly barred when there is some enactments or rule of law precluding a Civil Court from taking cognizance of a suit. 14 C. 644. As to suits expressly barred by statutes, see 26 A. 594; 42 M. 647=37 M.L.J. 23 (custody of minor under the G. and W. Act). 30 M. 126 (suit for land as emolument of office under the Hereditary Village Officers Act, 1895) and other cases dealt with by special enactments. See also 43 B. 211=21 Bom. L. R. 27 (suit to recover the value of silver confiscated by the order of Collector under the Sea Customs Act). In this case, however, it was held that if there had been no legal adjudication of the matter by the Collector of Customs in accordance with the provisions of the Sea Customs Act, the jurisdiction of the Civil Court to take cognizance of the suit was not ousted. (*Ibid.*). Where the duty of deciding disputes between subjects and the Crown is cast upon a special tribunal by the legislature, the Civil Courts have no jurisdiction if the tribunal comes to a conclusion after due enquiry. But if the conclusion is arrived at without any sort of enquiry and without an opportunity being given to the parties to be heard the jurisdiction of the ordinary Civil Courts is not taken away. 43 B. 221. The jurisdiction of the Civil Courts is not barred by S. 287 of the Madras City Municipal Act at the Standing Committee of the Madras Corporation cannot be treated as a special tribunal constituted to decide claims between the house owners and the Corporation. 38 M. 41=23 M. L. J. 531. Cognizance may also be impliedly barred by general principles of law such as suits relating to acts of State and public policy.

SUITS RELATING TO ACTS OF STATE BARRED.—A suit for damages against Governments for acts done in the exercise of sovereign powers does not lie in a Civil Court. 1 C. 11. But where the act complained of is professedly done under the sanction of Municipal law, and in the exercise of powers conferred by that law, the fact that it is done by the sovereign power does not oust the jurisdiction of Civil Court. 4 M. 324; 5 M. 273. Publication in the Government Gazette, respecting the conduct of a public servant is an

act of State in respect of which no action for libel lies. 27 B. 189. A resumption of an inam by Government is an act of State. 28 I. C. 934. But see 6 M. 361. Resumption by Government of certain functions entrusted to non-feudatory Zamindars in Central Provinces is an act of State and consequently no action lies in a Civil Court. 39 C. 615=16 C. W. N. 362=39 I. A. 31 (P. C.). Appointment to the office of Ghatwal or Digwar is a matter for Government and Civil Courts have no jurisdiction in respect of the office. 23 I. C. 849=18 C. W. N. 1036.

SUITS BARRED ON GROUNDS OF PUBLIC POLICY.—Suit against a witness for defamatory statements, contained in the evidence given by him. 30 M. 222; 17 B. 172; 15 C. 264. See also 10 M. 87; 11 M. 477. Suit by a witness to recover money agreed to be paid to him in consideration of his giving evidence. 4 M. H. C. R. 7. Suits for damages against a judicial officer for acts done in good faith in the discharge of his judicial functions. 2 M. H. C. R. 396; 12 A. 115. (But when he acts illegally, without due care and attention, and beyond the limits of his jurisdiction, an action lies. 9 C. 341; 6 M. H. C. R. 423). Suits on agreements void on grounds of public policy, e.g., suit for rent of lodgings knowingly let to a prostitute. 18 W. R. 445. Suit to enforce an agreement to suppress a criminal prosecution. 8 C. 24.

Sec. 10; SCOPE OF THE SECTION.—S. 10 does not bar the institution of a suit but only the trial of it under certain circumstances. A Court cannot dismiss a suit under the section but only postpone its trial. 77 I. C. 157=27 M. L. J. 405=11 A. 148 at 154 (F. B.). There is no necessity for stay where is no possibility of conflict of decrees. 106 I. C. 661. See also on this section 1925 Pat. 201; 23 A. L. J. 529=1925 All. 615. Nor does the section dispense with the institution of a suit within the proper time when the law expressly requires such institution. 22 B. 640; 77 I. C. 157; 1925 Pat. 201. Notwithstanding stay of suit, interlocutory orders such as orders for receiver, for an injunction or for attachment before judgment could be passed. 46 B. 431=1922 Bom. 276. Under S. 10 a Court has no jurisdiction to decide the question of *res judicata*. It can only stay the new suit if it finds sufficient reasons. 27 I. C. 917=42 C. 926. See also 47 All. 904=A.I.R. 1925 All. 615; A.I.R. 1926 Pat. 171. Failure of court to apply section and stay suit—Effect of. 7 Lah. L. T. 4.

OBJECT OF THE SECTION.—The object of S. 10 is to prevent courts of concurrent jurisdiction from trying two parallel suits in respect of same matter in issue. 36 I. C. 641=24 C. L. J. 514. See also 75 I. C. 231; 48 M. L. J. 251; 23 A. L. J. 585; 1925 All. 677. Object is to avoid conflict of decisions. 29 Bom. L.R. 382=A. I. R. 1927 Bom. 245.

OPERATION OF THE SECTION.—An appeal is a continuation of the suit for the purposes of the section. 82 I. C. 539=36 I. C. 641=24 C. L. J. 514; 30 I. C. 753=(1915) M.W.N. 844. Pen-

such suit is pending in the same or any other Court in British India having jurisdiction to grant the relief claimed, or in any Court beyond the limits of British India established or continued by the Governor-General in Council and having like jurisdiction, or before His Majesty in Council.

Explanation.—The pendency of a suit in a foreign Court does not preclude the Courts in British India from trying a suit founded on the same cause of action.

11. [S. 13.] No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between

Res judicata.

pendency of an appeal before Privy Council is a bar to the trial of a subsequent suit where the same issue is raised, though the relief claimed is different. 23 O.C. 214=58 I.C. 629. The pendency of an application for leave to appeal to the Privy Council is no bar. 21 M. 18. A proceeding under S. 47 is not a suit within the meaning of the section 22 M. 256.

SUIT IN NATIVE STATE.—High Court can order party before it not to proceed with suit in Native State. See 29 Bom. L.R. 138=100 I.C. 951=A.I.R. 1927 Bom. 135 following 21 Bom. L.R. 963 and referring to 21 Bom. L.R. 955.

CONDITIONS FOR OPERATION OF THE SECTION.—There must be substantial identity between the matters in dispute and parties in the earlier and later suits. 44 B. 283=53 I.C. 518; 9 I.C. 929=13 Bom. L.R. 109; 48 M.L.J. 251. 'Matter in issue' has reference to the entire subject-matter in controversy and every matter in dispute should be in issue in both the suits. 82 I.C. 539; 36 I.C. 641=24 C.L.J. 514; 4. Pat. L.J. 557; 48 M.L.J. 251; 103 I.C. 274=26 L. W. 241; 8 Lah. L.J. 76=26 Punj. L.R. 185=A.I.R. 1926 Lah. 304; 47. All. 915=A. I. R. 1925 All. 677. It is not sufficient that there are some issues common to the two suits. 29 Bom. L. R. 382=102 I.C. 229=A. I. R. 1927 Bom. 245. 15 L.W. 646=1922 Mad. 304.

SAME PARTIES, ETC.—See 15 L.W. 667=68 I.C. 167; 31 I.C. 25. See also notes under S. 11.

LITIGATING UNDER THE SAME TITLE.—See also notes under S. 11.

POWERS OF THE HIGH COURT.—The High Court on its Original Side can order a party to a suit before it not to proceed with a suit instituted by him in a mufassal court in such a way as to delay or embarrass the trial of the suit in the High Court. 44 B. 283=21 Bom. L.R. 963.

BURDEN OF PROOF.—The onus is on the deft. to show that the case comes under S. 10. 39 I.C. 908=3 Pat. L.W. 327.

EFFECT OF CONTRAVENTION OF SECTION.—A decree passed in contravention of S. 10 is not a nullity and cannot be disregarded in execution proceedings. 22 P.R. 1919=46 I.C. 419.

REVISION.—An order under S. 10 is not a decision of a case within S. 115 and not liable to revision. 67 I.C. 870=4 Lah. L.J. 425=1922 Lah. 54.

Sec. 11: APPLICATION OF SECTION.—Not exhaustive of the law of *res judicata*. 16 M. 141; 24 M.L.J. 469; 48 C. 499=40 M. L. J. 423 (P.C.); 26 M. 760; 39 C.L.J. 40=79 I.C. 520=1924 Cal. 600. 94 I.C. 423=A.I.R. 1926 Sind. 236; 27 Punj. L. R. 504=A.I.R. 1926 Lah. 603=8 Lah. 15. But the general principles cannot be extended to cases which are within S. 11. 9 I.C. 910=A.I.R. 1926 Lah. 670. Foundation

of rule is there should be an end to litigation as to any issue which has been determined between the parties by a court of competent jurisdiction. 1 Pat. 174. See also 13 Bom. L.R. 717=36 B. 283. *Res judicata* differs from estoppel. One ousts the jurisdiction of the Court; while the other shuts the mouth of a party. 36 B. 283=12 I.C. 535. Does not cover all cases of *estoppel by judgment*. 36 M. 141=24 M.L.J. 469. 40 A. 593 (P.C.). Allowing a decree to become barred will bar a suit again on the same cause of action. 33 C. 679; 41 M. 641=34 M.L.J. 167=44 I.C. 110. (23 M. 629 dis. 25 M. 300 ref.); 99 I.C. 478=A.I.R. 1927 Oudh 60. Dismissal of suit, if contention not established, bars a subsequent suit on the same contention in another form. 37 B. 224=19 I.C. 558. Where causes of action are distinct as many actions as there are causes of action can be brought. 27 C. 142. A decree in an administration suit does not bar a suit for distribution of the shares declared by the decree. 64 I.C. 813. Dismissal of a prior suit for declaration of title by adverse possession no bar to a subsequent suit provided '12 year' adverse possession after the date of prior suit is proved. 33 A. 463=9 I.C. 572; 27 Punj. L. R. 617=97 I.C. 172=A.I.R. 1926 Lah. 668. Two separate suit can be brought on two successive mortgages on the same property by the same debtor in favour of the same creditor. 60 I. C. 809=25 C.W.N. 129; 98 I.C. 695=A.I.R. 1927 Nag. 83. The dismissal of a suit by reversioner for declaration that he was the next reversioner is no bar to a subsequent suit for possession of the property. 70 I.C. 685=20 A.L.J. 672. Dismissal of suit for partition under a *compromise* not carried out does not bar a *second suit for partition*. 37 A. 155=27 I.C. 694; 36 M. 46; 35 M. 75; 20 C.L.J. 583. So also where the first decree, declaring the right of parties to partition, has not been given effect to. 37 B. 307=17 I.C. 955; 56 I.C. 610; 31 I.C. 200. But see 40 I.C. 820=(1917) M.W.N. 327. Rule has no application to a case where a suit is withdrawn with *liberty for another suit*. 11 I.C. 831. Where there are two *inconsistent decisions*, later decision operates as *res judicata*. 44 A. 319; 65 I.C. 877; 37 A. 531=30 I.C. 775; 31 M.L.J. 219; 46 A. 220. Where there are two decrees operating as *res judicata*, the earlier decree must prevail. 49 A. 606=25 A.L.J. 387=108 I.C. 501=A.I.R. 1927 A. 717. The plea of *res judicata* is available not only as regards *final conclusions*, but also regarding the *findings* necessary for arriving at conclusions. 39 M. 1202=27 M.L.J. 529; 39 C.L.J. 40=79 I.C. 520. The plea of *res judicata* may be waived by the party. 36 I.C. 289=31 M.L.J. 219.

parties under whom they or any of them claim, litigating under the same title, in a

VOID DECREES OR DECREES OBTAINED BY FRAUD.—A void decree cannot operate as *res judicata*. 7 B. 408. A decree obtained by fraud or collusion, if nullity. 26 A. 272; 24 A. 242. So also a judgment of a Court and competent to decide it is a nullity. 28 M. 42.

ERRONEOUS DECISIONS.—A *wrong decision* operates as *res judicata*. 60 I.C. 404; (1918) M. W.N. 580=49 I.C. 369. As to wrong decision on question of law see 7 L.R. 21 (Rev.). As to wrong decision on mixed questions of law and fact see A.I.R. 1926 Oudh 417. An erroneous decision on the question of the construction of a deed of transfer operates as a bar. 29 B. 339 at 347 (P.C.); 10 C. 697; 41 C. 778=2 Pat. L.W. 146; 31 M.L.J. 97. Whether distinction can be made between decisions on abstract questions of law and concrete questions such as construction of a particular document, see 45 B. 1260=64 I.C. 162 in which 18 B. 525 is considered. Apparently no distinction can be made. 2 Pat. 771=74 I.C. 781.

CHANGE IN LAW WHETHER AFFECTS *res judicata*.—A change in the law or a different interpretation of it by the appellate Court cannot operate to re-open matters which had previously become *res judicata*. 21 M. 18. See also 26 M. 104. Similarly what is not *res judicata*, at the time a suit is filed cannot have that effect by the change in the law. 85 I.C. 574=A. I. R. 1925 Mad. 1107.

DECISION ON QUESTIONS OF LAW.—An *erroneous decision on a point of law* may be *res judicata*. 24 A. 138; 29 M. 225; 28 C. 318; 19 I.C. 244; 21 I.C. 979=19 C.L.J. 34; 15 I.C. 911=15 C. L. J. 684; 45 I. C. 252; 39 C. 848. 9 N.L.J. 183=96 I.C. 963=A.I.R. 1926 Nag. 476; 45 Bom. 1260; 28 Bom.L.R. 876=A.I.R. 1926 Bom. 481; 99 I. C. 528=A. I. R. 1927 All 206. But see 5 O.W.N. 50. An issue of law may be *res judicata* if the cause of action in the subsequent suit is the same as in the former suit. 9 I.C. 568=13 C.L.J. 119; 37 M.L.J. 554=54 I.C. 202; 10 C. 1087; 15 A. 327; 26 M. 104; 31 B. 128; 28 M. 517. Where a decision lays down what the law is and is found to be erroneous, it cannot have force of *res judicata* in a subsequent proceeding to recover a different relief. 39 C. 848; 37 I. C. 857=32 M. L. J. 63; 32 C. 749; 22 B. 669. The decision on a question of law in one proceeding does not bar later proceeding except that the right established in favour of one party in the former proceeding cannot be questioned in a subsequent proceeding. 40 M. 989=31 M.L.J. 513; see also 30 M. 461; 32 C. 729. Where in a prior suit for rent, the defendants did not contend that the suit must be dismissed as the plaintiff had failed to comply with S. 194 of Agra Tenancy Act, they are not debarred from raising the plea in the subsequent suit. 25 A.L.J. 582=103 I.C. 379=A.I.R. 1927 A. 505=49 A. 918. The existence of a custom is a question of fact and an erroneous decision on the point operates as *res judicata* even though the subsequent suit relates to different properties. 47 I.C. 373. See also 94 I.C. 463=A.I.R. 1926 A. 420. But see 22 I.C. 138. An issue of mixed law and fact stands on the same footing as an issue of fact for purposes of *res judicata*.

28 C. 318; 87 I.C. 811=1926 Cal. 80; 29 M. 225; 92 I.C. 769=A.I.R. 1926 Lah. 251. The rule that estoppel by *res judicata* does not apply to a question of law has no force in the case of *coram non judice* decrees. 35 M. 75=21 M.L.J. 709.

DECREES IN REDEMPTION SUITS—CONFLICT OF RULINGS.—Whether the decree be in a suit for foreclosure or in a suit for sale or in a suit for redemption, there is in each case a conditional decree for redemption in favour of the mortgagor and a subsequent suit for redemption is barred. 39 M. 896=30 M.L.J. 13. (25 M. 300; 31 M. 354 fol.); 49 M. 691=96 I.C. 607=A.I.R. 1926 Mad. 816=50 M.L.J. 612. But see 39 B. 41=27 I.C. 249; 86 I.C. 527=1925 Mad. 1191. Where after a preliminary decree for redemption mortgagor fails to redeem, he cannot bring a second suit to redeem. 46 B. 348=64 I.C. 1004. But it was held in later cases that the right of redemption could not be extinguished by the preliminary decree and could only be extinguished by a final decree. 75 I.C. 919=1923 Lah. 680. The right to redeem is not lost unless an order absolute is obtained under S. 93, T.P. Act (O. 34, R. 8), and a fresh suit for redemption is not barred by the preliminary decree for redemption. 18 I.C. 326 (All.); 24 A. 44. But see 48 I.C. 922; 19 I.C. 393=6 S.L.R. 140; 85 I.C. 480=1925 All. 484; 25 M. 300; 18 C. 139; 28 C. 73; 7 B. 467; 13 B. 567; 16 B. 243; 23 B. 592. Where decree provided payment of the mortgage money in instalments, in default mortgagee to remain in possession and also reserved the right to redeem, a subsequent suit to redeem not barred. 45 B. 1335=63 I.C. 902. See also 23 A.L.J. 888=1926 All. 20. A decree nisi is not *res judicata*. 10 I.C. 748=13 Bom. L.R. 162. Ordinarily a redemption suit by a mortgagor is not barred by *res judicata* by a previous suit by a second mortgagee to redeem the first. 36 I. C. 551=4 L.W. 184.

APPLICATION OF THE PRINCIPLE TO EXECUTION PROCEEDINGS.—The principle of *res judicata* applies to proceedings in execution of a decree. 31 C. 22; 24 A. 138; 2 Pat. 772=74 I.C. 781; 11 I.A. 181; 47 C. 446=30 C.L.J. 496. 92 I.C. 254=A.I.R. 1925 Lah. 640; A.I.R. 1926 Nag. 476; 102 I.C. 94=A.I.R. 1926 Oudh 216; 100 I.C. 23=9 Lah. L.J. 173; 99 I.C. 1006=A.I.R. 1927 Lah. 179. It is not every order passed in execution, but only certain descriptions of orders, that have operation as *res judicata*. 17 C. 57. Although the general principle of *res judicata* is applicable to execution proceedings, the special rules laid down in explanations to S. 11 ought not to be applied to execution cases. 3 Pat. L.T. 403=67 I.C. 656=1922 P. 289; 37 A. 589; 24 M. 681; 70 I.C. 530=1923 Rang. 119 (2). A decision in one stage of an application is not *res judicata* in another stage of the same application. 38 I.C. 627=40 M. 1016. As to the extent to which the rule applies to successive applications in execution, see 45 A. 735; 95 I.C. 31; 3 O.W.N. 241=A.I.R. 1926 Oudh 291 and cases referred to therein; A.I.R. 1926 Pat. 478; A.I.R. 1926 Nag. 164; 43 All. 245=A. I. R. 1926 All. 220; 48 All. 201=24 A.L.J. 91=A.I.R. 1926 All. 71; A.I.R. 1926 Mad. 177; 7 Pat. L.T. 353=A.I.R. 1924 P.

Court competent to try such subsequent suit or the suit in which such issue has been

628; (1926) M.W.N. 33=A.I.R. 1926 Mad. 177; A.I.R. 1926 Nag. 164. An order *ultra vires* does not operate as *res judicata*. 4 P. 440=1925 P. 807. A decision in a previous application to execute a *maintenance decree* to the effect that the application is barred is no bar to a subsequent application to recover maintenance for a different period. 18 M. 482; 30 M. 504; 46 Bom. 467=1922 Bom. 238 (limitation), 34 A. 518=16 L.C. 677 (where the order was made *ex parte*). But see 6 B. 54; 9 C. 65. When the decision on the prior application was one on a question of procedure as it then stood, it does not operate as *res judicata* when that procedure itself is changed by the statute law. 39 M. 923=30 M.L.J. 460. The decision as to whether the execution of a decree is time barred or not, though erroneous, will operate as *res judicata* in a subsequent application for execution. 24 A. 282; 24 M. 669. See also 40 M.L.J. 556=13 L.W. 529; 2 P. 771; 46 Bom. 467. A.I.R. 1927 Oudh 216; 1 Luck. 171. But it has been held that an order that a particular application for the recovery of mesne profits awarded by a decree is not barred by the 12 years' rule under S. 48, C.P.C. is no bar to a plea by the judgment-debtor that a subsequent application for the same purpose is barred by that rule. A.I.R. 1927 Mad. 842=103 I.C. 311=53 M.L.J. 440. Where a plea of limitation was raised by the judgment-debtor in a previous stage of an execution application, but was rejected, the same plea could not be raised again in a subsequent stage of the execution proceedings. 48 I.A. 45=40 M.L.J. 197. The judgment-debtor would be precluded from raising the contention, though the decision is arrived at *ex parte*, after notice to the judgment-debtor. 66 I.C. 751; 26 L.W. 481=A.I.R. 1927 Mad. 813; 45 B. 453=59 I.C. 747; 44 B. 227=55 I.C. 329; 98 I.C. 702=A.I.R. 1927 Mad. 149. Even in an application for transfer of a decree, it is open to the judgment-debtor to plead limitation and he ought to do so. 47 M. 641=47 M.L.J. 4. See also 92 I.C. 47=A.I.R. 1926 Nag. 200; 1 Luck. 171; (1928) M.W.N. 152. An order in execution to the effect that the decree is not executable is *res judicata* in subsequent execution proceedings. 4 Pat. L.J. 330=47 I.C. 154. An objection that a decree could not be executed, not raised at the first execution application, could not be raised in a subsequent stage. 44 A. 350; 4 Pat. L. J. 213; 80 I.C. 905. See also 31 C. 22; 99 I.C. 870. The fact that the subsequent application for execution relates to different items of property does not take the case out of the rule. 45 M. L. J. 71=72 I. C. 397 (2). But an omission to raise the objection to a wrong claim in execution, is not *res judicata* in a later execution application, as the principle of implied or constructive *res judicata* is not applicable to execution proceedings. 44 A. 159=65 I. C. 377=27 I. C. 950=13 A. L. J. 162. Finding as to the nature of property in an application to set aside execution sale is not binding on auction-purchaser at a subsequent sale. 105 I. C. 153. The principle of constructive *res judicata* should not be applied to execution proceedings unless the decision of the question subsequently sought to be agitated was given

expressly or by necessary implication or must be deemed to have been implied in the previous decision. 40 M. 780=38 I.C. 806. Sec. 11, *Expl. IV* does not extend to execution proceedings. An issue not raised in a claim proceeding can be subsequently raised in an application under O. 21, R. 50 (2). 44 A. 130. See also 90 I. C. 276; 1925 P. 588. Omission to appear and settle terms does not bar a plea that property was not liable to attachment in execution. 46 M. 768=45 M.L. J. 346. A plea that an application for setting aside an execution sale is barred cannot be set up by the auction-purchaser at a late stage of the proceeding. 48 B. 638. Where an objection petition in an execution proceeding is dismissed for non-prosecution, there is no adjudication on the merits and it cannot be *res judicata*. 67 I.C. 663=1923 Cal. 287. An order passed by the Court *ex parte* after notice duly served, binds the defendant on general principle of *res judicata* as much as a contested order. 37 M. 462=26 M. L. J. 189; 26 M. L. J. 83.

APPLICATION OF PRINCIPLE TO OTHER MISCELLANEOUS PROCEEDINGS.—Dismissal of an application to set aside an *ex-parte* decree (not a suit within the meaning of the section) on the ground of non-service of summons would bar a subsequent suit to set aside the decree on the same ground. 1 Rang. 500=76 I. C. 794. Where an application to amend a decree has once been refused on the merits, the decision is conclusive between the parties and no further applications would lie. 27 I. C. 320; 39 C. 265. See also 107 I.C. 390=A.I.R. 1928 Lah. 244. It has however been held that a suit lies. 40 C. 541=18 I. C. 444. Where an application under S. 151, C. P. Code, to set aside a compromise decree was summarily dismissed on the ground that such relief could not be given under S. 151, a suit for setting aside the decree on the ground of fraud is not barred. 5 P. 276=94 I. C. 765=A.I.R. 1926 Pat. 239. A question at issue between the parties once heard and finally decided, binds the parties at subsequent stages of the same suit, under general principles of law, though not under S. 11. 48 C. 499=40 M. L. J. 423=24 I.C. 343; 94 I.C. 313=A. I. R. 1926 Oudh 420. Failure to raise the plea of non-transferability by the mortgagors in the suit before the passing of the decree does not prevent him from raising it in execution. 48 A. 385=95 I. C. 1048=24 A. L. J. 489=A. I. R. 1926 All. 432. The validity of an order made at one stage of a litigation unless forthwith challenged by an appropriate proceeding in a superior tribunal is conclusive between the parties and cannot be questioned or collaterally attacked at a later stage. 70 I. C. 6=34 C. L. J. 415; 42 I. C. 392; 39 C. L. J. 251=81 I. C. 527. Where an application under S. 22 of the Insolvency Act is dismissed on the merits, the same issue cannot be once again raised in the ordinary Civil Courts. 39 A. 626=43 I. C. 573; 41 A. 378=49 I.C. 590. The decision on a question of title, in proceedings under the Land Acquisition Act, to apportion the compensation payable, does not operate as *res judicata*, 20 M. 269. See also 12 C. 484 (P. C.); 34 C. 466; 45 M. 320=43 M. L. J. 78. An order in a claim case on the validity of a wakf is not *res judicata* in a suit between the same parties,

subsequently raised, and has been heard and finally decided by such Court.

in which the property in dispute is not the same as that in the claim case though both were included in the waqf. 44 C. 698=37 I. C. 887. A decision in a previous proceeding for letters of administration, negating the claim of A as heir of the deceased, arrived at after hearing full evidence, bars a subsequent suit by A for declaration that she is the heir of the deceased. 1 Rang. 258=1923 R. 257. An order passed after contest in a probate proceeding is *res judicata* in any subsequent proceeding of any sort against the caveators who contested it as also those who had an opportunity of putting forward their objection. 46 M. L. J. 383=79 I. C. 44. But an order passed on compromise in such proceeding cannot operate as a bar to an application for probate of the same will. 51 C. 745=1924 Cal. 864.

"FORMER SUIT."—The expression denotes a previously decided suit under Expl. I, and the same rule applies to appeals. 37 C. L. J. 184=74 I. C. 591; 12 A. 678; 32 A. 67. Where there were two suits in the primary Court, decided by a common judgment but concluded by separate decrees and an appeal is preferred only in the first suit, while none is preferred from the decree in the second suit, the decree made in the latter becomes final and operates as *res judicata* so as to bar the appeal. 37 C. L. J. 184=74 I. C. 591; 1924 P. 823; 74 I. C. 583=1 L. L. J. 473. So also in two cross suits for damages involving the same issue and ending in two separate judgments, decreeing the one and dismissing the other. 34 C. L. J. 281=64 I. C. 574; 74 I. C. 583=3 Lah. L. J. 473; 35 A. 187; 19 I. C. 76; 11 A. L. J. 214 (where one appeal abates by reason of the death of the appellant); 2 Rang. 623=1925 Rang. 104 (where appeal from one decree dismissed). But if there is nothing prejudicial to the appellant in the decree from which no appeal has been brought, which is not raised and cannot be set right if the appeal which he has brought succeeds the right of appeal is not barred by *res judicata*. 45 A. 506=74 I. C. 411 (F.B.); 87 I. C. 804=1925 All. 488.

"MATTER DIRECTLY AND SUBSTANTIALLY IN ISSUE."—The word "directly" seems to be used in contradistinction to the words "incidentally" and "collaterally". The words "substantially" means "in effect though not in express terms". 25 C. 136. A decision on a point not substantially in issue in a suit cannot operate as *res judicata*. 17 I. C. 860. See also A. I. R. 1926 P. C. 63=30 C. W. N. 673; 96 I. C. 625; A. I. R. 1925 P. C. 184=50 M. L. J. 135 (P.C.); 7 Pat. L. T. 150=A. I. R. 1926 Pat. 87; 48 All. 17=A. I. R. 1926 All. 20; A. I. R. 1926 Cal. 1228; *Ibid.* 513; 29 Bom. L. R. 215=A. I. R. 1927 Bom. 145. (Case-law reviewed). Under Expl. III the matter must have been alleged by one party and either denied or admitted by the other. 6 A. 358. It does not matter whether the cause of action is the same or different provided the matter directly and substantially in issue, has been directly in issue in a former suit between the same parties. 2 Pat. 772=74 I. C. 781. In order to see what was in issue in a suit, or what has been heard or decided, the pleadings, and the judgment must be looked at and not merely the

decree. 37 I. C. 674=14 A. L. J. 1171; 12 I. C. 9=14 C. L. J. 220; 15 I. C. 981=1919 Pat. 393; 21 A. 251; 16 C. 173=15 I. A. 93; 24 I. A. 33; 29 M. 42; 33 C. 116=32 I. A. 224. If a question was directly and substantially in issue in the previous case it will operate as *res judicata* though decided on other grounds as well. 41 I. C. 479. For a matter to be in issue under S. 11, it is not necessary that an express issue should be framed on it, but it is sufficient if a decision about it is necessary for the decree. 9 L. W. 84=52 I. C. 258; 53 Cal. 837=A. I. R. 1927 Cal. 106. The decision in a previous case on an issue which did not arise at all, cannot operate as *res judicata* in any subsequent suit. 43 I. C. 754. As to when a decision on an irrelevant issue can operate as *res judicata*. 102 I. C. 28 (2); 25 L. W. 797=103 I. C. 90 (2)=A. I. R. 1927 Mad. 643. It is the matter in issue and not the subject-matter of the suit that forms the essential test of *res judicata*. 13 B. 25; 1925 Oudh 444; 89 I. C. 282. Where the question whether a particular sale-deed was a valid document was directly and substantially in issue in the previous suit, the decision of the issue is *res judicata* though the property involved in the subsequent suit is different from the one which was the subject of the prior suit. 45 A. 515; 4 Rang. 8=95 I. C. 104=A. I. R. 1926 Rang. 122. So also where the question decided is as to the validity of an adoption. 8 M. 219=12 I. A. 16; 2 I. A. 283; 13 A. 53=13 B. 25; 24 A. 112; 30 A. 470.

OTHER ILLUSTRATIVE CASES.—*Rent suits*.—A rent decree, is *res judicata* on the question of the existence of the relationship of landlord and tenant. 54 I. C. 763; 25 I. C. 204; 10 I. C. 363. This is so even if the decree is passed *ex parte*. 49 A. 658=A. I. R. 1927 A. 552. Where in a previous suit by A against B, it was held that B was a tenant of A, a subsequent suit by B against A and C, a *pro forma* defendant for a declaration that B is not a tenant of A but of C is barred. An incidental determination of an issue of title in a suit for rent is not a bar to any issue of title being raised subsequently. 34 I. C. 123; 63 I. C. 762; 51 I. C. 356=20 C. L. J. 13; 50 I. C. 598; 15 I. A. 97; 25 C. 136; 26 C. 428. See also 43 C. L. J. 146=30 C. W. N. 593=94 I. C. 837=A. I. R. 1926 Cal. 650. But where the entire question of title to the property was directly and substantially in issue in the previous suit, as in the case where the tenant sets up his own ownership, denying that of the landlord, the decision will operate as *res judicata*. 12 I. C. 9=42 I. C. 785. See also 85 I. C. 804=1925 Cal. 1004. If the question of title thus substantially in issue in the former suit had been decided, the decision will operate as *res judicata* in a subsequent suit for rent for a subsequent period. 1 C. 202; also 24 A. 112. If an issue as to the nature of the tenure held by the defendants was directly raised in the previous suit for rent the decision on the point will operate as *res judicata* in subsequent suits for rent. 25 C. 136; 14 M. L. J. 379; 13 M. 287; 26 B. 25; 30 M. 510; 30 A. 470. Where a previous suit for enhancement of rent was decreed in spite of the defendant setting up a permanent tenancy, the decree is not *res judicata* in a subsequent suit for ejectment in which the same claim

Explanation I.—The expression "former suit" shall denote a suit which has been

is set up by the defendant. 8 Lah. 573=54 I.A. 178=A. I. R. 1927 P. C. 102=52 M. L. J. 663 (P. C.). When a *recurring liability* is the subject of a claim, a previous judgment dismissing the suit upon findings which fall short of going to the very root of the title upon which the claim rests, cannot operate as *res judicata*. 11 A. 148. A *rent decree* is not *res judicata*, as to the rate of rent or as to the area for which the rent is payable but only as to the amount due for the years for which the suit was brought. 68 I. C. 298: 1923 Cal. 282 (2); 3 O. W. N. 313 (Sup.)=98 I. C. 77=A. I. R. 1927 Oudh 32. [It is however good evidence on these points. 47 I. C. 173; 1922 P. 213.] But if the Court determines them it is binding on the parties in a suit for rent for subsequent years. 43 C. L. J. 116=94 I. C. 844=A. I. R. 1926 Cal 672. The question of rate of rent is a necessary issue in a suit for enhancement of rent and the Court's decision thereon is *res judicata* in a subsequent suit for rent, in which the same question is at issue. 59 I. C. 752. This is so even if the decree is passed *ex parte*. 91 I. C. 380=A. I. R. 1926 Cal. 767. A decision in a suit by ryot to set aside a distraint on the ground that the tender of patta is not proper, operates as *res judicata* on the point in a subsequent suit for rent. 45 M. L. J. 199=1924 Mad. 209.

A decision as to the nature of possession held by a party, in a prior suit, operates as *res judicata*. 46 M. 525=43 M. L. J. 737. Where a claim of a third person based on a mortgage is disallowed, and also his suit for a declaration of his mortgage rights is dismissed, he cannot enforce by a regular suit his rights under the mortgage. 44 M. 268=40 M. L. J. 7=10 I. C. 961=8 A. L. J. 358. Suit by heirs against widow for possession dismissed for non-payment of dower debt ordered by Court to be paid by plaintiff to widow. Second suit for possession by the heirs is not barred. 47 A. 250=52 I. A. 145=48 M. L. J. 667=1925 P. C. 63. First suit by auction-purchaser to set aside order of re-delivery under O. 21, R. 101, C. P. C., dismissed. Subsequent suit for partition of the judgment-debtor's share not barred. 49 M. 596=23 L. W. 551=95 I. C. 209=A. I. R. 1926 Mad. 683=50 M. L. J. 681. Where a reversioner brought a suit for a declaration that an adoption by a widow is not binding on him and got a decree, the question of relationship is *res judicata* in a subsequent suit for a declaration that a gift by her is not binding on him. 59 I. C. 808. Dismissal of a suit to declare an alienation by a widow was not binding on the reversioner is *res judicata* in a subsequent suit by the reversioner for possession after the death of the widow. 59 I. C. 946. See also A. I. R. 1925 Mad. 1270. The dismissal of a prior suit by the plaintiff's ancestor for *chur* right in a river on the ground that it formed part of his estate, bars the subsequent suit for establishing his right of fishery in the said river. 31 C. W. N. 473=103 I. C. 13=A. I. R. 1927 Cal. 423. The decision in a suit based on a possessory right is no bar to a subsequent suit on title. 16 I. C. 431.

"HEARD AND DECIDED."—To support a plea of *res judicata*, the matter in issue must have been heard and finally decided. 45 C. 442=44 I. A. 213; 21 M. L. J. 57=9 I. C. 686. Where

a transaction was incidentally referred to in a suit in the Court of Small Causes, and it was not finally decided, a subsequent suit raising the same is not barred. 5 R. 527=105 I. C. 361=A. I. R. 1927 Rang. 319. So also a matter expressly left open by the parties cannot operate as *res judicata*. 88 I. C. 822=48 A. 34=A. I. R. 1925 All. 770; 96 I. C. 302. It is sufficient if the decision in the previous suit impliedly decides the point. 40 B. 210; 23 M. L. J. 740=8 L. W. 206=48 I. C. 905=(1918) M. W. N. 567, 54 I. C. 952=24 C. W. N. 221. In order to ascertain what matter was heard and finally decided, the pleadings and the judgment should be examined. 2 Pat. L. J. 159=38 I. C. 211; 37 I. C. 674=14 A. L. J. 1171. See also 29 Bom. L. R. 215=100 I. C. 1033=A. I. R. 1927 Bom. 145. (Case-law reviewed.) The refusal of a Court to try extraneous issues in a case does not bar a subsequent suit. 36 I. C. 650. The party who is sought to be affected by the bar of *res judicata* should have notice of the point which is likely to be decided against him and should have an opportunity of putting forward his contentions against such a decision. 46 M. 768=45 M. L. J. 346. Where in a prior suit for possession and future mesne profits, the Court did not purport to decide the question of future mesne profits, a subsequent suit for mesne profits *pendente lite* is not barred. 40 A. 292=44 I. C. 88; 41 M. 188=33 M. L. J. 699 (F. B.). See also 30 M. L. J. 326=31 I. C. 103. But it has been held by the Bombay High Court that where the decree is silent as to the claim of future mesne profits, it will be taken to have been refused and a separate suit will be barred by the Expl. V to S. 11. 44 B. 654=58 I. C. 419. Decision of a point on the ground of limitation only and not on the merits does not operate as *res judicata*. 73 I. C. 705=1923 Lah. 150 (2). Dismissal for technical defect does not operate as *res judicata*. 63 I. C. 344=19 A. L. J. 706. Dismissal for default does not operate as *res judicata*. 24 I. C. 480=12 A. L. J. 911; 41 I. C. 905 (Cal.); 24 I. C. 17=54 I. C. 789; 2 Pat. 739; 39 B. 41=16 C. 98=15 I. A. 156; 24 B. 251. Nor dismissal under O. 9, R. 3. 85 I. C. 509=1925 Oudh 337. Nor dismissal for misdescription of suit property. 1925 Lah. 193. Nor dismissal for non-joinder or misjoinder of parties. 43 M. L. J. 572=73 I. C. 491=24 I. A. 50; 8 A. 282; 46 C. L. J. 118=104 I. C. 576=A. I. R. 1927 Cal. 794. Also dismissal for want of jurisdiction. 5 B. 48=7 I. A. 18. A dismissal of a suit under O. 17, R. 3 for want of prosecution operates as *res judicata* in respect of the rights of the plaintiff to recover in a subsequent suit the property sued for in the first suit. 13 I. C. 172=10 M. 272; 13 M. 510; 40 A. 590=46 I. C. 390. Suit by a Hindu reversioner for declaration that a mortgage executed by a widow is invalid dismissed on the ground that plaintiff was not the reversionary heir—Subsequent suit by him after widow's death for possession is barred. 22 L. W. 170=(1925) M. W. N. 572=A. I. R. 1925 Mad. 1162=49 M. L. J. 142.

EXPLANATION V.—The legal effect of this explanation is that of treating the omission to grant the relief asked for in the plaint as equivalent to an express refusal and the claim thereto

decided prior to the suit in question whether or not it was instituted prior thereto.

in a fresh suit as *res judicata*. 14 M. 328 ; 21 C. 265. 21 A. 425. Relief claimed but not expressly granted—Decree in prior suit substantially in favour of plaintiffs but the findings being against them—Appeal not preferred—Effect in subsequent suit *see* 38 M. L. J. 374 = 101 I. C. 648 ; (1927) M. W. N. 116. It refers to the case where several heads of relief independent of each other are claimed, put in issue, and duly controverted, and one of them is neither granted nor refused. 12 B. 454. The granting of future mesne profits which the Court has a right to give or refuse, is not such a relief. 15 M. L. J. 462. 32 C. 118 ; 21 A. 425 (F. B.) ; 25 B. 115 ; 24 M. 681 ; 80 I. C. 710. Where the mortgagee claims a money decree and in default of payment for sale of the mortgaged property, but is content to take a money-decree only, he could not sue again to have the amount paid by sale of the mortgaged property. 33 C. 849.

EXPLANATION V—ILLUSTRATIVE CASES.—Previous suit for certain properties—Statement by plaintiff that he would pay additional court-fee if it was found that he was entitled to further properties—Subsequent suit for further properties not barred. (1926) M. W. N. 94 = 93 I. C. 1 = 23 L. W. 415 ; Redemption suit claim for mesne profits—Withdrawal of claim for mesne profits—Separate suit if lies. A. I. R. 1926 Cal. 178 ; 25 A. L. J. 425. In ejectment suit prayer for use and occupation referred—Subsequent suit after notice—Question of damages cannot be gone into. 104 I. C. 190 = A. I. R. 1927 Pat. 305. Mortgage suit—Personal remedy asked for in plaint—Decree silent regarding same—Effect—Party not barred from subsequently asking for the same. 39 M. L. T. 22 = 53 M. L. J. 489.

EX PARTE DECREE.—An *ex parte* decree can operate as *res judicata*. 16 C. 300 ; 40 C. L. J. 507 ; 26 A. L. J. 185 ; 85 I. C. 562 = 1925 Mad. 1025. But the only matter that can be *res judicata* is matter in respect of which relief has been claimed by the plaintiff in the plaint. 16 C. 300 ; 27 I. C. 999. On this point *see also* 6 Bur. L. J. 148. Where a previous suit for arrears of rent was decreed *ex parte*, the deft. cannot contend in a later suit for arrears of rent that the relationship of landlord and tenant did not exist. 49 A. 658 = 24 A. L. J. 467 = 101 I. C. 516 = A. I. R. 1927 A. 552.

CONSENT AND COMPROMISE DECREES.—S. 11 is not strictly applicable to consent or compromise decrees as it applies in terms only to what has been heard and finally decided by the Court. 35 M. 75 = 21 M. L. J. 709 ; 30 B. 395. A consent decree however raises an estoppel. 24 C. 216 ; 24 B. 77 ; 43 C. L. J. 116 = 94 I. C. 844 = A. I. R. 1926 Cal. 672. A consent decree passed between the predecessor-in-interest of the parties, touching matters now substantially and directly in issue, between them, is *res judicata*. 36 B. 283 = 12 I. C. 535 = 46 A. 820 = 80 I. C. 933. But a consent decree relating to matters outside suit does not operate as *res judicata*. 48 C. 1059 = 66 I. C. 705 = 27 I. C. 640 = 27 C. L. J. 583. The decision by oath of any matter in issue in a former suit between the parties is *res judicata* in a subsequent litigation between them

36 M. 287 = 24 M. L. J. 321 = 24 M. 444. A decree or ordered passed on a *razinama* would constitute the matters contained in it *res judicata* between the parties to suit. 36 M. 46 = 21 M. L. J. 820 ; 21 B. 465.

THE DECISION MUST BE NECESSARY FOR THE DETERMINATION OF THE SUIT.—Matter which was not necessary for the decree passed in the suit is not matter directly and substantially in issue in the suit which was heard and finally decided. 5 C. W. N. 445 ; 26 M. 104. *See also* 101 I. C. 522 = 40 W. N. 307 ; 102 I. C. 22 (1). If a finding arrived at on a certain issue is sufficient to completely dispose of the case, other findings on other issues not necessary for the disposal of the case or not a final decision of the matter covered by them and do not operate as *res judicata*. 36 I. C. 643 = 70 I. C. 666 = 44 B. 321 = 55 I. C. 312 = 22 Bom. L. R. 64 = 49 I. C. 513 ; 75 I. C. 317 = 1923 Lah. 523 ; 73 I. C. 854 = 1923 Lah. 248 ; 43 C. L. J. 501 = 95 I. C. 1011 = A. I. R. 1926 Cal. 1003. Where there are two findings, either of which would in law be sufficient to dispose of the case that one which in the logical sequence should have been first found rendering the determination of the other issue unnecessary, if the finding which operates as *res judicata*. 9 I. C. 983 = 8 A. L. J. 409 = 28 I. C. 580 = 21 C. L. J. 296 ; 17 A. 174. But it has been held by the Madras High Court that the decision on both the issues would be *res judicata* and the rule of logical priority is inapplicable. 38 M. 158 = 21 I. C. 258. If a decision is based on two grounds, both of them operate as *res judicata*. 31 M. L. J. 97 = 35 I. C. 266. Where a judgment is based on findings on more than one issue but it is doubtful as to on which issue the final conclusion is based, the decision on all issues is *res judicata*. 34 M. L. J. 431 = 45 I. C. 975. A question raised at the instance of a party and decided by the Court as necessary operates as *res judicata*, even though the issue in the previous suit was in fact not necessary. 63 I. C. 161 = 33 C. L. J. 317. When a Court decides a case upon a preliminary point as well as on the merits, it cannot be said that the decision on the merits does not operate as *res judicata*. 24 C. 900. But *see* 17 A. 174 ; 40 Cal. 29. Where an ejectment suit is dismissed on the ground of absence of notice, a finding recorded, that the permanent tenancy alleged by the deft. is not proved, cannot operate as *res judicata*. 47 M. 453 = 46 M. L. J. 198 ; 43 B. 568 = 51 I. C. 109 ; *see also* 18 C. 647 ; 13 C. 17. But where first Court decreed the suit for ejectment negating the claim of permanent occupancy, but the Appellate Court reversed it for want of a proper notice to quit, though upholding the finding as to the nature of the tenancy, the decision on the point is *res judicata*. 46 M. L. J. 515 = 1924 Mad. 626. But *see* 40 B. 662 = 36 I. C. 74 = (a suit of a declaratory nature). Where an appellate Court confirms the decision of the trial Court by deciding on one point only without giving its decision on another point which was also decided by the trial Court, the decision on this point is *res judicata* in a subsequent suit. 42 C. L. J. 560 = 92 I. C. 981 = A. I. R. 1926 Cal. 163. An *obiter dictum*, not necessary

Explanation II.—For the purposes of this section, the competence of a Court shall

for the decision of the case is not a decision on a point directly and substantially in issue and does not constitute *res judicata*. 45 A. 466=74 I. C. 656=(1917) M. W. N. 327; 4 Pat. L. J. 682=52 I. C. 338=1919 Pat. 343. Where a suit was dismissed on grounds of limitation, but a finding was also recorded against the plaintiff to avoid a remand in case the appellate Court took a different view, the finding will not operate as *res judicata*. 47 M. L. J. 532=82 I. C. 485. Where a suit is decided in favour of the defendants, but there is a finding adverse to them that finding is not *res judicata* against them. 48 Cal. 460; 47 M. L. J. 487; 11 C. 301; 18 B. 597; 17 A. 174; 18 C. 647. It is not the law that where a plaintiff's suit is dismissed, there is generally no *res judicata* on the findings in his favour. 34 M. L. J. 641=60 I. C. 397; 12 L. W. 277; 1 C. 144; 10 M. 102. The defendant is entitled to appeal against such findings. 47 M. 633=20 L. W. 63=1924 Mad. 689; 47 M. L. J. 487=1925 Mad. 521. When a decree was based on independent grounds and the adverse finding was not implied in the decree, it would not operate as *res judicata*. 37 M. 25=21 M. L. J. 947. But where the decision on an issue is necessary but the party against whom the finding is made could not appeal, as the final decree is in his favour the decision on that issue is *res judicata*. 34 M. L. J. 431=24 C. 900. Such a finding may be appealed against and constitutes *res judicata*. 40 I. C. 771. The fact that a party against whom an issue is found has no right of appeal does not affect the rule of *res judicata*. 34 M. L. J. 431=45 I. C. 975; 19 I. C. 399=29 M. L. J. 535.

CONSTRUCTIVE RES JUDICATA.—Expl. IV.—As to the application of the principle of constructive *res judicata*, see 49 All. 592=25 A. L. J. 437=101 I. C. 670=A. I. R. 1927 All. 439; 24 A. L. J. 33=50 M. L. J. 1 (P. C.). The rejection of a plea as having been raised too late operates as *res judicata*. 91 I. C. 683=A. I. R. 1926 Cal. 511. Question of jurisdiction wrongly decided in previous suit, no objection being raised—Decision operates as *res judicata*. 28 Bom. L. R. 879=98 I. C. 341=A. I. R. 1926 Bom. 481. Omission by judgment-debtor to challenge liability where it does not affect decree holder's position creates no estoppel. 71 I. C. 772. It is not only necessary that the matter might have been a ground of attack or defence but also it ought to have been so made. 60 I. C. 393. 2 Pat. L. T. 285; 1 A. L. J. 498. A person is not bound to sue on an alternative cannot of action and failure to sue in the former suit does not bar a subsequent suit. 103 I. C. 888=A. I. R. 1927 Nag. 322. Plea which might hurt need not necessarily be raised in prior suit—No bar. 8 L. 302=28 Punj. L. R. 432=A. I. R. 1927 Lah. 505. The question whether any matter ought to have been made a ground of attack or defence in a former suit depends upon the particular facts of each case. 20 C. 79=19 I. A. 234. The plea sought to be raised in the second suit must also be directly relevant to the issue in the first suit. (1924) M. W. N. 666; see also 46 I. C. 929; 40 C. L. J. 507. In a pre-emption suit, the pre-emption is not bound to set up his own title in that alternative. 96 I. C. 71=A. I. R. 1926 Oudh 545. Decree on mortgage. Subsequent suit by

heirs questioning the right of mortgagor to alienate, not barred. 4 P. 510=1925 P. 625. The Explanation in authorising a fiction that the matter contemplated by it was in issue, implies necessarily the further fiction that it was adjudicated upon. 8 M. L. J. 28; 26 M. 760. The matter would be deemed to have been decided against the party omitting to allege it. 2 A. 100; 25 B. 189. But see 2 C. 171; see also 35 C. 975 where the correctness of the previous decision has been doubted. Where in an interpleader suit as among several widows of the last male holder the factum or validity of the adoption of a son by one of the widows was not challenged, the question must be heard to have been raised and decided. 1 Luck. C. 733. It is only where the subject-matter of the two suits is the same that the matter can be said to have been heard and decided. 24 C. 711. Such a question cannot be treated as *res judicata* unless there is a judicial determination expressed or implied on the matter not put directly in issue. 28 C. 17; 1 Rang. 363=1923 Rang. 239. Where plaintiff claims title to certain property, he ought to put forward all means of attack in his armoury. 72 I. C. 14; 20 C. 79=19 I. A. 234; 25 B. 189. See also 37 I. C. 119; 20 I. C. 290=19 A. 517; 26 M. 645; 3 B. 137. Where the prior suit failed on account of omission to plead a family custom, a subsequent suit based on such custom is barred. 47 A. 158=52 I. A. 100=48 M. L. J. 64=1925 P. C. 55. Where the plaintiff had on a former occasion sued for a certain relief on the strength of one title, he cannot afterwards claim the same relief on the ground of another title of which on the former occasion he might have availed himself. 24 C. 83; 31 M. 385; 2 C. 252; 49 M. L. J. 701; 25 A. L. J. 1035. It is not necessary to put forward a claim and also an inconsistent claim in the alternative in the same suit. 24 M. L. J. 418=71 I. C. 1009; 29 A. 331=34 I. A. 72; 52 I. C. 813; (1919) M. W. N. 287; 72 I. C. 14=1923 Rang. 122; 35 Bom. 507; 47 A. 561=1925 All. 486; 107 I. C. 110. A subsequent suit based on a claim of title, which the plaintiff, owing to want of knowledge of it, could not put forth as a ground of attack in a prior suit, is not barred under Expl. IV. 37 I. C. 119; 10 I. C. 991. Where a suit for money on the basis of a contract for supply of boats at an agreed rate, is decided against the plaintiff, he cannot bring a subsequent suit to recover the same money as compensation for services rendered. 15 I. C. 374=5 Bur. L. T. 95. A suit by a Hindu son to avoid a sale in execution of a decree against his father on the ground that the sale was tainted with immorality, is barred by a similar previous suit on the ground that the property was joint family property. 65 I. C. 311=1923 All. 231. See also 46 Mad. 135=72 I. C. 207. Where a plaintiff sued to eject a trespasser basing his claim on an ancestral right and failed therein, he could not bring another suit against the same defendant, claiming to be the heir of a certain person. 34 I. C. 456=(1916) M. W. N. 286; 11 B. L. R. 158 (P. C.); 31 M. 385. Omission to plead available ground of defence would bar the defendant from raising the same plea again in a subsequent suit. 5 Lah. L. J. 251=72 I. C. 91=1924 Lah. 83; 24 I. C. 212; 31 C. 79=20 A. 81; 7 B. 272.

be determined irrespective of any provisions as to a right of appeal from the decision

Thus, where a prior suit for possession is decreed on the basis of a gift, a subsequent suit questioning the title of the donor to make a gift is barred. 1 Luck. 78=101 I. C. 812=A. I. R. 1927 Oudh 234. A person brought into defend his rights in respect of one property in a suit, ought to set up his rights, if any, to the other properties in the suit as well. (1917) M. W. N. 336=98 I. C. 184. A debt in a suit is under no obligation to avail himself of the right to claim a set off. 52 I. C. 850=28 M. L. J. 513; 49 M. L. J. 14=1925 Mad. 830. Or counter claim see 24 L. W. 282=97 I. C. 488=A. I. R. 1926 Mad. 1020. Where a suit for possession of property based on a lease alleged to have expired is dismissed on the ground that the lease is not proved, a subsequent suit for possession based on ownership is not barred by *res judicata*. 22 M. 323; 23 M. 629; 9 M. 251=see also 23 L. W. 58=92 I. C. 245=A. I. R. 1926 Mad. 849; 4 M. 308=8 B. 174; 63 I. C. 717; 3 Lah. L. J. 215. Where a suit for possession of certain property by the plaintiff treating the defendant as his tenant, is dismissed on the finding that the relationship of landlord and tenant did not subsist, a second suit by the plaintiff alleging that he was a reversioner entitled to the properties, is not barred by *res judicata*. 52 I. C. 813. (1919) M. W. N. 287. 1 Luck. C. 277=A. I. R. 1927 Oudh 341; 23 L. W. 23=A. I. R. 1926 Mad. 234. So also where A sues B for redemption of an alleged mortgage but fails to prove the mortgage and the suit is dismissed, he can sue again as owner. 35 B. 507. Separate suits for possession and mesne profits against same defendants are maintainable though the claim for mesne profits might have been joined in the previous suit. 26 Bom. L. R. 288=80 I. C. 259. See also 25 A. L. J. 425. Where one suit for partition of some of the joint family properties was brought and disposed of, another suit for partition of the remaining properties is barred. 44 M. L. J. 652. First suit as *Kittima adopted son*—Second suit as *apatitha son* barred. 105 I. C. 586=5 Rang. 565. First suit barred on exclusive title—Joint possession with certain relatives ordered—Second suit on the ground that those relations had already released their rights barred. 24 L. W. 812=99 I. C. 525=A. I. R. 1927 Mad. 120. Widow impleaded as legal representative in mortgage suit—Widow's individual rights not raised—Subsequent suit for declaration of widow's rights barred. 5 Bur. L. J. 114=A. I. R. 1926 Rang. 191. Prior suit for specific land based on exclusive title—Subsequent suit for partition and possession of share—Not barred. 24 L. W. 453=(1926) M. W. N. 724=A. I. R. 1926 Mad. 1128.

PRINCIPLE OF CONSTRUCTIVE RES JUDICATA APPLIES TO SUITS ON MORTGAGES.—

In a mortgage suit, all claims relating to the mortgage right up to the end of the proceedings, must be determined and a defendant who omits to put forward a counter-claim cannot bring a subsequent suit for recovery thereof. 60 I. C. 226=12 L. W. 173=16 L. A. 107=26 B. 661. The mortgagor obtaining possession in a redemption suit by him cannot subsequently sue for profits realised by the mortgagee for a period prior to the date of delivery of possession. 30 A. 36.

Where mortgagee has failed in a suit for redemption to obtain an order for sale of a mortgaged property on failure of payment by the mortgagor of the mortgage amount within the time fixed for payment, he cannot afterwards bring a separate suit for sale upon his mortgage. 13 B. 567. See also 7 Lah. 40=27 Punj. L. R. 209=94 I. C. 27=A. I. R. 1927 Lah. 162. Where in a suit by a prior mortgagee the puisne mortgagee is also impleaded as party and a decree is passed directing the sale of the property, the persons claiming under the parties to a previously puisne mortgagee is not debarred from enforcing his mortgage in a subsequent suit. 42 M. 90=35 M. L. J. 639; see also 1 Luck. 25. A prior mortgagee who is impleaded in a suit on a subsequent mortgage, but whose mortgage is not impugned has a paramount title outside the controversy of the suit and is not bound to set up his mortgage as a defence. 47 C. 662=47 I. A. 11=32 M. L. J. 424 (P. C.); 35 A. 111; 0 I. C. 158; 24 I. C. 42; 18 C. W. N. 1013; 58 I. C. 33; 1 Pat. L. T. 629. But where it is sought to displace his prior title and to postpone it to the title of the plaintiff, it is the duty of the prior mortgagee to prove his title and if he fails to do so, the decision in the suit will operate as *res judicata* against him. 2 P. 435=4 Pat. L. T. 108. Where in consequence of the failure of the prior mortgagee to claim priority under his mortgage, a decree for sale follows, in pursuance of which the properties are sold, he could not thereafter enforce the claim under his prior mortgage. 39 C. 527=22 M. L. J. 468; 34 A. 599=10 A. L. J. 244=19 C. W. N. 947. If being a party to a suit on a mortgage prior to his own, he omits to claim his right to redeem such prior mortgage, he cannot afterwards sue for that purpose on the mortgage he has omitted to plead. 24 A. 429 (P. C.); see also 31 C. 428; 20 A. 110 (F. B.); 26 M. 776. A subsequent mortgagee claiming title as owner of a portion in a prior mortgage suit may set up his title in a separate suit as the question cannot be raised in the former suit. 16 A. L. J. 639; 46 I. C. 559=40 A. 584. On this point see also 25 L. W. 238=38 M. L. T. 20=A. I. R. 1927 Mad. 301=52 M. L. J. 52.

"SAME PARTIES.—A judgment not *inter partes* or in *rem* is not *res judicata* in a subsequent suit though it may be received as evidence. 14 I. C. 66. The matter decided in a previous suit is *res judicata* only as against those who had been parties to the previous suit. 33 A. 493=26 C. 428; 54 I. A. 238=54 Cal. 770=31 C. W. N. 1063=101 I. C. 873=A. I. R. 1927 P. C. 128=53 M. L. J. 123 (P. C.); 103 I. C. 858=9 Lah. L. J. 270. Where some of the defendants in a previous suit do not appear and are exempted from plaintiff's claim the decision in it does not operate as *res judicata*. 1 A. L. J. 363; 12 C. 580. Appeal by several parties—Death of one pending appeal—Legal representative not brought on record—Common decision—Binding nature of, on legal representative. (1927) M. W. N. 426. A decision arrived at in a prior suit is not *res judicata* against a person who was merely a nominal defendant in the previous suit. 35 I. C. 543=12 C. 580; 25 B. 589; 27 A. 59. *Res judicata* operates against a person who took an active part in the

of such court.

litigation in contesting the claim of the plaintiff notwithstanding the fact that he was described as a *pro forma* defendant. 21 C. L. J. 157=27 I. C. 954=19 C. W. N. 1280 (14 B. 176; 14 B. 408 dist.)=85 I. C. 953=1925 Cal. 985. As to the application of the principle to *pro forma* defendants see 23 I. C. 381=45 I. C. 318. A *pro forma* defendant in a suit would be as much bound by the decision therein as any other defendant (1917) M. W. N. 336=38 I. C. 184=44 I. C. 546. But see 39 B. 29=26 I. C. 444. A party unnecessarily impleaded the previous in suit is not bound by a decree therein. 44 A. 428=66 I. C. 62; see also 5 O. W. N. 510. Where a suit for declaration of title to an office is dismissed, a subsequent suit against another party for recovery of money alleged to be due to the person entitled to the office is not barred by *res judicata*. 44 M. 778=41 M. L. J. 223. A decree for partition in a suit instituted by one member of a joint family impleading the others as parties is *res judicata* between all the sharers who are parties to the suit. M. L. J. 76=24 I. C. 294=(1914) M. W. N. 948. A decision against a mortgagor is not binding on a mortgagee whose title under the mortgage arose prior to the suit deceased against the mortgagor. 40 B. 679=36 I. C. 443; so also in the case of a donee of land. 35 B. 297. A lessor cannot be considered as a party claiming under his own lessee and the dismissal of the latter's suit for ejectment does not bar the present suit for ejectment by the lessor. 29 Bom. L. R. 274=101 I. C. 340=A. I. R. 1927 Bom. 270; see also in the case of creditor and debtor. 105 I. C. 647=32 C. W. N. 248. Party who is privy to a decree is bound by the decree whether he has notice thereof or not. 53 I. C. 143. Decision against a reversioner is not *res judicata* against another. 43 A. 558=63 I. C. 524. As to how far, the decision in a suit by one reversioner for a declaration that an adoption or alienation by a Hindu widow is invalid, is binding on other reversioners, see 29 M. 390 (F. B.); 27 M. 588. The dismissal of a suit by a Hindu father to set aside an alienation of a joint family properties or the ground of undue influence and fraud is no bar to a suit by the sons to set aside the alienation on the ground that it is not for a binding family purpose. 47 I. C. 192=35 M. L. J. 451. When both parties to a subsequent litigation a claim through the same party in the prior suit, there is no bar of *res judicata*. 78 I. C. 65; 30 C. 556. A decree for ejectment by the landlord against one of several joint tenants of a holding does not bind the other tenants. 16 I. C. 698=24 M. L. J. 79.

EXPL. VI.—See 28 M. 457 (F. B.); 13 C. 352; 33 A. 493. For cases where the Expl. cannot apply, see 30 M. 185; 33 A. 493. As to the applicability of the section, see 52 M. L. J. 641. The expression "*private right claimed in common*" in Expl. VI, extends also to village communal rights. 31 M. L. J. 26=35 I. C. 116; 6 C. 49. But see *contra*. 101 I. C. 58=A. I. R. 1927 Mad. 645=52 M. L. J. 641. To attract the operation of Expl. VI, the former suit need not have been instituted with leave of court. 31 M. L. J. 26=35 I. C. 116; 27 L. W. 216=A. I. R. 1928 Mad. 77=54 M. L. J. 8 (F. B.); but see 43 M. 427=38

M. L. J. 493; 49 I. C. 796; 8 M. 496. There is no bar if the prior suit is compromised. I. L. T. 40 C. 19=9 Pat. L. J. 65=27 L. W. 339=A. I. R. 1928 P. C. 16 (P. C.). Prior suit by joint family manager acting on behalf of minor members—Decree therein bind members. See 54 I. C. 122=51 Bom. 450=45 C. L. J. 504=A. I. R. 1927 P. C. 56=52 M. L. J. 472 (P. C.); A. I. R. 1926 All. 201. A decree obtained by a trustee on behalf of the trust is binding also on all persons interested in the trust. 46 A. 657. A suit for setting the amount of Kattubadi from an Aghaharam is one in which all the aghaharamdars are necessarily interested and the decision is binding on all aghaharamdars. 43 M. 427=38 M. L. J. 493. Where a suit instituted *bona fide* in respect of a public right claimed in common was dismissed, a subsequent suit by two others in respect of the same right is barred. 36 A. 424. Where a suit by a reversioner brought in, a representative capacity that an alienation made by a Hindu widow in possession is without legal necessity is decided after a fair contest in the absence of fraud and collusion the deed will be binding on the whole body of the reversioners. 44 A. 19=79 I. C. 484. See also 103 I. C. 454=28 Punj. L. R. 369. But see 95 I. C. 178=A. I. R. 1926 All. 573 which holds that one reversioner does not represent the whole reversionary body, and so a finding against one does not bind another. (A. I. R. 1926 P. C. 247 Ref.) Where in a previous suit against the adoptive mother, a decision is given that she possessed no authority to adopt, it is binding on the adopted son, though he may have been adopted by her subsequent to the decision and could have been no party to the previous litigation. 1 Luck. C. 733.

REPRESENTATIVE SUIT.—As to what is a representative suit and how to decide whether it is one or not; see 27 L. W. 769=A. I. R. 1928 Mad. 445=54 M. L. J. 587. A judgment a *benamidar* operates as *res judicata* against the real owner. 15 M. 267; 4 A. L. J. 689; 18 A. 69=22 B. 679. A decree against a *shebait* as representing the idol is binding on his successor in the absence of fraud or collusion. 42 C. 440=19 C. W. N. 521=18 I. C. 394=17 C. W. N. 964. Also decrees against holders of similar offices as trustees, *karnam*, etc. 11 M. 191; 12 M. 235=9 B. 198; 29 B. 96; 39 C. 887. So also a decision against a *Karnavan* of a *Tarwad* is *res judicata* against the junior members of the *Tarwad*. 44 M. L. J. 443=17 M. 214=30 M. 215. Dismissal of a suit brought by the managing member of a joint family is a bar to a subsequent suit by a junior member who had been a *pro forma* deft. in the former suit, in respect of the same property and on the same cause of action. 42 A. 359=18 A. L. J. 326. A creditor is bound by an adjudication against his debtor on his title to property in the absence of fraud, collusion, etc., 38 M. L. J. 266=54 I. C. 565. Decision against Official Liquidator in the winding up is conclusive on all parties represented by him. 43 M. 550=32 M. L. J. 444. A decree fairly and properly obtained against a Hindu widow limited owners in the absence of fraud or collusion, is binding on the reversionary heir. 40 A. 593=36 M. L. J. 597=43 B. 249; 35 C. L. J. 348=68 I. C. 322=49 C.

Explanation III.—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

45 = 25 C. W. N. 585 = 46 I. C. 162 = 3 Pat. L. J. 426. The principle does not apply to compromise or an award decree. 45 C. 590 = 34 M. L. J. 298 = 43 B. 249, 365 ; 38 C. 369 ; 29 A. 239. Where the compromise is due to collusion on the part of the widow a suit by the revisioner is not barred. 21 I. C. 605 = 11 A. L. J. 574. Where an alienee from a widow of the last owner gets a declaration of the validity of his alienation against the mother who is the next reversioner, the decision is binding on the male reversioners. 34 M. L. J. 719 = 42 I. C. 540. A Hindu widow cannot be deemed to represent her husband's estate so as to bind the reversionary heirs of her husband in relation to anything which she may have done herself to the prejudice of these reversionary heirs. 53 I. C. 761. A decree given against a Hindu widow on a ground personal to herself and on her admission in the prior litigation is not binding on the reversioner. 21 Bom. L. R. 837 = 43 B. 869. In a litigation which is personal to a widow, the widow does not represent the estate fully so as to bind reversioners. 42 B. 69 = 43 I. C. 233. As to when a litigation can be said personal to the widow, see 73 I. C. 284 = 18 L. W. 491. Successor of shebait when bound by decree against predecessor in shebaitship barred. 42 C. 244 = 27 M. L. J. 100 (P. C.).

DECREES AGAINST MINORS.—S. 11 does not bar a suit if plaintiffs who were minors were not adequately represented in a prior suit. 39 B. 29 = 22 I. C. 673. See also 6 P. 388 = 8 Pat. L. T. 730 = A. I. R. 1927 Pat. 271. A compromise involving a minor without the court's sanction does not operate as *res judicata*. 36 B. 53. Where the guardian *ad litem* is guilty of negligence, the decree will not operate as *res judicata* against the minor. 53 I. C. 412 ; 27 M. L. J. 486 = 26 I. C. 16 = 25 M. L. J. 379 = 21 I. C. 15 = 19 B. 571 ; 22 C. 8. An omission to rely upon a judgment in support of a plea of *res judicata* is not such negligence as would get rid of the bar of *res judicata*. 47 M. L. J. 700. Nor an omission to produce some evidence which existed and which might have been produced. 4 O. W. N. 748 = 105 I. C. 59 = A. I. R. 1927 Oudh 354. A guardian is not bound contest a suit to which there is no good defence. 47 M. 476 = 46 M. L. J. 291. Where guardian is not guilty of fraud nor his interests adverse. 9 L. W. 479 = 51 I. C. 724.

RES JUDICATA AS BETWEEN CO-DEFENDANTS.—The doctrine should be applied to co-defendants with great caution. 25 C. L. J. 322 = 21 C. W. N. 639 ; 51 I. C. 997. To constitute *res judicata* between co-defendants it is necessary there should be (1) conflict of interest, (2) adjudication should be necessary to give appropriate relief to plaintiff. 33 M. L. J. 740 ; 17 A. L. J. 225 ; 7 L. W. 104 ; 4 Bur. L. J. 250 = 1926 Rang. 75 ; 97 I. C. 205 = A. I. R. 1926 P. 478 ; 96 I. C. 406 = A. I. R. 1926 Sind. 282 ; 30 C. W. N. 415 = 94 I. C. 235 = 44 C. L. J. 399 = A. I. R. 1926 Cal. 568 ; A. I. R. 1927 All. 365 ; 103 I. C. 701 ; A. I. R. 1927 Mad. 50. Where an adjudication between the defendants is necessary to give the appropriate relief to the plaintiff, the adjudication will be *res judicata* as between the defend-

dants, if there is a conflict of interests amongst them, and a judgment defining the real rights and obligations of the defendants *inter se*. 11 B. 216 ; 26 A. at p. 442 (F. B.) ; 22 B. 245 ; 25 B. 74 ; 18 A. 65 = 22 A. 386 ; 47 B. 534 ; 46 A. 220 = 38 B. 438. See also 2 Lah. 88 = 62 I. C. 665 = 3 Lah. L. J. 223 ; 92 I. C. 131 = A. I. R. 1927 Lah. 112. Where in a suit brought against the mortgagor and mortgagee by a third party, a finding is given that the mortgagee is entitled to add the amount spent by him in defending his title, to his mortgage money and recover it when the mortgagor seeks to redeem the property, the finding constitutes *res judicata* in a subsequent suit for redemption. 1 Luck. 367 = 29 O. C. 336 = A. I. R. 1926 Oudh 281. A finding against a defendant who is not a necessary party is not *res judicata*. 25 B. 589. Where a defendant is *ex parte*, it cannot be said that there has been an active contest between him and another defendant who is not *ex parte*. 14 M. 324 ; 57 I. C. 252. Where in a partition suit, none of the parties claimed or resisted partition except the plaintiff, any questions regarding partition which might thereafter arise between defendants remains open to be decided. 47 B. 534. See also 96 I. C. 406 = A. I. R. 1926 Sind 282.

RES JUDICATA AS BETWEEN THE CO-PLAINTIFFS.—A finding to become *res judicata* as between co-plaintiffs must have been essential for giving relief against the defendant. 36 B. 207. It must be also on points actively contested between co-plaintiffs. 38 I. C. 213 ; (1917) M. W. N. 14. There must also be conflict of interest between persons ranged as co-plaintiffs. 70 I. C. 232 = 1921 Pat. 369. On the point see also 17 I. C. 205 = 14 Bom. L. R. 854. See also 21 M. 8 = 36 B. 207 = 31 M. L. J. 77.

LITIGATING UNDER THE SAME TITLE.—A person who litigates a suit as the representative of a deceased deft. and who afterwards files a suit in respect of the same subject-matter in his own right, does so in a different capacity and is not affected by the rule of *res judicata*. 17 C. 57 ; see also 5 M. 239. It cannot be said for the purpose of the section that a decision on a plea of *ius tertii* is a decision between the parties litigating under the same title when the *ius tertii* is put forward and actually relied on in a later case by the third person. 50 M. 877 = 26 L. W. 115 = 104 I. C. 468 = A. I. R. 1927 Mad. 844 = 53 M. L. J. 864. A decision against a person in his individual capacity does not bind his successor in the office of trustee of an endowment. 24 C. W. N. 690 = 47 C. 866 ; see also 69 I. C. 528. Where the plaintiff in a subsequent suit sues under a title different from the one he endeavoured to support in a prior suit, the decision in the prior suit will not be *res judicata*. 55 I. C. 767 = 31 C. L. J. 163. See 9 C. 945 = 19 L. W. 369 = 1924 Mad. 576. A suit under S. 92, C. P. Code, for a scheme is not barred by a prior suit by them in which the defendant was held to be hereditary trustee. 43 M. L. J. 448. Dismissal of a suit by the members of a community to assert their personal rights is no bar to a subsequent suit by them as representatives of

Explanation IV.—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

the community to establish the right of the community. 18 A. L. J. 150; see also 3 O. W. N. 645=97 I. C. 853=A. I. R. 1926 Oudh 578=1 Luck. 489.

COURT MUST BE COMPETENT TO TRY THE SUBSEQUENT SUIT.—The section applies only when the court whose decision is cited as *res judicata* is competent to try the second case. 1 A. L. J. 503. See also A. I. R. 1925 Mad. 1270; 91 I. C. 1026=A. I. R. 1926 Cal. 603; 43 C. L. J. 606=A. I. R. 1926 Cal. 1053. The "Competent" Court is the Trial Court and it does not affect the question whether the decision is that of an appellate court. 44 A. 712=34 I. C. 581=21 M. L. J. 57=9 I. C. 686; 5 C. 832; 30 B. 220; 23 C. 415; 35 C. 356. See also 49 All. 543=100 I. C. 601=A. I. R. 1927 All. 297. The fact that in the two suits appeals may lie in different courts does not affect the application of the rule. 1924 Lah. 644=32 A. 67. See also 99 I. C. 299=A. I. R. 1927 All. 189. Court which decided the former suit must have been competent to try and decide not only the particular matter in issue in the latter suit but also the latter suit itself in which the issue is subsequently raised. 45 B. 805=58 I. C. 576=51 I. C. 127=29 C. L. J. 237=29 C. 707 (P. C.). See also 35 C. 553; 25 A. 138; 25 C. 571; 35 C. 356. In determining the jurisdiction of the court which decided the former suit regard should be had to the jurisdiction on the date, not of the subsequent suit, but of the former suit. 19 C. W. N. 128; 27 I. C. 954; 10 C. 697; 11 C. 153; 15 M. 404. Court which at date of the institution of the first suit at jurisdiction to try the subsequent suit but was deprived of such jurisdiction before it pronounced judgment in the first suit, is a "Court of jurisdiction competent to try such subsequent suit". 42 M. 702=37 M. L. J. 248=40 I. C. 587=6 L. W. 10. If the court which passed the decree in the first suit is competent to try the subsequent suit, it is immaterial that it is prevented from entertaining the subsequent suit by reason of the existence of another Court with preferential jurisdiction. 28 B. 338; 27 M. 63; 29 M. 65. See also 54 Cal. 114=44 C. L. J. 467=A. I. R. 1927 Cal. 216. A plaintiff cannot evade the provisions of this section by joining several causes of action against the same defendant, in the subsequent suit and instituting it in a court of superior jurisdiction. 28 C. 72; 22 A. L. J. 745; 1924 A. 849. Or by intentionally inflating the claim. See 23 L. W. 653=A. I. R. 1926 Mad. 829=51 M. L. J. 630; 28 Bom. L. R. 879=A. I. R. 1926 Bom. 481. If any specific question be within the jurisdiction of the court which decided it in the previous suit, the trial of it is barred though the whole suit is beyond the jurisdiction of the former court. 21 I. C. 15=25 M. L. J. 379=42 I. C. 657. Nor can the plaintiff deliberately over value the subsequent suit to get rid of the bar. 39 I. C. 551=1 Pat. L. W. 418. Judgment of a Court of British India in respect of property situated in a Native State could not operate as *res judicata* in the court of the Native State, as it is not competent court. 20 C. W. N. 1213=36 I. C. 710=37 A. 1; 12 A. L. J. 1074. The term 'competent jurisdiction' has re-

gard to the subject-matter as well as the pecuniary limit. 17 M. 273; 13 B. 224; 29 M. 65; 24 M. 444. Judgment of a court on issues which it is not competent to try could not operate as *res judicata* in a subsequent suit involving the same issue. 37 B. 563; 20 I. C. 557. A decision of a Court of Small Causes on a question of title is not *res judicata*. 3 M. 192 (F. B.); 80 I. C. 724; 11 C. 301; 12 I. A. 23. The decision of a Small Cause Court in a suit for rent tenant was a permanent does not operate as *res judicata* in a subsequent suit on the regular side, even though the Small Cause Judge had jurisdiction to decide the latter suit. 48 B. 541. Where a suit of the nature cognizable by a Court of Small Causes is tried as a regular suit, the decision operates as *res judicata* even though it is not appealable. 41 A. 54=47 I. C. 837. But see also 98 I. C. 176=A. I. R. 1927 Mad. 96. A Small Cause Suit transferred to a munsif retains its character as such and his decision does not bar subsequent suits not cognizable by the Small Cause Court. 26 I. C. 56=12 A. L. J. 853. A Probate Court is not a competent to try an ordinary suit for title and its decision is no bar to a suit in the Civil Court. 15 C. W. N. 1021=10 I. C. 434=13 C. L. J. 547. 20 C. 888; 34 B. 589. A probate court's findings about rights and titles of parties are only incidental. 15 C. W. N. 1021=13 C. L. J. 547. But see also 21 M. L. J. 485=9 I. C. 613. A finding by a probate court in contentions proceedings operates as *res judicata* between the parties thereto. 38 B. 309=23 I. C. 325. See also 31 C. W. N. 898=46 C. L. J. 596=100 I. C. 510=A. I. R. 1927 Cal. 421. The decision of Revenue Court in a suit exclusively triable by it binds the Civil Court, though the subsequent suit could not be brought in the Revenue Court. 43 M. 859=39 M. L. J. 476=see also 3 O. W. N. 210=93 I. C. 62=A. I. R. 1926 Oudh 205; 93 I. C. 374=A. I. R. 1926 Oudh 348; A. I. R. 1926 Oudh 181; A. I. R. 1926 Cal. 369; 91 I. C. 528=A. I. R. 1926 Lah. 178; A. I. R. 1926 All. 34. See also 3 O. W. N. 210=13 O. L. J. 406=A. I. R. 1926 Oudh 205; 19 A. 101. Where in a suit under S. 105 of the B.T. Act, before the Revenue Officer, the question of the maintainability of the suit on the ground of jurisdiction was raised and adjudicated upon, and it was not appealed against the decree of the Revenue Officer cannot be attached in a subsequent suit in a Civil Court. 3 C. W. N. 974=97 I. C. 702=A. I. R. 1926 Cal. 1180. The decision by a Revenue Court on a question of title is no bar to the same question being litigated in the Civil Court. 46 I. C. 13; 34 I. C. 354. A decision on a question of tenancy by a Rent Court is not *res judicata* in a subsequent suit for declaration of title. 21 A. L. J. 476=1924 All. 163. But when a Revenue Court is invested with the powers of a civil court regarding a particular class of cases, its decision on a question of title will operate as *Res judicata*. 18 A. 59; 18 A. 270 (F. B.); 29 C. 252. It would not be *res judicata* of the Revenue Court is not so invested. 26 A. 601. See also 33 A. 453=29 A. 601. A revenue court's decision in a rent suit declaring a tenant's status bars a subsequent suit in the Civil Court for declaring the tenant as an

Explanation V.—Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused.

Explanation VI.—Where persons litigate *bona fide* in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

12. Where a plaintiff is precluded by rules from instituting a further suit in respect of any particular cause of action, he shall not be entitled to institute a suit in respect of such cause of action in any Court to which this Code applies.

13. A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except—

When foreign judgment not conclusive.

occupancy tenant. 42 A. 191; 58 I. C. 772; 71 I. C. 307=50 C. 79=1923 Cal. 433. But see 100 I. C. 851=A. I. R. 1927 Oudh 183 where the under proprietary rights of the tenants were in question. The decision of a Revenue Court on a question as to the existence of the relationship of landlord and tenant cannot operate as *res judicata* in subsequent suit in ejectment and for declaration of title, in a civil court. 30 C. 339=25 A. 138=26 A. 468=26 A. 601. But see 13 M. 287=33 A. 453=8 A. L. J. 341. See also 37 A. 280=13 A. L. J. 326=41 A. 319=49 I. C. 591.

EFFECT OF APPEAL.—When a judgment of a Court of First Instance is appealed against, it ceases to be *res judicata*, 11 A. 148; 61 (F.B.); 24 C. 616; 39 C. 925 and if the appellate Court declines to decide that issue and disposes of the case on other grounds, the judgment of the first Court on that issue is not a bar to a future suit. 6 B. 110; 5 C. L. J. 653. As to the effect of appeal with some only of the defendants as respondents, see A. I. R. 1927 (P. C.) 252=6 R. 29=55 I. A. 7=54 M. L. J. 88 (P.C.). When an appeal is preferred against the finding of an issue and the appeal is disposed of on other points, the finding of the lower court cannot operate as *res judicata* 27 I. C. 959=28 M. 338. Where in appeal, permission is granted to withdraw a suit with liberty to file a fresh suit, the order of the trial court on the merits *ipso facto* falls to the ground and hence cannot operate as *res judicata*. 74 I. C. 894; 40 M. 259=32 M. L. J. 477=37 I. C. 414=22 I. C. 218. Such an order though erroneous and unjustifiable is not void or one made without jurisdiction and consequently the prior suit is not *res judicata*. 31 C. L. J. 482=24 C. W. N. 723 (F. B.); 32 M. L. J. 434=40 I. C. 611. But the contrary has been held in 46 I. C. 322=3 Pat. L. J. 404; 44 C. 367=23 C. L. J. 489=33 I. C. 670=20 C. W. N. 1000. The dismissal or withdrawal of an appeal has the same effect as a decision on the merits and leaves the finding of the trial court final. 22 A. L. J. 365=78 I. C. 677. Where pending a Privy Council appeal the matter is compromised and the appeal withdrawn, the decree of the High Court becomes final. 6 M. 43. A decision in the previous suit is final though an appeal is pending against the same in the Privy Council. 4 Rang. 8=95 I. C. 104=A. I. R. 1926 Rang. 122.

CONNECTED SUITS.—Decrees in only one appeal against one preferred—Effect of A. I. R. 1926 Mad. 378; see also 102 I. C. 171=4 O. W.

N. 297; 105 I. C. 850=9 L. L. J. 526; A. I. R. 1927 Lah. 98; 8 Lah. L. J. 136=93 I. C. 1014=27 Punj. L. R. 203.

CROSS-SUITS.—One decided after the other—Decision in the former is *res judicata* in the latter 96 I. C. 694. See also 8 Lah. 384=104 I. C. 849=A. I. R. 1927 Lah. 289 (F. B.).

RECOVERING SUITS.—for rent, not *res judicata* as to amount of cess. A. I. R. 1927 Pat. 58.

PROOF AND PRACTICE.—The judgment pleaded in bar of the suit must be strictly proved. 31 M. L. J. 311=35 I. C. 421. The original pleadings and should be filed to sustain a plea of *res judicata*. 47 C. 662; 38 M. L. J. 424 (P. C.). Judgments which do not operate as *res judicata* may be used as evidence. See 22 I. A. 60; 24 I. A. 10; 12 A. 1; 25 M. 300 (F. B.); 28 C. 109.

Sec. 13. EFFECT OF FOREIGN JUDGMENT.—Every issue decided by the foreign court is not binding on the British Indian Court. The expression "matter directly adjudicated upon" in the section should be held to include the right set up by the plaintiff limited only to the particular relief granted or refused. A. I. R. 1928 Mad. 327=108 I. C. 305=54 M. L. J. 479. Bar to a suit upon the same cause of action. But a suit upon it lies in a British Indian Court. 6 M. 273=7 M. 164; 24 B. 86; 22 C. 222 (P. C.). See also 13 B. 224. Has no force or authority as such in British India, but may give a cause of action for a suit to obtain the same relief in British India. 20 C. W. N. 1213=36 I. C. 710=31 M. L. J. 563 (P. C.). Section is not confined in its application to plaintiffs suing on foreign judgments. A defendant is equally entitled to non-suit the plaintiff on the basis of a foreign judgment. A. I. R. 1928 Mad. 327=108 I. C. 305=54 M. L. J. 479. A Court which entertains a suit on a foreign judgment cannot enquire into the merits of the original action or the propriety of the decision. 46 A. 119=21 A. L. J. 890=1924 A. 161. See also 28 C. 641; 107 I. C. 352=47 C. L. J. 263 (P. C.). A foreign judgment cannot directly affect land situated in British India. 19 M. 527. As to the effect of adjudication of insolvency in a foreign Court, see 23 M. 458. The judgment of a foreign court obtained on a decree of a court in British India is no bar to the execution of the original decree. 7 C. 82. Where a judgment falls under any of the exceptions no judgment on them can be passed in a British Indian Court. 50 Mad. 261=100 I. C. 555=A. I. R. 1927 Mad. 265=52 M. L. J. 240 (F. B.).

- (a) where it has not been pronounced by a Court of competent jurisdiction ;
- (b) where it has not been given on the merits of the case ;
- (c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of British India in cases in which such law is applicable ;
- (d) where the proceedings in which the judgment was obtained are opposed to natural justice ;
- (e) where it has been obtained by fraud ;
- (f) where it sustains a claim founded on a breach of any law in force in British India.

Cl. (a). JURISDICTION OF FOREIGN COURT.—A British executing Court has jurisdiction to see whether the foreign court had jurisdiction to pass the decree in question. Scope of Ss. 13 and 14 considered. 39 M. 24=27 M. L. J. 535 (F.B.) = 40 B. 551=36 I. C. 363=18 B. L. R. 486. The debt must either be a subject of the foreign state or reside in it, at the date of suit where the claim against him is of a personal nature. 37 M. 163=24 M. L. J. 619 ; 22 C. 222 (P.C.) ; 26 C. 931 ; 24 B. 77 ; 20 M. 112 ; 32 M. 469. In actions relating to the recovery of the office of trusteeship the court of competent jurisdiction is the court of what may be called the domicile of the trust. A. I. R. 1928 Mad. 327=108 I. C. 305=54 M. L. J. 479. Where the judgment is that of a Court in England and the defendant resides in British India, the decree is not a nullity. 28 C. 641. If the debt, submits to the jurisdiction of a foreign Court and takes the chance of a judgment in his favour, the decree is binding. 39 M. 733=30 M. L. J. 148=32 I. C. 597. See also 37 M. 163 ; 24 M. L. J. 619 ; 15 M. 82 ; 30 M. 292. But if he appears not voluntarily but under duress or coercive process, the decree cannot be binding. 39 M. 733=30 M. L. J. 148=32 I. C. 597. A submission to jurisdiction for saving property is not a voluntary submission. 39 M. 24=27 M. L. J. 535 (F.B.). What amounts to submission. See 22 N. L. R. 82=A. I. R. 1926 Nag. 77. Execution of power of attorney whether submission. 92 I. C. 491=A. I. R. 1926 Mad. 259. The mere engagement of a pleader to defend a suit, does not amount to submission to jurisdiction, where the pleader reports no instructions at the time of trial. 18 M. 327. But see also 40 M. 112 *infra* and 39 M. 95. The protest against jurisdiction must be made at an early stage of the proceedings. 7 M. 105. Where there has been contract to submit to the jurisdiction of the foreign Court, the decision is binding. 37 M. 163=24 M. L. J. 619. There is voluntary submission to jurisdiction when a party not subject applies for review of an order passed against him. 8 Lah. 54=102 I. C. 523=1927 Lah. 200. A service on the agent of a firm within jurisdiction cannot create jurisdiction against non-resident partners and the judgment against the firm does not amount to personal decree against them. 37 M. 163=24 M. L. J. 619. See also 20 M. 112=24 B. 77. But where there has been submission to the forum by the partners for many years, a decree against them can be personally enforced against them. Service 1927 notice on servant not sufficient 102 I. C. 523 affect. Lah. 200. *Ibid.* Irregularities which do not affect the jurisdiction of the Court do not vitiate a

foreign judgment. 30 M. 292. Suit on foreign judgment. Plea of want of jurisdiction. Merits if open. 46 A. 119=79 I. C. 332=1924 All. 161.

Cl. (b). JUDGMENT ON THE MERITS.—See 92 I. C. 491=A. I. R. 1926 Mad. 259. As to effect of foreign judgments not given on the merits. See 40 M. 112=44 I. A. 6=32 M. L. J. 35 ; 21 C. W. N. 351=25 C. L. J. 233=38 I. C. 683=5 L. W. 342 (P.C.). Affirming 27 I. C. 386=39 M. 95. But see 18 M. 327 *supra*. A judgment given against a defendant on his failure to answer interrogatories after striking out his defence is not a judgment "on the merits" and cannot be enforced in British India as such. (*Ibid.*) Absence of notice to defendants before a foreign judgment is passed, renders it void. 13 M. 496 ; 11 B. 241. As to irregular service of notice ; see 47 Mad. 877=47 M. L. J. 356. An *ex parte* judgment of a foreign Court would also be a judgment on the merits. 22 L. W. 820 ; 47 Mad. 877=45 M. L. J. 356. But see 4 Mad. 359. See also 25 A. L. J. 887=105 I. C. 186=A. I. R. 1927 A. 510. A judgment delivered against a party represented by a solicitor in London is one given on the merits. 50 I. C. 780=17 A. L. J. 501. As to which is a judgment on the merits, see 11 L. W. 609 ; 57 I. C. 742 ; 20 I. C. 971 ; 105 I. C. 186. Where no evidence was recorded there is no decision on merits. 26 L. W. 803 also 50 Mad. 261=100 I. C. 555=1927 Mad. 265=52 M. L. J. 240.

Cl. (c). MISTAKE OF LAW.—A mistake of law in a foreign judgment is no ground for vacating it. A wrong view as to burden of proof will not make a foreign judgment erroneous on the face of it. 41 M. 205=34 M. L. J. 295.

Cl. (d).—There must be something in the procedure anterior to the judgment which is repugnant to natural justice. 41 M. 205=34 M. L. J. 295. A decree pronounced in absence of a party in a personal action by a Court of a foreign State is null and void. 23 C. 22 (P.C.) ; 40 B. 551=36 I. C. 363=18 Bom. L. R. 486. A foreign judgment cannot be impeached on the ground that the suit could not have been brought in British India under the law of limitation. 35 I. C. 741 ; 2 M. 400 ; 4 M. 14. Where in a foreign judgment no guardian *ad litem* of a minor was appointed, where Legal Representative of a deceased defendant were not brought on record and where after decree a third application for review was allowed such a judgment is falls under clause (d). 8 Lah. 54=102 I. C. 523=A. I. R. 1927 Lah. 200.

Cl. (e) : FRAUD.—Where a decision is obtained by fraud, it is not binding on the parties. 1922 Lah. 175 ; see also 15 B. 216.

14. [S. 13, Expl. VI.] The Court shall presume, upon the production of any document purporting to be a certified copy of a foreign judgment, that such judgment was pronounced by a Court of competent jurisdiction, unless the contrary appears on the record ; but such presumption may be displaced by proving want of jurisdiction.

Presumption as to foreign judgment.

Place of Suing.

Courts in which suits to be instituted.

15. [S. 15.] Every suit shall be instituted in the Court of the lowest grade competent to try it.

Suits to be instituted where subject-matter situate.

16. [S. 16.] Subject to the pecuniary or other limitations prescribed by any law, suits—

- (a) for the recovery of immoveable property with or without rent or profits,
- (b) for the partition of immoveable property,
- (c) for foreclosure, sale or redemption in the case of a mortgage of or charge upon immoveable property,
- (d) for the determination of any other right to or interest in immoveable property,
- (e) for compensation for wrong to immoveable property,
- (f) for the recovery of moveable property actually under distraint or attachment,

Sec. 14. BURDEN OF PROOF.—In a suit on a foreign judgment, the onus is on the defendant to prove want of jurisdiction. 24 M. L. T. 244 = 49 I. C. 202. See also 13 Bom. at p. 227. See also 25 A. L. J. 887 = 108 I. C. 186 = 1927 A. 510.

Sec. 15. SCOPE AND OBJECT OF THE SECTION.—To prevent the Courts of higher grades from being overcrowded and not to oust the jurisdiction of the Courts of higher grades. 7 All. 230 ; see also 17 Cal. 155 ; 14 Mad. 183 ; 14 C. W. N. 322. Exercise of jurisdiction by a Court of higher grade than is competent to try it is a mere irregularity. 7 All. 230 ; 13 M. 145 ; 17 Cal. 155 ; 1925 Rang. 278. But exercise of jurisdiction by a Court of lower grade than is competent to try it is a nullity and the decree will be set aside. 17 Cal. 155 ; 38 Cal. 639.

JURISDICTION—PRINCIPLES REGULATING.—The plaintiff's valuation determines jurisdiction not only of the first Court, but of the Appellate Court. 8 Bom. 31 ; 13 All. 320 ; 16 All. 286. But where the plaintiff knowingly makes false statements, it is a fraud on the Court and the Court would have no jurisdiction to entertain the suit. 45 A. 193 = 71 I. C. 411 = 1923 A. 137 (2).

Sec. 16. [See Notes under S. 15].—This section does not apply to chartered High Courts, vide S. 120 applies to moveables. A. I. R. 1926 Lah. 503. *Transfer of place* where subject-matter is situated to jurisdiction of different Court does not deprive Court which originally entertained the suit from jurisdiction to try it to its conclusion. 1925 Mad. 117 = 47 M. L. J. 448 = 87 I. C. 152.

Cl. (a).—A British Indian Court may not entertain a suit regarding immoveable property in a foreign jurisdiction but a suit for mesne profits may lie. 23 N. L. R. 170.

Cl. (b).—When in a suit for partition of moveable and immoveable property, the latter is situated outside the jurisdiction of the Court, leave can be granted to withdraw the suit, so far as it relates to it. 28 M. 216. A suit for dissolution of partnership does not fall under S. 16. 50 I. C. 156 = 17 A. L. J. 567.

Cl. (c).—Suit for a declaration that a mortgage in favour of the defendant is *invalid*, falls under the Section. 23 M. L. J. 679 = 17 I. C. 758. A suit to enforce a charge created on the land for Govt. revenue on it can be instituted at the place where the land is situated. 29 M. L. J. 639 = 31 I. C. 255 = 39 Mad. 795. A suit for maintenance with a prayer for a charge on property within jurisdiction of a Court against a subject of a Native State is cognizable by the Court. 40 Bom. 337 = 18 Bom. L. R. 67.

Cl. (d).—“ANY OTHER RIGHT TO OR INTEREST IN IMMOVEABLE PROPERTY”.—A suit for arrears of rent is not governed by this section but by S. 20 although the plaintiff's title to the property may incidentally come in question. 6 B. H. C. A. C. 29 ; 10 I. C. 267 = 9 M. L. T. 372. But a suit for declaration of the plaintiff's right to rent is covered by cl. (d). 22 Bom. 22. The words “interest in immoveable property” do not include the proceeds thereof. 17 C. 541. A right of ferry is an interest in immoveable property. 13 M. 54 ; also a right of fishing. 24 C. 445 ; also a right to have a watercourse opened. 4 W. R. 107. A suit for a declaration that the plaintiffs are beneficiary interested in a decree for sale, although it did not run in their names, does not fall under the clause. 26 A. 603. A suit for recovery of unpaid purchase money falls under the clause. 28 M. 227. A suit for specific performance either by the vendor or purchaser is not a suit for land or for the determination of any right to or interest in immoveable property. 36 I. C. 431 = 9 Bur. L. T. 119. But see 33 C. 1065. Suit for recovery of money due on a promissory note and for declaration that decretal amount is a charge on certain property falls under this section. 96 I. C. 752 = A. I. R. 1926 Lah. 660. Suit for declaration of title and for administration, declaring prior probate proceeding as not binding does not come under this section. 94 I. C. 1046 (1) = A. I. R. 1926 Lah. 456 ; 27 Punj. L. R. 398 = 96 I. C. 691 = A. I. R. 1926 Lah. 503.

Cl. (f).—As to jurisdiction in a suit for re-

shall be instituted in the Court within the local limits of whose jurisdiction the property is situate :

Provided that a suit to obtain relief respecting, or compensation for wrong to, immoveable property held by or on behalf of the defendant may, where the relief sought can be entirely obtained through his personal obedience, be instituted either in the Court within the local limits of whose jurisdiction the property is situate, or in the Court within the local limits of whose jurisdiction the defendant actually and voluntarily resides, or carries on business, or personally works for gain.

Explanation.—In this section “property” means property situate in British India.

17. [S. 19.] Where a suit is to obtain relief respecting, or compensation for wrong to, immoveable property situate within the jurisdiction of different Courts, the suit may be instituted in any Court within the local limits of whose jurisdiction any portion of the property is situate :

Suits for immoveable property situate within jurisdiction of different Courts.

Provided that, in respect of the value of the subject-matter of the suit, the entire claim is cognizable by such Court.

18. [S. 16-A.] (1) Where it is alleged to be uncertain within the local limits of the jurisdiction of which of two or more Courts any immoveable property is situate, any one of those Courts may, if satisfied that there is ground for the alleged uncertainty, record a statement to that effect and thereupon proceed to entertain and dispose of any suit relating to that property, and its decree in the suit shall have the same effect as if the property were situate within the local limits of its jurisdiction :

Place of institution of suit where local limits of jurisdiction of Courts are uncertain.

Provided that the suit is one with respect to which the Court is competent as regards the nature and value of the suit to exercise jurisdiction.

(2) Where a statement has not been recorded under sub-section (1), and an objection is taken before an appellate or revisional Court that a decree or order in a suit relating to such property was made by a Court not having jurisdiction where the property is situate, the appellate or revisional Court shall not allow the objection unless in its opinion there was, at the time of the institution of the suit, no reasonable ground for uncertainty as to the Court having jurisdiction with respect thereto and there has been a consequent failure of justice.

covery of moveable property under attachment by a foreign Court. *See* 14 I. C. 279 = (1912) M. W. N. 524.

PROVISO.—‘Defendant’ means all the defendants where there are more than one. 73 I. C. 405 = 1924 Cal. 443. Suit for mesne profits of lands situated outside British India can under the proviso be instituted in a British Indian Court, if the defendant is residing within its jurisdiction. 23 Bom. L. R. 903 = 46 Bom. 108 = 1922 Bom 188. The Secretary of State for India in Council is not a person who dwells or carries on business or personally works for gain within the local limits of Calcutta within the meaning of the Proviso. 21 I. C. 1 = 40 C. 908. On this section (proviso). *See also* 23 B. 756; 20 C. 689; *see also* notes under S. 20.

plurality of suits. 16 All. 359. As to applicability of section to moveable property *see* 96 I. C. 691 = A. I. R. 1926 Lah. 503. Where the properties are situate in different jurisdictions, the section is no bar to parties bringing successive suits. (1916) 1 M. W. N. 146 = 32 I. C. 423 = 3 L. W. 107. (22 Bom. 922; 14 Cal. 835 *follows*). *See also* 3 M. H. C. R. 376; 14 M. 324; 12 C. 566. ‘Courts’ in S. 17 means Courts to which the Code applies. The Court of a district subject to the Code has no jurisdiction under S. 17 to entertain a suit so far as it claims a decree for sale of mortgaged land situated in a scheduled district. 42 M. 813 = 46 I. A. 151 = 37 M. L. J. 11 (P.C.). *See also* 42 Cal. 116 = 41 I. A. 197 = 18 C. W. N. 994 = 27 M. L. J. 459 (P.C.) [On appeal from 4 I. C. 56 = 9 C. L. J. 288.]

19. [S. 18.] Where a suit is for compensation for wrong done to the person or to moveable property, if the wrong was done within the local limits of the jurisdiction of one Court and the defendant resides, or carries on business, or personally works for gain, within the local limits of the jurisdiction of another Court, the suit may be instituted at the option of the plaintiff in either of the said Courts.

Suits for compensation for wrongs to person or moveables.

moveable property, if the wrong was done within the local limits of the jurisdiction of one Court and the defendant resides, or carries on business, or personally works for gain, within the local limits of the jurisdiction of another Court, the suit may be instituted at the option of the plaintiff in either of the said Courts.

Illustrations.

(a) *A*, residing in Delhi, beats *B* in Calcutta. *B* may sue *A* either in Calcutta or in Delhi.

(b) *A*, residing in Delhi, publishes in Calcutta statements defamatory of *B*. *B* may sue *A* either in Calcutta or in Delhi.

Other suits to be instituted where defendants reside or cause of action arises.

20. [S. 17.] Subject to the limitations aforesaid, every suit shall be instituted in a Court within the local limits of whose jurisdiction—

(a) the defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain; or

(b) any of the defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the Court is given, or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution; or

(c) the cause of action, wholly or in part, arises.

Sec. 20. SCOPE OF THE SECTION.—See 19 M. 477; 19 A. L. J. 696=65 I. C. 93=1922 A. 367. The C. P. C. does not forbid the institution of a suit against a defendant resident in British India even if the decision may involve adjudication regarding plaintiff's title to immovable property outside British India. 23 N. L. R. 170.

CL. (a) : ACTUALLY AND VOLUNTARILY RESIDES, ETC.—Under S. 20 residence means permanent residence not a temporary or casual residence as traveller. 54 I. C. 65 (Bur.) (38 B. 125 *fol.*). But see 14 I. C. 573 (Mad.). See also 34 M. 257. A Govt. servant liable to be sent to various places but stationed in one place for several years cannot be said to have only a temporary residence there. 11 I. C. 851=4 Bur. L. T. 183. The mere fact that the defendants had their ancestral home within the jurisdiction of the Court would not give jurisdiction to it. 64 I. C. 688 (1)=19 A. L. J. 822; 38 I. C. 62=112 P. R. 1916.

CARRIES ON BUSINESS.—'Carrying on business' is used as distinct from personally working. It does not involve personal appearance or personal effort. It means having an interest in business, a voice in what is done, a share in the profit or loss and some control upon the business. 19 A. L. J. 696=65 I. C. 93=1922 A. 367. See also 4 M. 29; 96 I. C. 887=(1926) M. W. N. 592=A. I. R. 1926 P. C. 88. But where business is carried on by an agent, he should be an agent in the strict sense of the term. 23 M. 458. The employment of a mere commission agent without power to enter into contract is not enough. 8 B. H. C. 102; 12 B. 507; 8 C. 678; 73 I. C. 205=1923 Lah. 427. Whether mere letting of house property through an agent can be said to be carrying on business. 66 I. C. 865=1922 Lah. 164. A corporation resides wherever it carries on business, irrespective of the location of its Head Office and if a Bank has 50 branch offices, it has 50 separate and distinct jurisdictions. 4 Pat. L.

J. 141=48 I. C. 943=1919 Pat. 155. See also 8 C. 678.

CL. (b) : LEAVE OF THE COURT.—Leave may be given even after the institution of the suit. 30 B. 570. Leave to sue may be granted without previous notice to the defendant. 64 I. C. 794; 25 A. 603. The leave can be granted in appeal by the Dt. Judge. 35 I. C. 74=4 L. W. 411. Where leave to sue was sought for but refused, the suit cannot go on with the defendants on the record, when no permission was granted by the Court. 46 Bom. 229=23 Bom. L. R. 1086=1922 Bom. 152. A defendant may be taken to have "acquiesced in such institution" if he does not object. See 6 M. 349; or apply under S. 22; 30 B. 81. As to when and how objection to jurisdiction is to be taken. See secs. 21 and 22.

CL. (c) : CAUSE OF ACTION.—The expression means the bundle of facts which is necessary to be proved to entitle the plaintiff to a decree. 29 B. 368; 22 C. 451; 23 C. W. N. 517; 30 B. 167; 39 A. 506=41 I. C. 233; 31 M. L. J. 816; 72 I. C. 920=1923 M. 109; 1924 Nag. 308; 65 I. C. 425=1922 Oudh 109. Assignment if part of cause of action. A. I. R. 1926 Sind 31. The cause of action must be antecedent to the institution of suit. 4 P. L. J. 387 (393). The term means the cause of action as it was at the time when the right to sue arose for the first time. Per Krishnan, J. in 31 M. L. J. 816=37 I. C. 681=5 L. W. 246. It has no relation to the defence set up or to the character of the relief prayed for in the plaint. 16 C. 98=15 I. A. 156 (P. C.); 46 I. C. 913.

CAUSE OF ACTION—SUITS ON CONTRACT.—The cause of action in suits on a contract arises at the place where the contract was made or the place where the contract was to be performed or performance completed or at the place where in performance of the contract any money to which the suits relate was expressly or impliedly payable. 1 Rang. 231=1924 Rang. 2; 7 N. L. J. 25;

Explanation 1.—Where a person has a permanent dwelling at one place and also a temporary residence at another place, he shall be deemed to reside at both

79 I. C. 30 ; 13 I. C. 943 = 16 C. W. N. 325 ; 27 I. C. 129 = 8 S. L. R. 107. See also 9 I. C. 824 ; 11 B. 649 ; 31 M. 223 ; A. I. R. 1926 Cal. 100. A suit for damages for breach of contract can be brought either where the contract was made or where the breach was committed in the place where it ought to be performed. 16 C. W. N. 325 ; 50 I. C. 130 ; 21 B. 126 ; 27 M. 494. See also 27 M. 355. See also 103 I. C. 37 (2) ; 19 S. L. R. 207. Where no place for the performance is prescribed by the agreement, the place where it is intended by the parties that such contract should be performed ought to supply the forum. 13 Bom. L. R. 46 ; 11 B. 649 ; 31 M. 223.

CONTRACTS OF SALE.—A contract is made where it is accepted and the buyer at Agra cannot sue at Agra for breach of a contract to sell goods concluded by acceptance at Delhi. 41 All. 602 = 17 A. L. J. 718. On this point see also 60 I. C. 481 ; 2 Lah. L. J. 555 ; 53 I. C. 331. Cause of action may arise in the place of delivery of goods, if such place is an essential part of the contract. 39 All. 368 = 15 A. L. J. 342. See also 66 I. C. 501 = 1922 All. 448. A suit on account of non-delivery of goods may be brought in a Court of the place where delivery and payment were to be made. 42 All. 480 = 18 A. L. J. 566. On this point, see also 71 I. C. 38 ; 39 M. 195 ; 43 A. 334 ; 77 P. R. 1909 ; 65 I. C. 282 ; 1924 Lah. 349 ; 79 I. C. 30. Where goods are ordered by V. P., the place of suing is the place where the goods were delivered and paid for. 42 A. 619 = 18 A. L. J. 749. The cause of action for a suit by the seller for balance of accounts due from the buyer arises at the place of consignment of the goods to the railway. 24 I. C. 423 = (1914) M. W. N. 803. Delivery to carrier is equivalent to delivery to buyer. 1925 Lah. 555 = 89 I. C. 751. Cause of action arising in place where money is payable. See 42 All. 480 = 56 I. C. 192 = 18 A. L. J. 566 ; 1925 Oudh 209. (Payment is due at creditor's place in absence of express or implied specification). 83 I. C. 339. (Place of performance of contract is place where money is payable. See also 86 I. C. 1046.) 80 I. C. 181 = 1925 Nag. 408 ; 1925 P. C. 290 = 40 M. L. J. 806 (P. C.). In a contract of sale of goods by Calcutta Firm to Madras Firm, where the payment was to be by hundies to be drawn by the former upon the latter, the cause of action for a suit to recover money overpaid arose in Madras, the payment having been made in Madras. 47 Mad. 403 = 79 I. C. 800 = 1924 Mad. 464 = 46 M. L. J. 82.

CONTRACTS OF AGENCY.—Where goods are sent to place to be sold there and a sale takes place in contravention of instructions, a suit for damages will be at place A. 1924 Nag. 308. In a suit for damages caused by the agent's negligence, cause of action was held to have arisen in the place where the agent's negligence occurred and the Court elsewhere had no jurisdiction. 34 All. 49 = 11 I. C. 712 ; 1922 Nag. 167 ; 794 I. C. 287 ; A. I. R. 1926 Sind 238. The cause of action in a suit for accounts against an agent arises at the place where the contract of agency took place or where it was to be performed and where account was refused. 55 I. C. 266 = 12 Bur. L. T. 198 ; 94 I. C. 287 = A. I. R. 1926 Sind 238. See

also 6 Lah. 153 = 1925 Lah. 387 ; 1924 All. 530 ; 10 Lah. L. J. 87 = 9 L. W. N. 18. Where money was intended to be paid to the plaintiff at his place part of the cause of action arose there. 19 L. W. 499 = 1924 Mad. 789 = 46 M. L. J. 371. Unless the contract clearly indicated the contrary a commission agent is liable to render account only at the place where all the business is transacted. 46 A. 465 = 22 A. L. J. 591 = 1924 A. 530. See also 92 I. C. 273 = A. I. R. 1926 Lah. 287.

INSURANCE CONTRACTS.—In cases based on contract of insurance, the words 'cause of action' do not include the loss or damage of the property insured, which is merely a cause of the cause, the real cause of action being failure to pay money under the contract. 1 Rang. 231 = 76 I. C. 482 = 1924 Rang. 2. The death of the assured is a part of the cause of action and the plaintiff can maintain a suit on the insurance policy at the place of his death. 44 I. C. 694 = 22 C. W. N. 517 ; 41 I. C. 392 (Mad.). See also 98 P. R. 1918 = 45 I. C. 900 = 29 P. L. K. 1918.

PARTNERSHIP SUITS.—A suit for dissolution of partnership can be brought only at the place of its business. 42 P. R. 1916 = 33 I. C. 953. If there are two such places at any one place, 23 L. W. 361 = 92 I. C. 915 = 1926 Mad. 427 ; 50 M. L. J. 298. A suit for dissolution of partnership carried on in foreign territory is maintainable in British India if the parties are resident there. 23 Bom. L. R. 543 = 63 I. C. 959 = 45 Bom. 1228. Where partnership business was carried on at two places suit for dissolution can be filed at either place and also at the place where partnership accounts are maintained. 23 L. W. 361 = 92 I. C. 915 = A. I. R. 1926 Mad. 427 = 50 M. L. J. 298.

SUIT FOR MONEY.—The cause of action for the payment of a debt will arise at the place where the debt is payable. 20 I. C. 683 (Bur.) If there is nothing as to the place where the money under a bond is payable, the Court must be guided by the intention of the parties. 49 I. C. 950. The debtor must seek his creditor and pay him. 24 L. W. 576 = 27 I. C. 1027 = A. I. R. 1926 Mad. 1207. See also 24 A. L. J. 48 ; 43 C. L. J. 1 = 23 L. W. 3 = (1926) M. W. N. 108 = 27 Punj. L. R. 1 (P. C.) = A. I. R. 1925 P. C. 290.

SUIT ON NEGOTIABLE INSTRUMENTS.—A suit on promissory note lies at the place where it is drawn and signed and dated. 28 M. 19. Where money on a pro-note was intended to be paid in place A the Court at A has jurisdiction to entertain a suit on the pro-note. 2 P. R. 1916 = 31 I. C. 698. The assignment of a promissory note is a part of the cause of action and the assignee can sue on it in the Court within whose jurisdiction it took place. 31 M. L. J. 816 = 37 I. C. 681 = 5 L. W. 246. The cause of action on a *hundi* arises at the place where it is endorsed by the payee. 22 C. 451 ; see also 107 I. C. 218. The dishonour of a *hundi* by non-acceptance constitutes part of the cause of action in a suit against the drawer. 20 B. 133. Where a *hundi* drawn in Cawnpore for acceptance and payment in Calcutta is so accepted and paid in Calcutta, part of the cause of action arises in Calcutta. 59 I. C. 539 = 47 C. 583.

places in respect of any cause of action arising at the place where he has such temporary residence.

Explanation II.—A corporation shall be deemed to carry on business at its sole or principal office in British India or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place.

Illustrations.

(a) *A* is a tradesman in Calcutta. *B* carries on business in Delhi. *B*, by his agent in Calcutta, buys goods of *A* and requests *A* to deliver them to the East Indian Railway Company. *A* delivers the goods accordingly in Calcutta. *A* may sue *B* for the price of the goods either in Calcutta, where the cause of action has arisen, or in Delhi, where *B* carries on business.

(b) *A* resides at Simla, *B* at Calcutta and *C* at Delhi. *A*, *B* and *C* being together at Benares, *B* and *C* make a joint promissory note payable on demand, and deliver it to *A*. *A* may sue *B* and *C* at Benares, where the cause of action arose. He may also sue them at Calcutta, where *B* resides, or at Delhi, where *C* resides; but in each of these cases, if the non-resident defendant objects, the suit cannot proceed without the leave of the Court.

21. [S. 16-A (2).] No objection as to the place of suing shall be allowed by any

appellate or revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, and unless there has been a consequent failure of justice.

MATRIMONIAL SUITS.—In matrimonial suits, to which the Divorce Act does not apply, questions of jurisdiction should be decided under the C. P. Code. 54 I. C. 65=12 Bur. L. T. 120. A Court is competent to try a case of breach of contract of betrothal when the breach took place within its jurisdiction, though the defendants may be residing elsewhere. 37 I. C. 114=93 P. R. 1916. In a suit for damages for breach of contract to marry, part of the cause of action arises at the place where the marriage is to take place, though the agreement to marry is entered into at another place. 65 I. C. 812. A suit for restitution of conjugal rights may be brought either where the husband resides or the wife resides. 18 B. 316; 54 I. C. 120. A suit for dower lies in a Court within whose jurisdiction the marriage and divorce took place. 32 C. 146. See also 18 A. 400.

SUITS FOR DAMAGES FOR TORTIOUS ACTS.—If tort is committed within the limits of one Court and the tort-feasor resides within the limits of another, both Courts have jurisdiction. 39 M. 483=28 M. L. J. 310=28 I. C. 394=2 L. W. 290. Where a person purchases a ticket for journey by railway at *A*, but fell out of the train and was injured owing to the neglect of the Ry. Co. at *B*, the cause of action for a suit for damages arises at *B* and not at *A*. 42 All. 488=50 I. C. 130=17 A. L. J. 506. A suit for defamation may be instituted at the place where the defamatory matter was published. 13 B. 178. In a suit for malicious prosecution and arrest part of the cause of action arises at the place where the person is arrested. 6 Bom. L. R. 141.

SUITS TO SET ASIDE DECREE ON THE GROUND OF FRAUD.—A suit to set aside a decree obtained by fraud, where no other relief is claimed, cannot be maintained in any district outside the district in which the fraud was committed and the decree obtained. 29 All. 418; 25 All. 48; 36 All. 564. Defendant fraudulently obtained a decree in *S* and transferred it to *A* and in execution had the plaintiff arrested in *A*. Held, a suit to set aside the decree could be filed at *A* as the material portion of the cause of action

accrued at *A*. 39 All. 607=15 A. L. J. 638; 5 C. W. N. 559. See also 4 O. W. N. 1103; 100 I. C. 164 (2). As to whether the Court, in whose jurisdiction the property attached under the decree is situate, has jurisdiction to entertain a suit to set it aside. see 37 All. 189=28 I. C. 502=13 A. L. J. 190. Decree obtained at one place and transferred to another place for execution. Suit to set aside, can be filed at either place. 7 Lah. 61=94 I. C. 377=27 Punj. L. R. 517=A. I. R. 1926 Lah. 277.

As to forum in *suits for rent*, with and without an additional prayer for ejectment, under S. 66, B. T. Act. See 27 C. W. N. 542=1923 Cal. 619=77 I. C. 253.

Revision in cases of decisions as to jurisdiction under S. 20. See 1923 Lah. 565; 41 All. 602=17 A. L. J. 718.

SUITS AGAINST NON-RESIDENT FOREIGNERS.—A British Indian Court has jurisdiction to entertain a suit if the cause of action arises within its jurisdiction, even where the defendant is a non-resident foreigner. 35 M. L. J. 189=(1918) M. W. N. 521=47 I. C. 708 (a case against a foreign ship-owner for short delivery of goods). The question whether its decree could be enforced against him in the foreign Court is one for consideration of the Courts of that State. (*Ibid.*) See also 29 M. 69 (suit against a subject of a protected Native State). On this point see also 20 B. 133; 17 B. 662; 26 M. 544=30 I. A. 220 (P. C.); 25 B. 528.

Sec. 21. SCOPE OF THE SECTION.—S. 21 is new and the alterations in procedure are retrospective in effect. 87 P. R. 1914=26 I. C. 543=234 P. L. R. 1915. Section does not apply to objection in fresh suit. 28 Bom. L. R. 879=98 I. C. 341=A. I. R. 1926 Bom. 481. Section does not apply to execution of foreign judgments. 21 L. W. 330=86 I. C. 492=1925 Mad. 788. The provisions of the section are an exception to the well-established rule that where the Court has no inherent jurisdiction over the subject-matter of a suit, its decree is a nullity even though the parties may have consented to the jurisdiction of the Court. The parties cannot, by their mutual

22. [Ss. 22, 23, 24.]

Power to transfer suits which may be instituted in more than one Court.

Where a suit may be instituted in, any one of two or more Courts and is instituted in one of such Courts, any defendant, after notice to the other parties, may, at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, apply to have the suit transferred to another Court, and the Court to which such application is made, after considering the objections of the other parties (if any), shall determine in which of the several Courts having jurisdiction the suit shall proceed.

consent, convert it into a proper judicial process although they may constitute the Judge their arbitrator. 27 C. W. N. 542=1923 Cal. 610. See also 9 A. 191; 13 I. A. 134; 11 M. 26; 14 I. A. 160; 9 B. 266; 8 B. 313; 9 B. H. C. 242; 38 C. 639. This exception cannot be so interpreted as to have a wider application than what is justified by the terms of the section. 27 C. W. N. 542=1923 Cal. 610. All conditions mentioned in the section must be fulfilled before decree can be set aside. 96 I. C. 544 (1). Objection should be at the earliest opportunity. 49 Mad. 74=95 I. C. 12=A. I. R. 1926 Mad. 421=50 M. L. J. 161. S. 21 does not apply to a case where the objection is not one as to the place of suing, but one going to the nullity of the order of the first Court on the ground of *want of jurisdiction* and it can be taken at any time. The Court of a district subject to the C. P. Code has no jurisdiction under S. 17 to entertain a suit so far as it claims a decree for sale of mortgaged property situated in a scheduled district and the order for sale of the land can be set aside although no objection to the jurisdiction of the first Court was taken. 42 M. 813=46 I. A. 151=37 M. L. J. 11 (P. C.) *overruling* 34 I. C. 411. See also 7 A. 230; 13 M. 25; 2 B. H. C. 40; 12 B. 155; 13 B. 424; 13 M. 273; 33 B. 664; 13 B. 650; 23 B. 22; 97 I. C. 770=926 Cal. 1101. Section cannot apply where the case is one of inherent incompetency of British Indian Court, the cause of action arising outside British India. 10 Law L. J. 87=9 Lah. W. N. 18. The section applies where there is want of territorial jurisdiction not merely at the institution of a suit but at any stage during the progress of it. 1925 Mad. 117=47 M. L. J. 448; 1924 Mad. 697=47 M. L. J. 192; 19 L. W. 16=1924 M. 457=46 M. L. J. 250. See also 87 I. C. 341=1924 Mad. 697. The principle underlying the section is that objection to jurisdiction may be waived and it applies as well to collateral proceedings as to proceedings in appeal or revision. 1925 Mad. 117=47 M. L. J. 448. A defendant who objects to the jurisdiction of a Court cannot be said to have acquiesced in the trial of the suit if he does not apply for a transfer. 27 I. C. 232=18 C. W. N. 1340. The section applies to all objections based on the alleged infringement of the provisions of Ss. 16 to 18, C. P. Code, as regards the institution of suits relating to immoveable property. A Court executing a decree could not entertain an objection on the ground of want of territorial jurisdiction. 43 M. 675=39 M. L. J. 203 (F. B.). See also 52 M. L. J. 605. Nor an appellate court when the objection has not been raised in the trial court. 93 I. C. 103. Nor can the decree be called in question in collateral proceedings between the same parties. 108 I. C. 321=7 Pat. 216. Neither S. 21 in terms, nor any principle underlying it is applicable to a remand-

ed case being dealt with by a court other than the Court specified in the order of remand. 44 M. L. J. 238=72 I. C. 314=1923 Mad. 351.

FAILURE OF JUSTICE.—An objection as to territorial jurisdiction raised before Appellate Court must be determined on merits to ascertain whether there has been a failure of justice. 42 A. 74=17 A. L. J. 1034; 37 I. C. 114=93 P. R. 1916; 87 P. R. 1914=26 I. C. 543; 1922 Oudh 224; 19 A. L. J. 305=62 I. C. 399. Although the objection was taken at the earliest opportunity before issues were settled, the High Court refused to interfere in revision as there was no prejudice to the parties. 44 I. C. 694=22 C. W. N. 517. See also 2 Pat. L. R. 74=80 I. C. 745. Where there has been no failure of justice, the plea as to want of territorial jurisdiction cannot be entertained in appeal. 49 I. C. 441=55 I. C. 442; 36 I. C. 431=9 Bur. L. T. 119; 66 I. C. 865=1922 Lah. 164. The question cannot be gone into in *second appeal* unless it was raised at the earliest possible moment in the course of the suit. 48 I. C. 465; 41 I. C. 161.

APPLICABILITY OF SECTION TO EXECUTION PROCEEDINGS.—An execution sale after confirmation cannot be avoided on the ground that the Court had no territorial jurisdiction over the property. 18 I. C. 498=24 M. L. J. 70 See also 43 M. 675=39 M. L. J. 203 (F. B.); 1924 Mad. 457=46 M. L. J. 250. The rule of territorial jurisdiction does not apply to execution of mortgage decrees. 49 Mad. 74=95 I. C. 12=A. I. R. 1926 Mad. 421=50 M. L. J. 161.

OBJECTION TO JURISDICTION—PROCEDURE.—If the plea as to objection is taken in the original proceedings at any stage thereof, the Court should return the plaint for proper presentation. The question of delay mentioned in S. 21 is only applicable to appeals and revisions, 10 I. C. 980=4 S. L. R. 264. See also 53 I. C. 331; 8 B. 313; 9 B. 266; 23 B. 679; 10 M. 211; 93 I. C. 103.

Sec. 22. SCOPE AND APPLICABILITY OF THE SECTION.—The provisions of the section are mandatory. An application for transfer cannot be maintained after the settlement of issues. 78 I. C. 608; 11 P. R. 1917=35 I. C. 616=16 P. L. R. 1917; 7 Lah. L. J. 93=88 I. C. 531=26 Punj. L. R. 465=1925 Lah. 322; 1025 Lah. 175. The provision as to notice is mandatory. 107 I. C. 593. Both Courts must have jurisdiction in order that an application can be made under S. 22 or S. 23. Where jurisdiction is denied, no application for transfer can be made. 24 I. C. 318=12 A. L. J. 896; 71 I. C. 268=1923 Lah. 288 (2); 12 A. L. J. 986; 48 I. C. 105=21 O. C. 217. In an application for transfer under Ss. 22 and 23, the question of want of jurisdiction of the trying Court cannot be raised. 34 I. C. 707; 1 Pat. L. T. 277=56 I. C. 920.

To what Court application lies.

Appellate Court.

(2) Where such Courts are subordinate to different Appellate Courts but to the same High Court, the application shall be made to the said High Court.

(3) Where such Courts are subordinate to different High Courts, the application shall be made to the High Court within the local limits of whose jurisdiction the Court in which the suit is brought is situate.

General powers of transfer and withdrawal.

24. [S. 25] (1) On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court or the District Court may at any stage—

GROUND FORS FOR TRANSFER.—The plaintiff has always a right to choose his forum. The jurisdiction conferred by Ss. 22 and 23 must be exercised very cautiously and only when a clear cause has been shown. The mere fact that it would add to the defendant's convenience is no ground for transferring a case. 73 I.C. 860. *See also* 13 B. 178; 69 I. C. 772; 69 I. C. 239; 54 I. C. 935 = 167 P.R. 1919; 34 I.C. 686; 25 I.C. 874; 24 I. C. 707; 57 I.C. 649; 17 A.L.J. 371 = 41 A. 381; 32 I.C. 613 = 14 A.L.J. 242; A.I.R. 1928 Lah. 183; 1927 Lah. 14; 106 I. C. 869 = A.I.R. 1928 Lah. 159. Convenience to the parties and witnesses would be a good ground for transfer. 10 O. & A. L.R. 108 = 11 O.L. J. 377 = 1924 Oudh 410. A suit can be transferred only upon two grounds, *viz.*: (a) that there will not be an impartial trial by the trying Court, or (b) that there is a manifest preponderance of convenience to the petitioner, if the suit is transferred to the other Court. 56 I. C. 920 = 1920 Pat. 235. *See also* (1927) M. W. N. 607 = 39 M.L.T. 401; 4 O.W.N. 1114; 97 I. C. 390. The apprehension that there will not be an impartial trial must be such as a reasonable man might reasonably be expected to have. 1923 Lah. 564. The fact that a Judge has decided a point of law arising in a case analogous to the case is not a good ground for transferring the case from his file. 67 I.C. 228 = 1922 Lah. 369; 15 I. C. 569. Observations injudiciously and thoughtlessly made by the Judge, not a sufficient ground for transfer. 29 I. C. 29. *Balance of convenience* may be considered in deciding an application for transfer. 72 I. C. 592 = 1923 Lah. 383; 44 A. 278 = 20 A.L.J. 115 = 1922 All. 65; 9 O. L. J. 413 = 69 I. C. 717. An order of transfer passed without regard to the convenience of the parties and without hearing the other party is illegal. 33 I.C. 797 = 23 C. L. J. 295. On this section *see also* 85 I. C. 852 = 6 Pat. L. T. 540.

Sec. 23. 'SUBORDINATE,' MEANING OF.—The Oudh Chief Court is a High Court. 4 O. W. N. 1114. The Judge sitting on the Original Side is subordinate to the Appellate Side of the High Court for the purpose of transfer applications. A. I. R. 1928 Lah. 183; 1923 Rang. 22 = 1 Bur. L. J. 194 = 11 L. B. R. 446; 85 I. C. 852; 6 Pat. L. T. 540. But *see also* 27 M. L. J. 645 *infra*. *See contra* 100 I.C. 331 = 45 C. L. J. 71 = A. I. R. 1927 Cal. 290. Sec. 23 does not apply to a Court not subordinate to the High Court. Therefore a suit pending on the Original Side of a High Court cannot be transferred under S. 23. 27 I. C.

455 = 27 M.L.J. 645. But *see also* 1923 Rang. 22 *supra*. The High Court may order a transfer of a suit pending in a Court subordinate to it to a Court under a different High Court where another suit between the same parties is pending. 35 C. 541. *See also* 51 Bom. 26 = 100 I. C. 154 = 1927 Bom. 79, but *see also* 20 I. C. 758. Ss. 22 and 23 do not provide for the transfer of a case from a Court subordinate to one High Court to the Original Side of another Court. 69 I. C. 772. *See also* 57 I. C. 649 = 1 Pat. L. T. 389.

Sec. 24. JURISDICTION.—S. 24 is exhaustive of the judicial power to transfer suits and no Court has jurisdiction to transfer a suit from one Court to another unless both Courts are subordinate to it. This power is entirely different in character and legal effect from the one in case of an order returning the plaint for presentation in proper Court. 40 I. C. 393 = 13 N. L. R. 81. A suit instituted in a Court not competent to try it cannot be transferred to another Court under S. 24. 53 I. C. 892 = 1919 Pat. 409; 9 A. 191 = 13 I. A. 134. "Suit" includes execution application. A. I. R. 1926 Lah. 465; 47 All. 57 = 1925 All. 276. *See also* 49 Mad. 746 = 95 I. C. 12 = A. I. R. 1926 Mad. 421 = 50 M. L. J. 161. An order transferring an application for review to a Court other than the one which decided the case is illegal. 50 I. C. 910. No court other than the trial or appellate court can file a complaint under S. 476, Cr. P. C. 49 A. 460 = 101 I.C. 247 = 25 A. L. J. 433 = A. I. R. 1927 A. 469. A superior Court has no jurisdiction to direct the transfer of a case from a Court subordinate to it to another Court, which is outside its jurisdiction. 1924 Nag. 152. *See also* 88 I. C. 139 = 26 Punj. L. R. 308 = 1925 Lah. 561. Where District Judge has refused to transfer, whether High Court can interfere, *see* 87 I. C. 170; 103 I.C. 456 = A. I. R. 1927 Pat. 383. High Court in Insolvency Jurisdiction cannot withdraw insolvency proceedings pending before a Sub-Judge in the presidency. 49 Bom. 788 = 1925 Bom. 543. Competent to try, *see* 45 I. C. 13 = 8 L. W. 259. 98 I. C. 371 = A. I. R. 1927 Mad. 321. Where a Court having really no territorial jurisdiction enquired fully into the case, but when the defect was found out, returned the plaint, *held*, it was a proper case in which the High Court should send it for disposal to the first Court itself. 21 A. L. J. 86 = L. R. 4 A. 311 = 73 I. C. 495 (2) = 1923 A. 249.

APPLICATION FOR TRANSFER.—Where there are numerous suits pending, which are sought to be transferred, an application should be made

(a) transfèr any suit, appeal or other proceeding pending before it for trial or disposal to any Court subordinate to it and competent to try or dispose of the same, or

(b) withdraw any suit, appeal or other proceeding pending in any Court subordinate to it, and

(i) try or dispose of the same ; or

(ii) transfer the same for trial or disposal to any Court subordinate to it and competent to try or dispose of the same ; or

(iii) retransfer the same for trial or disposal to the Court from which it was withdrawn.

(2) Where any suit or proceeding has been transferred or withdrawn under sub-section (1), the Court which thereafter tries such suit may, subject to any special directions in the case of an order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn.

(3) For the purposes of this section, Courts of Additional and Assistant Judges shall be deemed to be subordinate to the District Court.

(4) The Court trying any suit transferred or withdrawn under this section from a Court of Small Causes shall, for the purposes of such suit, be deemed to be a Court of Small Causes.

25. [Ss. 20, 21.] (1) Where any party to a suit, appeal or other proceeding

Power of Governor-General
in Council to transfer suits.

pending in a High Court presided over by a single Judge objects to its being heard by him and the Judge is satisfied that there are reasonable grounds for the objection, he shall make a report to the Governor-General in Council, who may, by notification in the *Gazette of India*, transfer such suit, appeal or proceeding to any other High Court.

separately in respect of each suit. 49 I. C. 208 = 4 Pat. L. J. 13.

GROUND OFS OF TRANSFER.—Justifying circumstances. See 31 C.W.N. 332. That defendant is an influential man of the locality is no ground. 98 I.C. 859 = A. I. R. 1927 Lah. 80 (1). Convenience of parties, Limitation of property and counsel engaged at heavy fees are grounds to be considered. 101 I. C. 723 = A. I. R. 1927 Nag. 219.

NOTICE.—Notice should be issued to the parties before a Court passes an order of transfer otherwise than of its own motion. 78 I. C. 614 (1) ; 58 I.C. 560 = 18 A. L. J. 351 ; 40 I. C. 111 ; 42 I. C. 746 ; 26 O. C. 62 = 74 I. C. 249 ; 1925 Lah. 189 ; 90 I. C. 287 = 23 A. L. J. 948 ; 84 I.C. 238 = 1923 Lah. 444. Transfer without notice is ground for setting aside *ex parte* decree. 1923 Lah. 44. Want of notice does not render the order of transfer void. 13 M. 211 but see 1926 All. 17.

POWERS OF A DT. JUDGE.—A Dt. Judge can transfer a case pending before him to the Addl. Dt. Judge. 28 P. W. R. 1912 = 13 I. C. 6 = 14 P. L. R. 1912. A Dt. Judge cannot transfer a case to a Court not competent for any reason to try the same. 5 P. L. T. 588 = 1920 Pat. 274 = 57 I. C. 522 = 1 P. L. T. 637. See also 32 I. C. 788 ; 37 Cal. 574. Nor can he transfer a suit instituted in a Court not competent to try it, so as to confer jurisdiction upon another Court. 37 C. 574. Under S. 24, a Dt. Court to which a case has been remanded by the High Court has power to transfer it to the Court of the Addl. Dt. Judge, unless the terms of the High Court's order expressly limited those powers. 44 A. 211 = 20 A. L. J. 44 = 66 I. C. 317 = 1922 All. 35 ; 12 A. L. J. 1094 = 25 I. C. 141. (Transfer to Subordinate Judge.) Powers of High Court where Dt. Judge refused transfer. A. I. R. 1926 Cal. 326. If a Dt.

Judge transfers a case remanded by the High Court to a Sub-Judge who disposes of it without objection being taken as to his jurisdiction, the irregularity would not affect the decision on its merits. (1924) M. W. N. 317 = 23 I. C. 425 = 15 M. L. T. 304 ; 19 C. W. N. 143 = 23 I. C. 69 = 19 C. L. J. 408 ; 12 A. L. J. 1094 = 25 I. C. 141. Transfer of case from Munsif to Sub-Judge who acts as Small Cause Court is within the Dt. Judge's power, though a party is thereby deprived of his right of appeal. 36 I. C. 881. The Dt. Court can withdraw a transmitted execution proceeding to its own file and dispose of it. 39 M. 485 = 29 I. C. 119 = 29 M. L. J. 712. Where an Appellate Court remands a suit for fresh disposal on the merits by the Court which first decided it, the Dt. Judge can transfer it to his file and decide it. 19 I. C. 552 = 9 N. L. R. 40. (21 A. 230 *dist.*)

DELEGATION OF POWERS BY THE DT. JUDGE.—The power of transfer under S. 24 can be delegated by the Dt. Judge but when so delegated it must be exercised in accordance with law. It can only be exercised in cases pending in a Court subordinate to the Court exercising the power. 52 I. C. 352. Ss. 37 and 44 of the Punjab Courts Act provide for such a delegation in the Punjab. 40 I. C. 111 = 33 P. W. R. 1917.

GROUND OFS OF TRANSFER.—Prejudice against pleader if ground for transfer, see 91 I. C. 559 = A. I. R. 1926 Mad. 359.

COURT OF SMALL CAUSES.—A Court of Small Causes under S. 24 (4) includes Courts vested with Small Cause jurisdiction as well as the Special Courts constituted under the Provincial Small Cause Courts Act. 39 All. 214 = 15 A. L. J. 69 ; 44 I. C. 881 = 27 C. L. J. 461 ; 38 A. 425 ; 34 I. C. 113 = 14 A. L. J. 549 ; 13 A. 324. But see also 23 B. 382 ; 31 C. 1057 *contra*. A

(2) The law applicable to any suit, appeal or proceeding so transferred shall be the law which the Court in which the suit, appeal or proceeding was originally instituted ought to have applied to such case.

INSTITUTION OF SUITS.

26. [S. 48.] Every suit shall be instituted by the presentation of a plaint or in such other manner as may be prescribed.

Institution of suits.

SUMMONS AND DISCOVERY.

27. [S. 64.] Where a suit has been duly instituted, a summons may be issued to the defendant to appear and answer the claim and may be served in manner prescribed.

Summons to defendants.

28. [S. 85.] (1) A summons may be sent for service in another province to such Court and in such manner as may be prescribed by rules in force in that province.

Service of summons where defendant resides in another province.

(2) The Court to which such summons is sent shall, upon receipt thereof, proceed as if it had been issued by such Court and shall then return the summons to the Court of issue together with the record (if any) of its proceedings with regard thereto.

29. [S. 650-A.] Summonses issued by any Civil or Revenue Court situate beyond the limits of British India may be sent to the Courts in British India and served as if they had been issued by such Courts :

Service of foreign summonses.

Provided that the Courts issuing such summonses have been established or continued by the authority of the Governor-General in Council, or that the Governor-General in Council has, by notification in the *Gazette of India*, declared the provisions of this section to apply to such Courts.

30. Subject to such conditions and limitations as may be prescribed, the Court may, at any time, either of its own motion or on the application of any party,—

Power to order discovery and the like.

(a) make such orders as may be necessary or reasonable in all matters relating to the delivery and answering of interrogatories, the admission of documents and facts, and the discovery, inspection, production, impounding and return of documents or other material objects producible as evidence ;

(b) issue summonses to persons whose attendance is required either to give evidence or to produce documents or such other objects as aforesaid ;

(c) order any fact to be proved by affidavit.

31. The provisions in sections 27, 28 and 29 shall apply to summonses to give evidence or to produce documents or other material objects.

Summons to witness.

32. The Court may compel the attendance of any person to whom a summons has been issued under section 30 and for that purpose may—

Penalty for default.

(a) issue a warrant for his arrest ;

(b) attach and sell his property ;

(c) impose a fine upon him not exceeding five hundred rupees ;

transfer of a Small Cause suit from a competent Small Cause Court to a Court not having Small Cause jurisdiction makes the latter Court for the purpose of the suit a Court of Small Causes, whose decision is therefore not appealable. 40 A. 525 ; 36 I. C. 317 = 14 A. L. J. 705 ; 38 M. 25 ; 23 M. L. J. 373 ; 27 C. L. J. 461 ; 31 B. 314 (F. B.) ; 1 Pat. 696. A Dist. Judge cannot transfer a case of a Small Cause nature to a subordinate Court not invested with the powers of a Small Cause Court so long as the Small Cause Court capable of trying it is in existence. 43 I. C. 314 = 20 O. C. 350. The section does not apply to cases transferred from a Court of Small Causes to Honorary Munsif's Courts in U. P. and the

decrees passed by the latter Courts in such cases are appealable. 54 I. C. 435 ; 50 I. C. 648 = 1 U. P. L. R. (H.C.) 27. As to grounds for transfer, see notes under S. 22.

Sec. 26.—Presentation of plaint at private residence of Judge is valid. 65 I. C. 674 = 1922 Nag. 167. (34 A. 482 *relied on*). As to essentials of a suit, see 31 B. 393.

Sec. 27. SUIT DULY INSTITUTED, MEANING OF.—Where a suit is dismissed for non-payment of deficit Court-fee, review without notice to the other side is not illegal. Until the suit was registered, the suit could not have been said to be duly instituted. 26 C. W. N. 391 = 69 I. C. 43 = 1922 Cal. 234.

(d) order him to furnish security for his appearance and in default commit him to the civil prison.

JUDGMENT AND DECREE.

Judgment and decree.

33. [S. 198.] The Court, after the case has been heard, shall pronounce judgment, and on such judgment a decree shall follow:—

INTEREST.

34. [S. 209.] (1) Where and in so far as a decree is for the payment of money, the Court may, in the decree, order interest at such rate as the Court deems reasonable to be paid on the principal sum adjudged, from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior

Sec. 33.—Judgment is not legal where case transferred after hearing arguments but decided without hearing fresh arguments. 57 I. C. 34. Omission or neglect to draw up a decree following judgment does not deprive the party of his right to appeal. 52 I. C. 479=66 P. R. 1919.

Sec. 34.—Decree for money must be construed as including a claim to unliquidated damages. A. I. R. 1926 Mad. 1021=51 M. L. J. 243. A decree for sale in enforcement of a mortgage or charge is not a decree for the payment of money. 24 C. 766; 21 M. 364; 19 A. 174; 29 M. 65. Section does not apply where the decree is not for a definite sum of money, but only for partition and accounts. 49 Bom. 282; 94 I. C. 686=A. I. R. 1925 Bom. 406.

DISCRETION AS TO INTEREST.—The Court has a discretion as to the rate of interest to be awarded after the institution till judgment and where the Courts below had awarded 8 per cent. the Privy Council refused to interfere. 43 M. L. J. 66=26 C. W. N. 737=24 Bom. L. R. 971=1922 P. C. 46. *See also* 32 C. 582; 42 A. 230; 12 C. 569; 3 B. 202; 18 C. 164; 17 I. A. 201; 22 P. R. 1915=26 I. C. 402=66 P. L. R. 1915; 25 I. C. 658; 96 I. C. 310. It is a judicial discretion to be exercised on proper judicial grounds. 26 C. 39 (P. C.). Though award of interest pending suit is discretionary, it should not be refused in the absence of proper reasons. 50 I. C. 862=23 C. W. N. 336. *See also* 106 I. C. 270. The Court must award interest generally at the contract rate, unless it would be inequitable to do so in which case it must give reasons. 36 A. 220=23 I. C. 88=12 A. L. J. 283; 3 A. 91; 28 I. C. 429 (Mad.). Mere hardship is no ground for disallowing the contract rate unless there is evidence of undue advantage taken by lender. 60 I. C. 733; 60 I. C. 693. The Court has a discretion to award interest on damages for breach of contract from the date of suit up to the date of decree. 39 C. L. J. 77=80 I. C. 87=1924 Cal. 637. *See also* 27 Bom. L. R. 1168=1925 Bom. 547; (1926) M. W. N. 691=97 I. C. 871=51 M. L. J. 243=A. I. R. 1926 Mad. 1021. The Court has discretion to grant interest not specifically asked for in the plaint. 64 I. C. 806=2 Lah. 256. Interest at 6 per cent. will be allowed in a restitution suit from the date of withdrawal by decree-holder till date of repayment to judgment-debtor. 21 C. W. N. 564. Interest awarded under this section is no part of the claim or relief granted, as in the case of mesne profits. 33 C. 1232. No additional Court-fee is required on account of the claim for interest from the date of suit until realization.

17 B. 41. *See* 34 C. 1252.

Sub-Sec. (2).—Where a decree is silent with respect to interest, the Court must be deemed to have refused it. 45 M. L. J. 687. As to the object of the rule, *see* 106 I. C. 270.

DAMDUPAT.—The rule of damdupat is not applicable after suit even in cases where it is otherwise applicable. 40 C. 710; 22 B. 86; 33 C. 1869; 78 I. C. 632; 1925 Nag. 193. As regards application of section to mortgage, *see* O. 34, R. 2.

INTEREST IN MORTGAGE DECREES.—The date referred to in O. 34, R. 2 is the date fixed by Court for payment of money. The Court must ascertain the amount of interest due on the mortgage up to that date according to the contract rate, unless the Court, for some legal reason, sees fit to decrease that rate. 36 A. 220=12 A. L. J. 283; 33 M. L. J. 679; 17 C. L. J. 120=18 I. C. 747=17 C. W. N. 457. *See also* 26 C. 39; 34 C. 150; 20 C. 360; 20 B. 744; 21 M. 364; 29 C. W. N. 118=1925 Cal. 268; 1925 Nag. 193. The date cannot be extended by an unsuccessful appeal by the mortgagor or mortgagee. 17 C. L. J. 120=18 I. C. 747=17 C. W. N. 457. The Appellate Court can extend time for redemption and the mortgagee would be entitled to interest at the contract rate up to the extended date. 29 I. C. 289. Where there is no express stipulation for the payment of interest after the due date, the mortgagee would be entitled to damages for non-payment of the debt on the date. The measure of damages would be *prima facie* but not necessarily the contract rate. 4 Lah. 406=75 I. C. 375=1923 Lah. 632. [17 A. 511 (P. C.), 3 Lah. 200 (F. B.) *ref.*] *See also* 44 A. 772=20 A. L. J. 752=1923 A. 7. Where the trial Court did not provide for interest on the mortgage money after the date of filing of a suit for redemption, it must be deemed to have declined to award any interest for the period. 37 B. 326=40 I. A. 63=17 C. W. N. 573=25 M. L. J. 101 (P. C.) affirming 2 I. C. 469=11 Bom. L. R. 318. Interest from the date fixed for payment to the date of realisation is to be calculated on the principal, interest and costs found to be due on the date fixed and not on the principal alone. Such further interest is to be calculated at 6 per cent., but the Court has a discretion. 42 M. 465=36 M. L. J. 288 (34 C. 150; 21 M. 364, *rel.*). *See also* 47 I. C. 701; 27 I. C. 522; 26 I. C. 177; 34 C. 150=34 I. A. 9; 21 M. 364; 29 M. 176. A Court may in its discretion allow *post diem* interest though not allowed in the mortgage deed. 36 I. C. 685; 30 I. C. 323. *See also* notes under O. 34, Rr. 2 and 4.

to the institution of the suit, with further interest at such rate as the Court sonable on the aggregate sum so adjudged, from the date of the decree to payment, or to such earlier date as the Court thinks fit.

(2) Where such a decree is silent with respect to the payment of further on such aggregate sum as aforesaid from the date of the decree to the date ment or other earlier date, the Court shall be deemed to have refused such and a separate suit therefor shall not lie.

COSTS.

35. (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incident to all suits shall be in the discretion of the Court, and the Court shall have full power to determine by whom or out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid. The fact that the Court has no jurisdiction to try the suit shall be no bar to the exercise of such powers.

Sec. 35.—DISCRETION OF THE COURT AS TO COSTS.—Costs are in the discretion of the Judge, a judicial discretion to be exercised on general principles, not arbitrarily. 27 M. 341; 7 C. W. N. 647; 58 I. C. 421=24 C. W. N. 352; 90 I. C. 577. See also A. I. R. 1926 Oudh 35; 5 O. W. N. 35. Rule as to apportionment of costs in England and India, see 4 Pat. 510=6 P. L. T. 634=87 I. C. 849=1925 Pat. 625. See also 88 I. C. 141. As a rule costs follow the event. It should be awarded to the successful party. It is not necessary that he should be wholly successful, and substantial success is enough. 18 B. 474; 3 C. 473; 24 C. W. N. 352; 40 C. L. J. 504=1925 Cal. 297; 1923 Lah. 513 (2); A. I. R. 1928 Mad. 345=54 M. L. J. 603; 1923 Lah. 302 (1). See also 95 I. C. 446 (2). A party succeeding on a particular issue must ordinarily get his costs of that issue unless there is special reason to deprive him of it or the issues are closely and inseparably connected with each other. 45 I. C. 738=27 C. L. J. 78. In a proper case the Court may deprive the successful party of costs. 30 C. 213; 30 I. A. 86=25 A. 287; 31 C. 332 (P. C.); or even saddle him with costs of the other party. 9 C. W. N. 844; 21 C. W. N. 1137 (P. C.); 40 A. 558. But if it does so, it must give reasons in writing. 30 C. 536. For other cases regarding conduct of parties determining the award of costs, see 24 C. W. N. 110=30 C. L. J. 417; 17 L. W. 358=73 I. C. 329=1923 M. 485 (Costs disallowed owing to the vindictive nature of the proceeding launched by the client against his pleader for professional misconduct); 58 I. C. 421=24 C. W. N. 352; 62 I. C. 812; 21 I. C. 944=16 P. L. R. 1914; 38 I. C. 695=5 L. W. 672 (*Bona fide* mistake of a temple committee in instituting proceedings); 40 I. C. 614 (Tender of rent due before suit); 65 I. C. 709 (Delay in the final disposal of the suit due to the laches of the plaintiff); 85 I. C. 445=1925 Oudh 561 (Vague and loose drafting of grounds of appeal). Where both parties make false allegations costs may not be allowed or disallowed to either side. 31 I. C. 862. A successful appellant may not get his costs, because his case was not properly represented in the lower Court. 104 I. C. 325. In deciding the question of costs, a Court is entitled to consider not merely the conduct of the parties in the actual litigation but also matters which led up to the litigation. 13 C. L. J. 404=10 I. C. 90=16 C. W. N. 805; (1900) 2 Q. B.

616. Costs disallowed where proceedings could have been taken in a cheaper Court. 45 B. 1236. Where suit is overvalued, costs will be allowed on proper valuation. 87 I. C. 1002. Costs disallowed to the successful party for raising inconsistent pleas regarding effect of document whose construction was in issue. 33 A. 344=38 I. A. 104. (P. C.); for failure to prove exclusive title set up by successful party. 19 C. 253 (P. C.). Costs were awarded to the respondent against the successful appellants in view of special difficulties in construction of will and nature of contentions. 38 B. 399=26 M. L. J. 647 (P. C.). Where the suit has been caused by the conduct of the returning officer, each party may be ordered to bear his own costs. 24 C. W. N. 189=53 I. C. 741=30 C. L. J. 270. Where the litigation was due to vagueness of testamentary directions, costs of all parties should come out of testator's estate. 19 S. L. R. 220. The fact that questions of law raised are not easy of solution is not a good ground for not allowing the costs of a successful litigant. 23 M. L. J. 638=17 I. C. 609. Where alternative relief was claimed against either of two defendants who were disputing their liability, the unsuccessful defendant should be made to bear the costs of the successful defendant. 42 I. C. 636. The Court can disallow costs where suit was based on a state of law, which since has been overruled. 43 M. 61=37 M. L. J. 271; 47 B. 559=1923 B. 206. District Court can decide even after an appeal has been disposed of by High Court, whether its own order of taxation is right or not. 28 Bom. L. R. 550=95 I. C. 515=A. I. R. 1926 Bom. 367.

COSTS IN MORTGAGE SUITS.—A mortgagor is ordinarily entitled to costs in a redemption suit unless he forfeits his right by laches. 38 I. C. 655. A mortgagee is ordinarily entitled to costs of suit, unless he is guilty of grave misconduct. 19 I. C. 474. Or he denies the mortgagor's right to redeem. 91 I. C. 943=A. I. R. 1926 Mad. 405. Mortgage decree with costs, how to be realized. 41 C. L. J. 607=1925 Cal. 1135. See also 21 L. W. 252=48 M. L. J. 213 (Costs in redemption suit). In an unsuccessful appeal by the mortgagor, the mortgagee is entitled to add to the security the costs of the appeal. 40 A. 473=17 A. L. J. 582. Mortgage decree with costs how to be realised. See 93 I. C. 364=A. I. R. 1925 Cal. 1135.

2) Where the Court directs that any costs shall not follow the event, the Court te its reasons in writing.

3) The Court may give interest on costs at any rate not exceeding six per cent. m, and such interest shall be added to the costs and shall be recoverable as

- [35-A. (1) If in any suit or other proceeding, not being an appeal, any party objects to the claim or defence on the ground that the claim or defence or any part of it is, as against the objector, false or vexatious to the knowledge of the party by whom it has been put forward, and if thereafter, as

Compensatory costs in respect of false or vexatious claims or defences.

COSTS IN PARTITION SUITS.—Costs in a partition suit up to the preliminary decree ought not to be given to plaintiff but to be borne by all the parties. 42 C. 451=19 C. W. N. 233; 11 L. W. 5.

COSTS IN A REPRESENTATIVE SUIT.—See 42 B. 566=42 I. C. 9; 60 I. C. 362. Costs of all parties in a scheme suit may be directed to be paid out of the trust funds. 17 I. C. 441=25 M. L. J. 199 (P. C.). Trustees ought to have their costs out of the trust estate in legal proceedings concerning the estate, unless they have unreasonably carried on or resisted such proceedings. 39 I. C. 388=21 C. W. N. 339. Where a litigation is caused by the language of a will, its costs should be borne by the estate and not by the trustees. 39 M. 476=29 I. C. 203; 24 I. C. 96. Costs in pre-emption suits. See 71 P. R. 1915=30 I. C. 517. Costs of intervenor in administration proceedings. See 24 C. W. N. 888=48 C. 352. In an unsuccessful litigation, the Secretary of State is liable to pay costs like any other unsuccessful party. 5 Pat. L. J. 321=56 I. C. 507.

PRACTICE AS TO AWARD OF COSTS.—Excessive costs should not be allowed where a plaint is rejected at an early stage. 35 P. R. 1914=25 I. C. 435. The Court-fee paid on part of the claim subsequently withdrawn cannot be recovered. 23 I. C. 231. Withdrawal of suit—Court's discretion to award costs is not restricted by the use of the word "shall" in O. 23, R. 1. 2 O. W. N. 901=1925 Oudh 699. Where the appellate decree is silent as to costs, the decree of the trial Court is the guide to determine the costs. 62 I. C. 299=13 Bur. L. T. 173. Travelling expenses of witnesses can be recovered. 67 I. C. 277=1923 Cal. 315 (1). On a question of pleaders' fees, the Court will not interfere with the opinion of the Taxing Master unless it is wrong on principle or very clearly wrong in detail. 63 I. C. 37=45 B. 1234. The words "abide the result" are equivalent to the words "costs in the cause." 39 M. 476=28 M. L. J. 411. Order for costs in an interlocutory application to be costs in the cause, cannot be varied by the trial Judge. 28 Bom. L. R. 1283=97 I. C. 133=50 Bom. 430=A. I. R. 1926 Bom. 596. Affirming on appeal 24 I. C. 476=39 M. 476 (note). Taxation of costs in third party proceedings, see 59 I. C. 18=21 B. L. R. 808 at p. 816. As to costs incurred before the arbitrator or umpire, see A. I. R. 1928 Mad. 370 (2)=54 M. L. J. 580.

SEPARATE SETS OF COSTS.—Different sets of costs can be awarded when there are several defendants raising various defences. 31 I. C. 312= (1915) M. W. N. 1021. When the suit of a reversioner against various alienees is decreed with costs, each set of defendants are liable only for the

costs proportionate to their interest. A. I. R. 1928 Mad. 16. Where plaintiff's suit is dismissed each defendant is entitled to costs taxed on the basis of the suit valuation and not on the basis of what each defendant's interest might be in the suit itself. 27 Bom. L. R. 692=89 I. C. 211=1925 Bom. 432. When a defence is common and not separate only one set of costs should be awarded. 9 A. 205; 4 M. L. J. 281. See also 11 Bom. L. R. 158 (P. C.). Award of costs on abatement of suit, see 37 M. L. J. 596=43 M. 284; 22 M. L. J. 439.

COURT'S DISCRETION TO AWARD INTEREST ON COSTS.—The power to award interest on costs is discretionary and can be inserted after judgment while framing the decree. 35 I. C. 218; but see also 60 I. C. 345. Where a decree does not allow interest on costs, it cannot be allowed in execution. 6 Bom. L. R. Ap. 33; 3 C. 351.

NO SEPARATE SUIT FOR COSTS.—No separate suit for costs is maintainable when the Court has made no order as to costs. 2 B. 360.

APPEAL AS TO ORDER FOR COSTS.—Appeal does not lie against an order relating merely to costs but an appeal would lie when such costs are incidental to a judgment. 26 M. L. J. 356. See also 27 Bom. L. R. 692=89 I. C. 211=1925 Bom. 432 (Appeal lies from order directing how costs are to be taxed). An appeal raising only a question of costs is incompetent where it does not contain a question of law. 47 C. 67; 39 I. C. 388=21 C. W. N. 339. An Appellate Court will interfere when there is a patently erroneous order. 26 M. L. J. 356. Appellate Court can interfere if satisfied that the discretion has not been judicially exercised by the Lower Court. 40 A. 558. See also 45 I. C. 738=27 C. L. J. 78; 44 I. C. 870=22 C. W. N. 372; 20 C. W. N. 929=36 I. C. 655; also where there has been a misapprehension of facts and violation of principle. 42 B. 327. See also 24 C. W. N. 352; 16 B. 676. Second appeal lies on a question of costs only where an important question of principle has been decided. 41 A. 254; 35 C. L. J. 156; 46 I. C. 544; 12 C. 197; 12 C. 171. As to revision by High Court, see 24 M. L. J. 212.

PRIVY COUNCIL COSTS.—Where respondent lodged a case but did not appear at the hearing and the appeal was dismissed with costs, the costs should be paid to respondent. 41 C. L. J. 450=27 Bom. L. R. 853=49 M. L. J. 238 (P. C.). Appeal to Privy Council presented but not prosecuted—Respondent entitled to costs on petition for leave to appeal. 27 Bom. L. R. 699=89 I. C. 213=1925 Bom. 471.

Sec. 35-A.—1 Sec. 35-A was added by Act IX of 1922 which under S. 1 (2) thereof may,

against the objector, such claim or defence is disallowed, abandoned or withdrawn in whole or in part, the Court, if the objection has been taken at the earliest opportunity and if it is satisfied of the justice thereof, may, after recording its reasons for holding such claim or defence to be false or vexatious, make an order for the payment to the objector, by the party by whom such claim or defence has been put forward, of costs by way of compensation.

(2) No Court shall make any such order for the payment of an amount exceeding one thousand rupees or exceeding the limits of its pecuniary jurisdiction, whichever amount is less :

Provided that where the pecuniary limits of the jurisdiction of any Court exercising the jurisdiction of a Court of Small Causes under the Provincial Small Cause Courts Act, 1887, and not being a Court constituted under that Act, are less than two hundred and fifty rupees, the High Court may empower such Court to award as costs under this section any amount not exceeding two hundred and fifty rupees and not exceeding those limits by more than one hundred rupees :

Provided, further, that the High Court may limit the amount which any Court or class of Courts is empowered to award as costs under this section.

(3) No person against whom an order has been made under this section shall, by reason thereof, be exempted from any criminal liability in respect of any claim or defence made by him.

(4) The amount of any compensation awarded under this section in respect of a false or vexatious claim or defence shall be taken into account in any subsequent suit for damages or compensation in respect of such claim or defence.]

PART II.

EXECUTION.

General.

36. The provisions of this Code relating to the execution of decrees shall, so far as they are applicable, be deemed to apply to the execution of orders.

Application to orders.

37. [S. 649.] The expression "Court which passed a decree," or words to that effect, shall, in relation to the execution of decrees, unless there is anything repugnant in the subject or context, be deemed to include,—

Definition of Court which passed a decree.

with the previous sanction of Governor-General in Council, be brought into force in any province by the Local Government on any specified day. Compensation under section can be awarded only after objection by the opposite party. 94 I. C. 78 (2) = A. I. R. 1926 Lah. 472 (2). See also 94 I. C. 790 = A. I. R. 1926 All. 554.

Sec. 36.—Order under O. 21, R. 11 (2) can be executed as if it were a decree. 2 Rang. 673 = 1925 Rang. 189.

Sec. 37. SCOPE AND APPLICATION OF THE SECTION.—Applies to cases where the territorial jurisdiction of the Court is changed, as also to cases where the status of the parties is changed and the ceasing of the jurisdiction is due to either of these causes. 17 B. 162. See also 49 Mad. 746 = 95 I. C. 12 = A. I. R. 1926 Mad. 421 = 50 M. L. J. 161 ; 7 Pat. L. T. 333 = 92 I. C. 900 = A. I. R. 1926 Pat. 209. On this section, see also 41 C.L.J. 166 ; 1925 Cal. 679 ; 4 Pat. 688. The power to execute a decree is vested in the Court which passed the decree. But in the event of the Court ceasing to exercise jurisdiction, it would be exercised by the Court which would have power to try the suit at the time when the application was filed. 49 I. C. 958 (Pat.) ; 48 I. C. 107 = 3 Pat. L. J. 435. Though a defendant

did not object to jurisdiction at the time of the final decree he could do so in execution. 50 Mad. 882 = 102 I. C. 245 = 1927 Mad. 627 = 52 M. L. J. 605. The section is permissive. If after a Court has passed a decree, the local jurisdiction in respect of the suit is transferred to some other Court, the Court which passed the decree may still execute it. 28 C. 238 ; 35 C. 974 ; 25 C. 315. See also the Full Bench decision in 42 M. 821 = 37 M. L. J. 284, overruling 37 M. 462 = 26 M. L. J. 189 and other earlier Madras decisions. Where subsequent to the passing of a money decree the area is transferred from the jurisdiction of the Court which passed the decree to that of another Court, the latter Court can execute the decree. 45 M. L. J. 210 = 1924 Mad. 32. When the Court which passed a mortgage-decree is in existence, no other Court has jurisdiction to execute the decree, though the hypotheca may be within its jurisdiction unless and until the decree was transferred to it for execution. 42 M. 461 = 36 M. L. J. 199. A Court does not cease to be Court which passed the decree merely by reason that the headquarters of such Court are removed to another place or merely because the local limits of the jurisdiction of such Court are altered. 6 C. 513.

(a) where the decree to be executed has been passed in the exercise of appellate jurisdiction, the Court of first instance, and

(b) where the Court of first instance has ceased to exist or to have jurisdiction to execute it, the Court which, if the suit wherein the decree was passed was instituted at the time of making the application for the execution of the decree, would have jurisdiction to try such suit.

Courts by which decrees may be executed.

Court by which decree may be executed.

38. [S. 223, 1st para.] A decree may be executed either by the Court which passed it, or by the Court to which it is sent for execution.

39. [S. 223.] (1) The Court which passed a decree may, on the application of the decree-holder, send it for execution to another Court,—

Transfer of decree.

(a) if the person against whom the decree is passed actually and voluntarily resides or carries on business, or personally works for gain, within the local limits of the jurisdiction of such other Court, or

(b) if such person has not property within the local limits of the jurisdiction of the Court which passed the decree sufficient to satisfy such decree and has property within the local limits of the jurisdiction of such other Court, or

Sec. 38.—Section not exhaustive. 47 All. 57. Court can call back transferred decree. 50 Bom. 439 = 28 Bom. L. R. 381 = 94 I. C. 146 = A. I. R. 1926 Bom. 271.

TERRITORIAL JURISDICTION.—Territorial jurisdiction though not necessary for the trial of suits is necessary for the executing Court apart from the special and exceptional procedure by precept. 31 M. L. J. 750 = 43 I. C. 79. On this section, *see* 80 I. C. 901 = 1925 Pat. 139. Particular execution application may be transferred. 47 All. 57 = 1925 All. 276. Territorial jurisdiction is a condition precedent to the execution of a decree. The Court having jurisdiction over the property which is the subject-matter of the suit in which the decree is passed has alone the power to execute the decree. 48 I. C. 107 = 3 Pat. L. J. 435 ; 6 C. 201 ; 35 I. C. 96 ; 31 M. L. J. 22. [But *see also* the cases cited under S. 37 as to loss of territorial jurisdiction after the passing of decree.] So the decree must be transferred to the Court within the local limits of whose jurisdiction the property sought to be attached is for the time being. 4 Pat. L. J. 141. *See also* 50 M. 882 = 103 I. C. 245 = (1927) M. W. N. 282 = 25 L. W. 671 = 38 M. L. T. 351 = A. I. R. 1927 Mad. 627 = 52 M. L. J. 605. But in cases of decrees for sale of mortgage property, an exception has been recognised and a Court can order sale of properties comprised in the mortgage though some of them are situated in another district. 80 I. C. 901. *See also* 14 C. 661 ; 15 C. 667 ; 19 C. 13 ; 21 C. 689 ; 22 C. 871 ; 107 I. C. 195. The fact that all the property is not situated within the jurisdiction of the Court which passed the decree does not affect its jurisdiction to sell the property comprised in the decree. 29 I. C. 745 (Mad.) *See* O. 21, R. 3. As to pecuniary jurisdiction of the Court to which a decree is sent for execution, *see* the cases cited under S. 39. Jurisdiction is not lost in execution, because the interest which accrued after decree has raised the amount due. 10 B. 200. Also where the pecuniary limits of the

jurisdiction of the Court are exceeded by the amount of rent or mesne profits ascertained for a period subsequent to the institution of the suit. 21 C. 550 ; 40 C. 56.

CONCURRENT EXECUTION.—There is nothing in law against a decree being simultaneously executed in more places than one against the property of the judgment-debtor. 24 I. C. 302 = 3 L. W. 336 ; 4 M. I. A. 529 ; 8 C. 687. Where a decree is transferred to another Court for execution, concurrent execution of it is permissible in the Court from which the decree has been transferred. 39 I. C. 729 = 15 A. L. J. 532. But *see also* 37 M. 231 and 39 M. 640. *infra*. An application for execution has to be made to the Court to which the decree has been transferred and not to the Court which passed the decree, so long as the former Court has the seisin of execution proceedings. An application to the latter Court is not a step-in-aid of execution. 39 M. 640 = 31 M. L. J. 300 = 43 I. A. 258 (P. C.) affirming 37 M. 231. *See also* 2 P. 247. Application by legal representatives for substitution must be made to the Court which passed the decree and not to the Court to which it is transferred for execution. 55 I. C. 156 ; A. I. R. 1926 Mad. 411. An executing Court cannot refuse to execute a decree passed against a minor not properly represented in a suit. (1928) M. W. N. 227 ; 15 C. W. N. 725, *fol.*

Sec. 39. APPLICATION OF THIS SECTION.—On this section, *see* 5 P. 714. To make this section applicable, it is necessary that the provisions of the Code should regulate the procedure of both the Courts. 34 C. 576. On this section, *see also* 1925 Oudh 481 ; 1925 Oudh 428 ; 82 I. C. 958 ; 8 Pat. L. T. 292 = A. I. R. 1927 Pat. 38. An order transmitting a decree for execution is one of a quasi administrative nature. 78 I. C. 1001. An order transferring a decree for execution should not be made so as to evade the provision of the Lim. Act or to validate an invalid application. 42 M. 461 = 36 M. L. J. 199. Transfer of a portion of a decree to another

(c) if the decree directs the sale or delivery of immoveable property situate outside the local limits of the jurisdiction of the Court which passed it, or

(d) if the Court which passed the decree considers for any other reason, which it shall record in writing, that the decree should be executed by such other Court.

(2) The Court which passed a decree may of its own motion send it for execution to any subordinate Court of competent jurisdiction.

40. Where a decree is sent for execution in another province, it shall be sent to such Court and executed in such manner as may be prescribed by rules in force in that province.

41. [S. 223.] The Court to which a decree is sent for execution shall certify to the Court which passed it the fact of such execution, or where the former Court fails to execute the same the circumstances attending such failure.

Transfer of decree to Court in another province.

Court for execution is irregular. 43 I. C. 186=3 Pat. L. W. 247. Also a decree cannot be transferred for a limited purpose only. 39 I. C. 737=1 Pat. L. W. 582. A court has no power to take away the decree-holder's legal right to execute his decree in such manner as he chooses, having regard to his facilities and convenience. 1 O. W. N. 409. A District Munsif receiving by transfer a decree of a Village Court for execution or withdrawing execution of a decree to his own file cannot transfer the decree to another District Munsif's Court. 46 M. 734=44 M. L. J. 643. Application for transfer of a decree for execution is a step-in-aid. 33 I. C. 523=14 A. L. J. 415. But is not an execution application within the meaning of O. 21, R. 10. 94 I. C. 482=A. I. R. 1926 All. 473. A decree-holder need not make a second application for execution to the Court to which a decree has been transferred, when he has already made one application to the Court transferring the decree. 2 P. 909=1924 Pat. 120. Questions regarding who are the legal representatives and plea of limitation, if raised, should be decided before transfer. (1926) M. W. N. 120=91 I. C. 1056=23 L. W. 92=A. I. R. 1926 Mad. 411.

PECUNIARY JURISDICTION OF THE COURT TO WHICH A DECREE IS SENT.—The Court to which a decree is sent must be one having jurisdiction and competent to execute the decree, having regard to the amount or the value of the subject-matter. 16 C. 457 at 465; 12 B. 155. See also S. 6. Court to which the decree is transferred must be one having pecuniary jurisdiction to try the suit in which the decree was passed. The provision in sub-Sec. (2) that the Court may of its own motion transfer a decree to a subordinate Court of competent jurisdiction does not mean that under sub-S. (1) a decree may be transferred for execution to any Court, irrespective of its pecuniary jurisdiction. 1 P. 651=3 P. L. T. 422. But the Madras High Court has held that the question of competency does not arise where the decree is sent to another Court on the application of the decree-holder. 7 M. 397; 17 M. 309; (1914) M. W. N. 97=22 I. C. 275. See also 12 I. C. 27 (Bur.).

Cl. (e).—If a Court passes a decree for the sale of property mortgaged, and after the passing

of the decree the District within which the property is situate is transferred to another Court, the Court which passed the decree can still sell it. 15 C. 667; 19 C. 13; 21 C. 639; 22 C. 371.

Cl. (d).—Under this clause a Court which passed a decree in its Small Cause jurisdiction, may, for any good reason, transfer it to the other branch of the same Court. The two branches may be regarded as different Courts. 8 B. 230; 9 B. 237=6 A. 243 (F. B.); 76 I. C. 548=1923 Bom. 371. In 18 B. 61 the question whether a Sub-Judge can transfer a decree for execution to a Court of Small Causes, when the property attached was situated within the local limits of his jurisdiction was raised, but not decided.

CONCURRENT EXECUTION IN SEVERAL COURTS.—A Court has power to send its decree for execution to several places. 14 M.I.A. 529, 8 C. 687. See also notes under the heading under S. 38. Execution case once transferred—Certificate under S. 41 not received—Court passing decree cannot transfer it again to different Court. 29 O. C. 84=A. I. R. 1925 Oudh 428.

APPEAL.—An appeal lies from an order rejecting an application for transfer. 8 C. W. N. 575.

Sec. 40.—See 31 Bom. 5.

Sec. 41. SCOPE AND APPLICABILITY OF THE SECTION.—It is only when the Court to which a decree is sent has executed it or has wholly failed to execute it that the Court is bound to send a certificate under S. 41. It does not matter if one application fails. 25 Bom. L. R. 453=74 I. C. 149=1923 Bom. 396. See also 20 A. 129. After the issue of a certificate under S. 41, and return of the copy of the decree, the Court to which the decree is transferred ceases to have jurisdiction. 22 A. L. J. 1039=1925 All. 179; 26 Bom. L. R. 345=1924 B. 359; 5 Pat. 398=94 I. C. 36=1926 P. H. C. C. 86=7 Pat. L. T. 461=A. I. R. 1926 Pat. 274. Certificates as to result of each application sent under the executive orders of the High Court cannot put an end to the jurisdiction of the Court to execute the decree. 18 N. L. R. 178=68 I. C. 657=1922 Nag. 210. As to the applicability of the section to a Court executing its own decree on Small Cause Side, in the Original Side, and entering satisfaction in the Small Cause Register, see 76 I. C. 548=1923 Bom. 371. On this section, see also A. I. R. 1926 Lah. 113.

42. [S. 228.] The Court executing a decree sent to it shall have the same powers in executing such decree as if it had been passed by itself.

Powers of Court in executing transferred decree.

All persons disobeying or obstructing the execution of the decree shall be punishable by such Court in the same manner as if it had passed the decree. And its order in executing such decree shall be subject to the same rules in respect of appeal as if the decree had been passed by itself.

43. [S. 229.] Any decree passed by a Civil Court established in any part of British India to which the provisions relating to execution do not extend, or by any Court established or continued by the authority of the Governor-General in Council in the territories of any foreign Prince or State, may, if it cannot be executed within the jurisdiction of the Court by which it

Execution of decrees passed by British Courts in places to which this Part does not extend or in foreign territory.

was passed, be executed in manner herein provided within the jurisdiction of any Court in British India.

44. [S. 229-B.] The Governor-General in Council may, by notification in the *Gazette of India*, declare that the decrees of any Civil or Revenue Courts situate in the territories of any Native Prince or State in alliance with His Majesty and not established or continued by the authority of the Governor-General in Council, or any class

Execution of decrees passed by Courts of Native States.

of such decrees, may be executed in British India as if they had been passed by the Courts of British India.

Sec. 42. POWERS OF COURT IN EXECUTING TRANSFERRED DECREE.—The executing Court cannot call the legality of a decree in question. 8 C. 687; 31 C. 922; 23 A. 181₆; 7 Bom. L.R. 659; 4 M. 324, 11 B. 528; 7 B. 481; 10 B. 65. But see 28 B. 378. Court cannot vary decree. See 4 I. A. 137; 9 I. A. 1=8 C. 332; 15 B. 644; 7 A. 194; 22 C. L. J. 561; 34 I. C. 362; 39 I. C. 537; 99 I. C. 535=27 *Punj. L. R.* 750. The Court to which a decree is sent can decide whether or not the execution was barred by limitation. 23 C. 39. But it has no such power when the Court which passed the decree makes an order for execution and then transmits the decree for execution to another Court. 15 B. 28. The Court to which a decree is sent cannot question the propriety of the order transmitting the decree to such Court. 21 B. 456. See also 7 A. 330; 8 M. L. J. 1. It cannot refuse execution on the ground that questions are raised between the parties that cannot properly be dealt with in execution. 11 B. 528. In executing a decree against a firm Court can determine whether a person is a partner or not. 98 I. C. 855. The executing Court has power to consider an objection that the decree-holder's demand must be deemed to have been satisfied under S. 18 of the U. P. Court of Wards Act. 46 A. 560=22 A. L. J. 439. Where a decree is already transferred for execution by Court which passed it, an application for further transfer should be made to the Court where execution is pending. 47 B. 56=1922 B. 359. Objections to the execution of the decree should be raised before the Court to which it is transmitted for execution. 78 I. C. 1001. Where a decree-holder obtains an order for the transfer of a decree but the decree is not actually sent, the Court which passed the decree has jurisdiction to execute it. 1 F. 328=3 *Pat. L. T.* 298. Section not applicable to execution proceedings of a decree of Madras Small Cause Court transferred to a mofussil Court, but applicable to execution proceedings in the Madras Small Cause Court. 22 L. W. 455=49 M. L. J. 104. Transfer for execution—Power of court to order attachment. 91 I. C. 1043.

APPEAL.—Although no appeal lies from the

orders of a Small Cause Court, still under S. 42 an appeal lies from an order passed in execution of a Small Cause decree transferred to a Court on its Original Side. 33 I. C. 523=14 A. L. J. 415; 27 I. C. 10=20 C. L. J. 129; also 103 I. C. 344. Only one appeal lies against such orders. 12 I. C. 959; 25 C. 872.

Sec. 43.—The section is applicable to decrees passed by Courts in the Scheduled Districts. 15 C. 365. The Court of the Political Agent at Sikkim is a Court established by authority of Governor-General. 38 C. 859. See also cases noted under S. 1 *supra*.

Sec. 44. SCOPE OF THE SECTION.—(See also notes under S. 13.) A suit does not lie in British India on decrees of the Courts of Native States; such decrees are made executable by Notification by Governor-General in Council under S. 44. 39 M. 24=27 M. L. J. 535 (F. B.). The expression "may be executed" gives a discretion to the Court to refuse execution. This discretion is not limited to Ss. 13 and 14 of the Code. 21 L. W. 330=86 I. C. 492=1925 *Mad.* 788. These words refer only to the mode of execution. 21 L. W. 330=86 I. C. 492=1925 *Mad.* 788. As to powers of Court executing decree of foreign Court, see 41 C. L. J. 508=1925 *Cal.* 955. As to the mode of executing foreign decrees, see 2 M. 237. Notice to judgment-debtor is essential. 21 L. W. 330=86 I. C. 492=1925 *Mad.* 788. The Law of Limitation governing the execution of foreign decrees in British India is the law in force in British India. An order for transmission of a decree to British Court cannot be treated as an order for execution. 40 B. 504=36 I. C. 369; 14 C. at p. 571. The section does not remove the decree of a Native State from the category of foreign judgments. 15 B. at p. 219. If the foreign decree has been obtained by fraud, a British Court is not bound to execute it. (*Ibid.*) A British Court executing a foreign decree can enquire whether the foreign Court had jurisdiction to pass it. 40 B. 551=16 I. C. 363. See also notes under S. 13. An application for execution under S. 44 may be resisted on any of the grounds mentioned in S. 13. 39 M. 733=30 M. L. J. 148.

45. [S. 229-A.] So much of the foregoing sections of this Part as empowers a Court

Execution of decrees in
foreign territory.

to send a decree for execution to another Court shall be construed as empowering a Court in British India to send a decree for execution to any Court established or continued by the authority of the Governor-General in Council in the territories of any foreign Prince or State to which the Governor-General in Council has, by notification in the *Gazette of India*, declared this section to apply.

46. (1) Upon the application of the decree-holder the Court which passed the

Precepts.

decree may, whenever it thinks fit, issue a precept to any other Court which would be competent to execute such decree to attach any property belonging to the judgment-debtor and specified in the precept.

(2) The Court to which a precept is sent shall proceed to attach the property in the manner prescribed in regard to the attachment of property in execution of a decree :

Provided that no attachment under a precept shall continue for more than two months unless the period of attachment is extended by an order of the Court which passed the decree or unless before the determination of such attachment the decree has been transferred to the Court by which the attachment has been made and the decree-holder has applied for an order for the sale of such property.

*Questions to be determined by Court executing decree.***47. [S. 244.] (1)** All questions arising between the parties to the suit in which

Questions to be determined
by the Court executing de-
crees.

the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.

Sec. 45.—Neither S. 44 nor S. 45 sanctions the transmission of a decree of British Indian Court to a Court in a Native State. 40 M. 1069=33 M. L. J. 130 (F. B.); 32 M. L. J. 487=41 I. C. 41. See also 12 B. 230; 29 C. 400; 39 M. 648.

Sec. 46. ATTACHMENT BY PRECEPT.—The Court which passed the decree can issue a precept even after the decree is transferred to another Court for execution. 31 C. W. N. 653=102 I. C. 513=A. I. R. 1927 Cal. 581. The Court to which precept is issued can accept money or security. 27 Punj. L. R. 757. An application under the section should be made to the Court which passed the decree. The period of two months may be extended after it has expired. See S. 148. An order extending the period of attachment relates back to the date of the petition and the attachment would be effective though the order was passed after the expiry of two months if the application for extension was put in within the period. 34 I. C. 302=3 L. W. 336. Court to which decree is transferred cannot issue precept. A. I. R. 1926 Sind 157. Application for attachment, if sufficient to entitle applicant to rateable distribution, see 90 I. C. 527. Power of Court to which precept is issued to accept money or security, see 94 I. C. 119=8 L. L. J. 164=A. I. R. 1926 Lah. 433.

Sec. 47. SCOPE AND OPERATION OF THE SECTION.—All questions relating to the execution, discharge for satisfaction of a decree and arising between the parties to the suit or their representatives shall be determined under S. 47 by the executing Court and not by suit; the order passed is appealable, as it has the force of a decree. The section applies only to matters arising subsequent to the passing of the decree. 67

I. C. 753; 25 Bom. L. R. 440. A suit to enforce an injunction is barred under S. 47. 46 C. 103. After decree for possession of properties, a suit for declaration of title barred. 1 P. 157. Section no bar to setting up by way of defence matters relating to execution. 41 M. L. J. 261; 27 C. W. N. 280. The section should be interpreted liberally. 3 Pat. L. T. 613; 19 C. 683. S. 47 does not apply to a decree of a foreign Court. (1913) M. W. N. 665. An order allowing the decree-holder to withdraw execution proceedings is outside the section. 19 I. C. 904=18 C. L. J. 53. O. 21, R. 103 is not restricted by the general provisions of S. 47. 52 I. C. 928. O. 21, R. 103 only applies to cases where strangers to the decree are involved, while S. 47 governs cases where the persons concerned are parties to the suit or their representatives. 41 M. L. J. 54. An application to draw out an amount deposited by defendant in setting aside an *ex-parte* decree is not an execution application. (1927) M. W. N. 885 (2).

QUESTIONS TO BE DETERMINED UNDER THE SECTION.—Objections by the judgment-debtor to the execution of a decree fall under the section. 46 M. L. J. 240; 5 O. W. N. 242; 22 I. C. 926=12 A. L. J. 12. If objection to execution is taken by a party to the suit, S. 47 applies and not O. 21, R. 63. 16 I. C. 255 (All.). An agreement for stay of execution of decree before the decree is passed is a matter to be enquired into under S. 47. 40 M. 233=32 M. L. J. 13 (F. B.); 22 B. 463. But see *contra* 31 C. 179; 29 C. 810; 9 Lah. L. J. 7=100 I. C. 156=28 Punj. L. R. 71; but not so the agreement made prior to decree to execute for lesser sum. 4 Rang. 118=96 I. C. 773=5 Bur. L. J. 41=A. I. R. 1926 Rang. 149.

(2) The Court may, subject to any objection as to limitation or jurisdiction,

The following are questions to be determined in execution and not by suit:—Whether or not execution of a decree is barred. 2 Pat. L. R. 222 = 1924 Pat. 683. That the decree was a nullity having been passed against a dead person. 28 Bom. L. R. 1367 = 98 I. C. 927 = A. I. R. 1927 Bom. 53. That the Court had no jurisdiction to pass the decree and was against S. 42 of the Co-operative Societies Act. 31 C. W. N. 739 = 103 I. C. 644 = A. I. R. 1927 Cal. 578 or is otherwise a nullity. 103 I. C. 673 = A. I. R. 1927 Lah. 651. The right of a transferee of a decree to execute the same. 28 I. C. 906 (Mad.). The effect of irregularity or illegality of notice issued under O. 21, R. 16. 56 I. C. 461. Whether the decree against a shebait is capable of execution against his successor. 14 C. L. J. 337. The right of a judgment-debtor to stay execution on the ground of fraud or negligence of the decree-holder where the execution proceedings are still pending. 22 I. C. 963. An enquiry into administrator's accounts in case of money decree against him falls under the section. 5 R. 44 = 101 I. C. 431 = A. I. R. 1927 Rang. 127 (1). The question whether a decree against a Hindu father is capable of execution against the son, the debt being tainted with immorality. 62 I. C. 905 = 6 P. L. J. 451. An objection by the heir of a Hindu judgment-debtor that the debt was not for necessity. 13 I. C. 670. (11 M. 413; 17 M. 122, Dist.; 16 A. 449; 87 P. R. 1887; 147 P. R. 1907; 34 C. 642, *Rel. on*). An application for refund of excess amount levied in execution. 44 B. 97 = 13 I. C. 133 = (1912) M. W. N. 44; 40 M. 780. Also an application for the recovery of the land taken possession of by the decree holder and either not covered by the decree or in excess of it. 23 C. 483; 2 A. 61; 45 All. 96. An improper seizure of a judgment-debtor's property by the decree-holder in excess of his rights. 38 A. 339. A suit does not lie for recovery of property included by mistake in the decree and sold in execution, where the sale was not set aside within time. 46 B. 914 = 1923 Bom. 62. Where the sale is set aside, an application for restitution of the property sold may be made under the section and no separate suit lies. 16 M. 287; 22 A. 108. The title of a purchaser in execution of a mortgage decree can be determined under this section. 54 Cal. 419 = 103 I. C. 233 = A. I. R. 1927 Cal. 614. *See also* 53 Cal. 837 = A. I. R. 1927 Cal. 106. An application for restitution of property purchased by the auction-purchaser on the ground that certain properties not covered by the decree were sold, is not maintainable under S. 47. 45 A. 96 = 1923 All. 470. An order in execution adjudicating the claims of an assignee decree holder and a person claiming a charge over the properties is not appealable as it relates to a question between decree-holders *inter se*. 24 L. W. 70 = 93 I. C. 649 = A. I. R. 1926 Mad. 691. The execution Court has under S. 47 power to correct a mistake in the final decree in a partition suit in awarding an excess share to one party. 78 I. C. 1039; 41 M. L. J. 120. As to power of amendment of decree, *see* 103 I. C. 673 = A. I. R. 1927 Lah. 651. Where a decree is thus amended after full execution, an application for restitution may be made under the section and no separate suit lies. 27 A. 485;

22 A. 79; 5 C. W. N. 627. Security bonds can be enforced in execution. 45 A. 649 = 21 A. L. J. 604.

ADJUSTMENT OUT OF COURT.—An application for certifying payments made out of Court falls under S. 47. 1 Pat. 644 = 68 I. C. 645. O. 21, R. 2 does not limit the operation of S. 47. 1 Bur. L. J. 43 = 70 I. C. 859; but not whether such application is barred by time. 25 I. C. 884. S. 47 bars a suit for a declaration that a decree is satisfied. 3 Lah. 319 = 36 I. C. 988 = 31 M. L. J. 429; 21 C. 437; 15 M. 302; 31 C. 480. The question of decree-holder's fraud in not certifying the payment and holding a sale after satisfaction did not fall under O. 21, R. 90 but under S. 47. 10 I. C. 625; 30 C. L. J. 248; 41 All. 443. *See also* 32 C. W. N. 434. Where after a decree for possession of a share in an estate, specific lands have been allotted in lieu of the share in partition proceedings, an enquiry as to what are those lands is one relating to execution of the decree. 1 P. 378 = 43 M. L. J. 124 (P. C.). *See also* 1 Pat. L. W. 711 = 2 Pat. L. J. 496.

OBJECTION TO ATTACHMENT.—Objection by the judgment-debtor that the property is not saleable comes under the section. 19 B. 328; 27 C. 187. Also an objection on the ground of want of saleable interest 1 O. W. N. 857. *See also* 76 I. C. 316. An objection by the judgment-debtor to an attachment of property in his possession on the ground that he is in possession as a *shebait* of a deity falls under O. 21, Rr. 58 and 60 and not under S. 47. 39 C. 298 = 16 C. W. N. 26 (F. B.); 12 I. C. 411; 42 C. 440 = 19 C. W. N. 520. But *see contra*. 2 Luck. 145 = 4 O. W. N. 102 = 100 I. C. 464 = A. I. R. 1927 Oudh 120. So also an objection that the property sought to be attached is *wakf* property. 3 Pat. L. T. 432 = 67 I. C. 438. *See also* 23 M. 105; 23 B. 237; 31 M. 125. An objection by the legal representative of a deceased judgment-debtor that the property attached is his own falls under S. 47 and not under O. 21, R. 58. 3 Pat. L. T. 613 = 68 I. C. 367; 28 A. 51; 26 M. 501; 27 C. 34; 34 B. 546; 2 Rang. 168; *also* 54 C. 1064; 5 Rang. 659; 100 I. C. 786 = 28 Punj. L. R. 121. Where a person was added as legal representative and he objected to a certain attachment as being a legatee, the question falls under the section. 6 Bur. L. J. 107 = 5 R. 393 = 104 I. C. 121 = A. I. R. 1927 Rang. 273. But where the legal representative sets up title on behalf of a third person, the case does not fall within S. 47. 31 I. C. 393 (Mad.); 21 M. 195; 23 B. 237; 31 M. 125; 39 C. 298. Objection by a member of a tarwad that a property attached in execution of a decree passed against a karnavan of a tarwad in his representative capacity does not belong to the tarwad but to a separate *tavashi* to which the claimant belonged could not be enquired into under this section. 51 M. 46 = 106 I. C. 230 = 26 L. W. 775 = A. I. R. 1927 Mad. 1043 = 53 M. L. J. 824 (F. B.), overruling 30 Mad. 215 and 24 M. 658.

PROCEEDINGS TO SET ASIDE EXECUTION SALE.—The question of the validity or otherwise of a sale held in execution of a decree is one relating to execution arising between parties to the suit. 13 I. C. 133 = (1912) M. W. N. 44. The fact that the auction-purchaser is interested in

treat a proceeding under this section as a suit or a suit as a proceeding and may, if

the result, does not matter. 19 C. 683=19 I. A. 166. *See also* 34 M. 417; 34 B. 546. S. 47 applies to a case where the question raised concerns the auction-purchaser as well as parties to the suit, e.g., an application to set aside the sale for irregularity. 41 M. 403=34 M. L. J. 463 (P.C.). An application to set aside an execution sale as illegal falls under S. 47 22 A. L. J. 413. So also an application on the ground of want of notice under O. 21, R. 22. 5 Pat. L. T. 61; or suppression of processes. 27 C. L. J. 528. The proper remedy for a plaintiff to set aside a sale held in contravention of O. 34, R. 14, is by an application under S. 47 and not by a separate suit. 45 B. 174. But an order setting aside confirmation of sale does not fall under the section. 100 I. C. 800=A. I. R. 1927 Lah. 337. Where property claimed by a person in his personal capacity is sold in execution of a decree to which he was a party in a representative capacity, he can apply under S. 47 to have the sale set aside and a separate suit will be barred by that section. 46 I. C. 458=27 C. L. J. 572. So also where it is objected that the property sold is not liable to attachment and sale under S. 60. 6 A. 448; 8 A. 146; 34 M. 417; 34 B. 546; also where it is alleged that before sale the decree was adjusted and that consequently the sale was illegal. 22 A. 86. An objection by a Hindu widow who is a party to the suit, to the sale of a certain house without reserving rooms for her residence, can be enquired only under S. 47 and not by a separate suit. 19 I. C. 926 (2) (Punj.). The section, however, does not bar a suit to set aside a decree and execution sale thereunder as having been obtained by fraud. 42 C. 244=27 M. L. J. 100 (P.C.). *See also* 24 I. C. 695; 26 C. 326; 27 C. 197; or as having been a nullity, the legal representative of the deceased defendant not having been brought on record. 21 A. 316. Where a mortgage decree is not passed in accordance with law but the properties are purchased by the mortgagee in execution sale, the sale is not void but irregular. The remedy of the aggrieved party is to apply under the section before confirmation of the sale and not by a subsequent suit for redemption treating the execution sale as void. 41 M. 403=22 C. W. N. 553=45 I. A. 54=34 M. L. J. 463 (P.C.). An application by a Receiver of an insolvent's estate to annul a sale on the ground of a prior adjudication of the debtor is one under S. 47 to which O. 21, R. 90 is not applicable and hence a second appeal lies to the High Court. 34 I. C. 829=30 M. L. J. 611. *See also* 1 Rang. 533. A petition objecting to the whole execution procedure in a case and not merely to the natural irregularity in conducting or publishing the sale may be dealt with under S. 47 and is not fettered by the 30 days rule for presentation under O. 21, R. 90. 37 I. C. 827=10 Bur. L. T. 249. An order on an objection that the properties could not be sold subject to encumbrances as notified in the sale proclamation is one relating to execution within S. 47. 72 I. C. 860. An order on an application by a judgment-debtor objecting to the sale of certain property falls under S. 47. 31 I. C. 102 (Mad.). Such an order is appealable. 17 A. L. J. 802. So also an order declining to proceed with execution for the sale of the property, in view of

S. 63. 26 C. L. J. 42=42 I. C. 466. Where an execution sale is challenged on the ground that no notice was issued under O. 21, R. 22 but the Court finds, that no such notice was necessary, the order is not one under S. 47. 2 P. 916. Order setting aside sale—whether appeal and second appeal lie. 91 I. C. 711=A. I. R. 1926 Cal. 539.

PROCEEDINGS FOR DELIVERY OF PROPERTY SOLD IN EXECUTION.—Proceedings for delivery of possession of property sold in execution where the auction-purchaser is a stranger are not covered by the section. 14 C. 644; 31 M. 177. *See also* cases cited under the heading "auction-purchaser whether a representative of a party." Where the decree-holder is himself the auction-purchaser, the question is one relating to execution, arising between the parties to the suit, the decree-holder not ceasing to be a party by becoming the auction-purchaser. 35 B. 452=11 I. C. 987=13 Bom. L. R. 661; 27 C. 34; 31 C. 737; 31 A. 82; 26 M. 740; 13 M. 504; 25 M. 529; 10 I. C. 51=13 C. L. J. 467; 44 I. C. 563; 78 I. C. 930 overruling. 35 R. 452. But *see* 48 Bom. 550; 5 O. W. N. 108=A. I. R. 1928 Oudh 199 (F. B.). A suit lies by a decree-holder who purchases his judgment-debtor's rights in joint property, for partition against the judgment-debtor and other co-owners. 28 M. L. J. 642=29 I. C. 976; 1 Lah. 134; 39 M. L. T. 281=105 I. C. 414=A. I. R. 1927 Mad. 955. Where the decree was for *khas* possession of lands jointly owned with the defendants, a separate suit for partition and possession would be barred. 54 Cal. 524=31 C. W. N. 406=101 I. C. 622=A. I. R. 1927 Cal. 411. Questions relating to the possession of property after sale has taken place are not questions connected with the execution, etc., of a decree within S. 47 and a separate suit for recovery of possession by the decree-holder auction-purchaser is not barred. 33 I. C. 367; 3 Pat. L. J. 571; 48 B. 550; 53 I. C. 460. Even if they are questions relating to execution, the decree-holder cannot be treated as a party to the suit after he has become the purchaser. 31 A. 82; 6 C. L. J. 749. *See also* 49 I. C. 137=29 C. L. J. 48; 4 Pat. L. J. 716. A suit for possession lies by the decree-holder auction-purchaser who is resisted in obtaining possession of the property by the judgment-debtor as well as by a third person claiming to have an interest in the property. 44 B. 977. The question of delivery of possession arising between the decree-holder and defendant against whom no relief is granted is still under S. 47. 32 I. C. 769=29 M. L. J. 629. Where the decree-holder who is himself the auction-purchaser is obstructed in possession, and the Court refuses to remove the obstruction, the order is one under S. 47. 61 I. C. 349=39 M. L. J. 603.

OTHER CASES WHERE SEPARATE SUIT WILL LIE.—That which in reality forms the basis of an independent suit cannot be introduced as a question to be tried in execution proceedings. 49 I. A. 220=1 P. 581=43 M. L. J. 589 (P.C.); 49 A. 379=25 A. L. J. 253=100 I. C. 495=A. I. R. 1927 All. 378. *Questions as to validity of decree.*—An objection to execution on the ground that the decree is invalid being collusive, can be tried only in a regular suit and not in execution under S. 47. 22 B. 475; 27 M. 118; 28 M. 26; 30 M. 26; 32

necessary, order payment of any additional court-fees.

C. 265; 21 A. 277, 356. So also the question whether a decree was obtained by fraud or collusion. 29 I.C. 239=38 M. 221; see also 9 M. 80; 23 C. 639; 38 Mad. 1076. So also where it is claimed that the decree passed against a Hindu widow is not binding on the reversionary inheritance. 30 M. 402. S. 47 does not bar a suit by a person against whom a decree has been passed at a time when he was suffering from unsoundness of mind, to set aside the decree. 50 I. C. 109=17 A. L. J. 257. Where a decree is of a purely declaratory nature, a separate suit will lie to enforce the rights declared by such a decree. 22 B. 267. Where in a suit by the prior mortgagee impleading the puisne mortgagee as party, the decree does not provide for the working out of the rights of the puisne mortgagee, he can enforce his mortgage by a suit of his own, unaffected by S. 47. 49 I.C. 466=(1918) M. W.N. 902. See also 42 M. 90. Where a puisne mortgagee impleaded a prior mortgagee decree-holder and obtained a decree, then the prior mortgagee purchased the property in execution of his own decree and objected to the sale by the puisne mortgagee the order on the puisne mortgagee's application is not appealable. 99 I.C. 658=A. I. R. 1927 Mad. 431. If the profits are not ascertained, a fresh suit to ascertain their amount is maintainable. 33 I.C. 83. S. 47 is no bar to a suit for actual possession by a purchaser who obtained symbolical delivery after confirmation of the execution sale. 20 C. W. N. 675=23 C. L.J. 587 (26 M. 740, *diss.*). A suit by the decree-holder for declaration that the assets of the deceased debtor are liable to attachment and sale in execution of the decree, when objections are allowed under O. 21, R. 58, is not barred by the sections. 71 I.C. 1012=1923 A. 292. Where a decree-holder under a *bona fide* mistake brought to sale in execution some of his own properties, the remedy is only by a suit under O. 21, R. 103 and not by an application under S. 47. 15 L. W. 272=1922 Mad. 63. A suit lies for contribution by one judgment-debtor against another, for his share of the decree debt, the whole of which has been levied in execution from him. 18 A. 106. A suit will lie against the auction-purchaser for recovery of property sold in execution of a decree, in which the judgment-debtor has no interest. 75 I.C. 238. A dispute as to possession between rival auction-purchasers of the same property in execution of different decrees does not fall within the scope of S. 47. 49 I.C. 629=9 L.W. 81. A suit for damages for fraudulent execution is not barred. 23 I. C. 405=(1914) M.W.N. 174.

PARTIES TO THE SUIT.—S. 47 is not confined only to cases arising between parties who are opposed to each other in the suit. 45 M. L. J. 478=1924 M. 365; 82 I. C. 734. Persons may be parties opposed to each other without necessarily being arranged as plaintiff and defendant in the suit. 70 I. C. 329; 18 L. W. 311=24 M. L. J. 477=13 I. C. 448=(1913) M. W. N. 382; 5 Rang. 418=99 I. C. 418=A.J.R. 1927 Rang. 55. Questions or disputes between judgment-debtors *inter se*, in which the decree-holder has no interest are not questions between the parties to the suit. 31 M. L. J. 44=35 I. C. 179; 70 I. C. 329=32 M. L. T. (H. C.) 118 (2)=6 A. 12. So

also disputes between co-decree-holders. 70 I. C. 329=32 M. L. T. (H. C.) 118 (2); 8 M. 495; 11 C. W. N. 433. 6 P. 386=103 I. C. 724=A. I. R. 1927 Pat. 288. Also questions between a party to a suit and his own representative. 20 I. C. 329=32 M. L. T. (H. C.) 118 (2); 25 B. 631. Parties unnecessarily impleaded are still parties to the suit within S. 47. 67 I. C. 6=34 C. L. J. 477. A defendant whose name is struck off the record cannot be said to be a party to the suit. 80 I. C. 470. A party to a suit exonerated on the ground of misjoinder ceases to be a party after such exoneration. 40 M. 964=32 M. L. J. 532. But see 37 I. C. 673=5 L.W. 701; 23 M. 361 (F. B.); 45 I. C. 671=(1927) M. W. N. 905. Where a suit is dismissed against a defendant, the plaintiff abandoning his case against him, he is still a party to the suit within S. 47 *expl.* The proper course in such a case is to strike out the name of the defendant, instead of dismissing the suit as against him. 41 M. 418=34 M. L. J. 17 (F. B.). See also 78 I. C. 225=1924 A. 313; 98 I.C. 726=A. I. R. 1927 Mad. 253; 15 Rang. 110=101 I. C. 794=A. I.R. 1927 Rang. 137. A Hindu son who was impleaded as one of the defendants in a suit for the recovery of a sum of money but subsequently excluded from the suit and exempted from the decree is not a party to the suit. 52 I.C. 187. A party to a mortgage suit, who sets up a paramount title and is discharged from the suit, no decree being passed either in his favour or against him, is not a party within S. 47. 52 I.C. 736. The minor sons of a deceased judgment-debtor brought on record but not properly represented, cannot be considered parties to the proceedings. 67 I.C. 547=1922 Lah. 447. A bidder at an execution sale is not a party to the suit or his representative within S. 47. 42 M. 776=37 M.L.J. 274.

REPRESENTATIVE.—The term includes any transferee of the decree-holder's interest or any transferee of the judgment-debtor's interest who so far as, such interest is concerned, is bound by the decree. 24 C. 62; 26 A. 447. Purchaser of property prior to decree in a rent suit is bound by the decree. 54 C. 1064. Purchaser of property not mentioned in and not affected by the decree is not representative of the judgment-debtor. 3 L.W. 289=33 I.C. 84. A transferee of the decree is a representative of the decree-holder. 24 C. 62; 26 A. 447. The purchaser from the decree-holder auction-purchaser is not a representative of the decree-holder *qua* decree-holder. 64 I.C. 68. A purchaser of the interest of the judgment-debtor after a decree for sale on a mortgage has been passed against him is a representative of the judgment-debtor. 16 A. 286 (private sale); 72 I.C. 862=1 Pat. L.R. 139; 26 A. 447; 24 C. 62 (execution sale). See also a purchaser from a judgment-debtor under O. 21, R. 83. 23 A. 116. Whether the assignee of interest pending suit can execute decree passed in suit. See A.I.R. 1927 Sind 78. Where a transferee *pendente lite* from a defendant obstructs delivery of possession in execution to the decree-holder and the Court orders it to be removed, the order is one under S. 47, the transferee being the representative of the defendant 66 I. C. 722=(1921) M. W. N. 698. See also 22

(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the Court.

A. 243. A mortgagee of judgment-debtor is his representative for the purposes of S. 47. 56 I. C. 646=1 Pat. L. T. 267. A mortgagee whose mortgage was subsequent to a mortgage decree on property is a representative of the judgment-debtor. 25 I. C. 118=41 C. 418. Purchaser of property prior to attachment is not a representative. 99 I. C. 989=A. I. R. 1927 Mad. 450. A purchaser of a portion of non-transferable holding from a raiyat, is a representative of the judgment-debtor within S. 47 and can apply to set aside a sale of holding in execution of a decree for arrears of rent on the ground of fraud. 42 C. 172=18 C. W. N. 971 (F. B.). See also 64 I. C. 124; 27 I. C. 431. But see 3 Pat. L. J. 579=43 I. C. 969. Benamidar for a party is not his representative within S. 47. 44 B. 352=22 Bom. L.R. 296; 46 I. C. 748; 18 C. W. N. 184. That a recognised transferee decree-holder was only a benamidar could not be pleaded. 48 Mad. 553=48 M. L. J. 419. But after the death of the benamidar transferee decree-holder, the real owner will be entitled to plead in execution his right. 51 Mad. 219=26 L. W. 308=39 M. L. T. 176=(1927) M. W. N. 639=135 I. C. 405=A. I. R. 1927 Mad. 903=53 M. L. J. 568.

AUCTION-PURCHASER WHETHER A PARTY TO THE SUIT OF HIS REPRESENTATIVE.—A stranger purchaser at a sale in execution of a decree is not a representative of any of the parties to the suit. 25 Bom. L. R. 147=72 I. C. 256=1923 Bom. 214. See also 9 I. C. 194=15 C. W. N. 542; 27 I. C. 570=2 O. L. J. 57; (19 C. 683, Expl.; 28 M. 87, 30 M. 507, Diss., 30 A. 379; 25 B. 631, Ref.); 9 I. C. 472=4 Bur. L. J. 28. Thus a complaint by the judgment-debtor that the auction-purchaser had taken possession of certain property not covered by the sale cannot be tried under S. 47 but only in a separate suit. 64 I. C. 866. See also 25 B. 631; 10 I. C. 714=45 A. 96. But see 41 M. L. J. 120=63 I. C. 200; 45 I. C. 608 (Mad.) *contra*. A decision as between an auction-purchaser and a judgment-debtor is not one between parties to the suit under S. 47. 61 I. C. 961=13 L. W. 15. An auction-purchaser not a party to the suit cannot appeal against an order setting aside the sale on the application of the judgment-debtor. 19 C. L. J. 81=20 I. C. 191. Where the decree holder is himself the purchaser, see A. I. R. 1927 Cal. 57. An auction-purchaser is a representative of the judgment-debtor and not of the decree-holder. 41 M. L. J. 120=63 I. C. 200; 43 M. 107=38 M. L. J. 32 (F. B.); 50 I. C. 931=9 L. W. 596; 42 I. C. 552 (Mad.). See also 37 I. C. 825; 25 M. 529; 30 A. 379. Disputes between a judgment-debtor and the auction-purchaser as to the extent of the land sold do not fall within S. 47, as it is not between parties to the suit, but between the judgment-debtor and his representative, the auction-purchaser. 1924 All. 856. Auction-purchaser is not a representative of the judgment-debtor within S. 47. 42 B. 411=49 I. C. 140=12 P. R. 1919; 19 C. 683; 34 M. 417. Disputes between assignee decree-holder and auction-purchaser to be settled by suit. 98 I. C. 856=A. I. R. 1927 Mad. 240.

'DETERMINED' in the section shows that questions should be finally disposed of by granting appropriate relief. 2 I. C. 696=26 M. L. J. 460.

Sub-Sec. (2).—A suit can be converted into an application only if the application under S. 47 would not, at the date of suit, be time-barred. 34 I. C. 774=4 L. W. 400; 45 I. C. 608; 35 B. 452; 53 Cal. 837=99 I. C. 180=A. I. R. 1927 Cal. 106. Also the Court in which the suit is brought must have jurisdiction to execute the decree. 22 A. 121; 26 A. 101; 29 A. 348; 32 M. 425; 54 C. 419=103 I. C. 233=A. I. R. 1927 Cal. 614; but a prior order in execution which led up to the suit would not operate as *res judicata*. 4 O. W. N. 1045. A decree passed in such a suit barred under this section would still be upheld as an order passed on an application under the section, if it is otherwise good in law. 14 C. 605; 22 C. 483; 28 M. 64; 32 C. 332. The applicant is not entitled for a conversion as of right. 27 I. C. 570. See also 16 I. C. 543. Where a suit is brought for restitution in spite of the provision in S. 144, it is open to the Court to treat the suit as proceeding in execution in the exercise of its powers under Cl. (2). 67 I. C. 319=1922 Nag. 198. Power of Court to treat application as suit, see 39 M. L. T. 579.

Sub-Sec. (3).—See 82 I. C. 604=1925 All. 66=L. R. 5 All. 668 (Civ.). The question of the representative character of a party can be determined only for a limited purpose under S. 47. 43 I. C. 165=11 S. L. R. 74. Where a person applies to be brought on record as the representative of the judgment-debtor so that he may raise a question to be decided under S. 47, the proper Court to entertain the application is the Court executing the decree. 55 I. C. 812=11 L. W. 173.

ORDERS APPEALABLE UNDER S. 47.—Interlocutory orders dealing with mere matters of procedure can hardly be said to be determination of any question within S. 47. There must be determination of the rights or liabilities of the parties as to the execution, discharge or satisfaction of the decree. 24 C. 725; 34 A. 530; 27 I. C. 444=20 C. L. J. 512. 5 Rang. 534=6 Bur. L. J. 155=104 I. C. 324=A. I. R. 1927 Rang. 317. An appeal lies against an interlocutory order passed in execution proceedings, where the order has the effect of reviving an application for execution dismissed for default. 57 I. C. 905. Also against an order on the question of notice under O. 21, R. 22. 8 Pat. L. T. 28. An order on a claim for exemption from arrest is appealable under S. 47. 47 M. L. J. 678=1924 Mad. 900. An order directing execution to issue against a judgment-debtor is one under S. 47, determining the rights and liabilities of parties with reference to the relief granted. 19 C. L. J. 581=26 I. C. 866=19 C. W. N. 1008. Also an order directing execution against a surety to a Receiver ordered to pay up monies. 59 I. C. 844=10 L. B. R. 236. Also an order directing decree to be executed only against the property of the judgment-debtor and not against his person. 1924 Lah. 604. Also an order allowing execution of a decree alleged by the defendant to be declaratory in nature, 37 M.

Explanation.—For the purposes of this section, a plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed, are parties to the suit.

Limit of time for execution.

- 48. [S. 230, paras. 3 and 4.]** (1) Where an application to execute a decree not being a decree granting an injunction has been made, no order for the execution of the same decree shall be made upon any fresh application presented after the expiration

Execution barred in certain cases.

of twelve years from—

29 = 21 M.L.J. 1063. No appeal lies against an order refusing to stay execution. 100 I.C. 76 (2) = A.I.R. 1927 Lah. 235; nor against an order rejecting security. 102 I.C. 621 = A.I.R. 1927 Lah. 527. Also 9 Lah. L.J. 189. Where the execution Court finally negatives the right of the decree-holders to proceed against the land of the judgment-debtor, the order is appealable under S. 47. 2 Lah. L.J. 398. An order on an objection petition to an attachment put in by a defendant against whom the suit had been dismissed, is one under S. 47 though ostensibly put in under O. 21, R. 58. 1924 Lah. 589. A decision of an executing Court as to the order in which properties were to be sold in execution, even though it is a question between judgment-debtors only, is one relating to execution within S. 47. 1924 Mad. 365 = 45 M.L.J. 478. An order refusing to discharge a receiver appointed in an execution proceeding is within S. 47. 3 Pat. L. J. 513 = 46 I. C. 655. An order deciding the legality of arrest made in execution of a decree falls under the section. 32 I. C. 731 = 3 L. W. 35. An order disallowing the objection of a judgment-debtor that a fresh attachment is necessary is not appealable. 34 A. 530 = 15 I. C. 50. Also an order settling sale proclamation. 1924 Mad. 527 = 46 M. L. J. 192; 27 M. 59 = 14 M. L. J. 57 (F. B.); also an order fixing value of properties to be sold. 99 I. C. 455 = A. I. R. 1927 All. 208. Also an order issuing a warrant for arrest (70 I. C. 766) or refusing to arrest the judgment-debtor in execution of a decree. (4 Lah. L.J. 266 = 1922 Lah. 259). Also an order refusing to restore an execution application dismissed for default. 80 I. C. 39 = 1924 All. 794. So also an order staying proceedings and directing each party to bear his costs. (*Ibid.*) See also 75 I. C. 419. But an order security to stay execution is not appealable 106 I. C. 890 (2). Also an order refusing to stay. 27 I. C. 444 = 20 C. L. J. 512. (But see 75 I.C. 789; 1924 Lah. 602.) Such an order is a determination of a question relating to execution within S. 47 but yet it is not a decree because it has not got the characteristics required by S. 2. It is therefore not appealable as a decree. 46 A. 733 = 1924 All. 808. Whether an order for security to stay execution amounts to a decree or appealable order. See 5 Rang. 534. No appeal lies from an order accepting security in execution proceeding. 106 I.C. 866 (2). An order refusing stay of sale falls under S. 47 and is appealable. 75 I.C. 789; 1924 Lah. 631; 75 I.C. 1001. So also an order refusing to make defaulting bidder to pay the difference in price between the amount of his bid and that realized on re-sale. 107 I.C. 274. An order under S. 73 is not an order under S. 47, and hence is not an appealable. 5 Pat.L.J. 415 = 57 I.C. 421. See also 42

C. 1 = 27 I.C. 644; 1924 Mad. 97. But see 31 M.L.J. 820 = 37 I.C. 900. An order under S. 73 rejecting an application for rateable distribution is neither an order under S. 47 determining questions between parties nor a decree under S. 2 (2) and hence is not appealable. 57 I. C. 421 = 5 Pat. L.J. 415. Orders under S. 73 are appealable, if they affect parties to the suit under S. 47, especially when the appeal is by the judgment-debtor who cannot avail himself of the right of suit given by S. 73 (2). 39 M. 570 = 29 M.L.J. 96. An order not simply refusing rateable but also dismissing execution application *in toto* is appealable. 98 I. C. 884 = A.I.R. 1927 Lah. 100. An order of rateable distribution and of sale of the property attached by two creditors to satisfy the claims of the other creditors, after the making of deposit under O. 21, R. 55, of a sum sufficient to discharge the two creditors who made the attachment, relates to a question in execution within S. 47. 36 B. 156 = 12 I. C. 911. No appeal lies against an order directing respondent to draw out costs on furnishing security. 5 Rang. 534 = 6 Bur. L. J. 155 = 104 I. C. 324 = A. I. R. 1927 Rang. 317. An order relating solely to jurisdiction does not determine any question relating to the execution, discharge or satisfaction of a decree. 52 I. C. 461 = 4 Pat. L. J. 461. No appeal lies from an order staying execution. 28 Panj. L. R. 607 = 100 I. C. 23 = 9 Lah. L. J. 193.

Sec. 48. SCOPE AND OPERATION OF THE SECTION. Saving decrees granting injunctions, S. 48 applies to all decrees. 26 I. C. 244. S. 48 deals with the maximum limit of time prescribed for execution and not period for each application. 21 A. L. J. 861 = 46 A. 73. S. 48 does not strictly provide a period of limitation but merely bars the execution after 12 years. 40 A. 198 = 44 I. C. 24. The section does not apply to decrees passed by Chartered High Courts on account of sub-sec. (2), Cl. (6). See 6 B. 258; 7 M. 541; nor to orders in Council made on appeal to the Privy Council. 20 C. 551. S. 48 has a retrospective effect, and governs an application for the execution of mortgage decree passed before the Code came into force. 59 I. C. 790 = 45 B. 365; 19 I. C. 899; 40 C. 704 = 19 I. C. 391; 20 C. W. N. 952 = 1 Pat. L. J. 214; 27 I. C. 969 = 11 N. L. R. 25. But see 32 A. 499 (*contra*). The period begins to run only from the date on which the decree is in all parts ripe and capable of execution. 36 B. 368 = 14 Bom. L. R. 381. See also 54 I. C. 924. S. 48 covers compromise decrees. 39 B. 256 = 17 Bom. L. R. 178. The executing Court cannot extend the period prescribed by the section under S. 15, Limitation Act. 45 M. 785 = 43 M. L. J. 168. See also 54 I. C. 279. An agreement to desist from execution does not attract the provisions of S. 15 of the Limitation

- (a) the date of the decree sought to be executed, or,
 (b) where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods, the

Act, 100 I. C. 20=A. I. R. 1927 Mad. 347=52 M. L. J. 137. S. 6 of the Limitation Act does not extend period provided by S. 48 in favour of minors. 27 I. C. 865=13 A. L. J. 166; 36 B. 498=14 Bom. L. R. 387; 37 M. 186=24 M. L. J. 96. The period prescribed in S. 48 begins to run from the date of the appellate decree, even when it is held that no appeal lies. 43 A. 405=61 I. C. 129=19 A. L. J. 159. 34 C. 874. *See contra* 48 All. 377=94 I. C. 961=A. I. R. 1926 All. 440. *See also* 32 A. 136 (second appeal). It is so even when a portion only of the original decree was appealed against. 12 I. C. 75=21 M. L. J. 1020. *See also* 26 M. 91. But where an appeal is dismissed for default, the period runs from the date of the original decree. 47 I. C. 125=5 O. L. J. 252. Where a decree is amended, the date of the amendment is the date of the decree. 60 I. C. 318. Pendency of appeal by judgment-debtor does not cause suspension of execution where there is no fraud or force. 32 I. C. 931=20 C. W. N. 686. A decree-holder cannot by binding himself not to execute a decree allow himself more time than the law gives him. 13 I. C. 88=15 C. L. J. 678. The time spent in obtaining the conciliator's certificate under S. 48 of the Deccan Agriculturists' Relief Act can be deducted. 42 B. 367=45 I. C. 494. A mortgage decree-holder will have 12 years to perfect the preliminary decree into an order absolute under S. 89, T. P. Act and another 12 years for executing the order absolute. 39 M. 544=29 I. C. 237. But *see* 46 B. 761=24 Bom. L. R. 269 (a case of decree under the Deccan Agriculturists' Relief Act). Where execution of a suit is barred, a fresh suit on the basis of the decree is barred. 18 A. L. J. 1001=43 A. 170. *See also* 38 A. 509=35 I. C. 601. But *see* 28 I. C. 85 (11 C. 93, ref.). Nor can a fresh suit on the same cause of action be instituted. 41 M. 641=34 M. L. J. 167. *See also* 43 B. 703=52 I. C. 466. As to whether an action can be maintained on a judgment, *see* 20 C. W. N. 58=20 C. L. J. 272. The mere passing of a preliminary decree in any foreclosure suit does not put an end to the relationship of the mortgagor and mortgagee. If the mortgagor fails to redeem within six months and no final decree is passed, he can bring a fresh suit for redemption. 39 B. 41=27 I. C. 249=16 Bom. L. R. 687.

WHEN AN APPLICATION MADE OUT OF TIME MAY BE TREATED AS CONTINUATION OF A PREVIOUS APPLICATION MADE WITHIN TIME. *See* 21 I. C. 923 (Cal.); 16 I. C. 541 (Cal.); 41 M. L. J. 378=64 I. C. 493; 38 I. C. 411. In order that an application may be treated as a continuation of another application within time, it is necessary that the two applications must be of the same nature. 34 A. 396=14 I. C. 172=20 C. W. N. 952=34 I. C. 27=1 Pat. L. J. 214. *See also* 38 M. L. T. (H. C.) 42=100 I. C. 20=A. I. R. 1927 Mad. 347=52 M. L. J. 137. It is also a necessary condition that the previous application should not have been dismissed for default on the part of the decree-holder. 72 I. C. 862. The execution of a decree is not barred

merely because the application for restoration of an execution petition made within 12 years but struck off on account of insufficient process-fees, is made after 12 years. 33 A. 57=9 I. C. 817 (F. B.)=*See also* 3 Pat. L. J. 103=44 I. C. 560. An application to transfer a decree to another Court for execution is not an application to execute within this section. 20 A. 78; 16 C. 744; 22 C. 921; 35 B. 103; 34 A. 396; 95 I. C. 96 (2)=A. I. R. 1926 All. 660.

Sub Sec. (1), Cl. (b).—To render the clause applicable there must be an order of Court directing the payment of money on a certain date. An arrangement made between the parties out of Court is of no avail. 72 I. C. 477. Where the Court accepted the compromise that the decretal amount should be paid by instalments, it would operate to extend the period. 73 I. C. 671=(1923) Lah. 381. *See also* 34 I. C. 393 (Mad.). An order under S. 48 (1) (b), must be made by the Court which passed the decree. 73 I. C. 794=1923 Lah. 678; 40 A. 198; 2 P. L. T. 80=58 I. C. 393. But *see* 95 I. C. 243=A. I. R. 1926 Lah. 463. An order of an executing Court granting time to the judgment-debtor is not a subsequent order directing payment of money within the clause, and does not operate to extend the period. 40 A. 198. If an instalment decree provides for payment of whole sum on default of any instalment, time runs from the date of the first default, in respect of the whole claim. 49 I. C. 497; 24 C. 281. Where some defendants only appealed and the others were not made parties to the appeal limitation for the non-appealing defendants starts from date of first Court's decree. 30 C. W. N. 306=95 I. C. 257=A. I. R. 1926 Cal. 664. Decree directing money to be recovered from one party—On default money to be recovered from another—If barred 12 years from date of decree. *See* (1926) M. W. N. 213=91 I. C. 597=A. I. R. 1926 Mad. 20. Where a mortgage decree directed sale of mortgage property and the balance to be realised from other properties and the persons of the defendants, the limitation for execution of the latter part of the decree runs from the date of the decree. 45 I. C. 436=22 C. W. N. 145 (P. C.), in effect overruling 40 M. 989=31 M. L. J. 513 (F. B.). *See also* 43 I. C. 122; 29 I. C. 556 (Mad.). Whether time runs from date of decree or date of sale for execution against person in a case where a combined decree against the person and property of the mortgagor. *See* 50 Mad. 5=52 M. L. J. 256=A. I. R. 1926 Mad. 954. Where mesne profits are ascertained in execution for its recovery should be made within 12 years from date of decree and not from date of its ascertainment. 1927 Mad. 842=103 I. C. 311=53 M. L. J. 440.

FRAUD.—Fraud or force need not have occurred within three years of the application. 53 I. C. 862=10 L. W. 566. Nor is it necessary to show that it extended continuously for 12 years. It is sufficient if it is shown that the judgment-debtor on various occasions prevented the execution by fraud. 12 I. C. 793=14 O. C. 238. *See also* 22 M. 320; 35 M. 670=22 M. L. J. 35. S. 48 (2) (b)

date of the default in making the payment or delivery in respect of which the applicant seeks to execute the decree.

(2) Nothing in this section shall be deemed—

(a) to preclude the Court from ordering the execution of a decree upon an application presented after the expiration of the said term of twelve years, where the judgment-debtor has, by fraud or force, prevented the execution of the decree at some time within twelve years immediately before the date of the application ; or

(b) to limit or otherwise affect the operation of particle 180 of the second schedule to the Indian Limitation Act, 1877.

Transferees and legal representatives.

49. [S. 233] Every transferee of a decree shall hold the same subject to the equities (if any) which the judgment-debtor might have enforced against the original decree-holder.

Transferee.

50. [S. 234.] (1) Where a judgment-debtor dies before the decree has been fully satisfied, the holder of the decree may apply to the Court which passed it to execute the same against the legal representative of the deceased.

Legal representative.

(2) Where the decree is executed against such legal representative, he shall be liable only to the extent of the property of the deceased which has come to his hands and has not been duly disposed of ; and, for the purpose of ascertaining such liability, the Court executing the decree may, of its own motion or on the application of the decree-holder, compel such legal representative to produce such accounts as it thinks fit.

Procedure in execution.

51. Subject to such conditions and limitations as may be prescribed, the Court may, on the application of the decree-holder, order execution of the decree—

Powers of Court to enforce execution.

extends the period to 12 years from the time when the decree-holder was prevented by fraud of the judgment debtor, from executing the decree. 34 A. 20=11 I.C. 672=8 A.L.J. 1020 (7 C. 566, *dist.*). 'Fraud' should be understood in a large and liberal sense. 44 A. 319=L.R. 3 A. 111=20 A.L.J. 185=65 I.C. 877=1922 All. 145 ; 18 I.C. 1008=24 M.L.J. 270. See also 35 M. 670=22 M.L.J. 35. The term should be interpreted in a wider sense than that in which it is generally used in English law. 13 I.C. 88=15 C.L.J. 678 ; 6 M. 365 ; 80 I.C. 905. Includes, except with reference to contract, circumvention. 25 A.L.J. 842=103 I.C. 277=A.I.R. 1927 A. 668. The delaying of execution by frivolous, futile and dishonest objections on the part of the judgment-debtors amount to fraud. 44 A. 319=1922 All. 145. But objection which ultimately proves unsuccessful will not amount to fraud. The fraud should be such as to prevent the decree-holder from executing the decree. 13 I.C. 88=15 C.L.J. 678. An intentional avoiding by the judgment-debtor of arrest under a warrant by the decree-holder to avoid payment of decretal amount amounts to fraud. 12 L.W. 710=60 I.C. 630 ; 20 L.W. 475=47 M.L.J. 428 ; 6 M. 365. Locking up the house to prevent attachment of moveable property is fraud. 9 B. 318 ; 22 M. 320. But keeping the doors closed is *per se* no evidence at all of fraudulent conduct on the part of a pardanashin lady. 40 I. C. 399=4 O. L.J. 345. A fictitious transfer of property made in order to defeat or delay the execution amounts to fraud. 4 M. 292 ; 80 I.C. 905. A deliberate evasion of the process of Court to defeat execution of decree amounts to fraud. 35 M. 670=22 M.L.J. 35. See also 13 I.C. 929=9 A.L.J. 17.

Where the execution of decree is prevented by the fraud of one of several judgment-debtors, extension of time will be allowed only against such judgment-debtor. 30 I.C. 423=38 M. 419. [On appeal from 35 M. 67c].

Sec 49.—S. 49 relates only to the stage of execution and has no application to a suit for damages. 42 M. 338=36 M.L.J. 376. A judgment-debtor can attach the money deposited by him in Court towards a decree against him, which is assigned to one against whom he has a decree. 19 N.L.R. 164=1924 Nag. 46.

Sec. 50.—Execution may be had not only against the legal representatives of the judgment-debtor but also against the transferee who purchased the property pending execution proceedings. 51 Bom. 37=29 Bom. L. R. 60=A. I. R. 1927 Bom. 93. *Quære.* Whether a purely personal decree such as an injunction can be so executed. (*Ibid.*) Duty of Court which passed the decree to decide who are the legal representatives before transfer of decree. A. I. R. 1926 Mad. 411. Where wrong legal representatives were brought on record and the real heirs having knowledge of the same did not object, the decree is binding on them also or on any subsequent purchaser from them. 51 Bom. 125=29 Bom. L. R. 107=100 I. C. 956=A. I. R. 1927 Bom. 131. Where a judgment-debtor died before proclamation of sale, and his legal representatives were not brought on record before the sale actually took place, *held* the sale was not a nullity and was not liable to be set aside. 23 C. W. N. 418.

Sec. 51. EXECUTION SALE.—Sale of property not belonging to judgment-debtor—Void or valid—Distinction in cases where property is

- (a) by delivery of any property specifically decreed ;
- (b) by attachment and sale or by sale without attachment of any property ;
- (c) by arrest and detention in prison ;
- (d) by appointing a receiver ; or
- (e) in such other manner as the nature of the relief granted may require.

52. [S. 252.] (1) Where a decree is passed against a party as the legal representative of a deceased person, and the decree is for the payment of money out of the property of the deceased, it may be executed by the attachment and sale of any

Enforcement of decree against legal representative.

such property.

(2) Where no such property remains in the possession of the judgment-debtor and he fails to satisfy the Court that he has duly applied such property of the deceased as is proved to have come into his possession, the decree may be executed against the judgment-debtor to the extent of the property in respect of which he has failed so to satisfy the Court in the same manner as if the decree had been against him personally.

53. For the purposes of section 50 and section 52, property in the hands of a son or other descendant which is liable under Hindu law

Liability of ancestral property.

for the payment of the debt of a deceased ancestor, in respect of which a decree has been passed, shall be deemed

to be property of the deceased which has come to the hands of the son or other descendant as his legal representative.

bona fide believed to belong to judgment-debtor. 52 M.L.J. 148.

Sec. 52. SCOPE OF SECTION.—This section does not provide for reservation of property to satisfy debts. 30 I.C. 256 = 18 M.L.T. 147. Liability of legal representative under this section and under S. 50 are the same. 7 M. 257. See also 89 I.C. 534 = 1925 Oudh 515. The section does not contemplate the insolvency of the deceased party. 22 C. 259. Written statement in the suit that no assets are available suit if to be dismissed. 25 A. I. J. 359.

ASSETS—MEANING OF—“Assets” include also property acquired after decree. On this point see also 89 I. C. 477 = 1925 Nag. 449. “Property” includes rents from immoveable property. 4 O. W. N. 98 = 99 I. C. 897 = 2 Luck. 408. Investigation as to assets may be made either in suit or in execution. 85 I. C. 768 = 1925 Nag. 380. Whether executing Court has power to inquire into administrator's accounts where a money decree is passed against him. See 5 Rang. 44. Arrears of maintenance due to a Hindu widow at her death are assets. 11 B. 528.

LEGAL REPRESENTATIVE—MEANING OF.—See 50 I. C. 951 (*Executor de son tort* is legal representative).

DECREE AGAINST PARTY AS LEGAL REPRESENTATIVE.—A legal representative can be sued without proving that assets have come into his hands, if there are assets of which he may become possessed. 8 B. 309. See also 13 B. 653 : 33 All. 414 = 8 A.L.J. 199 ; 56 I.C. 962 ; 89 I.C. 236. S. 52 shows that there may be a decree passed against the legal representative of a deceased person without showing that the deceased left any property and the legal representative got that property. 49 A. 645 = 101 I. C. 507 = 25 A.L.J. 359 = A.I.R. 1927 A. 459. Per *Ashworth*.—S. 52 provides for the due application of the assets, i.e., of ‘*plene administravi*’ being taken in execution proceedings. Therefore it must be inferred

that it cannot be taken at an earlier stage. In English law the plea of ‘*plene administravi*’ can certainly be raised by a legal representative sued on a debt due from the deceased. (*Ibid.*) A.I.R. 1927 A. 459. The fact that the estate is not in the hands of the legal representative, but in the hands of third parties, he is not bar to a decree against him. 22 C. 259. Plaintiff must prove assets had or ought to have come to the hands of the defendant. 3 M. H. C. R. 161. See also 4 C. W. N. 151 ; 1925 Nag. 449. A personal decree may be passed against the legal representative if it is proved that he has received sufficient assets. 20 M. 446. As to effect of obtaining decree against a wrong person as legal representative, see 15 Bom. L. R. 41 ; 34 All. 79. When a wrong person is sued as representative and property is sold, the proper representative can sue. 9 B. 86. See also 11 M. 408 ; 11 C. 45. A decree against one representative does not bind the other representatives. 4 C. 142. See also 7 A. 822 (F. B.) ; 8 C. 370 ; 24 I.C. 280. Legal representative should account for mesne profits in the shape of rent or interest. 15 W. R. 285 ; 30 M. L. J. 391. Also liable for the assets realized by sale of the properties of the deceased. 12 W. R. 177. In case he fails to account for the assets come into his hands, he can be arrested in execution. 12 W. R. 117. Absence of assets—Effect of. A. I. R. 1926 Nag. 170.

Sec. 53.—This section is new, and gives effect to the rulings under the old Code in 34 C. 642 and 20 B. 385. The law laid down in 31 Cal. 224, 27 Mad. 243 and 28 Mad. 26, are not now good-law.

SCOPE OF SECTION.—See 20 Bom. L. R. 660 = 46 I. C. 745. See also 91 I. C. 785 = 24 A.L.J. 273 = 40 All. 245 = A. I. R. 1926 All. 220. S. 53 provides that a question as to what property would be liable in execution, is to be determined in execution proceedings and not by a separate suit. 16 I.C. 970 = 16 C.L.J. 85. On this section,

54. [S. 265.] Where the decree is for the partition of an undivided estate assessed to the payment of revenue to the Government, or for the

Partition of estate or separation of share.

separate possession of a share of such an estate, the partition of the estate or the separation of the share shall be made by the Collector or any gazetted subordinate of the Collector deputed by him in this behalf, in accordance with the law (if any) for the time being in force relating to the partition, or the separate possession of shares, of such estates.

Arrest and detention.

55. [S. 336.] (1) A judgment-debtor may be arrested in execution of a decree at any hour and on any day, and shall, as soon as practicable, be brought before the Court, and his detention may

Arrested and detention.

see also 23 A. I. J. 467; 28 Bom. L.R. 1322. To make this section operative there should be a decree against the son as the legal representative of the deceased. 103 I. C. 338=A. I. R. 1927 All. 683.

ILLUSTRATIVE CASES.—It is only the son or lineal descendant of a deceased Hindu that comes within the scope of S. 54. 45 A. 455 (42 B. 504, Ref.); 24 I. C. 280=(1914) M. W. N. 354. A son is liable for the decree debts of his father to the extent of the ancestral properties unless the debt was for an illegal or immoral purpose. This is so even if the son was a party to the decree against the father. 20 A. I. J. 969=1923 A. 124; 19 I. C. 252; 9 I. C. 631. The whole of the ancestral property and not merely that part of it in the hands of Mitakshara son, is liable for satisfaction of the judgment-debt. 16 I. C. 970=16 C. L. J. 85 (22 W. R. 56; 13 C. 21, *fol.*) A Hindu son can, under S. 47, have the question whether the debt had been contracted for immoral purposes tried. 33 C. 676. *See also* 20 M. 385; 3 P. L. T. 43=1923 P. 142. Ancestral property of a deceased judgment-debtor is not an asset in the hands of his heirs. 11 I. C. 376=80 P.W.R. 1911. A gratuity granted to the heirs of a deceased employee by a Railway administration is not assets in the hands of his heirs. 26 O. C. 53=1923 Oudh 21.

Sec. 54. SCOPE OF SECTION.—In case the Collector contravenes the directions in the decree or acts *ultra vires*, his action is subject to the control and correction of the Court. 19 B. 435; 28 B. 238. The primary object of the section is to prevent the annulment of joint responsibility for the payment of land revenue. *See* 16 C. at p. 205 and 24 C. at p. 734 (F. B.). Section only applies to case of estates assessed to revenue in lump and not to those assessed at acre rates. 4 Bur. L. J. 260=95 I. C. 39 (1)=A. I. R. 1926 Rang. 80.

POWERS OF THE COLLECTOR.—A Collector cannot refuse to carry out a partition. 14 B. 450. A Civil Court cannot appoint a Commissioner to make a partition under this section. 23 C. 679. Collector's duty is not confined to mere division of the lands but includes the delivery of the shares to the respective allottees. 11 B. 662. Also 103 I. C. 231=A. I. R. 1927 Nag. 300 (along with the crops attached to the land). He no doubt acts ministerially, but when a certain discretion is allowed to him, and so long as he keeps within bounds the Civil Court has no right to interfere. 12 B. 376. *See also* 15 B. 527; 19 B. 435; 28 B. 238. The Collector can do nothing which contravenes the command of the

Court. 14 B. 450; 28 B. 238.

POWERS OF CIVIL COURT.—A Civil Court has no power to interfere with the Collector's proceedings under S. 54. 42 Bom. 689=20 Bom. L. R. 411 (15 B. 527, *fol.*). A Civil Court is not competent to make a division of revenue-paying land even with the consent of the parties. 30 I. C. 209.

FINAL ORDER—MEANING OF.—35 Mad. 26=12 I. C. 775. The decree of a Court is final and a final decree in a partition suit cannot be reopened unless by way of review. 4 Pat. L. J. 29=45 I. C. 895. *See also* 38 I. C. 593. Partition of a revenue-paying estate—If allowable. 2 Pat. L. J. 221=39 I. C. 173.

ESTATE.—A ryotwari holding is not an estate. 7 M. 382 (F. B.). But *see* 16 B. 528. The word 'estate' is used in its ordinary sense. 10 C. 400. Section only applies to cases where revenue is assessed in lump and not at acre rates. 5 Rang. 206.

Sec. 55. ARRESTED IN EXECUTION OF A DECREE.—Provisions mandatory. 54 C. 782. As to what is meant by the word 'arrest', *see* 11 C. 451 (458). In the execution of a decree payable by instalments the judgment-debtor cannot be arrested for default in the payment of each instalment. 7 B. 106. An undischarged insolvent can be arrested for a debt not included in the schedule, and for which a decree has been subsequently obtained. 16 C. 85. A warrant of arrest may be issued even when a writ of attachment has already issued. 7 B. 301. An arrest on a Sunday is legal. 4 M.H.C.R. 12.

"AS SOON AS PRACTICABLE."—*See* 30 M. 170. When a warrant orders a debtor to be imprisoned in a particular civil jail, his confinement in another jail would be unlawful. 11 C. 527. An arrest is illegal if officer has not warrant with him at time of arrest. 5 A. 318. *See also* 27 A. 258. An irregular endorsement on the warrant does not invalidate the arrest. 6 A. 385. *See also* 7 A. 507.

PROVISO 3.—It is not necessary that a special order of the Court should be made, empowering an officer authorized to arrest a purda lady, to enter the zenana house in which she resides, 7 C. 19.

PROVISO 4.—This proviso applies only when the arrest is made in execution of a "decree for the payment of money." 24 C. 766. A decree for the enforcement of a mortgage or charge will not be a decree for the payment of money. *See* 24 C. 766; 21 M. 364; 19 A. 174; 29 M. 65.

SUBSECS. (3) AND (4).—The provisions apply only to judgment-debtors who are under

be in the civil prison of the district in which the Court ordering the detention is situate, or, where such civil prison does not afford suitable accommodation, in any other place which the Local Government may appoint for the detention of persons ordered by the Courts of such district to be detained :

Provided, firstly, that, for the purpose of making an arrest under this section no dwelling-house shall be entered after sunset and before sunrise :

Provided, secondly, that no outer door of a dwelling-house shall be broken open unless such dwelling-house is in the occupancy of the judgment-debtor and he refuses or in any way prevents access thereto, but when the officer authorized to make the arrest has duly gained access to any dwelling-house, he may break open the door of any room in which he has reason to believe the judgment-debtor is to be found :

Provided, thirdly, that, if the room is in the actual occupancy of a woman who is not the judgment-debtor and who according to the customs of the country does not appear in public, the officer authorized to make the arrest shall give notice to her that she is at liberty to withdraw, and, after allowing a reasonable time for her to withdraw and giving her reasonable facility for withdrawing, may enter the room for the purpose of making the arrest :

Provided, fourthly, that, where the decree in execution of which a judgment-debtor is arrested, is a decree for the payment of money and the judgment-debtor pays the amount of the decree and the costs of the arrest to the officer arresting him, such officer shall at once release him.

(2) The Local Government may, by notification in the local official Gazette, declare that any person or class of persons whose arrest might be attended with danger or inconvenience to the public shall not be liable to arrest in execution of a decree otherwise than in accordance with such procedure as may be prescribed by the Local Government in this behalf.

(3) Where a judgment-debtor is arrested in execution of a decree for the payment of money and brought before the Court, the Court shall inform him that he may apply to be declared an insolvent, and that he [may]¹ be discharged if he has not committed any act of bad faith regarding the subject of the application and if he complies with the provisions of the law of insolvency for the time being in force.

(4) Where a judgment-debtor expresses his intention to apply to be declared an insolvent and furnishes security, to the satisfaction of the Court, that he will within one month so apply, and that he will appear, when called upon, in any proceeding upon

arrest and not already committed to jail. 8 M. 503. S. 55 (3) does not entitle the debtor to be adjudged an insolvent on an application except in conformity with the provisions of the Insolvency Law. 21 I.C. 293=25 M. L. J. 545. The provisions apply to small cause debtors. 2 M. 9. But see also 22 B. 731. When the application of judgment-debtor to be declared an insolvent has been dismissed and he is re-arrested in execution, he cannot claim the benefit of S. 55 (3) and (4) so long as the previous dismissal is not set aside. 9 I. C. 121. Where the insolvency petition is filed one day too late, delay cannot be excused, and surety becomes liable. 86 I. C. 304. When a judgment-debtor furnishes security under S. 55 (4) the security should be directed to continue until a final order is made. 46 Bom. 702=1922 Bom. 340. The mere filing of an insolvency petition by the debtor or the dismissal of an execution petition does not absolve the surety. 34 I. C. 407=(1916) 2 M. W. N. 273 (14 C. 757, *dist.*). See also 22 I. C. 953=15 M. L. T. 224; 5 Pat. L. J. 417=57 I. C. 303. The liability of a surety is now clearly laid down in S. 145. The surety is liable to a transferee decree-holder. 26 M. 258. The surety is not liable when the judgment-debtor

dies. 29 A. 466; 41 Cal. 50. See also 1924 Bom. 428. (Judgment-debtor not applying within time, dying subsequently—liability of surety). An application to set aside an order of arrest abates on the death of the person against whom the order is made. 22 I. C. 953. Covenants in a surety bond as to what is to happen in case the application to be declared an insolvent is refused, do not come within the purview of the section. 16 A. 37. See also 23 A. L. J. 59.

§ 55 (8).—¹The word "may" was substituted for "will" by Act III of 1921.

SUB-SEC. 4.—An order made under S. 55 (4) rejecting an application for forfeiture of security bond is appealable and therefore no revision lies. 34 I. C. 247 (15 A. 183, *dist.*). Liability of a surety when arises—Interpretation of section. 26 L. W. 49=101 I. C. 525=52 M. L. J. 523. Delay by one day—If excusable A. I. R. 1926 Mad. 286. See also A. I. R. 1926 Mad. 689=50 M. L. J. 477=95 I. C. 444. Surety undertaking to produce judgment-debtor until discharge from insolvency—Debtor obtaining protection order does not absolve surety of his duty to do so. (1926) M. W. N. 612=24 L. W. 480=97 I. C. 413=A. I. R. 1926 Mad. 958 (2).

the application or upon the decree in execution of which he was arrested, the Court [may]¹ release him from arrest, and, if he fails so to apply and to appear, the Court may either direct the security to be realized or commit him to the civil prison in execution of the decree.

56. [S. 245-A.] Notwithstanding anything in this part, the Court shall not Prohibition of arrest or detention of women in execution of decree for money. order the arrest or detention in the civil prison of a woman in execution of a decree for the payment of money.

57. [S. 338.] The Local Government may fix scales, graduated according to rank, race and nationality, of monthly allowances payable for the subsistence of judgment-debtors.

58. [S. 342.] (1) Every person detained in the civil prison in execution of a decree shall be so detained,—

(a) where the decree is for the payment of a sum of money exceeding fifty-rupees, for a period of six months, and

(b) in any other case for a period of six weeks :

Provided that he shall be released from such detention before the expiration of the said period of six months or six weeks, as the case may be,—

(i) on the amount mentioned in the warrant for his detention being paid to the officer in charge of the civil prison, or

(ii) on the decree against him being otherwise fully satisfied, or

(iii) on the request of the person on whose application he has been so detained, or

(iv) on the omission by the person, on whose application he has been so detained, to pay subsistence-allowance :

[S. 341.] Provided, also, that he shall not be released from such detention under clause (ii) or clause (iii), without the order of the Court.

(2) A judgment-debtor released from detention under this section shall not merely by reason of his release be discharged from his debt, but he shall not be liable to be re-arrested under the decree in execution of which he was detained in the civil prison.

59. [S. 653.] (1) At any time after a warrant for the arrest of a judgment debtor has been issued the Court may cancel it on the Release on ground of illness. ground of his serious illness.

(2) Where a judgment-debtor has been arrested, the Court may release him if, in its opinion, he is not in a fit state of health to be detained in the civil prison.

Sec. 55 (4).—¹ The word " may " was substituted for " shall " by Act III of 1921.

Sec. 56.—A money decree does not necessarily carry with it a right to execute it by arrest of the judgment-debtor, *e.g.*, minor or a female, or a legal representative. 18 N. L. R. 145 = 1922 Nag. 98.

Sec. 58.—The section does not apply to the case of a person imprisoned for contempt. 4 C. 655. The Court has no power to fix shorter terms of detention than those prescribed. 13 M. 141. Imprisonment on arrest before judgment becomes, after decree, imprisonment in execution of a decree, and the imprisonment suffered must be taken into consideration in calculating the period provided by this section. 7 B. 431. In execution of a decree payable by instalments the debtor cannot be detained separately for default in the payment of each instalment. 7 B. 106. The language of sub-section (2) indicates that immunity from re-arrest arises only when there has been release after " detention in the civil prison." See 8 M. 21. See also 23 C. 128. When a warrant of committal to jail has been made out

the discharge of the debtor whilst in confinement in the Court house, for non-payment of subsistence allowance, must be regarded as discharge from jail. 9 B. 151. But see 8 M. 21. The Code contemplates as immaterial the circumstances under which the debtor obtains his release. 20 C. 878. See also 12 C. 652. The Code does not forbid, retaking of a person who has been released under S. 13 of the Indian Insolvent Act. 26 B 652 at 659. A debtor who has been discharged for non-payment of subsistence money cannot be re-arrested. 4 M. H. C. R. 76. The cost of clothing, etc., required under S. 33, Prisons Act, is not subsistence allowance under S. 58. 17 I. C. 911. When a debtor who has been committed to a particular jail is detained in another jail, he is entitled to his release. 11 C. 527. While calculating the period of imprisonment under a new warrant the time of imprisonment suffered by him under the former warrant should be deducted. 17 I. C. 911. A payment is not made to the officer until the officer actually receives the money. 22 I. C. 25.

(3) Where a judgment-debtor has been committed to the civil prison, he may be released therefrom—

(a) by the Local Government, on the ground of the existence of any infectious or contagious disease, or

(b) by the Committing Court, or any Court to which that Court is subordinate on the ground of his suffering from any serious illness.

(4) A judgment-debtor released under this section may be re-arrested, but the period of his detention in the civil prison shall not in the aggregate exceed that prescribed by section 58.

Attachment.

60. [S. 266.] (1) The following property is liable to attachment and sale in execution of a decree, namely, lands, houses, or other

Property liable to attachment and sale in execution of decree.

buildings, goods, money, bank-notes, cheques, bills of exchange, hundies, promissory notes, Government securities, bonds or other securities for money, debts, shares

in a corporation and save as hereinafter mentioned, all other saleable property, moveable or immovable, belonging to the judgment-debtor, or over which or the profits of which, he has a disposing power which he may exercise for his own benefit, whether

Sec. 60. CONSTRUCTION OF SECTION.—The provisions of S. 60, which restrict the right of the decree-holder to realise the decretal amount from the property of the debtor should be strictly construed. 39 I. C. 375.

SCOPE OF SECTION.—Section does not apply to sales where there is no attachment, as, in mortgage decrees. 23 A. L. J. 841=89 I. C. 364. See also 47 All. 900=A. I. R. 1925 All. 652. A decree-holder can attach all the properties of the judgment-debtor as S. 60 does not limit the extent of properties to be attached. He can also attach property for mesne profits even before they are assessed. 16 I. C. 708. The articles given in section as liable to attachments are given only by way of illustration. Per *Mukerji, J.* in 26 A. L. J. 253=108 I. C. 229=A. I. R. 1928 All. 193. Damages resulting from wrong attachment may be recovered from the decree holder though he acts in good faith. 8 N. L. J. 170=1925 Nag. 390. Provisions whether applicable to attachment under Co-operative Societies Act. 23 Nag. L. R. 66.

"DEBT".—It is not necessary that the exact amount due should be ascertained prior to attachment. 16 A. 286. See also 16 I. C. 708. (Accrued debt can be attached—Not one where the debt and its payment rest in the future. 1925 Cal. 561). On this point see 86 I. C. 626=5 P. L. T. 504. Prospective rent cannot be attached. 3 Rang. 235=89 I. C. 794. Nor rent in respect of a period still in existence. 26 A. L. J. 253=108 I. C. 229=A. I. R. 1928 All. 193. A decree for money is not a debt. 6 M. 418. Money not immediately payable, if debt. 56 I. C. 948. A decree of a Revenue Court is a debt. 21 A. 406; 21 M. 293. Money deposited with a Railway Company by one of its servants as guarantee for due performance of his duties can be attached. 9 M. 203. A monthly allowance given in payment of an antecedent debt and acknowledged the debtor as such, is attachable in execution as debt. 9 C. W. N. 703.

SALEABLE PROPERTY.—What is 28 M. 84; 15 M. L. J. 7; 6 C. W. N. 796; 7 B. L. R. 186; P. C. and 30 M. 378. Decision of trial court as to

whether property is saleable or not, cannot be questioned in execution. 23 A. L. J. 841. "Saleable" means saleable by auction at a compulsory sale under the order of the Court and not transferable by act of parties. 19 C. W. N. 1182. A claim which may accrue under a pending award cannot be sold. 7 B. L. R. 186 (P. C.). All decrees, except money decrees, are both attachable and saleable. 16 B. 522. The share of a partner in a partnership business is saleable property. 20 C. 693. Also his unascertained interest in partnership business. 13 M. 447. An interest in the income of immovable property assigned by way of maintenance to a Hindu widow, cannot be attached. 15 A. 371. The equity of redemption of the mortgagor is saleable property. 21 B. 226. Also the interest of a person in ancestral property governed by the Mitakshara law. 5 A. 430. Also property revertible to the donor after the donee's death. 17 B. 503. Whether interest of a Burmes= Buddhist husband in property of marriage saleable. 5 Rang. 478. Also an actionable claim. 14 Cal. 241. The doors and window-shutters of a pucca building cannot be separately attached and sold. 11 C. 164. Future melwaram rents of an inalienable shrotriham Inam cannot be attached. 4 M. L. J. 13. Nor can a non transferable lease. 7 L. R. 33 (Rev.). After a cheque for the payment of money is delivered to the payee, it cannot be attached by giving notice to the payer. 3 B. 49. Earnings derived from offerings made by pilgrims are not saleable. 19 C. 730. "He has a disposing power"—Meaning of. See 26 M. 222. In trust.—The whole or any portion of property dedicated to a trust cannot be attached, even although after the due performance of the trust, a balance remains, which goes into the pockets of the trustee. 15 C. 329 (P. C.). So also *bona fide* assignment by debtor for benefit of creditors. 1 B. H. C. R. 233. Letters in a Post Office addressed to judgment-debtors, are held in trust for them by the Postmaster. 13 M. 242. When a decree expressly directs that property of the kind specified in this section is to be sold, the Court executing it cannot go behind its terms. 8 B. 185.

the same be held in the name of the judgment-debtor or by another person in trust for him or on his behalf :

Provided that the following particulars shall not be liable to such attachment or sale, namely :—

(a) the necessary wearing-apparel, cooking vessels, beds and bedding of the judgment-debtor, his wife and children, and such personal ornaments as, in accordance with religious usage, cannot be parted with by any woman ;

(b) tools of artisans, and, where the judgment-debtor is an agriculturist, his implements of husbandry and such cattle and seed-grain as may, in the opinion of the Court, be necessary to enable him to earn his livelihood as such, and such portion of agricultural produce or of any class of agricultural produce as may have been declared to be free from liability under the provisions of the next following section ;

(c) houses and other buildings (with the materials and the sites thereof and the land immediately appurtenant thereto and necessary for their enjoyment) belonging to an agriculturist and occupied by him ;

(d) books of account ;

(e) a mere right to sue for damages ;

(f) any right of personal service ;

PROVISO, CL. (a).—The words “any such personal ornaments, etc.”, give effect to the decision in 9 B. 106.

CL. (b) TOOLS OF ARTIZANS.—Musicians and washermen are not artisans. 5 L.W. 596=38 I. C. 415. Sewing machine owned by a tailor is a tool of an artisan and therefore exempt. 65 I. C. 416.

CL. (c) SCOPE OF SUB-CL. (c).—The term ‘agriculturist’ does not include persons who are agriculturists’ by virtue of a Govt. Notification. 106 I.C. 45. The judgment-debtor can waive the privilege provided by the section. The judgment-debtor will be estopped from pleading protection under the section if he mortgages the house. 6 P. 254=102 I.C. 616=A.I.R. 1927 Pat. 233. S. 60 is only intended for the benefit of the indigent agriculturists and not when the judgment-debtor suffers no material inconvenience. 25 I. C. 117=1 L.W. 519. The word ‘occupation’ does not mean residence only. 99 I. C. 376=A.I.R. 1927 A. 214. See also 102 I. C. 712 (2). Where agriculturist judgment-debtor agreed under a compromise to have immovable property attached in execution, he cannot at the time of execution be protected by saying that the property is non-transferable. 57 I.C. 249=24 C.W.N. 575.

WHO IS AGRICULTURIST.—A judgment-debtor is not an agriculturist under S. 60 (1) (c) of the Code, where his only source of living is not by cultivation. 63 I.C. 681 ; 35 I.C. 343=20 C. W. N. 834. See also L. R. 6 A. 217=87 I. C. 564 ; 7 Lah. L. J. 95=88 I. C. 543 ; 20 C. W. N. 874. A person does not cease to be an agriculturist merely because he transfers his land by lease or mortgage. 55 I.C. 481 ; 4 Bom. 25. The protection afforded by this clause was intended for agriculturists in the strictest sense, and for an agriculturist in that sole character. 12 B. 363 ; 7 B. 530. Chief means and not one means determines profession. 92 I.C. 416=A.I.R. 1927 Mad. 342. See also 105 I.C. 129. A zamindar, is not. 8 L.R. 229 (Rev.)=A. I. R. 1927 All. 601.

WHAT IS EXEMPT FROM ATTACHMENT.—A house of an agriculturist is exempt from attachment and sale in execution of a decree. 39 All. 120 ; 38 I. C. 171 ; 40 I. C. 544 ; 35 All. 307=11 A. L. J. 437=19 I. C. 125. The phrase “house

and other buildings” does not include a vacant site used for storing manure and fodder and with no structure over it. 39 I. C. 375. The house must be a building if in ruins without doors or roof it is not a building. 99 I. C. 376=A. I. R. 1927 A. 214. But see also 105 I. C. 129. The clause refers only to a house occupied by an agriculturist, and does not refer to his town residence. 7 Bom. L.R. 685 ; 45 I.C. 546; but see A. I. R. 1926 Lah. 230. See also 49 Mad. 227=92 I. C. 328=A.I.R. 1926 Mad. 350=50 M. L. J. 90. As S. 60 forbids the sale of materials of a dwelling-house occupied by an agriculturist, a decree for the sale of such a house is bad even though it be a mortgage decree. 33 All. 136 ; 34 All. 25 ; 41 Bom. 475 ; 39 I. C. 639=19 Bom. L. R. 281. In the case of attachment of the cattle of an agriculturist, the Court has to see whether the cattle are necessary to enable an agriculturist to earn his livelihood. 56 I. C. 69 ; 61 I. C. 777. The right to improvements of a mulgeni tenant in South Kanara to compensation cannot be attached nor sold in execution. 48 I. C. 705=36 M. L. J. 92.

BURDEN OF PROOF.—The party alleging that he is an agriculturist must prove it. 1923 Bom. 12 ; 100 I. C. 104 ; 98 I.C. 857=A. I. R. 1927 Lah. 66 (2). Where crops are grown on a tenancy by the heir of deceased tenant, after his death such crops cannot be said to be his crops and cannot be as such liable to attachment and sale in the hands of the heir under S. 60, C. P. Code. 69 I. C. 520.

CL. (e).—A right to sue for mesne profits cannot be attached. 9 C. 605. Also the right to appeal. 3 W. R. Mis. 16.

CL. (f).—A “*vrithi*” is a right of personal service. 23 B. 131. See also 12 B. 366 and 10 B. 395. But see *contra* 29 Bom. L. R. 102=100 I. C. 1008=A. I. R. 1927 Bom. 143 (*vrithi* could be sold). The right to officiate at funeral ceremonies cannot be attached. 16 W. R. 171. Also the right of a shebait of Hindu idol. 5 B. L. R. 617 ; also the right of managing a temple. 4 A. 81. An inam of land granted to do *swasthiwachakam* service is always burdened with service and is not liable to attachment and sale in execution. 42 M. L. J. 477=45 M. 620. The birt of a Mahabrahman is a right to personal service and cannot be sold in execution of a money decree.

(g) stipends and gratuities allowed to pensioners of the Government, or payable out of any service family pension fund notified in the *Gazette of India* by the Governor-General in Council in this behalf, and political pensions ;

(h) allowances (being less than salary) of any public officer or of any servant of a railway company or local authority while absent from duty ;

(i) the salary or allowances equal to salary of any such public officer or servant as is referred to in clause (h), while on duty, to the extent of—

(i) the whole of the salary, where the salary does not exceed [forty]¹ rupees monthly ;

(ii) [forty]¹ rupees monthly, where the salary exceeds [forty]¹ rupees and does not exceed [eighty]¹ rupees monthly ; and

(iii) one moiety of the salary in any other case :

(j) the pay and allowances of persons ; to whom the Indian Articles of War apply ;

(k) all compulsory deposits and other sums in or derived from any fund to which the Provident Funds Act, 1897, for the time being applies in so far as they are declared by the said Act not to be liable to attachment ;

(l) the wages of labourers and domestic servants whether payable in money or in kind ;

41 All. 656 = 51 I. C. 539. Offerings made at the temple by the worshippers being the personal property of the priest are not liable to be attached. 42 I. C. 390. A future perquisite on account of offering or bhog to the deity will be an uncertain and indefinite income which cannot be attached. 55 I. C. 175 = 1 Pat. L. T. 75 (29 C. 70 ; 1 C. W. N. 493 ; 1 M. 235 ; 23 M. 274 = 44 A. 81, *fol.*). As to whether and when a religious office can be sold, see 6 M. 76 and 6 B. 296.

Cl. (g).—The bar to the attachment of gratuities is not limited to such gratuities as are allowed to "pensioners", but applies to a gratuity granted in consideration of past services. 6 All. 173. A political pension is not transferable. 50 Mad. 711 = 103 I. C. 339 = 25 L. W. 640 = 38 M. L. T. (H. C.) 299 = A. I. R. 1927 Mad. 604 = 52 M. L. J. 622. A gratuity granted to the heirs of a deceased employee by a Railway administration is not assets of the employee in the hands of his heirs and cannot be attached in execution of a decree against him. 69 I. C. 893. The words 'pension' means the same thing as in S. 11, Pension Act. 4 B. 432 ; 31 A. 382, *fol.* ; 24 I. C. 805. A Malikhana allowance is in the nature of a pension and so cannot be attached in execution of a money-decree. 13 I. C. 194 = 8 A. L. J. 126. A bonus sanctioned by a Railway Company to one of its servants, and which has not been paid over to the payee, cannot be attached. 6 A. 634. Arrears of pension due to the estate of a deceased cannot be attached. 5 M. H. C. R. 371. Also 47 All. 900 = A. I. R. 1925 All. 652. The stipend of a Carnatic stipendiary cannot be attached. 4 M. H. C. R. 277. Also one allowed to a member of the Mysore family. 7 W. R. 169. A zemindari granted revenue free, as a reward for services rendered, is not a pension. 1902 A. W. N. 161. An executing Court cannot question the decision of the trial Court regarding saleability of a pension. 47 All. 900 = A. I. R. 1925 All. 652.

Cl. (h).—The words "allowances being less than salary of" have been added to supersede the ruling in 6 M. 179.

Cl. (i).—¹The words "forty and eighty" for the words "twenty and forty" were respectively substituted by Act XXVI of 1923, S. 2. [See also notes under sub-Cl. (2) (b)]. A khot is not a public officer, and percentage received by him for collecting the assessment on dhara lands is not "salary". 13 B. 673. An officer of the Indian Staff Corps is a "Public Officer". An officer in the regular forces is not such an officer. 24 C. 102. Civil Courts can attach one moiety of the salary of an officer in the Indian Staff Corps. 25 M. 402. Part of the pay of an officer of the Indian army while serving in this country can be attached. 39 All. 308 ; 30 I. C. 92 ; 15 A. L. J. 264. See also 50 I. C. 683 ; 21 Bom. L. R. 143. An attachment by a Civil Court, of a moiety of the monthly salary of a debtor, subject to Military Law, not exceeding Rs. 20, is legal. 9 M. 170. Under S. 15 (2). Prov. Insolvency Act, read with S. 60, C. P. C. of the insolvent's salary vests in the receiver. 38 I. C. 410.

Cl. (j).—[See also notes under cl. (i)]. Salary of an officer in Indian army could not be attached. 38 Bom. 667 ; 23 I. C. 575 ; 16 Bom. L. R. 233.

Cl. (k).—This clause is new. The deposit which a Railway servant makes towards a provident fund is a compulsory deposit, and does not cease to be so when he leaves the service. 6 Bom. L. R. 921. But see 5 Bom. L. R. 454. Compulsory deposits made in a State Railway Provident Fund by an officer of the Railway during his employment are not liable to attachment in execution of money decree even if he has ceased to serve. 50 Cal. 347 = 27 C. W. N. 472. Deposit under Provident Funds Act—Not attachable. 21 A. L. J. 454 = 74 I. C. 746 = 45 A. 554. See also 92 I. C. 673.

Cl. (l).—The wages of a private servant cannot be attached in whole or in part, before they become due, and a debt exist. 21 M. 293. Persons who agree to spin cotton and to receive a certain amount of money or a certain quantity of cotton spun by them are labourers, and their remuneration is wages. 5 B. 132.

(m) an expectancy of succession by survivorship or other merely contingent or possible right or interest ;

(n) a right to future maintenance ;

(o) any allowance declared by any law passed under the Indian Council Acts, 1861 and 1892, to be exempt from liability to attachment or sale in execution of a decree ; and

(p) where the judgment-debtor is a person liable for the payment of land-revenue, any moveable property which, under any law for the time being applicable to him, is exempt from sale for the recovery of an arrear of such revenue.

Explanation.—The particulars mentioned in clauses (g), (h), (i), (j), (l) and (o) are exempt from attachment or sale whether before or after they are actually payable.

[Provided that where the decree-holder is a society registered or deemed to be registered under the Co-operative Societies Act, 1912, and the judgment-debtor is a member of the Society, the provisions of sub-clauses (i) and (ii) shall be construed as if the word "twenty" were substituted for the word "forty" wherever it occurs and the word "forty" for the word "eighty."]¹

(2) Nothing in this section shall be deemed—

² to exempt houses and other buildings (with the materials and the sites thereof and the lands immediately appurtenant thereto and necessary for their enjoyment) from attachment or sale in execution of decrees for rent of any such house, building, site or land.²

[* * * *]¹

Cl. (m).—What in English Law would be termed a vested remainder, is capable of attachment and sale during the lifetime of the person in possession. 17 B. 503. The interest of an heir under the Hindu Law, expectant on the death of a widow in possession, cannot be attached. 7 B. L. R. 341. See also 5 A. 430. Hindu Widow—Life interest in lands—Maintenance. 47 Bom. 597=73 I. C. 196. The right of a son to succeed by right of survivorship to his father's specific share cannot be attached. 8 W. R. 253. The reversionary right of a grantor under a deed of maintenance can be attached. 10 A. 462. An expectancy of succession by survivorship is not attachable. 22 B. 984. The right of a judgment-debtor to get by division a quantity of land which had been reserved by him for his own use in a deed of gift, can be attached. 14 C. 241. See also 17 B. 503. Future rents and profits that may become due to a ghatwal cannot, as such be attached. 28 C. 483. Also a claim which may accrue under a pending award. 14 M. I. A. 40. See 3 A. 12 and 21 M. 293.

Cl. (n).—A mere right to maintenance cannot be attached and sold in execution of a decree. 5 I. C. 879 ; 7 I. C. 80 *fol.*, 40 Mad. 302 ; 34 I. C. 381 ; 30 M. L. J. 361. But see also 85 I. C. 477=23 A. L. J. 149. Interest in property in lieu of maintenance not attachable. 30 M. 266 ; 7 I. C. 80 ; 29 I. C. 578. Right to maintenance—Property granted under a compromise can be attached. 43 All. 617=19 A. L. J. 648=63 I. C. 181. Right to maintenance of a widow—Standing crops on land in her possession—If can be attached. 22 M. L. J. 204. (See also 15 M. L. J. 7 ; 10 Bom. 342, *dist.*). A heritable right to receive a certain monthly allowance in lieu of a share of landed property is not a mere right to maintenance. 10 C. 521. See 27 C. 38 and 10

B. 342 ; 15 A. 371. A hereditary grant of an allowance of paddy out of the melwaram of certain land, is not a right to future maintenance. 30 M. 279. Also an annuity granted by a will. 10 C. W. N. 1102. See 15 M. L. J. R. 7.

Cl. (o).—See 28 M. 84 and 21 B. 588 (F. B.).

¹ The proviso was added by Act XX of 1925, S. 2.

Sec. 60, Cl. (2).—² The bracketted letter "(a)" and the word "or" at the end of cl. (a) and the whole of cl. (b) were repealed by Act X of 1914, Sch. II. S. 60, C. P. C., does not encroach on the provisions of Army Act. 37 Bom. 26=14 Bom. L. R. 777. Deduction of the pay of an officer of His Majesty's forces. 1 O. L. J. 127=23 I. C. 935=17 O. C. 99 (33 All. 529 ; 37 Bom. 26, *dist.*). Salary of officer of the Regular Forces. 37 Bom. 26=17 I. C. 13=14 Bom. L. R. 777. (33 A. 529, *fol.*). S. 60 does not apply to the case of an officer of His Majesty's Regular Forces and his salary is not liable to attachment under S. 60. 33 All. 529=9 I. C. 1053=8 A. L. J. 487. (24 Cal. 102, 25 M. 402, *ref.*). But see also 43 Bom. 368 ; 50 I. C. 427 ; 21 Bom. L. R. 137. Military Assistant Surgeons in Indian Subordinate Service are warrant officers and so soldiers, and therefore their pay is altogether exempt from attachment. 10 I. C. 719.

MISCELLANEOUS.—According to the Buddhist law, the wife ceases to have any interest in the joint property of her husband and herself, from the time of divorce and so attachment of the property after divorce is futile. 33 I. C. 118=9 Bur. L. T. 74. Insurance Policy—Wife named as beneficiary—Attachment. 37 Bom. 471=19 I. C. 736=15 Bom. L. R. 320. Moveable property—Belonging to judgment debtor in the hands of another—Attachment. 4 Pat. L. J. 141=48 I. C. 943=1919 Pat. 155.

61. The Local Government, [* * *]¹ may, by general or special

Partial exemption of agricultural produce.

order published in the local official Gazette, declare that such portion of agricultural produce, or of any class of agricultural produce, as may appear to the Local Government to be necessary for the purpose of providing until the next harvest for the due cultivation of the land and for the support of the judgment-debtor and his family, shall, in the case of all agriculturists or of any class of agriculturists, be exempted from liability to attachment or sale in execution of a decree.

62. [S. 271.] (1) No person executing any process under this Code directing or authorizing seizure of moveable property shall enter any dwelling-house after sunset and before sunrise.

Seizure of property in dwelling-houses.

(2) No outer door of a dwelling-house shall be broken open unless such dwelling-house is in the occupancy of the judgment-debtor and he refuses or in any way prevents access thereto, but when the person executing any such process has duly gained access to any dwelling-house, he may break open the door of any room in which he has reason to believe any such property to be.

(3) Where a room in a dwelling-house is in the actual occupancy of a woman who, according to the customs of the country, does not appear in public, the person executing the process shall give notice to such woman that she is at liberty to withdraw; and, after allowing reasonable time for her to withdraw and giving her reasonable facility for withdrawing, he may enter such room for the purpose of seizing the property, using at the same time every precaution, consistent with these provisions, to prevent its clandestine removal.

63. [S. 285.] (1) Where property not in the custody of any Court is under attachment in execution of decrees of more Courts than one, the

Property attached in execution of decrees of several Courts.

Court which shall receive or realize such property and shall determine any claim thereto and any objection to the attachment thereof shall be the Court of highest grade, or, where there is no difference in grade between such Courts, the Court under whose decree the property was first attached.

(2) Nothing in this section shall be deemed to invalidate any proceeding taken by a Court executing one of such decrees.

Sec. 61.—¹ The words "with the previous sanction of the Governor-General in Council" were repealed by Act XXXVIII of 1920.

Sec. 62.—A bailiff can break open the outer door of a shop in order to execute a writ of attachment. 3 B. 89. On this section, *see also* 1925 All. 140.

Sec. 63. **OBJECT OF SECTION** is to prevent confusion in execution proceedings. 18 Bom. 458.

SCOPE OF SECTION.—This section refers to attachments and has no relationship with the sections relating to sale and delivery of the property. 3 A. 353 (359). On this section, *see also* 22 A. 182; 18 B. 458; 25 C. 46; 21 C. 200; 6 M. 357; 16 B. 683; 49 Bom. 655; 27 Bom. L.R. 363.

APPLICATION OF SECTION.—Section applies only as between Civil Courts. 43 All. 612. There must be subsisting attachments of property in execution of decrees of more Courts than one at the same time under execution. 6 A. 255 (258). Where property is under attachment by two courts of different grades and is sold by the court of lower grade the sale is not invalid. 38 C.L.J. 266; 32 I.C. 41; 32 I.C. 927; 1924 Mad. 889. *See also* 33 M.L.J. 217; 46 C. 64.

COURT OF HIGHEST GRADE.—The grade of

a Court depends upon the pecuniary or other limitations of the jurisdiction of the particular court. 19 B. 127. In the North Western Provinces, the Court of a Munsiff, is of higher grade than a Court of Small Causes. 16 A. 11; (F.B.). Assets held by Court of inferior grade transferred to superior court. Rateable distribution—Inferior Court not agent of superior Court. 29 Bom. L.R. 319.

MEANING OF WORDS.—The words of "property not in the custody of any Court" seem to be more applicable to moveable than to immoveable property. 7 C. 410. But *see* 7 M. 47. "Realise" means "realize" by sale. 3 A. 356, 59. Rights of attaching decree-holders of different Courts. 29 I.C. 21; *see also* 26 M. L. J. 406; 6 P.L. J. 332. Money attached before judgment is liable to rateable distribution in execution of decrees against the same defendant. 26 I.C. 941. An attachment of immoveable property in execution of a money-decree followed by order for sale does not confer on the judgment-creditor any charge on the land. 18 C.W.N. 1058 = 27 M.L.J. 150 = 41 I.A. 251 (P.C.) (Reversing 15 I.C. 288). *See also* 15 C. 202 (210).

64. [S. 276.] Where an attachment has been made, any private transfer or delivery of the property attached or of any interest therein and any payment to the judgment-debtor of any debt, dividend or other monies contrary to such attachment, shall be void as against all claims enforceable under the attachment.

Sec. 64.—There cannot be a partial raising of attachment by consent of parties out of Court. The section being absolute in its terms a sale by consent or connivance of the decree-holder is not excepted by the section. 101 I. C. 591 (1) = A. I. R. 1927 Mad. 648. The object of section is to prevent fraud on decree-holders. 30 B. 337; 33 I. C. 492; and also to preserve in tact the rights of the attaching creditors against the attached property by prohibiting private alienations pending litigation. 29 I. A. 9 = 29 C. 154. This section avoids only private transfers and not awards by arbitrators. 35 M. L. J. 441. In the case of attachment before judgment as in the case of attachment in execution of a decree any private alienation of property during the continuance of attachment is void. 26 C. 531. Purchase made during pendency of an attachment is void and the purchaser does not obtain a lien. 34 I. C. 34. S. 64, avoids an alienation made while an attachment remained subsisting and enforceable. 4 Pat. L. T. 409; 20 S. L. R. 111; A. I. R. 1927 Lah. 103. A private sale of property pending an attachment by a decree-holder which has subsequently been raised is valid as against a non-attaching decree holder who had applied for rateable distribution during the continuance of the attachment. 49 I. C. 134 = 5 P. R. 1919 (32 M. L. J. 707, *fall.*). Obligations touching the property attached incurred by the debtor prior to the attachment are not affected by the section. 23 C. L. J. 115 = 34 I. C. 953 = 21 C. W. N. 158. *See also* 1 L. W. 977; 36 M. 348. Where a purchaser has entered into possession and paid the price without a registered deed of sale attachment of land in execution of decree against vendor is not effectual against the purchaser. 4 Bur. L. J. 166 = 1925 Rang. 382. A private transfer does not avoid transactions which in no way prejudice the execution creditor 29 C. 154 (166) (P. C.) An alienation is not altogether void but only subject to sale that may be effected pursuant to attachment. 24 L. W. 836 = 99 I. C. 656 = A. I. R. 1927 Mad. 190. It must be strictly construed, and before property can be subjected to the restriction imposed, there must be a perfected attachment. 7 C. 702. *See also* 2 A. 58; 3 A. 698. The attachment does not affect subsisting equitable rights which could be enforced against the property at the date of the attachment. 8 M. L. J. 266. It does not create in favour of the attaching creditor, any interest in, or charge upon the property, as against other creditors. 15 C. 202, at p. (210). *See also* 18 C. W. N. 1058 = 27 M. L. J. 150 (P. C.). Effect of attachment—If creates right in attaching creditor. 25 I. C. 759 (15 C. 202, 25 C. 179 (P. C.) *fall.*). A private alienation of property after an order for attachment which has not been effected, is valid unless proof is given that all the requirements of O. 21, R. 54, C. P. C. have been complied with and the proclamations have been made. 26 I. C. 204; 1 O. L. J. 549. *See also* 36 I. C. 732; 3 O. L. J. 422; 42 Mad. 565 = 36

M. L. J. 284. The words "Private transfer" mean a voluntary sale, gift, or mortgage, in contravention of the attachment order, and not the enforced execution of a conveyance or assignment in obedience to the decree of a Court qualified to pass it. 4 A. at p. 225; (F. B.) Where the alienation is made with the consent of the judgment-creditor and the money is applied towards the discharge of the judgment-debt, it is not void. 7 W. R. 430. A private transfer of property under attachment is not absolutely void but is void only as against claims enforceable under attachment. 63 I. C. 108.

PRIVATE TRANSFERS — ILLUSTRATIVE CASES.—An agricultural lease made by a judgment-debtor of attached property, is an alienation. 18 A. 123. Purchaser of land in possession—Execution and registration of conveyance only after attachment—Effect. 92 I. C. 777 = A. I. R. 1925 Rang. 382. A renewal of a mortgage already existing on the property is not an alienation. 4 M. 417. But a mortgage created for the first time is. 9 W. R. 544. Consent given by the heirs of a Mahomedan who by his will bequeaths more than one-third of his property, does not amount to an alienation. 26 B. 496. Where an alienation is effected by operation of law, as in the case of a vesting order under the Insolvent Act, the attachment cannot prevent the operation of the statute. 8 M. 556. *See also* 17 M. 180; 33 C. 666. Decree creating a mortgage during a subsisting attachment is not void against attaching decree-holder. 41 M. L. J. 557 = 45 Mad. 103; *but see* 41 M. L. J. 393 = 45 Mad. 84. Rival attachments—Private transfer to satisfy one decree if void. 13 Bom. L. R. 1189. *But see also* 37 Bom. 138.

ATTACHMENT WHEN EFFECTIVE. *See* 30 I. C. 857. Effect of attachment.—An attachment of property does not confer title therein, but merely prohibits its transfer. 39 P. R. 1915 = 29 I. C. 572. An order of attachment takes effect only from the date of its actual promulgation under O. 21, R. 54, C. P. C., and not from the date of the Court's order. 32 I. C. 276; 42 M. 365; 41 M. 151; 39 I. C. 857; 39 I. C. 562; 42 Mad. 844 = 37 M. L. J. 375, *but also see* 33 I. C. 492. A prohibitory order restraining the payee of a promissory note from receiving the money has not the effect of an attachment. Such an attachment is invalid and S. 64 does not apply. 46 Mad. 415 = 44 M. L. J. 206. The Court can make an order striking off an execution proceeding, and at the same time continuing an attachment. 11 C. W. N. 163. For instances which might tend to show that an attachment has expired, *see* 22 C. 909 (P. C.) Attachment before judgment—Subsequent sale of property in execution of another decree—Application for sale by person who attached before judgment. 38 M. L. J. 441 = 55 I. C. 626. Where property is attached before judgment and the order of attachment is set aside but the attachment is restored the parties are restored to the position they occupied, when the property was originally attached.

Explanation.—For the purposes of this section, claims enforceable under an attachment include claims for the rateable distribution of assets.

Sale.

65. Where immovable property is sold in execution of a decree and such sale has become absolute, the property shall be deemed to have vested in the purchaser from the time when the property is sold and not from the time when the sale becomes absolute.

Suit against purchaser not maintainable on ground of purchase being on behalf of plaintiff.

66. (1) No suit shall be maintained against any person claiming title under a purchase certified by the Court in such manner as may be prescribed on the ground that the purchase was made on behalf of the plaintiff or on behalf of some one through whom the plaintiff claims.

A private sale of the property in the interval is void. 42 All. 39=52 I.C. 343. An *interim* order of attachment before judgment passed when the minor defendant is not properly represented will operate for the purpose of preventing alienation though the order cannot be made absolute without a proper guardian. A purchaser of the property in the interval can intervene in the proceedings and show that the order should not be made absolute. 106 I. C. 142=A. I. R. 1928 Mad. 1. A re-attachment in execution as a matter of greater caution, of certain immovable properties which had been attached before judgment does not amount to an abandonment of the original attachment. 26 I. C. 81=1 L. W. 932. Attachment ceasing under O. 21, R. 57 Re-Attachment—Alienation during interval is valid 97 I.C. 547. When an execution application is struck off, the attachment made under it cannot be treated as subsisting. 18 A. 49. See also 6 A. 33; 7 A. 617; 19 A. 482; 23 C. 829. The assignee of a decree need not apply for a fresh attachment. 16 A. 132; 17 M. 58. The death of the judgment-debtor does not cause the attachment to cease. 12 A. 440. When a judicial sale takes place all previous attachments effected on the property sold cease. 12 C. 317. What are "Claims enforceable under the attachment". See 20 A. 421; 23 M. 478; 14 M. I. A. 543; 6 A. 33; 2 A. L. J. 265; see also 10 W. R. 99.

EXPLANATION.—This explanation is new and supersedes. 16 B. 91 at p. 100; 15 C. 771 and 25 All. at p. 434.

Object of Expl. 93 I.C. 366=A. I. R. 1926 Sind 177. Explanation gives priority to claims under S. 73, C. P. Code, only in connection with the attachment under which they are enforceable. If an attachment is withdrawn or ceases to exist there is no right to rateable distribution. 66 I. C. 642=8 O. L. J. 358. Meaning of "enforceable" in explanation, 49 M. 38=97 I. C. 49=A. I. R. 1926 Mad. 307.

Sec. 65. TITLE OF PURCHASER when accrues liability to Government revenue. See 40 Cal. 89=39 I. A. 228=16 C. W. N. 985=28 M. L. J. 311=12 M. L. T. 352=(1912) M. W. N. 244=14 Bom. L. R. 1046=16 I. C. 210=16 C. L. J. 606 (P. C.). As to when title vests in the purchaser, see 88 I. C. 693; A. I. R. 1926 Nag. 17. The auction purchaser in execution of a rent decree and not the judgment-debtor is liable for rents accruing between the date of the sale and its confirmation, as under S. 65 the title of the former dates from the date of the sale. 23 I. C. 101=18 C. W. N. 136. See O. 21, R. 92. The right

of an auction purchaser of a share in a village to mesne profits dates from the date of sale and not from the date of mutation of names in the Revenue Register. 45 I. C. 248=5 O. L. J. 31. See also 24 All. 475. Standing crops go with the sale of land, unless otherwise provided for. 13 Mad. 15. Failure to obtain sale certificate from court, does not vitiate the title of the auction-purchaser, 25 I. C. 8. See also 95 I. C. 965. Gift by auction purchaser before firmation takes effect if he authorises donee to take possession 2 Luck. 496=1 Luck. C. 50=102 I. C. 72=A.I.R. 1927 Oudh 261. As to effect of reversal of decree before grant of sale certificate, see 29 All. 591.

Sec. 66. SCOPE OF SECTION.—As to whether the section has retrospective operation, see 36 C. L. J. 396=27 C. W. N. 305. See also 43 All. 416; 47 Cal. 1108; 1925 Nag. 41; 30 C. W. N. 160. S. 66 applies only where the plaintiff's claim is based on an auction purchase and not where it is prior to and independent of the sale. 36 I.C. 681. As to applicability of section, see 90 I. C. 116 (Sec. not applicable to sale by receiver with permission of Court which appointed him); 83 I. C. 382=1924 Oudh 218 (Title of persons beneficially interested in the purchase not affected); 84 I. C. 98=1925 Oudh 20 (Sec. does not exclude evidence as to auction-purchase being benami when such evidence is relevant). A suit for execution of a sale-deed and for recovery of possession on the ground that defendant's father purchased the properties as benamidar for the plaintiff falls within S. 66, C. P. C., and is barred. 29 I. C. 138. The section provides that no suit shall lie against the certified purchaser on the ground that the purchase was on behalf of the plaintiff. 44 I. A. 201=44 A. 159 (P.C.). Cases of suits by certified purchasers are beyond the letter and scope of this section. 21 A. at p. 40. A benami certified purchaser can sue in his own name even when the true owner's name is disclosed. See 22 B. at p. 679. The object of S. 66 is to put an end to benami purchases at Court sales in execution. 43 Mad. 643=47 I.A. 108=30 M.L.J. 11 (P. C.); 12 Beng. L. R. 317. An agreement subsequent to a purchase if not affected by the section and is specifically enforceable. 43 Mad. 643=47 I. A. 108=39 M. L. J. 11 (P. C.); 42 M. 615=37 M.L.T. 98 (F.B.) But see 54 I.C. 726=24 C.W.N. 27; 42 Mad. 616 (F.B.). A suit by a judgment-debtor against an auction purchaser to enforce an agreement before the sale to reconvey the properties to the judgment-debtor is barred. 50 I. C. 546. The section is intended

(2) Nothing in this section shall bar a suit to obtain a declaration that the name of any purchaser certified as aforesaid was inserted in the certificate fraudulently or without the consent of the real purchaser, or interfere with the right of a third person to proceed against that property, though ostensibly sold to the certified purchaser, on the ground that it is liable to satisfy a claim of such third person against the real owner.

to prevent fraud, and cannot apply to cases in which its application would promote fraud. 12 C. 204. But see 16 M. at p. 292-93. The section has no application where it is found that the certified purchaser was, at the date of the purchase, managing the plaintiff's family as its agent, and that he bought the lands as such. 17 M. at p. 286, 87; see also 18 M. 436; but see 22 A. 434. A person is entitled to be regarded as the certified purchaser at any time after the acceptance of his bid at the sale, even though a sale certificate has not issued to him. 25 W. R. 493; 19 I. C. 909=19 C. L. J. 330; 29 I. C. 716; 53 I. C. 961. Section is no bar when the certified purchaser does not contest plaintiff's claim. 82 I. C. 344=1925 All. 47. The section should be construed strictly. 5 Bom. L. R. 329; 2 Lah. L. J. 358; and literally 2 I. A. 154.

APPLICABILITY OF SECTION.—A plaintiff, a purchaser, at a court sale is not entitled to recover the property from the defendant of whom he was found to be the benamidar, and the benami transaction was found to be free from fraud. 36 Bom. 116=12 I. C. 564=13 Bom. L. R. 1002. See also 43 All. 416=62 I. C. 725=19 A. L. J. 227; 108 I. C. 130=26 A. L. J. 245. The section applies only to sales in execution of decrees of Civil Courts, held under the Code. 14 C. at p. 585. S. 66 has no application in a case where the benamidar himself does not claim under the sale certificate. 27 C. W. N. 208; 1923 Cal. 302. A cause of action against the benamidar which arose under the old Code, 1882, is not affected by the new Code. 50 I. C. 335=23 C. W. N. 604. See also 18 C. I. J. 616=8 C. W. N. 1331. Section applies to the case of a purchaser at a sale in enforcement and execution of certificate under S. 2 of the Public Demands Recovery Act. 16 C. W. N. 973=16 C. L. J. 412. Where at an auction, a person purchased property in the name of one and it was alleged by another that it was in trust for him, a suit between these two claimants is not within the prohibition contemplated by S. 66. 33 I. C. 1000. Section does not apply to cases where a plaintiff who purchases property in the name of another, has been in adverse possession for over 12 years. 19 C. 199. The section applies whether the ostensible purchaser at an auction-sale purchases the whole or part of the property sold. 57 I. C. 684. Benami purchaser attesting sale by true owner, effect of—Whether operates as estoppel. See 36 Mad. 564=23 M. L. J. 301. A manager guilty of fraud cannot take advantage of this section as against the ward. 30 I. C. 212. As to fraud, see also 36 Bom. 116. Joint decree-holders—Co-decree-holders purchasing at execution sale—Rights of others. See 37 All. 545=42 I. A. 177 (P. C.) (affirming 32 All. 541=6 I. C. 364). 29 I. C. 447 is not now good law. See also 29 All. 557. S. 66 has no application to cases where the manager of a Hindu family or a tenant-in-common purchases

with funds belonging to the joint family or to all the tenants-in-common. 17 I. C. 434=(1912) M. W. N. 1071. See also 43 M. L. J. 363=45 M. 856; 37 I. C. 111. Where properties sold in execution of a decree were purchased with the funds of the manager of a joint Hindu family in the name of his son-in-law. S. 317 of the C.P.C., 1882, bars the claim of the members of the joint Hindu family to the properties as being really joint family acquisitions. 40 All. 159=44 I. A. 201 (P. C.) (see also 35 All. 80=18 I. C. 30=40 I. A. 40=16 O. C. 129. Purchase at court auction by two persons with joint funds—Sale certificate in the name of one—It is a joint transaction constituting the parties co-purchasers and not a benami transaction and this section does not apply to it. 28 Bom. L. R. 997=50 Bom. 660=97 I. C. 688=A. I. R. 1926 Bom. 525.

SUIT FOR REPRESENTATIVES OF REAL PURCHASERS.—S. 66, C.P.C., is intended to bar the institution of a suit against the certified purchaser by the beneficial owner or one standing as successor in-title of the beneficial owner. 16 I. C. 489=10 A. L. J. 97; also see 25 I. C. 821=12 A. L. J. 1145. S. 66, C. P. C., applies to the successor-in-title of the certified purchaser. 55 I. C. 499=16 N. L. R. 87 (31 Bom. 61; 35 Bom. 342, Ref.) also see 19 I. C. 909=19 C. L. J. 330. Third parties—S. 317 of the old Code did not apply to persons claiming through the certified purchaser. 46 I. C. 216. Third parties—Suit by beneficiary against the benami certificated purchaser. See 54 I. C. 127=24 C. W. N. 51. Third parties—Property mortgages by judgment-debtor—Sale in execution—Suit by mortgagee against the judgment-debtor and execution purchaser. 54 I. C. 967; 37 M. L. J. 586, [37 A. 545 (P. C.), Ref.].

SUIT FOR POSSESSION.—A plaintiff, a purchaser at a Court sale is not entitled to recover the property from the defendant of whom he was found to be the benamidar and the benami-transaction was found to be free from fraud. 36 Bom. 116. Also see 35 All. 138=18 I. C. 246=11 A. L. J. 111; 29 I. C. 787; 20 C. W. N. 147=40 Cal. 20, 28 M. L. J. 251 (Auction-purchaser not trustee for real purchaser.) S. 66 of the C. P. C. is no bar to a suit brought by the principal against the agent for the recovery of properties purchased by the agent in his own name but with the principal's money and for the principal's benefit in a Court auction though without the knowledge of the principal. 49 I. C. 734=9 L. W. 276. [19 W. R. 356 (P. C.); 37 A. 545, Foll.]

SUIT FOR DECLARATION.—A suit by a son, member of a joint Hindu family for a declaration that a Court auction-purchase in the name of his mother, made out of family funds, is benami, is barred under this section. 43 A. 711. But it has however been held that the real purchaser in a benami sale who remains in possession is not precluded by S. 66, C.P.C., from suing for declaration that he is the owner. 25 I. C. 810

671. [S. 327.] (1) The Local Government. [* * * * *]2

Power for Local Government to make rules as to sales of land in execution of decrees for payment of money.

may, by notification in the local official Gazette, make rules for any local area imposing conditions in respect of the sale of any class of interests in land in execution of decrees for the payment of money, where such interest are so uncertain or undetermined as, in the opinion of the Local Government, to make it impossible to fix their value.

1["(2) When, on the date on which this Code came into operation in any local area, any special rules as to sale of land in execution of decrees were in force therein, the Local Government may, by notification in the local official Gazette, declare such rules to be in force, or may, [* * * * *]2 by a like notification, modify the same.

Every notification issued in the exercise of the powers conferred by this subsection shall set out the rules so continued or modified.]"

Delegation to Collector of power to execute decrees against immoveable property.

68. [S. 320] The Local Government may, [* * * * *]

Power to prescribe rules for transferring to Collector executions of certain decrees.

declare, by notification in the local official Gazette, that in any local area the execution of decrees in cases in which a Court has ordered any immoveable property to be sold, or the execution of any particular kind of such decrees, or the execution of decrees ordering the sale of any particular kind of, or interest in, immoveable property, shall be transferred to the Collector.

69. The provisions set forth in the Third Schedule shall apply to all cases in which the execution of a decree has been transferred under the last preceding section.

Provisions of Third Schedule to apply.

PLEADINGS.—The plea of bar under the section may be put forward and given effect to at any stage of the suit, even in appeal for the first time. 37 I. C. 111.

Sec. 67.—The rules framed are not retrospective in their operation. 15 B. 322; and may provide for an appeal from the Collector's orders. 12 A. 564. Sanction of Commissioner to sale of agricultural land in execution—Unnecessary. 19 I. C. 480 = 15 Bom. L. R. 249; 66 I. C. 893 = 3 Lah. L. J. 5 = 89 P. R. 1913.

(1) **Sec. 67.**—S. 67 was renumbered as (1) and to the same section sub-sec. (2) was added by Act I of 1914, S. 3.

(2) **S. 67 (1) and (2) and S. 68.**—The words "with the previous sanction of the Governor-General in Council" were repealed by Act XXXVIII of 1920.

Sec. 68. SCOPE OF SECTION.—The Collector is bound to carry out the decree, subject to the discretion given to him by S. 1 of Sch. III and the following sections, and subject to the provisions contained in Ss. 4, 5 and 6 of Sch. III. 11 A. at p. 95 (F.B.); see also 7 B. 332. Rules framed under R. 17 as to transfer of decrees for execution. 45 Bom. 1132 = 62 I. C. 221 = 23 Bom. L. R. 476. Collector—Power of, to execute decree transferred. 61 I. C. 579. A Court has authority to recall its own record transmitted to the Collector for execution. 7 B. at p. 336; and can control the proceedings of the Collector. 8 B. 301; 11 B. at p. 482; 7 A. 407; see 9 A. 43 and 11 A. 94. After transfer to Collector no new process of attachment can be issued against the same property. 92 I. C. 906 = A. I. R. 1926 Oudh

318. As to jurisdiction of Civil Court to interfere with the powers of the Collector, see also 2 O. W. N. 73 = 1925 Oudh 448. See also 83 I. C. 766 = 1924 All. 704. A Civil Court can order the temporary alienation of the land of an agricultural tribe in satisfaction of a money-decree. 74 I. C. 194 = 4 Lah. L. J. 476. The Collector must decide the best method of satisfying the decree whether by management by the Collector himself or by sale or by letting. But he has not got the discretion to decide whether the decree has been satisfied. 37 Bom. 32 = 14 Bom. L. R. 787. But see 16 All. 228. When a decree has been transferred for execution to a Collector, an application to record satisfaction under O. 21, R. 2 should be made to him. 16 A. 228. But see 37 Bom. 32. A suit lies in a Civil Court for confirmation of a sale held by a Collector and to set aside an order passed by him cancelling it. 25 A. 355. An ancestral grove with a house which has been assessed by Government can be sold in execution by the Collector only. 36 All. 33 = 21 I. C. 831 = 11 A. L. J. 1009. Execution sale—Ancestral property sold as non-ancestral property whether can be set aside. 44 A. 383. Where a certain land is saleable under the Bundelkand Land Alienation Act this section cannot be invoked to transfer the decree to the Collector. 48 All. 392 = 24 A. L. J. 397 = 93 I. C. 1020 = A. I. R. 1926 All. 339.

APPEAL.—No appeal lies to the High Court from an order passed by the Collector in an execution proceeding transferred to him. 7 Bom. L. R. 682; 5 A. 314 (F. B.).

70. [S. 320, paras. 2 and 3] (1) The Local Government may make rules consistent with the aforesaid provisions—

Rules of procedure.

(a) for the transmission of the decree from the Court to the Collector, and for regulating the procedure of the Collector and his subordinates in executing the same, and for retransmitting the decree from the Collector to the Court ;

(b) conferring upon the Collector or any gazetted subordinate of the Collector all or any of the powers which the Court might exercise in the execution of the decree if the execution thereof had not been transferred to the Collector ;

(c) providing for orders made by the Collector or any gazetted subordinate of the Collector, or orders made on appeal with respect to such orders, being subject to appeal to, and revision by, superior revenue authorities as nearly as may be as the orders made by the Court, or orders made on appeal with respect to such orders, would be subject to appeal to, and revision by, appellate or revisional Courts under this Code or other law for the time being in force if the decree had not been transferred to the Collector.

[S. 320, para. 4.] (2) A power conferred by rules made under sub-section (1) upon the Collector or any gazetted subordinate of the Collector, or upon any appellate or revisional authority, shall not be exercisable by the Court or by any Court in exercise of any appellate or revisional jurisdiction which it has with respect to decrees or orders of the Court.

Collector deemed to be acting judicially.

71. [S. 320, para. 5.] In executing a decree transferred to the Collector under section 68 the Collector and his subordinates shall be deemed to be acting judicially.

72. [S. 326] (1) Where in any local area in which no declaration under section 68 is in force the property attached consists of land or of a share in land, and the Collector represents to the Court that the public sale of the land or share is objectionable and that satisfaction of the decree may be made within a reasonable period by a temporary alienation of the land or share, the Court may authorize the Collector to provide for such satisfaction in the manner recommended by him instead of proceeding to a sale of the land or share.

(2) In every such case the provisions of sections 69 to 71 and of any rules made in pursuance thereof shall apply so far as they are applicable.

Sec. 70.—A Collector acting under the section is a Revenue Court and can pass order under S. 476, Cr. P. C. 14 A. L. J. 1077 = 38 I. C. 419. After a sale is confirmed by the Collector and retransmitted to the civil court, he has no power left to interfere with the sale. 48 All. 568 = 95 I. C. 578 = A. I. R. 1926 All. 575. And a civil suit lies challenging such interference. (*Ibid.*) No suit lies to set aside sale by Collector. 3 O. W. N. 739 = 97 I. C. 1036 = A. I. R. 1926 Oudh 612.

EXECUTION.—Objections to sale of property—Court, power of, to amend application—Date of application. 37 I. C. 78 ; 3 O. L. J. 529.

Sec. 70, Cl. (2).—Where a decree is transferred to the Collector for execution, a Civil Court cannot entertain an application under O. 21, R. 72 inasmuch as that power has been conferred on the Collector. 42 Bom. 621.

(1) **Sec. 70.**—For rules providing for appeals in the Punjab from the orders of a Collector or the gazetted subordinate of a Collector in certain cases—see Punjab Gazette, 1909, Pt. I, p. 12.

Sec. 72.—SCOPE AND APPLICABILITY OF SECTION.—On this section, see 103 I. C. 884 (1)

= A. I. R. 1927 Nag. 324. Section does not apply to decree directing sale of land, in pursuance of a contract affecting the same. 2 A. 356 ; see also 9 C. 290 at p. 293. Action of Collector under section is administrative. 1 Lah. 192 = 58 I. C. 603 (F. B.). The sanction of the Revenue authorities not necessary for sale of revenue paying land, in execution. 69 P. L. R. 1918 = 46 I. C. 864 ; see also 1 P. R. 1919 = 52 I. C. 356. A District Judge executing a decree is not bound to accept the recommendation of a sub-divisional officer to the Collector to arrange to have the decree satisfied by a temporary alienation. 9 P. L. R. 1915 = 27 I. C. 630. The object of section is to save land by temporary alienation and the Court executing decree cannot vary its terms by authorising satisfaction in instalments. 2 N. W. P. 347. See also 6 N. W. P. 39. Regarding suit to set aside sale by Collector, see 1 Luck. 558 ; see also A. I. R. 1926 Oudh 612. Collector reporting inability to execute. Executing Court should not file execution application but should proceed with the execution. 96 I. C. 199 (1) = A. I. R. 1926 Lah. 632.

Distribution of assets.

73. [S. 295.] (1) Where assets are held by a Court and more persons than one have, before the receipt of such assets, made application to the Court for the execution of decrees for the payment of money passed against the same judgment-debtor and have not obtained satisfaction thereof, the

Proceeds of execution sale to be rateably distributed among decree-holders.

Sec. 73- SCOPE AND APPLICABILITY OF SECTION.—Conditions as to the applicability of the section, and right to rateable distribution. *See* 30 I. C. 49 = 21 C. L. J. 624 ; 19 I. C. 226 = 19 C. W. N. 535 ; 42 M. L. J. 473 ; 48 M. L. J. 459 ; 42 I. C. 897 = (1917) M. W. N. 859. Where the assets are not liable to be rateably distributed, S. 73 (2) has no application. 42 M. L. J. 473 = 1922 Mad. 99. A decree against the judgment-debtor for assets of his father gives no priority over the decrees against him personally. 42 I. C. 897 = (1917) M. W. N. 859. Scope of the section has been purposely broadened under the new Code of 1908. 70 I. C. 541 = 35 C. L. J. 327. Execution application paying for a relief which the Court could not grant is no ground for rejecting decree-holder's application for rateable distribution. 49 M. L. J. 753. An order under this section affects only interests existing at the time. The insolvency of the debtor introduces a new state of things from the date of the insolvency. 27 C. 351. A judgment-creditor has no priority over the Official Assignee in respect of property attached by him previous to the vesting order. 29 C. 428. Applicability to a Solicitor's claim for costs. 29 Bom. L. R. 1196. The section applies to cases where a District Court transfers execution proceedings in a Small Cause Court to the Court of a Sub-Judge. 18 B. 61. *See also* 15 Mad. 345. The section applies to cases where property has been attached in execution of a decree of a Presidency Small Cause Court, and the same property has been attached in execution by the High Court. 20 B. 377. Nature of proceedings under the section is one of non-judicial character, and the court cannot enquire into the validity or otherwise of the decrees under which payments are claimed. 19 N. L. R. 172 = 1924 Nag. 39. Identity of judgment-debtors in all the decrees is not necessary. 4 Pat. L. T. 373 = 74 I. C. 626 ; 5 R. 757. *See also* 9 C. 920 ; 30 C. 583. But the holders of decrees against one of the brothers in a joint family are not entitled to rateable distribution from out of the sale proceeds of the property pertaining to the share of another brother realised in execution of decrees against both the brothers. 54 M. L. J. 278. Claims under this section are claims enforceable by attachment, against which assignments made under S. 64 are void. 7 C. 34. Section does not apply to deposits by judgment-debtor for a particular decree. 1925 Nag. 157. Where set-off is claimed under O. 21, R. 72 application under this section must be made before decree-holder's application for set-off. 1925 Oudh 287.

WHO CAN APPLY.—*See* 20 S. L. R. 111. Only *bona fide* decree-holders can apply for rateable distribution, and a Court is bound to ascertain this fact. 11 C. at p. 44. *See also* 13 B. 154. Application for rateable distribution is not an application for execution. 64 I. C. 53 = 17 N. L. R. 143. Application for execution is necessary to

entitle decree-holder to rateable distribution. Mere petition for rateable distribution is not enough. 87 I. C. 1025. The application must be to the Court holding the assets, to which the decrees must have been transferred. 5 R. 757 = 1925 Nag. 382. Attachment, not sufficient. 90 I. C. 527. A person by simply obtaining an order for attachment before judgment is not entitled to rateable distribution. 30 I. C. 38 = 28 C. L. J. 614 ; 12 B. 400. The holder of a decree for unascertained *mesne profits*, who has applied to the Court to ascertain the amount thereof comes within purview of this section. 5 M. 123. On this point *see also* 23 A. 106 ; 4 B. 429. Where money due to a judgment-debtor is attached in the hands of his debtor and paid by him into Court, a rival decree-holder attaching it in Court is entitled to rateable distribution. 5 M. L. J. 151. *See also* 5 Lah. L. J. 279 = 1924 Lah. 132 (*Sale* postponed to enable judgment-debtor to raise money by private alienation).

WHEN SHOULD APPLICATION BE MADE "BEFORE THE RECEIPT OF SUCH ASSETS".—As to cases bearing on this point *see* 13 C. 225 ; 21 C. at p. 817 ; 6 B. 588 ; 28 M. 380 ; 6 Bom. L. R. 376 ; 87 I. C. 783 = 1925 Cal. 966. "Receipt means receipt of the whole of the assets realised by one order for sale. 95 I. C. 205 = A. I. R. 1926 Nag. 380. Until the court has received a decree it has no jurisdiction to entertain an application for execution. Where the decree was received by the executing Court the next day after the application for execution was filed, the application is not sustainable in law so as to be the basis of a claim for rateable distribution. 27 L. W. 423 ; 101 I. C. 908-A. I. R. 1927 Pat. 252. Attachment by different Courts—Mode of distribution. *See* 29 Bom. L. R. 689. To determine the question of priority the material point of time is not the date of sale of the mortgaged property but the date of receipt of assets by the Court. 62 I. C. 167 = 33 C. L. J. 7. *See also* 44 Cal. 1072. The creditors are not entitled to preferential treatment by reason of priority of attachment. The Court will apply the rules of justice, equity and good conscience in the determination of the relative claims of the creditors. 44 Cal. 1072 = 21 C. W. N. 887. Where assets held by a Court of inferior grade is transferred to a superior Court, rateable distribution is to be made as on the date of receipt of assets by the superior Court. 29 Bom. L. R. 319 = 101 I. C. 411 = A. I. R. 1927 Bom. 247.

NATURE OF APPLICATION MADE "APPLICATION FOR EXECUTION"—A decree-holder who has obtained attachment before judgment is not entitled to rateable distribution in case he has not applied under O. 21, R. 10 to execute his decree. 33 C. 639 ; 12 B. 400 ; 30 I. C. 38 = 28 C. L. J. 614. So also, a decree holder at whose request a precept has issued under S. 46. The application for execution must be on the file and undisposed of, when the assets are received 4 M.

assets, after deducting the costs of realization, shall be rateably distributed among all such persons :

383. Necessity for execution application. *See* 95 I. C. 151=A. I. R. 1926 Lah. 538 ; A. I. R. 1926 Cal. 249 ; A. I. R. 1926 Sind 177. Execution application paying for relief which Court could not grant. If disentitles applicant to rateable distribution (1926) M. W. N. 27=91 I. C. 11=A. I. R. 1926 Mad. 179.

"DECREEES FOR PAYMENT OF MONEY."—A decree does not lose the character of being a money decree against one judgment-debtor because, under it, a sale of the property of the other judgment-debtor is also decreed. 10 A. 35 at p. 38. It is essential that the decrees should have been obtained against the same judgment-debtor. 42 C. 1=19 C. W. N. 1202 ; 25 B. 494 ; 47 I. C. 296 ; 27 C. L. J. 100 ; 14 C. L. J. 50. It is not necessary that all the judgment-debtors in the several decrees should be identical. 4 P. L. J. 373 ; 9 C. 920 ; 30 C. 583 ; 22 M. 241. A person who holds a decree against a Hindu father, and a person who holds a decree against the father and son holds decrees against the same judgment-debtor in case the property is the ancestral property of the family. 26 M. 179 (181). *See also* 29 B. 528. Clause (a) and the second proviso have reference only to sales in execution of simple money decrees, and to the mode in which sale proceeds are to be rateably distributed among simple-money-decree-holders. 5 A. at p. 558. Neither this section nor O. 34, R. 13 are applicable to a case where the question is whether the surplus amount can be paid to a subsequent encumbrancer. 49 A. 636=101 I. C. 505=A. I. R. 1927. All. 467. The words "an incumbrance" cannot be read as "an incumbrance or incumbrances." 12 A. 546. *See also* 7 A. 378. When in execution of a mortgage decree a sale proceeds in lots, the sale need not be stopped as soon as the sum due under the decree is realized, if several other decree-holders have applied for rateable distribution. 17 M.L.J. 80. The right to claim a refund of assets arises only after such assets have been actually paid to a person not entitled to receive the same. A suit for a declaration that another decree-holder is not entitled to rateable distribution is not maintainable. 7 M.L.J. 277 ; 3 C. L. J. 385. *See also* 15 B. 438. The words "assets liable to be rateably distributed" mean assets reduced to a form in which they are available for immediate application towards the satisfaction of the decree which is being executed. 16 B. at p. 98. A debt due by a third party to the judgment-debtor, when paid into Court, is available for distribution. 19 M. 72. Rents of property under attachment, which have been realized by a Receiver appointed at the instance of one decree-holder, are available for distribution. 26 C. 772. But rent taken in lieu of interest, by a mortgagee, does not fall within the scope of the section. 9 M. 57. The 25 per cent. deposited by the purchaser at the date of sale would not be available for distribution until the balance is paid. 18 C. 242. The fact that under certain circumstances it is possible for the Court to set aside the sale and to return the purchase-money to the purchaser, does not render the purchase-money not available for distribution. 16 B. 16. When property has been

ordered to be sold in several lots, and only some of the lots have been sold, the sale proceeds of those lots alone, are available for distribution before the remaining lots are sold. 26 M. 179.

NOTICE.—Notice of an application for rateable distribution need not be given to the other decree-holders. 27 A. 132.

PRESUMPTION.—Where payment of assets into court and application for rateable distribution are made on the same day, there is no presumption as to the order of events and the officer distributing the assets should ascertain which act was prior in time. 47 I. C. 296=(1918) M. W. N. 520.

ASSETS.—This term means all a man's property of whatever kind which may be used to satisfy debts or demands against him. 16 B. at p. 98 ; 16 I. C. 640=14 Bom. L. R. 633 ; 26 C. W. N. 169=70 I. C. 539=1922 Cal. 19. It also means proceeds of execution sale. 26 M. at p. 181. Assets must be realized in execution under process of court or in one of the modes prescribed by the Code. 13 I. C. 907=15 A. L. J. 49 ; 36 Bom. 156. But *see also* 70 I. C. 541=35 C. L. J. 327 ; 14 L. W. 582=70 I. C. 20=(1921) M. W. N. 817. It has however been held that the language of the section is wide enough to cover cases where moneys are in the hands of the courts by whatever process the same has been realized. 41 Mad. 616=35 M. L. J. 150=47 I. C. 538=(1918) M. W. N. 524. But *see also* 30 Cal. 262. The following are assets liable to rateable distribution :—(1) Salary of Government servant when attached. 16 I. C. 640=14 Bom. L. R. 633 (2) Money deposited by surety for release of an attachment before judgment. 26 C. W. N. 169=70 I. C. 539=1922 Cal. 19. (3) Money paid to sheriff in execution of decree. 59 I. C. 458=47 Cal. 515 ; 40 Cal. 619. But *see* 36 Bom. 156 ; 53 I. C. 599=21 Bom. L. R. 975. (4) Sale proceeds in the hands of decree-holder purchaser. 43 I. C. 715 ; 44 Cal. 789=35 I. C. 850=25 C. L. J. 303. (5) Sale proceeds of moveables realised by Nazir. 45 I. C. 108=33 P. R. 1918. (6) Money paid into court under a prohibitory order. 42 I. C. 436=167 P. W. R. 1917. (7) Money paid into court by judgment-debtor, though no process is issued. 24 I. C. 241=(1914) M. W. N. 309. (8) Money realized in execution of personal decree. 15 I. C. 406=(1912) M. W. N. 407. (9) Rents realized by receiver. 52 I. C. 305=22 O. C. 104. (10) Deposit by a defaulting purchaser. 49 Mad. 570=97 I. C. 86=A. I. R. 1926 Mad. 872. (11) Land acquisition compensation deposited in court for apportionment. 49 Mad. 38=97 I. C. 496=A. I. R. 1926 Mad. 307. (12) Moneys paid by judgment-debtor under O. 21, R. 43. 28 Bom. L. R. 237=93 I. C. 852 (2)=A. I. R. 1926 Bom. 242. The following are not assets liable to rateable distribution :—(1) Money paid privately by judgment-debtor to decree-holder. 13 I. C. 907=15 A. L. J. 49. (2) Money paid into court under O. 21, R. 55. 36 Bom. 156=12 I. C. 911=13 Bom. L. R. 1193 ; 53 I. C. 599. But *see contra* 59 I. C. 458=47 Cal. 515. (3) Money paid to bailiff to avert levy of attachment of moveables. 53 I. C. 599=21 Bom. L. R. 975 (36 Bom. 156, Fol. ; 28 Mad. 380 ; 28 Bom.

Provided as follows :—

(a) where any property is sold subject to a mortgage or charge, the mortgagee or incumbrancer shall not be entitled to share in any surplus arising from such sale ;

264 ; 38 Mad. 221 ; 27 Mad. 346, Ref.). But see *contra*. 47 Cal. 515 ; 40 Cal. 619. (4) Money paid by judgment debtor on arrest to bailiff to get himself released. 39 I.C. 623 = 19 Bom. L.R. 274. (5) Amount deposited under O. 21, R. 89 to set aside sale. 14 C.L.J. 50 = 10 I.C. 527 = 15 C.W.N. 872 ; 42 I.C. 507 ; (1916) M. W. N. 195 ; 45 I.C. 782 = L. W. 573 ; 30 Cal. 262. (6) Money not paid into court. 3 P. W. R. 1920 = 54 I. C. 41 = 11 P. W. R. 1920. (7) Money paid as security under O. 41, R. 5 ; 36 P. L. R. 1916 = 29 I. C. 791 = 120 P.W.R. 1915. (8) Money paid for a specific purpose (as) money paid to avoid arrest or arrest before judgment. 29 I. C. 714 = 5 Bur. L. T. 22 ; 61 I. C. 424 = 14 S. L. R. 164. (9) Money realized under attachment before judgment. 37 All. 578 = 29 I. C. 622 = 13 A. L. J. 732 (*i.e.*) such attachment confers no special right or priority on the party who obtains the order. (*Ibid.*) See also 32 I. C. 944.

FUND IN COURT.—If a fund in Court has been attached by several creditors, none can claim preferential treatment owing to priority of attachment. 33 C. L. J. 7 = 62 I.C. 167. When a Court in execution of a decree attaches a fund in the Court the latter court holds the fund subject to the direction of the execution Court and to transfer it to that court. The fund as soon as it is transferred to the execution Court becomes 'assets held by that Court' within S. 73. All decree holders who have applied are entitled to rateable distribution. 44 Mad. 100 = 39 M. L. J. 608 (F.B.) See also 42 Mad. 692 ; 42 M.L.J. 361 = 1922 Mad 31 ; 31 I.C. 616 = 19 C.W.N. 345. Where the fund in court was the surplus sale proceeds payable to the defendant mortgagor after sale under a mortgage decree, the fund was not available for rateable distribution and the attaching decree-holders were to be paid fully in the order of their attachment. 24 I.C. 617 = 26 M.L. J. 364 ; see also 29 I. C. 239 = 38 Mad. 221. The proceeds of a sale held in pursuance of an attachment of a company before its liquidation. must be distributed in accordance with the provisions of C.P.C. 43 Cal. 586 = 20 C.W.N. 358.

RIGHT TO RATEABLE DISTRIBUTION.—Execution before Collector. 36 Bom. 519 = 16 I. C. 59 = 14 Bom. L. R. 527. Right to rateable distribution—Conditions to be satisfied. 46 Mad. 506 = 44 M.L.J. 413. (On appeal from 70 I. C. 20.) See also 18 I. C. 55 ; 14 C. L. J. 50 = 15 C. W. N. 872. When there are two decree-holders of one judgment-debtor and the objection of the judgment debtor that the property was non-transferable against one is disallowed and against the other it is allowed, the latter is entitled to rateable distribution of the sale proceeds on execution by the former. 30 I.C. 49 = 21 C. L. J. 624. Where there are several attachments before judgment and the moneys are realised before any of the plaintiffs obtains a decree, the money should be held to the credit of all the suits and distributed between all the attaching creditors who subsequently obtained decrees. 15 L. W. 531 = 68 I. C. 714 = 1922 Mad. 236. If the order for rateable distribution is set aside on appeal, there is no power to order restitution under S. 144, C. P.

Code. 42 M. L. J. 473 = 67 I.C. 546 = 1922 Mad. 99. Permission to set-off granted to the other decree holder would not affect the right to such distribution. 59 I. C. 80 = 12 L. W. 328. Rival decree holders—Permission to one to bid and to set off—Right of the other decree-holders to rateable distribution not affected. 59 I. C. 86 = 12 L. W. 328. Decree against two persons assets realised in execution right of holder of another decree against one of these persons alone to rateable distribution confined to assets of the common judgment-debtor. 28 Bom. L. R. 78 = 93 I. C. 222 = A.I.R. 1926 Bom. 150.

RIVAL DECREE-HOLDERS.—Application for rateable distribution whether maintainable after realization of assets by executing Court. 62 I.C. 857. Right of one decree-holder to impeach decree of rival decree-holder—Fraud and collusion—Suit for declaration and injunction before distribution of assets. 43 Mad 381 = 38 M. L. J. 108 = 27 M. L. T. 66 = (1920) M. W. N. 92 = 55 I. C. 452 = 11 L. W. 81. Rival decree holders—Assets held by Munsiff—Power to order rateable distribution—Small Causes decree. 21 I.C. 869 = 25 M. L. J. 601. Mortgage decrees which provide for recovery of the deficiency of the decree after sale of hypotheca from the person and other properties of the mortgagor are decrees "for the payment of money" within the meaning of S. 73 and entitle the mortgagee to apply for rateable distribution. 39 Mad. 570 = 29 M. L. J. 96 = (1915) M. W. N. 134 = 29 I. C. 231 = 17 M. L. T. 427. See also 74 I.C. 140. As between two attaching decree-holders one executing his own decree and the other executing the attached decree, the one who had applied for execution of the attached decree was entitled to rateable distribution since in effect he was executing his own decree. (1913) M.W.N. 1021 = 21 I. C. 611 = 14 M. L. T. 533.

DISMISSAL OR WITHDRAWAL OF EXECUTION APPLICATION.—A decree-holder is not entitled to rateable distribution if the application for execution is dismissed or time barred or the decree is satisfied. 30 I.C. 49 = 21 C. L. J. 624 ; 24 I.C. 83 = 18 C. W. N. 1311. Claims enforceable under the attachment cease to have effect on withdrawal of attachment. 66 I.C. 642 = 8 O. L. J. 358.

ENQUIRY INTO RIVAL CLAIMS.—Suit by one decree-holder for refund of moneys awarded to others before actual distribution does not lie. 46 I. C. 101 = 16 A. L. J. 530. The inquiry by the court under this section is non-judicial. A Court under this section cannot inquire into the *bona fides* or otherwise of a decree brought to its notice. 40 Mad. 431 = 21 M. L. T. 225 = (1917) M. W. N. 280 = 5 L. W. 538 = 38 I. C. 117 = 32 M. L. J. 553. See also 5 Pat. 445 = A. I. R. 1926 P. 497. Under S. 73, C. P. C., when rival decree holders apply for rateable distribution of assets the Court can investigate whether any of the decree-holders is a *bona fide* decree-holder or is a benamidar for the judgment-debtor. 17 C. W. N. 326 = 16 C. L. J. 582 = 16 I. C. 795 (11 C. 42 ; 13 B. 154, Foll.). See also 23 M. L. J. 699 = 17 I. C. 940 = 12 M. L. T. 660. As to whether an executing Court can inquire into the validity of a

(b) where any property liable to be sold in execution of a decree is subject to a mortgage or charge, the Court may, with the consent of the mortgagee or incumbrancer, order that the property be sold free from the mortgage or charge, giving to the mortgagee or incumbrancer the same interest in the proceeds of the sale as he had in the property sold ;

(c) where any immoveable property is sold in execution of a decree ordering its sale for the discharge of an incumbrance thereon, the proceeds of sale shall be applied—

first, in defraying the expenses of the sale ;

secondly, in discharging the amount due under the decree ;

thirdly, in discharging the interest and principal moneys due on subsequent incumbrances (if any) ; and

fourthly, rateably among the holders of decrees for the payment of money against the judgment-debtor, who have, prior to the sale of the property, applied to the Court which passed the decree ordering such sale for execution of such decrees, and have not obtained satisfaction thereof.

(2) Where all or any of the assets liable to be rateably distributed under this section are paid to a person not entitled to receive the same, any person so entitled may sue such person to compel him to refund the assets.

(3) Nothing in this section affects any right of the Government.

Resistance to execution.

74. [S. 330.] Where the Court is satisfied that the holder of a decree for the possession of immoveable property or that the purchaser of immoveable property sold in execution of a decree has

Resistance to execution. been resisted or obstructed in obtaining possession of the property by the judgment-debtor or some person on his behalf and that such resistance or obstruction was

decree under any circumstance, *see also* 40 Mad. 341=21 M. L. T. 225=(1917) M. W. N. 280=5 L. W. 538=38 I. C. 117=32 M. L. J. 553 ; 39 M. L. T. 609=104 I. C. 735=A. I. R. 1927 Mad. 944.

FRAUD AND COLLUSION.—The Court will not grant rateable distribution, if collusion or corrupt bargain is proved. A decree-holder can show that a decree obtained by another decree-holder was obtained by collusion with the judgment-debtor. 23 M. L. J. 699=12 M. L. T. 660=17 I. C. 940 ; *see also* 17 C. W. N. 326=16 C. L. J. 582=16 I. C. 795 ; 43 Mad. 381=38 M. L. J. 108 ; but *see* A. I. R. 1926 P. 497. An executing Court when rateably distributing the proceeds of a sale in execution, cannot go into the question whether the decree has been obtained by fraud. 65 I. C. 600=46 Bom. 635=24 Bom. L. R. 1=1922 Bom. 31 ; (13 Bom. 154, overruled.). *See also* 43 Mad. 381=38 M. L. J. 108.

RIGHT OF SUIT.—Revision lies in the case of obvious mistake. 104 I. C. 735=A. I. R. 1927 Mad. 944. A suit lies to recover money paid to a wrong person under a valid judgment or equitable distribution under S. 73. 39 All. 322=39 I. C. 532=15 A. L. J. 295. A rival decree-holder need not wait for the distribution of the assets before bringing a suit for a declaration that the decree of the one of the decree-holders was obtained by fraud and collusion and that he was not entitled to share in the rateable distribution. 43 M. 381=38 M. L. J. 108=27 M. L. T. 66=(1920) M. W. N. 92=55 I. C. 452=11 L. W. 81. Petition under S. 115 is not the best way to settle questions coming under S. 73 where money is paid to third parties after the application and they are not parties to the application. Regular suit is proper

remedy. 25 I. C. 592=(1914) M. W. N. 738 ; *see also* 65 I. C. 230 ; (1927) M. W. N. 795 ; 104 I. C. 735=A. I. R. 1927 Mad. 944.

Sec. 73 (2).—A suit to recover money paid to a defendant under S. 73 is a suit for money paid to him for plaintiff's use and must be brought within three years from the date of payment and not within six years under Art. 120 of Lim. Act. 30 Mad. 62=16 M. L. T. 509=27 M. L. J. 640=26 I. C. 219=1 L. W. 952 (37 M. 381, Foll.). Application for rateable distribution—Death of applicant—Substitution of legal representatives—Application for rateable distribution by legal representatives—Dismissal—Suit by legal representatives not maintainable. 30 C. W. N. 735=96 I. C. 378=A. I. R. 1926 Cal. 967.

APPEAL.—No appeal lies against an order passed under this section. 14 A. 210=23 I. C. 422=1 L. W. 234 ; 5 P. L. J. 415=57 I. C. 421.

REVISION.—Neither can the High Court revise the order 4 M. L. J. 87. But *see* 4 M. 383. (*See also* 5 P. L. J. 415=57 I. C. 421) except in very exceptional circumstances. *See* 60 I. C. 371 ; 17 I. C. 254=176 P. L. R. 1912. Revision is not proper remedy, but a regular suit. *See* 25 I. C. 592=(1914) M. W. N. 738 ; A. I. R. 1926 Mad. 179.

Sec. 74.—A decree for partition is a decree for the possession of property. 16 M. 127. "Possession" is not limited to actual possession. 25 B. 478. Detention in civil prison can be ordered only at the instance of the decree-holder or purchaser and the Court cannot order it of its own motion. 26 M. 494. The "resistance" or "obstruction" is the resistance to or obstruction of the officer charged with the execution of the warrant. 14 A. 417 (419).

without any just cause, the Court may, at the instance of the decree-holder or purchaser, order the judgment-debtor or such other person to be detained in the civil prison for a term which may extend to thirty days, and may further direct that the decree-holder or purchaser be put into possession of the property.

PART III.

INCIDENTAL PROCEEDINGS.

Commissions.

Power of Court to issue commissions.

75. Subject to such conditions and limitations as may be prescribed, the Court may issue a commission—

- (a) to examine any person ;
- (b) to make a local investigation ;
- (c) to examine or adjust accounts ; or
- (d) to make a partition.

76. [S. 386.] (1) A Commission for the examination of any person may be issued to any Court (not being a High Court) situate in a province other than the province in which the Court of issue is situate and having jurisdiction in the place in which the person to be examined resides.

[Ss. 388, 389.] (2) Every Court receiving a commission for the examination of any person under sub-section (1) shall examine him or cause him to be examined pursuant thereto, and the commission, when it has been duly executed, shall be returned together with the evidence taken under it to the Court from which it was issued, unless the order for issuing the commission has otherwise directed, in which case the commission shall be returned in terms of such order.

77. In lieu of issuing a commission the Court may issue a letter of request to examine a witness residing at any place not within British India.

Commissions issued by foreign Courts.

78. [S. 391.] The provisions as to the execution and return of commissions for the examination of witnesses shall apply to commissions issued by—

- (a) Court situate beyond the limits of British India and established or continued by the authority of His Majesty or of the Governor-General in Council, or
- (b) Courts situate in any part of the British Empire other than British India, or
- (c) Courts of any foreign country for the time being in alliance with His Majesty.

PART IV.

SUITS IN PARTICULAR CASES.

Suits by or against the Government of Public Officers in their official capacity.

Suits by or against Government.

79. [S. 416.] (1) Suits by or against the Government shall be instituted by or against the Secretary of State for India in Council.

Sec. 75.—Order 26 does not in any way amplify the scope of S. 75. 3 Lah. 209—1922 Lah. 47. S. 75, does not authorize a court to delegate to a commissioner the trial of any material issue which the judge is bound to try. 3 Lah. 209 = 1922 Lah. 47 (16 Mad. 350, *fol.*). See also 1925 Pat. 576 ; 7 P. L. T. 161 = A. I. R. 1925 Pat. 576. The judicial functions of a Court cannot be delegated to a Commissioner and the powers of Court to issue a commission is strictly defined in S. 75. 15 C. L. J. 17 = 13 I. C. 440 = 17 C. W. N. 369 ; see also 30 Bom. L. R. 131.

Sec. 79.—FORM OF SUIT against the "Secretary of State" must be under the designation.

"The Secretary of State for India in Council." 1 C. 14 ; 40 I. A. 48 (51 and 52). Suit lies when the Secretary of State acts under colour of legal title and not as a sovereign authority. When property comes to him under a decree of court, it is not taken by an act of sovereignty but under colour of legal title. 5 Pat. 539 = 7 Pat. L. T. 679 = 94 I. C. 433 = (1926) P. H. C. C. 145 = A. I. R. 1926 Pat. 321. In all suits against Government, the Court should see that the defendant is properly described, 7 M. 478. The section gives no cause of action but only declares the mode of procedure when a cause of action has arisen. 6 Bom. L. R. 131 ; 27 B. 189.

(2) Nothing in this section shall be deemed to limit or otherwise affect any information exhibited by the Advocate-General in exercise of the power declared by section 111 of the East India Company Act, 1813.

80. [S. 424.] No suit shall be instituted against the Secretary of State for India in Council, or against a public officer in respect of any act purporting to be done by such public officer in his Notice.

The head of a Government department is not liable for wrongful acts of officials in that department unless it can be shown that the act complained of was substantially the act of the head of the department himself. 51 Bom. 749 = 104 I. C. 635 = A. I. R. 1927 Bom. 521.

Sec. 80.—The object of the section in providing for notice is to afford the Secretary of State or the Public Officer concerned an opportunity to reconsider his legal position, and to make amends if so advised without litigation. 40 B. 392; 24 M. 279; 7 C. 499; 6 C. 8 (F. B.); 54 C. 969 (1023); 23 L. W. 464 = 91 I. C. 368 = A. I. R. 1926 Mad. 408.

SCOPE OF SECTION.—A Public Officer who is sued in respect of an act in bad faith is not entitled to notice under S. 80 of the C. P. C. 16 C. W. N. 145; 26 All. 220; 32 C. 1130; 8 B. 421. A public officer is entitled to notice under S. 80 before suit, though he acts *mala fide* in the discharge of his duties. 41 M. 792 = 34 M. L. J. 494 (F. B.); 35 B. 421. The section is not limited to cases of what might be called torts or wrongs. 34 Cal. 257 (282). Defendants interest devolving on Government during suit—No notice necessary. 24 A. L. J. 726 = 96 I. C. 351 (1) = A. I. R. 1926 All. 585. Notice under S. 80, C. P. C. is necessary in every case instituted against the Secretary of State including one arising on a contract. 37 M. 113; 27 I. C. 232 = 18 C. W. N. 1340. But see 20 B. 697; 27 Bom. 450, as also a suit for an injunction. 105 I. C. 756 (2) = 29 Bom. L. R. 1427; see other 105 I. C. 729; 54 I. A. 338 = 51 Bom. 725 (P. C.).

ANY ACT PURPORTING TO BE DONE IN HIS OFFICIAL CAPACITY.—The notice contemplated is notice for an act which has been done, and does not relate to some act which is only threatened and which may or may not be done in the future. 28 A. 603; 24 L. W. 730 = 51 M. L. J. 671. When in a suit to set aside a sale under Bengal Act I of 1895, on the ground of fraud, the Secretary of State is made a party, and no relief is claimed against him, no notice is needed. 32 C. 1130. There must be a distinct act of the "Public Officer" which is complained of, to entitle him to notice. 13 B. 347; 30 C. 36. Where plaintiff does not allege any act or omission by Official Receiver but he is made a party because he is in possession of property, no notice is necessary. 48 A. 821 = 99 I. C. 138 = 24 A. L. J. 1067 = A. I. R. 1927 All. 132. See also 50 Mad. 239 = 99 I. C. 284 = A. I. R. 1927 Mad. 166. Notice given by two out of three joint plaintiffs is enough. 24 M. 279. When a person who has given notice, dies before suit his representative must give a fresh notice before suing. 25 A. 187. In case of an amendment necessitated by the alleged discovery of facts previously unknown to the plaintiff, no further notice need be given. 30 C. 36. But when one notice has been given specifying a particular cause of action, no amendment should be allowed

so as to introduce a new cause of action not specified in the notice given. 34 C. 257, 281; 38 C. 797. There is nothing to prevent defendant from waiving notice or from being estopped by his conduct from pleading want of notice at the trial. 34 C. 257, 82. A notice though invalid may be waived by the Secretary of State and would be deemed to have been waived if no issue is joined at the time of settlement issues. 40 Cal. 503. No other defendant than the Government and persons mentioned in this section can raise the question of validity of notice under S. 80. 40 Cal. 503. Notice—When dispensed with. 15 I. C. 539 = 14 Bom. L. R. 353. Plea as to want of notice can be raised at the final hearing. 22 A. L. J. 1116 = 47 All. 231.

SUITS FOR INJUNCTION.—Notice is necessary in all suits against the Secretary of State including suits for injunction. 37 Mad. 113 = 23 M. L. J. 181 (25 C. 239; 25 A. 187; 35 B. 362; 14 Bom. L. R. 353 *fol.*); 39 M. L. J. 151; 105 I. C. 756 = 29 Bom. L. R. 1427. Also 54 I. A. 338 = 51 Bom. 725 = 32 C. W. N. 61 = 101 I. C. 257 = 26 L. W. 809 = 25 A. L. J. 641 = 29 Bom. L. R. 1227 = (1927) M. W. N. 561 = 46 C. L. J. 76 = 1 Luck. C. 291 = A. I. R. 1927 P. C. 176 = 53 M. L. J. 81 (P. C.). Bombay rulings expressing contra opinion disapproved. 40 Bom. 392 = 53 I. C. 627; 34 I. C. 535; 37 Bom. 243 = 26 I. C. 749; 35 Bom. 362 are not now good law.)

ON WHOM NOTICE IS TO BE SERVED.—The term "District" in S. 80 means the district in which the suit is instituted and the notice must be served on the Collector or one of the Collectors of that district and not on the Collector of another district where the cause of action partly arises. 27 I. C. 232 = 18 C. W. N. 1340.

WHO IS A PUBLIC OFFICER.—A Collector when acting as the agent of the Court of Wards is a "Public Officer." 3 A. 20; see also 105 I. C. 729. But see 11 M. 317; 13 B. 343. An Official Receiver is a public officer and notice under S. 80 is necessary before filing a suit against him. 21 A. L. J. 737 = 46 A. 16; 22 A. L. J. 1116 = 47 All. 291; 24 L. W. 730 = 51 M. L. J. 671. Suit against Official Assignee—Notice not necessary. 25 Bom. L. R. 378 = 1923 Bom. 392. No notice to the Official Trustee is necessary, when the question to be decided relates to the rights of the *cestui que trust* in the trust fund. 7 C. 499. Notice is necessary when a Government Servant's services or but to a Municipal Committee and he retains a lien on his original Service. 104 I. C. 762. A Sub-Inspector of Police who is sued for the recovery of account books seized at a search, is entitled to notice. 29 A. 567. A notice is necessary, before suing a police officer for damages when he acts under the powers conferred by Cr. P. C. and S. 42 of the Police Act, will not apply. 30 I. C. 173 = 13 A. L. J. 788. No action for damages can lie against a village headman for an act done in his official capacity unless the requirements of

official capacity, until the expiration of two months next after notice in writing has been, in the case of the Secretary of State in Council, delivered to, or left at the office of, a Secretary to the Local Government or the Collector of the district, and, in the case of a public officer, delivered to him or left at his office, stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims; and the plaint shall contain a statement that such notice has been so delivered or left.

81. [Ss. 425, 428.] In a suit instituted against a public officer in respect of any act purporting to be done by him in his official capacity—

(a) the defendant shall not be liable to arrest nor his property to attachment otherwise than in execution of a decree, and,

(b) where the Court is satisfied that the defendant cannot absent himself from his duty without detriment to the public service, it shall exempt him from appearing in person.

82. [S. 429.] (1) Where the decree is against the Secretary of State for India in Council or against a public officer in respect of any such act as aforesaid, a time shall be specified in the decree within which it shall be satisfied; and if the decree is not satisfied within the time so specified, the Court shall report the case for the orders of the Local Government.

(2) Execution shall not be issued on any such decree unless it remains unsatisfied for the period of three months computed from the date of such report.

Suits by aliens and by or against Foreign and Native Rulers.

83. [S. 430.] (1) Alien enemies residing in British India with the permission of the Governor-General in Council, and alien friends, may sue in the Courts of British India, as if they were subjects of His Majesty.

(2) No alien enemy residing in British India without such permission, or residing in a foreign country, shall sue in any of such Courts.

S. 80 are fulfilled. A report to the S. D. O. or D. C. is not notice. 2 Bur. L. J. 29=1923 Rang. 250. A suit for accounts against a common manager appointed under S. 95 of the B. T. Act cannot be maintained without service of the notice under S. 80. 24 C. W. N. 138=53 I. C. 747=30 L. J. 279. No suit can be brought against a Bench Clerk for damages resulting from the loss of a record in Court through his negligence without giving notice. (1927) 3 U. B. R. 1=40 I. C. 677=11 Bur. L. T. 95. Notice under S. 80 of the C. P. C., is necessary for suits under S. 104 H. of the Bengal Tenancy Act. 22 I. C. 36=18 C. L. J. 566. See also 46 I. C. 899.

CONTENTS AND CONSTRUCTION OF NOTICES.—The notice should state the relief which the plaintiff claims; it should be absolute in terms and not conditional. 6 Bom. L. R. 132. The notice must mention the name and place of abode of the intending plaintiff. 14 M. 386. See also 27 P. 206. A notice which does not contain all the names, descriptions and places of residence of the plaintiffs in a suit is an invalid notice. 40 Cal. 503. A notice under S. 80 is not a proper notice if the case set up in the plaint is different from the case stated in the notice. A suit instituted upon such a notice cannot be maintained. 32 I. C. 235. Notice by a plaintiff under the section cannot constitute a cause of action. The right to sue can accrue when the order of the Collector interfering with the plaintiff's right is passed. 19

I. C. 565. The term "cause of action" in the section should not be too narrowly construed, the object of the section being merely to inform the defendant of the grounds of the complaint. 8 C. W. N. 913. See also 24 M. 279, 54 Cal. 969 (1923). Where plots mentioned in the notice comprised all the plots mentioned in the plaint, the variance between the notice and the plaint does not justify dismissal of the suit. 32 I. C. 752=20 C. W. N. 636.

LIMITATION.—Where notice to Government is necessary under S. 80, C. P. C., the period of two months is excluded from the prescribed limitation. 52 P. R. 1917=38 I. C. 600=42 P. W. R. 1917. Where a special law of limitation applies a party is not entitled to deduct the period of two months for service of notice under S. 80 of the Code. 66 I. C. 287=34 C. L. J. 205.

Sec. 83.—Whether the cause of action arose before or after war, an alien enemy can be sued in British Indian Courts and would have every right to prosecute his case before the Courts in accordance with the law of procedure, and it makes no difference that he was interned at the time. 40 Cal. 1140. A British subject voluntarily residing or carrying on business in enemy country will be treated as an alien enemy and cannot sue in British India. 55 I. C. 324=1 Lah. 276. Alien enemy who has been licensed to trade in British India has a right to sue in Indian Courts. 31 I. C. 888=9 Bur. L. T. 51.

Explanation.—Every person residing in a foreign country the Government of which is at war with the United Kingdom of Great Britain and Ireland, and carrying on business in that country without a licence in that behalf under the hand of one of His Majesty's Secretaries of State or of a Secretary to the Government of India shall, for the purpose of sub-section (2), be deemed to be an alien enemy residing in a foreign country.

When foreign States may sue.

84. [S. 431.] (1) A foreign State may sue in any Court of British India :

Provided that such State has been recognized by His Majesty or by the Governor-General in Council :

Provided, also, that the object of the suit is to enforce a private right vested in the head of such State or in any officer of such State in his public capacity.

(2) Every Court shall take judicial notice of the fact that a foreign State has not been recognized by His Majesty or by the Governor-General in Council.

85. [S. 432.] (1) Person specially appointed by order of the Government at the request of any Sovereign Prince or Ruling Chief, whether in subordinate alliance with the British Government or otherwise, and whether residing within or without British India, or at the request of any person competent, in the opinion of the Government, to act on behalf of such Prince or Chief, to prosecute or defend any suit on his behalf, shall be deemed to be the recognized agents by whom appearances, acts and applications under this Code may be made or done on behalf of such Prince or Chief.

(2) An appointment under this section may be made for the purpose of a specified suit or of several specified suits, or for the purpose of all such suits as it may from time to time be necessary to prosecute or defend on behalf of the Prince or Chief.

(3) A person appointed under this section may authorize or appoint persons to make appearances and applications and do acts in any such suit or suits as if he were himself a party thereto.

86. [S. 433.] (1) Any such Prince or Chief, and any ambassador or envoy of a foreign State, may, with the consent of the Governor-General in Council, certified by the signature of a Secretary to the Government of India, but not without such consent, be sued in any competent Court.

Suits against Princes, Chiefs, ambassadors and envoys.

Sec. 84.—See 11 Cal. 17 (24).

Sec. 85.—This section does not prevent the institution by an independent Prince of a suit in a Court in British India, in his own name, and through a recognized agent other than one appointed under the Section. 10 C. 136; 19 A. 10. The Desai of Patadi is a Ruling Chief. 83, 415. Also the Raja of Hill Tipperah. 9 C. 35. The section applies to suits filed in a Revenue Court. 25 A. 635.

Sec. 86. SCOPE OF SECTION.—S. 86 is exhaustive and lays down the cases where a prince or chief can be brought on record whether he is suing or sued as such or in any other capacity. 38 Mad. 635=25 M. L. J. 621. See also 39 Mad. 561=29 M. L. J. 667.

Secs. 86 and 87.—A suit will not lie against a sovereign prince without the consent of the Governor-General in Council. A State cannot be sued apart from its Ruling Chief. 12 M. L. T. 496=17 I. C. 444=23 M. L. J. 605. (9 C. 135 *Foll.*).

APPLICATION OF SECTION.—The section does not apply to a defence put forth (as set off). Such a defence can be put forward in answer to a claim by a Ruling Chief without the consent of the Governor-General. 62 I. C. 778.

RULING CHIEFS.—The Khrundward Jagirdars are Ruling Chiefs who cannot be sued without the consent of the Governor-General under S. 66 of the C. P. C. 51 I. C. 221=21 Bom. L. R. 376.

CONSENT OF GOVERNOR-GENERAL.—A suit against a Ruling Chief cannot be maintained without the consent of the Governor-General in Council. 25 I. C. 271. The consent must be given before the commencement of the suit. 21 B. 351. Even when leave is granted by the Governor-General in Council, the Court in which the suit is filed can question the leave in case the conditions mentioned in the section are not fulfilled. 29 A. 379.

SUBMISSION TO JURISDICTION.—Where a Ruling Prince having sovereign powers submits to the jurisdiction of a British Court, no objection can be raised by him, in the Appellate Court on the ground that the consent of the Governor-General had not been obtained prior to the institution of the suit. 46 I. C. 558. No suit can be maintained against a Ruling Chief without the consent of a Governor-General in Council. The mere fact that the defendant after claiming the privilege pleaded also on the merits, does not amount to a waiver of privilege and submission

(2) Such consent may be given with respect to a specified suit or to several specified suits, or with respect to all suits of any specified class or classes, and may specify, in the case of any suit or class of suits, the Court in which the Prince, Chief, ambassador or envoy may be sued; but it shall not be given unless it appears to the Government that the Prince, Chief, ambassador or envoy—

(a) has instituted a suit in the Court against the person desiring to sue him, or

(b) by himself or another trades within the local limits of the jurisdiction of the Court, or

(c) is in possession of immoveable property situate within those limits and is to be sued with reference to such property of for money charged thereon.

(3) No such Prince, Chief, ambassador or envoy shall be arrested under this Code, and, except with the consent of the Governor-General in Council certified as aforesaid, no decree shall be executed against the property of any such Prince, Chief, ambassador or envoy.

(4) The Governor-General in Council may, by notification in the Gazette of India, authorize a Local Government and any Secretary to that Government to exercise, with respect to any Prince, Chief, ambassador or envoy named in the notification, the functions assigned by the foregoing sub-sections to the Governor-General in Council and a Secretary to the Government of India, respectively.

(5) A person may, as a tenant of immoveable property, sue, without such consent as is mentioned in this section, a Prince, Chief, ambassador or envoy from whom he holds or claims to hold the property.

Style of princes and Chiefs
as parties to suits.

87. [S. 434.] A Sovereign Prince or Ruling Chief may sue, and shall be sued, in the name of his State :

Provided that in giving the consent referred to in the foregoing section the Governor-General in Council or the Local Government, as the case may be, may direct that any such Prince or Chief shall be sued in the name of an agent or in any other name.

Interpleader.

88. [S. 470.] Where two or more persons claim adversely to one another the same debt, sum of money or other property, moveable or immoveable, from another person who claims no interest therein other than for charges or costs and who is ready

Where interpleader-suit may
be instituted.

to pay or deliver it to the rightful claimant, such other person may institute a suit of interpleader against all the claimants for the purpose of obtaining a decision as to the person to whom the payment or delivery shall be made and of obtaining indemnity for himself :

Provided that where any suit is pending in which the rights of all parties can properly be decided, no such suit of interpleader shall be instituted.

to jurisdiction. 39 Mad. 661=29 M. L. J. 667. The recognition of cases of waiver as excepted from the ordinary provision of international law as understood in England cannot be imported into the clear language of the C. P. C. 39 Mad. 661=29 M. L. J. 667. Acquiescence by defendant bars him from questioning validity of decree. 2 P. L. T. 180=6 P. L. J. 185. See also 58 I. C. 912. Sec. 87.—See Notes under S. 86.

Sec. 88.—The law of interpleaders as set out in C. P. C. is the same as that of England. The applicant should satisfy the Court that he has no interest in the subject-matter of the suit except for charges and cost otherwise he is disentitled to sue. 4 Rang. 465=99 I. C. 985=A. I. R. 1927 Rang. 91. An interpleader-suit is not im-

properly constituted merely because one of the defendants does not claim the whole of the subject-matter. 1 M. H. C. R. 361. See also 14 B. 489. In an interpleader suit all contesting defendants are in the position of plaintiffs. 48 Mad. 1=1925 Mad. 497. Where the defendants do not claim adversely to one another, nor is the plaintiff admitting the title of one of the defendants or is willing to pay or deliver the property to him, the suit is not an interpleader-suit. 1922 Cal. 138. When in a suit for rent the defendant pays the money into Court with the request that it be paid over to the party entitled to it, such suit may be treated to in the nature of an interpleader proceeding. 17 M. 85.

PART V.
SPECIAL PROCEEDINGS.

Arbitration.

89. (1) Save in so far as is otherwise provided by the Indian Arbitration Act 1899, or by any other law for the time being in force, all references to arbitration whether by an order in a suit or otherwise, and all proceedings thereunder, shall be governed by the provisions contained in the Second Schedule.

(2) The provisions of the Second Schedule shall not affect any arbitration pending at the commencement of this Code, but shall apply to any arbitration after that date under any agreement or reference made before the commencement of this Code.

Special Case.

90. [S. 527.] Where any persons agree in writing to state a case for the opinion of the Court, then the Court shall try and determine the same in the manner prescribed.

Power to state case for opinion of Court.

Suits relating to Public Matters.

91. (1) In the case of a public nuisance the Advocate-General, or two or more persons having obtained the consent in writing of the Advocate-General, may institute a suit, though no special damage has been caused, for a declaration and injunction or for such other relief as may be appropriate to the circumstances of the case.

Public nuisances.

(2) Nothing in this section shall be deemed to limit or otherwise affect any right of suit which may exist independently of its provisions.

92. [S. 539.] (1) In the case of any alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature, or where the direction of the Court is

Public charities.

Sec. 89—S. 89 excepts the procedure of the Code from being applicable to arbitrations under the Arbitration Act and S. 4 does the same generally. 5 Bur. L. T. 155=17 I. C. 902. The object of the section is to give effect to the provisions of Sch. II as if they had been enacted in the body of the Code. 23 A. L. J. 561=47 All. 637. Arbitration without Court's order. 40 Bom. 386=37 I. C. 140=18 Bom. L. R. 559. Award without intervention during pendency of suit cannot be recorded as adjustment. 67 I. C. 123=3 Lah. L. J. 162.

Secs. 89 and 96.—A Court is competent on an application under Sch. II, C. P. Code, to pass a decree on an award as modified by a lawful compromise filed by the parties. 9 O. L. J. 219=68 I. C. 209=25 O. C. 213=1922 Oudh 189. The words 'save in . . . in force' in S. 89 do not let in O. 23, R. 3 of the Code and the words "any other law for the time being in force" refer to amendments of, or substitutions for, the Arbitration Act or other pieces of legislation on that subject-matter. 25 C. W. N. 127=61 I. C. 919=47 Cal. 6. Whether an award in a pending suit without intervention of court is an adjustment under O. 23, R. 3, C. P. C. 53 M. L. T. 444.

Sec. 89 and Sch. II, para. 22.—S. 89 (1), C. P. C., read with Sch. II, para. 22, makes the concluding provision of S. 21 of the Sp. Rel. Act inapplicable to all arbitration agreements and awards governed by Sch. II, 46 C. 1041=29 C. L. J. 399=51 I. C. 20=23 C. W. N. 716.

Sec. 91.—Relief not claimed in respect of public nuisance cannot be granted. 73 I. C. 616=1923 Lah. 546. See also 85 I. C. 304=1924 All. 599. Village pathway—Obstruction not public nuisance. 46 I. C. 970. See also 85 I. C. 304

=1925 All. 399. S. 33 of Calcutta Municipal Act, if controls S. 91 see 40 I. C. 74=21 C. W. N. 595. S. 91 does not control the provisions of O. 1, R. 8. 88 I. C. 505=1925 Cal. 1233. Nuisance—Public and private—Difference between—Right of suit—Obstruction to procession of Hindu idol by Mahomedans—Individuals' right of suit. 36 I. C. 534=12 N. L. R. 130. See also 27 Bom. L. R. 421=1925 Bom. 367. Obstruction of a way without any special damage can afford no cause of action to a member of the public. 23 M. L. J. 539=16 I. C. 962. See also 27 Bom. L. R. 421=1925 Bom. 367. In a suit by a private person for the removal of public nuisance he must prove special damage to himself. Special degree of inconvenience suffered by him cannot be said to cause him damages. 48 I. C. 88 (Nag.) See also 91 I. C. 728=A. I. R. 1926 Cal. 549. Per Sundara Aiyar, J.—Special damage need not always be only pecuniary. 23 M. L. J. 539=16 I. C. 962. Special damage should be something substantial and not pecuniary damage to the extent of four annas or eight annas. 23 M. L. J. 539=16 I. C. 962.

Sec. 92. SCOPE OF SECTION.—S. 92 is intended to be an exhaustive statement of the law applicable to suits based upon any alleged breach of any express or constructive trust, created for public purpose of a charitable or religious nature. 67 I. C. 658=44 A. 622. The requirement of the section as to sanction cannot be evaded by asking for a bare declaration under the Sp. Rel. Act. 24 L. W. 286=97 I. C. 630=A. I. R. 1926 Mad. 1029. Section not confined to what may be called in the English law sense of "express or constructive trust"—at all events as regards "constructive trust." 50 Mad. 567=39 M. L. T. 37=25 L. W. 461=(1927) M. W. N. 233=101 I. C. 420=

deemed necessary for the administration of any such trust, the Advocate-General, or

A. I. R. 1927 Mad. 614 = 52 M. L. J. 415. S. 92 is mandatory and a suit claiming any of the reliefs therein mentioned must be brought in conformity with its provisions or not at all. 41 All. 1 = 48 I. C. 94; 49 I. C. 530. A suit for removal of a trustee and for settling a scheme is governed by S. 92, C. P. C., and not by the Rel. End. Act. 20 I. C. 767 = 24 M. L. J. 658. Court has very wide powers under S. 92 and the circumstances under which those powers should be exercised are clearly stated by the Privy Council in 43 C. 1085, 1101 (P. C.). A court should not frame a scheme when there is no mismanagement or misappropriation. 106 I. C. 375 (Mad) S. 92 deals with completed trusts and is inapplicable where that stage has not yet been reached. 70 I. C. 903 = 16 L. W. 922. A suit for the administration of the trusts of a will which contained disposition for charitable purposes is maintainable though it is not brought under S. 92. 70 I. C. 903 = 16 L. W. 922. A suit by an idol in his juristic capacity against persons who are interfering unlawfully with his property or with his income is not governed by S. 92. 45 A. 215 = 71 I. C. 420. A dispute between rival claimants to the office of trustee does not fall within the section. 44 A. 721 = 1922 All. 499. In order to bring a case within S. 92 the suit must be a representative one, brought for the benefit of the public and to enforce a public right in respect of an express or constructive trust. *Ibid.* The section does not bar a suit for declaration that the plaintiff is a duly constituted mohant. 34 I. C. 502. A suit for declaration that defendants are not properly appointed trustees of a temple and for an injunction appropriate to that declaration does not fall within the purview of S. 92. 64 I. C. 353 = 46 Bom. 101. A suit by co-trustee to declare joint right of management needs no sanction. 39 M. L. T. 214 = 105 I. C. 194 = A. I. R. 1927 Mad. 948. See also 103 I. C. 134 = A. I. R. 1927 Mad. 820; A. I. R. 1927 Mad. 338; 97 I. C. 480. A suit is not taken out of the scope of S. 92 because the defendant denies the trust and claims to be the owner of the property. 9 I. C. 358 = 13 Bom. L. R. 49. See also 39 M. L. T. 65 = 102 I. C. 74 = A. I. R. 1927 Mad. 710 = 53 M. L. J. 183 but a decree cannot be passed against him to deliver possession of the properties in his possession. S. 92 need not be restored to where a suit for a declaration of public right of way is filed with the permission of Court obtained under O. 1. R. 8. 69 I. C. 910 = 26 C. W. N. 587. Suit for declaration that certain property is wakf does not fall under the section. 99 I. C. 755 = 2 Lah. L. J. 457 = 28 Punj. L. R. 486; 99 I. C. 756 = 8 Lah. 111 = A. I. R. 1927 Lah. 350; nor for declaration that plaintiff has got right to appoint trustees. 49 A. 435 = 25 A. L. J. 329 = 99 I. C. 1045 = A. I. R. 1927 All. 257; nor a suit to establish the existence of a trust. 5 Pat. 539 = 7 Pat. L. T. 679 = 94 I. C. 433 = 1926 P. H. C. C. 145 = A. I. R. 1926 Pat. 321; nor a suit to establish right to office of mutawali. 7 Pat. L. T. 4 = A. I. R. 1925 Pat. 544. S. 92 (2) saves the special jurisdiction of the District Court under Rel. End. Act. 37 I. C. 688 = 4 L. W. 444 (27 M. L. J. 266; 28 M. L. J. 326, *fol.*). Suit to enforce rights of worshippers is not one under S. 92. 35 I. C. 88 = 3 L. W. 512. A suit under S. 92 is a representative suit. 40 Mad. 110

= 31 M. L. J. 279. S. 92, C. P. C., and S. 14 of Rel. End. Act (XX of 1863) in so far as the forms of relief to which they relate are the same appear to offer a choice of proceeding under either of the sections, but they are not bound to proceed under both. 37 Mad. 184 = 24 M. L. J. 697. A suit under S. 92 does not concern the private rights of the parties thereto and cannot be referred to arbitration. 72 I. C. 1016. S. 92 debars persons from unrestricted access to Courts and hence must strictly construed. A suit to restrain interference with plaintiff's right to exclusive worship is not within S. 92. 50 I. C. 509; nor a suit for damages for misconduct of trustee. 92 I. C. 526 = A. I. R. 1926 Mad. 509.

SCOPE OF SCHEME BY COURT.—Scheme can be made only under this section. 7 Pat. L. T. 4 = A. I. R. 1925 Pat. 544. In settling a scheme of management the Court has a wide discretion. The wishes of the founder with regard to management, if conformable to the changed conditions and circumstances of the present day, as well as the past history of the institution, might be taken into consideration; but the primary duty of the Court is to consider the general interests of the body of the public for whose benefit the trust is created and the Court might vary any rule of management which it finds to be impracticable or unsuited to the best interests of the institution. 43 Cal. 1085 = 31 M. L. J. 290 (P. C.). See also 98 I. C. 208 = A. I. R. 1926 Mad. 1150 = 51 M. L. J. 457. In settling a scheme due consideration should be paid to the established practice of the institution and to the position of the person connected with it. 8 Bom. L. R. 756. The Court can uphold a scheme settled by the co-trustees of an institution under which each of them was to manage the trust in rotation. 13 M. L. J. 341. The High Court has a large discretion in the matter of sanctioning a scheme for the management of a temple and of its funds. 17 I. C. 441 = 24 M. L. J. 199 (P. C.). Even when a will directs that members of the testator's family are to be appointed members of the committee if suitable persons are not available, the Court has power to appoint strangers. 58 I. C. 566 = 17 A. L. J. 957. Where a Court has sanctioned a scheme for the administration of a religious or charitable trust the Court can vary the scheme from time to time according to the exigencies of the case. 37 C. L. J. 281 = 76 I. C. 220 = 43 Cal. 467. Successive scheme suits—Maintainability of. See (1922) M. W. N. 477 = 70 I. C. 579. Trustee appointed under a tentative scheme can only be removed by regular suit. 94 I. C. 610 = A. I. R. 1926 Mad. 799. Whether Courts have inherent powers to alter schemes without a fresh suit being brought for the purpose when there is no provision for alteration in the scheme. See 1922 M. 413 = 70 I. C. 579; 91 I. C. 794 = A. I. R. 1926 Mad. 659; 36 M. 464; 37 C. 870. Reservation of permission to apply to Court for the proper management of an institution is bad in a scheme decree. See (1926) M. W. N. 283 = 95 I. C. 5 = A. I. R. 1926 Mad. 655; A. I. R. 1926 Mad. 557 = 54 I. C. 354 (2) = 50 M. L. J. 409. See also 51 M. 31 = 106 I. C. 665 (2) = 26 L. W. 728 = A. I. R. 1927 Mad. 1073 = 54 M. L. J. 792 (F. B.). A scheme decree may be in general declaratory but in particular

two or more persons having an interest in the trust and having obtained the consent

circumstances provision may be made for execution of parts of this scheme. 39 M. L. T. 579. Provision in the decree for its alteration in execution is *ultra vires* changes can be made only in a fresh suit. 49 Mad. 580=95 I. C. 720=(1926) M. W. N. 226=A. I. R. 1926 Mad. 559. Rules framed by temple committee under scheme decree can be altered by Court. 28 Bom. L. R. 309=94 I. C. 47=A. I. R. 1926 Bom. 179. Where a suit is brought by plaintiffs not in assertion of their individual rights but on behalf of the general public who are interested in the institution for the settlement of a proper scheme of management of the charities and for other relief, there is no bar of limitation. 43 M. L. J. 448=69 I. C. 15.

SELECTION OF TRUSTEES.—Appointment from plaintiff's community on the ground that the trust had largely benefited by its endowment. 54 I. C. 263=10 L. W. 494. It is competent to the Court in framing a scheme for a Hindu religious or charitable endowment to sanction a cypres application of the funds of the endowment if the objects of the trust are not suited to modern conditions and if there is a general charitable intention in the terms of the endowment. The trustee himself cannot apply the income cypres without the sanction of the Court. 47 I. C. 611=37 M. L. J. 489. Court's jurisdiction to frame a scheme under S. 92 is not excluded by the fact that the temple is one subject to a Temple Committee, but in framing the scheme the Court should not unduly interfere with the power entrusted by the statute to the Committee, *e.g.*, by appointing a Board of Control between the trustees and the Temple Committee. 39 Mad. 700=30 M. L. J. 29. When a decree directs a trustee of a Hindu temple to perform festival, a Court has no jurisdiction to give certain directions for the same. 30 I. C. 771=2 L. W. 607. Hereditary trustee—Appointment of treasurer—Necessity for. 28 I. C. 479. A Court in framing a scheme regarding a temple is bound to have regard to the existing rights of individuals to the trusteeship of the temple. 23 M. L. J. 134; 28 M. 319; 21 M. L. J. 784. Indian Courts have the same powers as the Courts of Chancery in England to appoint additional trustees even where there are hereditary trustees. 23 M. L. J. 134=16 I. C. 225. *See also* 98 I. C. 208=A. I. R. 1926 Mad. 1150=51 M. L. J. 457. Scheme—Effect of—Private rights lost—Alteration of scheme. 36 Mad. 364=21 M. L. J. 952. Even apart from any question of mismanagement and misappropriation, a Court can settle a scheme if it can conduce to the better management of the trust property. 45 I. C. 213.

OBJECT OF SECTION.—The object of S. 92 is to make it clear that the provisions of section are mandatory and the object of the saving clause is to make it clear that Rel. End. Act is still in force. 20 I. C. 767=24 M. L. J. 658. The object of S. 92 is not to encourage abuse of the process of the Court by vexatious or improper suits. 37 I. C. 897.

APPLICATION OF SECTION.—Test of applicability. 97 I. C. 480. The section does not apply to the case of an endowment for purposes religious as well as charitable. 5 M. 383; 11 A. 18, 22; (F. B.)—25 A. 631. The section does not apply to a case where the suit is by the whole

body of persons who are legally authorised to administer the trust to which it relates. 29 A. 27. A suit for the recovery of trust property improperly alienated by a trustee does not lie under this section. 8 B. 365; 28 A. 112. But *see* 24 C. 418. Nor a suit by a trustee to recover possession of property from a trespasser. 25 A. L. J. 902. A suit to compel trustees to make good the loss sustained by the charity in consequence of their default falls, within the scope of the section. 21 B. 48. The section was intended to apply to persons who, before its enactment, had or were believed to have no right to take proceedings for purposes mentioned in it. 21 M. 406.

RELIEFS UNDER THE SECTION.—A Court has inherent power to pass a decree in a suit relating to trust, under S. 92 (*h*) appointing new trustees and directing old ones to deliver the properties to them. 58 I. C. 566=17 A. L. J. 957. In framing schemes the superintendence over temples should not be vested in courts but in temple committees. (1927) M. W. N. 759=26 L. W. 581=A. I. R. 1927 Mad. 1033. In S. 92 the words "such further relief as the nature of the case may require" cover every subsidiary order or direction on any matter of detail necessary for carrying out the main purposes of the section. 40 I. C. 182; 24 C. 418. The expression must be taken to mean relief of the same nature as clauses (a) to (g) and so the section does not apply to a suit by certain worshippers for a declaration that a prior scheme suit had been fraudulently compromised and for a declaration that the properties belonged to a wakf and no sanction is necessary. I. L. T. 40 C. 19=9 P. L. J. 65=27 L. W. 339=A. I. R. 1928 P. C. 16 (P. C.). A decree cannot be passed against a defendant who sets up title adverse to a trust, to deliver possession of properties in his possession, in a suit under this section. 39 M. L. T. 66=102 I. C. 74=A. I. R. 1927 Mad. 710=53 M. L. J. 183. There is much which is common between S. 14 of the Religious Endowments Act and S. 92 of the C. P. C., but the latter is substantially the wider and provides for settling a scheme which is a jurisdiction of a very wide and beneficial nature. 42 Bom. 742=48 I. C. 514. *See also* A. I. R. 1925 Pat. 544. Where none of the reliefs specified in S. 92 are claimed and the plaintiff does not ask the Court to appoint him a mutawalli, the suit is incompetent under S. 92. 29 I. C. 423=20 C. W. N. 605.

ACCOUNTS, DIRECTION AS TO.—S. 92, C. P. C., is quite wide enough to entitle the Court to direct an account against a trustee and to order him to pay the amount found due upon taking those accounts. 28 I. C. 886. A decree directing trustee to pay amount due on taking accounts is executable and not merely declaratory. (1927) M. W. N. 202=100 I. C. 841=A. I. R. 1927 Mad. 416=52 M. L. J. 182. *See also* 39 M. L. T. 579.

SANCTION.—A sanction granted for a suit under S. 92 means any suit which may be laid under that section and it is not confined to one of the species of suits that could be raised on the application. 48 Cal. 493; 21 B. 257. The limitation requiring previous sanction is necessary to prevent an abuse of the powers conferr-

in writing of the Advocate-General, may institute a suit, whether contentious or not in

ed by the section. 21 M. 406. The suit must be limited to matters included in the consent and it is not competent to the Court to enlarge the scope of the suit. 21 B. 257. But see 48 Cal. 493 (P. C.) Variance between sanction and plaint is not fatal to the suit unless there is any material omission. 27 L. W. 42 = 107 I. C. 130 = A. I. R. 1928 Mad. 205. The duties imposed upon a Collector by Government Resolution under S. 93 of the C. P. C. are of a very special nature, and cannot be discharged by his subordinates. 35 Bom. 243 = 10 I. C. 803. But there is no harm in an order being signed by the sheristadar for the Collector. 27 L. W. 42 = 107 I. C. 130 = A. I. R. 1928 Mad. 205. Consent obtained as against persons not real trustees is invalid as against the real trustees. (1926) M. W. N. 626 = 24 L. W. 419 = 97 I. C. 462 = A. I. R. 1926 Mad. 970. Such an objection cannot be waived by real trustee. (*Ibid.*). The "consent in writing" must be a specific permission given to two or more persons by name. A permission given to one applicant by name "and another" is not sufficient. 26 A. 162. But see 10 M. 185; 9 I. C. 358. Sanction is necessary for a suit, by individual worshippers against trustees for infringement of right common to them and other worshippers. 25 L. W. 575 = 38 M. L. T. (H. C.) 288 = 102 I. C. 328 = A. I. R. 1927 Mad. 551 = 52 M. L. J. 541.

FORM OF SANCTION.—The plaintiffs who are seeking to obtain the Court's assistance to enforce the management of the trust property are not to be defeated because the Collector elected to name only one of the petitioners and to refer to the others merely as the other applicants. 9 I. C. 358 = 13 Bom. L. R. 49. But see 26 A. 162 (*contra*). The suit for declaration and injunction as to a pathway is one to which O. 1, R. 8 is appropriate if the Court's permission is taken, the recourse to the Advocate-General being unnecessary. 69 I. C. 910 = 20 C. W. N. 587. Where the object of suit is to secure certain advantages to a trust, any two persons can sue in that behalf with the sanction of the Advocate-General or the Collector of the District concerned. 35 I. C. 88 = 3 L. W. 512. See also 60 I. C. 570. No sanction is required for a plaintiff suing as a trustee for obtaining a decree for an account against his co-trustee. 41 M. L. J. 608 = 45 Mad. 113. But see 66 I. C. 837 = 16 L. W. 155; also for a suit by a co-trustee for joint right of management. 105 I. C. 194 = A. I. R. 1927 Mad. 948. Where a sanction under S. 92 is granted to more than two persons interested in the trust, all must join in the suit, and not any two of them. 31 I. C. 236 = 29 M. L. J. 231. A suit for appointment of new trustee requires sanction. 9 I. C. 168 = 21 M. L. J. 450. No relief can be prayed for, to which no sanction has been obtained. (1927) M. W. N. 759 = 26 L. W. 581 = A. I. R. 1927 Mad. 1033.

"TWO OR MORE PERSONS."—When a suit is instituted by one plaintiff only with the consent of the Advocate-General, and the plaint is subsequently amended by the addition of a second plaintiff, and the Advocate-General consents to it, the suit is bad in its inception and should be dismissed. 30 B. 603. Reservation by a Court to a person or persons to apply for a relief is *ultra*

vires. (1927) M. W. N. 816 = 39 M. L. J. 422 = 26 L. W. 728 = A. I. R. 1927 Mad. 1073 = 53 M. L. J. 792 (F. B.).

"INTERESTED."—The interest must be an existing one; and not a mere contingency; the mere possibility of an interest is not sufficient. 20 C. 810 (816). The interest need not be personal. A worshipper has such an interest in the temple management to see not only that he himself is in the voters' list but also to see that the list is properly revised and the election is held as per rules. 50 Mad. 726 = 102 I. C. 270 = A. I. R. 1927 Mad. 462 = (1927) M. W. N. 197 = 25 L. W. 594 = 38 M. L. T. 253 = 53 M. L. J. 545. "Interest" what is. See 91 I. C. 924 = (1926) M. W. N. 40 = A. I. R. 1926 Mad. 257. 23 L. W. 240 = 92 I. C. 950 = A. I. R. 1926 Mad. 466; 1 L. T. 40 M. 16.

PRIVATE TRUST.—S. 92 is not applicable to private trust. 43 M. L. J. 116 = 49 C. 459 (P. C.); 25 I. C. 661; 56 I. C. 707; 101 I. C. 54. The Court should pause before interfering under S. 92 with a matter which is more a family matter than of a public nature. 28 I. C. 116.

PUBLIC TRUST.—A suit to remove a duly appointed mutawalli of a trust created for a public purpose of a religious or charitable nature cannot be instituted save in conformity with S. 92, C. P. C. 35 All. 98 = 18 I. C. 573. Public Trust—Test of. 38 I. C. 800; 45 I. C. 213; 11 I. C. 166. Unless a trust is expressly created for a public purpose of a charitable nature, the mere fact that the income of certain property has been for long spent in feeding an idol and in maintaining and taking care of pilgrims will not by itself constitute a trust of such a nature. 11 I. C. 308 = 8 A. L. J. 1120. A public trust must be proved by strong evidence; the mere fact that the income of certain property has for a long time been spent to support fakirs and visitors is not sufficient evidence of such a public trust. 11 I. C. 166. The section should be applied to Mutts and the public, the Advocate-General and the Courts of Justice should have the power to stop the wholesale misuse of the income of a charitable and religious institution like a matam. 38 Mad. 256 = 25 M. L. J. 393. The head of mutt is not a trustee of mutt property and no suit lies for his removal under S. 92, C. P. C. 32 M. L. J. 271 (affirmed on appeal in 39 M. L. J. 98 P. C.) But see also 37 M. L. J. 231 = 40 M. 745; 43 Cal. 707; 43 Mad. 253. Though a caste or a section thereof can own a temple (a temple which is merely managed by certain caste) is the subject of a charitable trust and a scheme can be framed for it. 34 I. C. 551 = 4 L. W. 228.

RELIGIOUS TRUST.—The head of a mutt may be answerable as a trustee for mal-administration. 50 Mad. 267 = 52 M. L. J. 405. Where a person was put in charge as pujary of an idol in a Dharmasala, he is a servant and not a trustee and a suit under S. 92 is not maintainable against him. 21 A. L. J. 310 = L. R. 4 A. 190 = 1923 A. 247. Although a District Judge has the powers of a Kazi under the Mahomedan law to deal with an application for appointment of a mutawalli he may relegate the petitioner to a suit under S. 92. 49 I. C. 799 = 23 C. W. N. 138. A suit by a temple trustee to recover the amount

the principal Civil Court of original jurisdiction or in any other Court empowered in

due by defendant under the terms of the trust cannot be maintained without leave as the suit is not exempt from S. 92 or S. 18, Religious Endowments Act. 62 I. C. 911=14 L. W. 238. Where the origin and founder of a temple are unknown, the facts that members of public are freely admitted, festivals are celebrated in a certain manner, and the like lead to the inference that the temple is a public one, and the inference is not rebutted by the fact that a particular mode of worship is followed, that management follows a particular line of descent in the pujari family. 62 I. C. 655=40 M. L. J. 289.

CO-TRUSTEES—S. 92 of the C. P. C. has no application to a suit for a declaration that the plaintiff and the defendant are co-mutwallis of wakf property and are entitled to manage it jointly. 52 I. C. 628 (All.). See also 97 I. C. 480. A trustee of a public charity can sue his co-trustee for an account without the sanction of the Advocate-General or the Collector. 41 M. L. J. 608=45 M. 113. See also 25 Bom. L. R. 747=1924 Bom. 198. S. 92 does not cover suits relating to disputes between parties as to who is to be a mutwalli on the ground of family relationship. 37 All. 86. See also 40 Bom. 439.

'DE FACTO' TRUSTEES.—A *de facto* trustee or a trustee *de son tort* is subject to the same liabilities as a *de jure* trustee and a suit under S. 92 is maintainable against the former. 27 I. C. 389. See also 33 C. 789; 22 B. 659; 15 C. 329; 26 M. 450.

CONSTRUCTIVE TRUSTEES.—Different from the English Law Sense, see 50 Mad. 567=A. I. R. 1927 Mad. 614=52 M. L. J. 415. A constructive trustee within the meaning of S. 92 would include a person who holds a particular fiduciary position and whose obligation as such can be enforced in a Court of Law. 25 Bom. L. R. 747 (22 Bom. L. R. 457; 11 M. I. A. 405; 20 Bom. L. R. 1088; 24 Bom. L. R. 629, Rel.) (Archaka of temple).

NEW TRUSTEES.—A suit lies for the appointment of new trustees on the ground that the defendants are not the lawful trustees and that the trusteeships are therefore vacant. The new trustees so appointed can demand possession from the defendants. 26 M. 450, (53). A fresh suit under the section is necessary to appoint additional trustees. A. I. R. 1927 Sind 1=97 I. C. 308.

REMOVAL OF TRUSTEE.—The Dharmakarta holds the position of trustee and as such on assertion of private ownership in trust property and falsification of accounts, he is liable to be removed. 45 M. 565=43 M. L. J. 536; 47 I. C. 850; 24 C. W. N. 690=47 Cal. 866. In framing a scheme the Court need not remove trustees already holding office when no misconduct is proved against them. 34 I. C. 551=4 L. W. 228. In a suit under S. 92 the Court has power to appoint a receiver and take the management of the Temple out of the hands of the trustees appointed by the Temple Committee pending the disposal of the suit even though there is no prayer for his removal and though he cannot be removed except on a proper enquiry. 68 I. C. 565=41 M. L. J. 545. Removal of trustee—Hereditary trustee—Trustee spending money not required by terms of endowment—

Right to reimbursement. 48 I. C. 897=(1918) M. W. N. 555. See also 42 Mad. 668. A person without instituting a suit under S. 92 cannot seek to oust from possession persons who claim to hold as trustees. A Court can appoint a mutavalli to fill up a vacancy in the office. 29 I. C. 849=18 M. L. T. 48; 18 M. L. T. 515=19 I. C. 740=25 M. L. J. 273. Removal of trustee, grounds for—*De facto* trustee—Long management—No misconduct—Scheme—Additional trustee when appointed. 48 I. C. 833=(1918) M. W. N. 786. Suit to remove defendant—Pandara Sannidhi and to frame scheme—Death of the defendant—Cause of action in respect of framing of scheme if survives. See A. I. R. 1926 Mad. 162.

ALIENATION OF TRUST PROPERTY.—A declaration regarding the validity of an alienation by a trustee comes within S. 92 (h) 20 A. L. J. 457=44 A. 622. See also 26 L. W. 274=A. I. R. 1927 Mad. 886. The transferee of a wakf property who is made a party to a suit under S. 92 is bound by decision in the suit and is barred from going behind it, in a subsequent suit. 33 All. 752=11 I. C. 218; 23 C. W. N. 115. Suits against strangers to a trust whether alienees from trustee or trespassers are not governed by S. 92. 40 Mad. 212=31 M. L. J. 777. A. I. R. 1926 M. 280=(1926) M. W. N. 117=92 I. C. 823=50 M. L. J. 42. The expression "granting further or more relief" must be read along with the specified reliefs and those that should be granted under this clause should be of the character as those expressly mentioned. 40 Mad. 212=31 M. L. J. 777.

ABATEMENT OF SCHEME SUIT.—A suit under this section is prosecuted by individuals not for their own interest but as representing general public and so it does not abate on the death of the original plaintiffs. 48 Cal. 493=62 I. C. 737 (P. C.). S. 92 is not mandatory but is permissive and directory. It is necessary for the continuance of the suit that there should be at least two plaintiffs. 37 All. 296=28 I. C. 681. Scheme suit—Death of defendant if suit abates. 91 I. C. 106; A. I. R. 1926 Mad. 162.

AMENDMENT OF PLAINT.—The sanction of the Advocate-General is equally a condition precedent to the amendment of the plaint especially where such amendment relates to a cause of action arising after the institution of the suit and fresh parties are added in consequence, with a claim for fresh reliefs against them. 36 Bom. 168=11 I. C. 726. The phrase "Any other Court empowered in that behalf by the Local Government" in S. 92, probably refers to Courts such as the Subordinate Judge's Courts. 62 I. C. 115=48 Cal. 53. But see 22 I. C. 951=18 C. W. N. 612. A notification by a Local Government empowering a Sub-Judge to try a particular suit pending before the District Judge is not one contemplated by S. 92. 39 Cal. 146=13 I. C. 243. See also 31 I. C. 397.

PARTIES TO SUIT.—The alienee of the trust property for the breach of which a mutwalli is sued under S. 92 may be made a party. 32 I. C. 801=42 Cal. 1135. See also 47 I. C. 111=28 C. L. J. 4; 35 Bom. 470=12 I. C. 30. It is doubtful whether alienees or trespassers on trust property can be joined as parties to a suit under

that behalf by the Local Government within the local limits of whose jurisdiction the whole or any part of the subject-matter of the trust is situate to obtain a decree—

- (a) removing any trustee;
- (b) appointing a new trustee;
- (c) vesting any property in a trustee;
- (d) directing accounts and inquiries;
- (e) declaring what proportion of the trust-property or of the interest therein shall be allocated to any particular object of the trust;
- (f) authorizing the whole or any part of the trust-property to be let, sold, mortgaged or exchanged;
- (g) setting a scheme; or
- (h) granting such further or other relief as the nature of the case may require.

(2) Save as provided by the Religious Endowments Act, 1863, no suit claiming any of the reliefs specified in sub-section (1) shall be instituted in respect of any such trust as is therein referred to except in conformity with the provisions of that sub-section.

S. 92. 33 I. C. 45=38 Mad. 1064; 28 M. L. J. 326; and also *see* 27 M. L. J. 266. Beneficiaries can sue trustees for encroachments made by them. 101 I. C. 744=A. I. R. 1927 All. 518. A relief against strangers for recovery of possession of properties in their hands cannot be granted under S. 92 and hence they must be struck off the record. 27 M. L. J. 266=25 I. C. 794. But *see* 102 I. C. 74=A. I. R. 1927 Mad. 710=53 M. L. J. 183. In a suit for framing a scheme for a public charity, the persons who *bona fide* allege to be trustees thereof, should be made parties, otherwise their rights would be lost if a scheme were framed 50 I. C. 58. (36 M. 364 Ref.)

ADDITION OF PARTIES.—In a suit for the protection of a trust under S. 92 the Court has power under O. 1, R 10 to add parties for the effectual adjudication of questions relating to administration of the trusts. 43 Mad. 707=38 M. L. J. 201. Court can add other worshippers if the suit is not properly prosecuted. 13 I. C. 232=10 M. L. T. 514. Under S. 92 a suit may be brought by the Advocate-General himself or by two worshippers to whom he has given his consent in writing to sue or by the Advocate-General in conjunction with those persons. The right of each to sue in his own name is not inclusive of the right of the other. 43 Mad. 707=38 M. L. J. 201. No consent from Advocate-General is necessary to be added as defendants. Plaintiffs no doubt do. 5 Rang. 263=103 I. C. 261=A. I. R. 1927 Rang. 180.

RIGHT OF SUIT.—“Interest”—A decree obtained in a suit under S. 5 of the Religious Endowments Act does not bar a suit under S. 92 of the Code. 63 I. C. 418. A suit relating to a public trust is not maintainable without the Advocate-General's permission unless the plaintiff has special claim or interest. 35 I. C. 846. The fact that the plaintiffs belong to the family of the founder and are entitled to succeed to the properties thereof under certain contingencies would naturally give them an “interest” so as to enable them to bring a suit under S. 92. 68 I. C. 631=41 M. L. J. 20 (42 M. 360, Dist.) Residents of the locality in which a choultry is situated and members of the community for whose benefit the choultry was

founded have a sufficient “interest” therein within S. 92 to institute a suit. 35 M. L. J. 661. A member of a church need not sue by virtue of an office. 39 Mad. 1056=30 M. L. J. 423. The section protects the right of the public and does not take away private rights; it should not be used to deprive individuals, whose rights have been infringed, of their remedy. 19 I. C. 740=25 M. L. J. 373. A suit by parties to a scheme suit to establish a private right which may interfere with the scheme settled is not maintainable. 9 N. L. J. 45=94 I. C. 326=A. I. R. 1926 Nag. 326. A Hindu entitled to worship in a temple has an “interest” in it; the section does not require a “direct” interest. 24 I. C. 712. Right to sue—Bad for want of requisite interest on the part of one of the plaintiffs—Subsequent addition of other persons having requisite interest—Effect of. 43 Mad. 720=38 M. L. J. 504.

APPEAL.—When a suit filed with the consent of the Advocate-General at the instance of relators is dismissed, and the Advocate-General does not think fit to appeal, the relators cannot file an appeal on their own account. 9 Bom. L. R. 996. When the suit is dismissed all the plaintiffs together must appeal. 100 I. C. 838=A. I. R. 1927 Lah. 382. Powers given under scheme—Order in exercise of their powers—Whether appealable. 92 I. C. 556=A. I. R. 1926 Mad. 130.

COMPROMISE OF SUIT.—A suit under S. 92 cannot be compromised if it is proved that the endowment is a public one and where the question whether the endowment is public or not is still in dispute, there cannot be a lawful agreement and it cannot be said to be proved to the satisfaction of the Court that the suit had been adjusted by a lawful agreement so long as such a controversy exists. 26 I. C. 360=18 C. W. N. 1264. A Court should not sanction a compromise of a suit under S. 92 under which any portion of the trust properties is given to any of the parties. 47 I. C. 611=37 M. L. J. 489.

Clause (2).—Clause is mandatory. 7 Pat. L. T. 4=A. I. R. 1925 Pat. 544.

- 93. [S. 539, last para.]** The powers conferred by sections 91 and 92 on the Advocate-General may, outside the Presidency-towns, be, with the previous sanction¹ of the Local Government, exercised also by the Collector or by such officer as the Local Government may appoint in this behalf.

Exercise of powers of Advocate-General outside Presidency-towns.

PART VI.

SUPPLEMENTAL PROCEEDINGS.

- 94.** In order to prevent the ends of justice from being defeated the Court may, if it is so prescribed,—

Supplemental proceedings.

(a) issue a warrant to arrest the defendant and bring him before the Court to show cause why he should not give security for his appearance, and if he fails to comply with any order for security commit him to the civil prison;

(b) direct the defendant to furnish security to produce any property belonging to him and to place the same at the disposal of the Court or order the attachment of any property;

(c) grant a temporary injunction and in case of disobedience commit the person guilty thereof to the civil prison and order that his property be attached and sold;

(d) appoint a receiver of any property and enforce the performance of his duties by attaching and selling his property;

(e) make such other interlocutory orders as may appear to the Court to be just and convenient.

Compensation for obtaining arrest, attachment or injunction on insufficient grounds.

- 95. [Ss. 491, 497.]** (1) Where, in any suit in which an arrest or attachment has been effected or a temporary injunction granted under the last preceding section,—

Sec. 93.—¹ For notification by the Government of Eastern Bengal and Assam, see E. B. and A. Gazette, 1909, Pt. I, p. 392.

Sec. 94.—Court has not got wider powers under this section in the matter of granting temporary injunctions than those conferred by O. 39, R. 1. 23 L. W. 85=92 I. C. 615=A. I. R. 1926 Mad. 258. A Civil Court has no jurisdiction to issue an injunction to a party to a proceeding under S. 40 of the B. T. Act restraining him from proceeding further with an application made by him under that section to a Revenue Court. 5 Pat. L. J. 76=53 I. C. 37=1919 Pat. 461. An order directing the furnishing of securities and submission of accounts passed on an application for the issue of temporary injunction is one under S. 94 (e). 17 I. C. 361=17 C. W. N. 318.

Sec. 95. RIGHT TO APPLY FOR COMPENSATION.—A defendant can apply for compensation whether process is served on him or not. 15 B. 160=26 I. C. 369. The application can be made only to the Court which disposes of the case. 3 W. R. Mis. 28; and a Court of Small Causes can award compensation. 26 M. 504. The Court cannot of its own motion grant compensation. 26 M. 494. Compensation can be given even when the suit is withdrawn. 15 B. 160.

ORDER FOR COMPENSATION—It is doubtful if an award of compensation can be made in a case where the order of injunction was passed after hearing both the parties and it was found there was sufficient grounds for making it. 17 L. W. 150=1923 Mad. 352. The proper stage for making such an application would be only when the suit is heard and until then, it would be premature. (*Ibid.*) An order for compensation is one

independent of decree, although it sets off the compensation as against the decreed amount. 21 I. C. 756. A compensation may be given for improperly obtaining a temporary attachment though the same is set aside on notice. 49 I. C. 86=9 L. W. 69.

PRESUMPTION.—It must be presumed that the Court granted the application for arrest or attachment upon sufficient grounds, unless the contrary is proved. 18 W. R. 450.

PROOF.—Damages can be awarded only when it appears to the Court deciding the suit, that there was no probable ground for instituting it. 13 M. L. J. 70. Plaintiff must prove want of reasonable and probable cause in a suit for damages for attachment before judgment and malice. Malice is any improper or indirect motive, i.e., no hatred or enmity is necessary. 35 Mad. 598=21 M. L. J. 1052; see also 9 I. C. 60=13 O. C. 357. He is a trespasser and is responsible for all damages though he may have acted innocently and mistakenly. 12 I. C. 26=4 Bur. L.T. 220. To justify an attachment before judgment it is not enough that the defendant is in straightened circumstances but it must be proved that he was actually about to dispose of his property. 49 I. C. 86=9 L. W. 69.

DAMAGES, EXTENT OF.—The litigation and delay, and also every depreciation of the goods, by any immediate fall in the market, are the natural and necessary consequences of the creditor's unlawful act. 17 C. 436. For wrongful attachment the decree-holder moving the Court is responsible for any loss suffered by the person whose goods are wrongfully attached. 12 I. C. 26=4 Bur. L.T. 220. Expense or injury in S. 95

(a) it appears to the Court that such arrest, attachment or injunction was applied for on insufficient grounds, or

(b) the suit of the plaintiff fails and it appears to the Court that there was no reasonable or probable ground for instituting the same, the defendant may apply to the Court, and the Court may, upon such application, award against the plaintiff by its order such amount, not exceeding one thousand rupees, as it deems a reasonable compensation to the defendant for the expense or injury caused to him :

Provided that a Court shall not award, under this section, an amount exceeding the limits of its pecuniary jurisdiction.

(2) An order determining any such application shall bar any suit for compensation in respect of such arrest, attachment or injunction.

PART VII.

APPEALS.

Appeals from Original Decrees.

96. [S. 540.] (1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorized to hear appeals from the decisions of such Court.

(2) An appeal may lie from an original decree passed *ex parte*.

(3) No appeal shall lie from a decree passed by the Court with the consent of parties.

for wrongful arrest includes also general damages such as damages for injury to reputation or humiliation. No special procedure is necessary for wrongful arrest. 3 L.W. 30=32 I.C. 592.

RIGHT OF SUIT.—A claim for compensation for wrongful attachment of property before judgment made in a counter-affidavit disputing the propriety of the interim order, is no bar to a suit for damages. 38 M.L.J. 324. Suit for damages, if can be maintained against a defendant for obtaining maliciously and without reasonable cause a perpetual injunction which was dissolved on appeal. 42 Cal. 550=18 C.W.N. 1189=21 C.L.J. 68 (13 W.R. 305, doubted). See *contra* 30 C.W.N. 465=94 I.C. 444=A.I.R. 1926 Cal. 757.

APPEAL.—An appeal will now lie from an order granting compensation. 28 A. 81; 24 M. 62 or refusing compensation. 25 M.L.T. 46=49 I.C. 86=9 L.W. 69. An order of a Divisional Court under S. 95 refusing an order of the court of first instance is an appellate order under S. 104 (9) and is not appealable. 11 I.C. 917=4 Bur. L.T. 204. An order under S. 95, C.P. Code, passed by a Small Cause Court dismissing an interim attachment issued by itself is valid and such an order cannot be questioned on appeal. 26 I.C. 359.

Sec. 96. RIGHT OF APPEAL.—There is no right of appeal unless it is conferred by statute. 11 M. 26=14 I.A. 160 (P.C.); 40 C. 21=39 I.A. 197, 200 (P.C.); 28 A. 549; in express words 20 B. 803=43 C. 857=20 C.W.N. 594. An agreement not to appeal if for consideration and is otherwise good is valid and enforceable. 14 M.I.A. 204; 8 C. 455; 1 A. 267 (F.B.).

Sub Sec. (3) Consent decrees are not appealable. 43 C. 85. But they can be set aside for proper grounds by a separate suit. 15 B. 594.

SCOPE OF SECTION.—The new Code does not deprive the litigant of the right of appeal which he had under the old Code even though such right could not be exercised immediately on the introduction of the new Code. 9 I.C. 937=21 M.L.J. 631. Finding of fact of Original Side Judge of High Court are generally accepted. 20 S.L.R. 295. See also 97 I.C. 505=A.I.R. 1926 Sind 216.

APPLICATION OF SECTION, SUB-CL. (3).—S. 96 (3) applies only to suits and not to proceedings in execution. 4 Pat.L.T. 735=1924 P. 346.

WHO CAN APPEAL.—A party cannot appeal against a decision in his favour on the ground that one of the findings is against him. 24 I.C. 36. See also 2 L.W. 101=27 I.C. 861; 3 A. 152 (F.B.). If a decree is upon the face of it, entirely in favour of a party to the suit, he cannot appeal. 7 A. 606 (F.B.). An adverse finding against any single issue or issues is not appealable unless such finding is incorporated in the decree. 6 M.L.J. 87. See also 44 I.C. 723. An appeal is not maintainable against opinions in a judgment when the decree is in favour of a party. 51 I.C. 622. When a suit is dismissed for want of cause of action there cannot be an appeal by defendant on a finding. 20 C.W.N. 1354. Notwithstanding a suit is dismissed, a defendant has a right of appeal and for that purpose it is open to the parties to go behind the decree and see really what the adjudication is. 21 I.C. 15=25 M.L.J. 379. Also see 52 I.C. 34=36 M.L.J. 641. If a person who ought not to have been made a defendant is impleaded as such, he cannot appeal. No person has a right of appeal from a decision unless his interest is prejudicially affected by it. 41 I.C. 468. A defendant has a right of appeal even if the suit has been

97. Where any party aggrieved by a preliminary decree passed after the commencement of this Code does not appeal from such decree he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree.

Appeal from final decree where no appeal from preliminary decree.

dismissed against him, if he is aggrieved by the decree. 30 M. 447; 9 C.W.N. 584. Any plaintiff or a defendant has a right to appeal without the concurrence of the other parties to the suit. 22 B. 718. The representative of a deceased person can appeal from the decree although he may not have been brought on the record. 12 M.L.J. 435.

EX PARTE DECREE.—A defendant against whom a decree has been passed *ex parte*, and who has not adopted the procedure provided by O. 9, R. 13 can appeal from such decree under the general provisions of this section. 9 M. 445. Appealability of order under O. 17, R. 3. 6 Bur. L. J. 77.

RES JUDICATA.—A finding upon a point necessarily arising in the case operates as *res judicata* between the parties and the aggrieved party can prefer an appeal against the finding although the decree is in his favour. 40 I. C. 771 (7 A. 606 = 11 C. 301, P. C.). See also 44 I. C. 723.

CONSENT DECREE.—Serious and substantial injustice to the party must be shown to result from letting the order stand which was made by the consent of the pleader under a mistake of fact. 46 M. L. J. 167 = 1923 P. C. 184 (P. C.). No appeal lies from an order made by consent of parties especially if the appellant has derived some benefit under it. 57 I. C. 70 = 30 C. L. J. 231; 34 I. C. 186 = 20 C. W. N. 752. See also 91 I. C. 294 = A. I. R. 1926 Bom. 39. No appeal lies against an order of dismissal of a suit under O. 23, R. 3 of the C.P.C. 34 I. C. 186 = 20 C. W. N. 752. A decree under O. 23, R. 3 can be passed only after there has been an order that the compromise be recorded. 33 I. C. 769 = 43 Cal. 85. A person who is not a party to the compromise though a party to suit can appeal against the compromise decree which binds only those who are parties to the compromise. 22 C. L. J. 333 = 20 C. W. N. 178. But see 91 I. C. 620 = A. I. R. 1926 Cal. 512. A consent decree in a partition suit as between some of the parties is not binding on any of the parties. 27 I. C. 242. An appeal lies against a decree passed on compromise entered into by a vakil without reference to his client. 41 Mad. 233 = 41 I. C. 429 (23 M. L. J. 381, Dist.; 21 M. 274, Foll.). An order directing the appointment of a Commissioner with the consent of parties does not come under cl. (3) of the section. 30 I. C. 357 = 29 M. L. J. 219; 27 M. L. J. 173 = 1 L.W. 541. The fact that defendant does not raise any objection to a particular relief cannot make the decree a consent decree when the relief is eventually decreed. 49 I. C. 840 = 15 N. L. R. 39.

WAIVER.—Where the plea of limitation is waived though the suit is time-barred, the decree following is a consent decree and thus not appealable. 39 M. L. J. 68 = 24 C. W. N. 1055 = 47 I.A. 200 (P. C.). Agreement to abide by decision of Court—Appeal if lies. A. I. R. 1926 All. 60.

DECREE ON APPEAL.—An appeal being a continuation of the original proceeding, the Appellate Court's decree is the decree in the suit.

30 M. L. J. 379 = 33 I. C. 9.

Sec. 97. PRELIMINARY AND FINAL DECREES.—Where a final decree is passed no appeal will lie against a preliminary decree. But the Court may allow the appeal to be amended so as to convert it into one against the final decree. 33 C.L.J. 414 = 25 C.W.N. 776 = 48 Cal. 1036; see also A.I.R. 1928 Lah. 73.

PRACTICE AND PROCEDURE.—It is a salutary rule that where the issue is simple and straightforward and the only question is which set of witnesses is to be believed the findings of fact of the Trial Judge should not be lightly disregarded. 31 C.L.J. 384 = 25 C.W.N. 779 = 49 Cal. 132. If the competency of an appeal is in question the appellant must establish that he has a right of appeal, for a right of appeal is not a natural right but must be given by express rules of statute. 43 Cal. 857 = 20 C.W.N. 594. Small Cause Suit tried on the original side—Appeal from decree. 51 I.C. 967. An appeal lies from a decree in a suit transferred from the Small Cause Court to the original side under S. 23 of the Prov. Sm. C. C. Act and the Appellate Court can remand the suit. 45 I.C. 645.

FORUM OF APPEAL.—Transfer of venue. 26 I. C. 519 = 37 Mad. 477. Where on withdrawal of a claim against some defendants a decree is passed which makes the defendants liable for their own costs, an appeal does lie. 18 M.L.T. 460 = 31 I.C. 312.

PRELIMINARY DECREE, WHAT IS.—The C.P. Code makes no provision for something which is neither a decree nor an order, not anything which is both; nor does it provide that one adjudication by the Court can be resolved into diverse elements, some of which are decrees and some orders. The question is one of substance, whether an adjudication is a decree or an order. 42 Cal. 914 = 42 I. A. 91 (P. C.). Though no appeal against the final decree is preferred it is no reason for not hearing the appeal against the preliminary decree in a suit for partition. 36 All. 532 = 12 A. L. J. 876. If an appeal from preliminary decree succeeds, the final decree passed later on falls to the ground. 34 All. 493; 36 All. 532; 48 I. C. 7 = 35 M. L. J. 361. The passing of a final decree, whether precludes a party from preferring an appeal against the preliminary decree. 37 Mad. 455 = 22 M. L. J. 317; 16 I. C. 380 = 24 M. L. J. 190. The right to appeal lies only from a preliminary decree and not from a preliminary finding in a suit directing accounts to be taken. 38 Bom. 331; 59 Bom. 339 (F. B.). Where there is only a preliminary finding and no decree is drawn up, there is no preliminary decree and no appeal under S. 97. 37 Bom. 480; 37 Bom. 60. The Legislature in enacting S. 97 intended to prevent preliminary questions being raised in the form of an appeal after a case has been decided upon the merits. 36 Bom. 536. Effect of passing of final decree after filing of appeal from preliminary decree. See 92 I.C. 545 = A.I.R. 1926 Bom. 43. An appeal filed against a preli-

98. [S. 575.] (1) Where an appeal is heard by a Bench of two or more Judges, the appeal shall be decided in accordance with the opinion of such Judges or of the majority (if any) of such Judges.

Decision where appeal heard by two or more Judges.

(2) Where there is no such majority which concurs in a judgment varying or reversing the decree appealed from such decree shall be confirmed :

Provided that where the Bench hearing the appeal is composed of two Judges belonging to a Court consisting of more than two Judges, and the Judges composing the Bench differ in opinion on a point of law, they may state the point of law upon which they differ and the appeal shall then be heard upon that point only by one or more of the other Judges, and such point shall be decided according to the opinion of the majority (if any) of the Judges who have heard the appeal, including those who first heard it.

99. [S. 578.] No decree shall be reversed or substantially varied or in any case be remanded, in appeal on account of any misjoinder of parties or causes of action or any error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the Court.

No decree to be reversed or modified for error or irregularity not affecting merits or jurisdiction.

minary decree can be heard though final decree made after the appeal was passed and lodged, is not appealed against. 33 I.C. 59=19 C.W.N. 1132. An appeal against a preliminary decree is not maintainable unless there is also an appeal against the final decree passed subsequent to the preliminary decree by the Court below. 71 I.C. 290 (40 C. 1036, referred to). 91 I.C. 358=A.I.R. 1926 Cal. 557. An appeal against the preliminary decree after the final decree is passed but before it is signed is not incompetent, as no copy can be got for the final decree until it is signed and drawn up and the only appealable decree is the preliminary decree. 46 I.C. 802=22 C. W. N. 831 (30 I. C. 321, Foll.). The order remanding after settling certain issues is a preliminary decree and must be appealed. 32 I.C. 866=20 C.W.N. 43. Where before the filing of an appeal against a preliminary decree, a final decree was passed and no appeal was preferred against the final decree, there is no appeal against the preliminary decree. 27 I.C. 135=20 C.W.N. 231 (18 C.L.J. 321, Foll.); 30 I.C. 321=22 C. L. J. 90. Under the old Code, objections to a preliminary decree could be taken in an appeal against the final decree, without appealing from the preliminary decree. 24 I. C. 18=21 C.L.J. 459. A final decree, passed before the appeal from the preliminary decree must be brought to the Appellate Court's notice, otherwise the Appellate Court's decree supersedes the final decree also. 17 C.W. N. 868=18 C. L. J. 209 (36 Cal. 672; 6 C. L. J. 547; 32 Cal. 1023; 32 All. 225, Dist.; 3 Cal. 20, Foll.). See also 20 I.C. 576=18 C. L. J. 214; 21 I. C. 510=18 C. L. J. 223; 21 I. C. 516=18 C. L. J. 321. Appeal from preliminary decree cannot be treated as one against the final decree also. 74 I. C. 485.

Sec. 98. SCOPE AND APPLICATION OF SECTION.—Where a bench of two Judges differ, S. 98 regulates the decision of the appeal if it is from a subordinate Court under the Code or any local or special statute and in all other cases the decision is governed by the Letters Patent. 27 Punj. L. R. 50=8 Lah. L. J. 13=93 I. C. 344=7 Lah. 179=A. I. R. 1926 Lah. 65. (N.B.—There is no

difference of procedure after the recent amendment of the Letters Patent.) Where two Judges of a Division Bench differ on a point of law and refer the matter to a third Judge, the latter must confine his opinion to the specific point, and not dispose of the case *de novo* on the merits. 35 All. 487=40 I. A. 182 (P. C.). Under the old Code when two judges differed, the whole appeal was referred to a third Judge, but under the new Code it is only the point of law that has to be referred. 14 C. L. J. 552=39 C. 353=16 C. W. N. 817. Under the proviso to the section reference can be made only when there is a difference on a question of law and not on fact. 17 Cal. 3. Letters Patent, Cl. 36 and not S. 98, C. P. C., governs the procedure in cases of difference of opinion in revision cases 18 M.L.T. 591=32 I.C. 330=17 Cr.L.J. 42. The procedure when Judges differ on second appeals from *mofussil* is governed by S. 98, C.P.C., and not by Cl. 36, Letters Patent, 43 Bom. 433=21 Bom. L.R. 157 (F.B.) (3 B. 204; 10 C. 814; 25 M. 555; 22 M. 68; 11 A. 176 (F.B.). Rel.). See also 91 I.C. 897=A.I.R. 1926 Cal. 121; 30 C.W.N. 1011=97 I.C. 236=A.I.R. 1926 Cal. 1211. Reference to a third Judge—Third Judge deciding case on another point—Procedure. 26 C.W.N. 985=1922 C. 544. If the Appellate Court judges agree that a part of the lower Court's judgment is erroneous, that part must be reversed, and if as to rest the judges are equally divided, it is deemed as confirmed. 21 I. C. 965=22 C.L.J. 525 (11 A. 176; 6 B.L.R. 131, Dist.); A.I.R. 1928 Mad. 180; but see 27 Punj.L.R. 50=8 Lah. L.J. 13=93 I. C. 344=7 Lah. 179=A.I.R. 1926 Lah. 65. Judges differing on a question of law—Decision to be arrived at with reservation of point of law. 22 I.C. 383=18 C.W.N. 33. Wherein an appeal under the Land Acquisition Act the judges composing a Division Bench differ as to the amount of additional compensation the award of the Lower Court should be confirmed under S. 98. 41 Mad. 943=35 M.L.J. 110.

Sec. 99. SCOPE AND APPLICATION OF SECTION.—The section applies only to errors or defects or irregularities in the suit or proceedings

out of which the appeal then being heard arises, and not to previous suits or proceedings which have come to an end. 23 A. 499, (500). Applicability to appeal under S. 142, Cal. M. Act. 31 C. W. N. 1040. The best test to ascertain whether an erroneous interlocutory order has affected the ultimate decision on the merits is to see whether the Court would have come to the same decision had the erroneous order not been passed. 2 C. L. R. 257.

JURISDICTION.—The term "jurisdiction" is used in the sense of pecuniary or local jurisdiction or jurisdictions relating to the subject-matter of the suit. 28 C. 324 ; 5 C. L. J. 71 ; 5 C. L. J. 329. The word "jurisdiction" in S. 99 judged from the point of view of locality, pecuniary value or the subject-matter of a suit means competency to try. 10 I. C. 731 = 7 N. L. R. 33. Whether non-compliance with S. 147-A of the B. T. Act amounts to want of jurisdiction, see 45 C.L.J. 24. Jurisdiction is that of the trial Court. 93 I. C. 938 = A. I. R. 1926 Lah. 402. When there is a want of jurisdiction Appellate Court will interfere even if there is no miscarriage of justice, 95 I. C. 406 = A. I. R. 1926 All. 650.

MISJOINDER.—The words "any misjoinder of parties or causes of action" have been inserted to supersede the rulings in 27 M. 80 ; 24 C. 540 ; 15 A. 380. Misjoinder—Joinder of different tenants in suit for enhancement of rent. 23 C. W. N. 945 = 30 C. L. J. 140. An objection as to misjoinder cannot be taken for the first time on appeal, especially when the suit is decided on the amendments in the first Court. 17 I. C. 97. Misjoinder of causes of action when interference by High Court proper. See 13 I.C. 788 = 22 M.L.J. 225. Whether misjoinder in S. 99. C.P.C., includes non-joinder. 44 M.L.J. 249 = 1923 Mad. 337. Objections as to non-joinder—Procedure—Lawfully stated. 42 M. L. J. 133 = 1922 Mad. 317.

ILLUSTRATIVE CASES.—Decree passed cannot be reversed simply because it was passed without hearing arguments. 93 I.C. 291. An order adding parties to a case is not one affecting the merits. 3 B.L.R. (O.C.) 113. As to decree passed without hearing arguments, see 13 O.L.J. 473. The joinder of an unnecessary party in a mortgage suit does not involve its dismissal but is a mere irregularity. 52 I.C. 105. Striking out names from the plaint and amending issues are not errors affecting the merits of the case. 4 B.L.R. (O.C.) 97. See 9 A. 508 and 14 C. 159. The defendant could not object to the frame of the plaint in appeal, where it stated all the facts fully and did not in fact mislead the defendant. 34 I.C. 704 = 12 N.L.R. 90. An objection that there cannot be a decision in a partition suit of rights subordinate to that of the co-sharers cannot be gone into for the first time in appeal. 63 I.C. 161 = 33 C.L.J. 317. An error in the valuation of the claim is not one which affects the merits of the case. 1 Bom. H.C.R. 163. Set off—Court-fee not paid—Objection in appeal—Interference. 19 I.C. 918 = 17 C.L.J. 305 (F.B.). Form of an issue throwing onus on the wrong party, is not a ground in appeal for setting aside the decree provided the parties were not misled and the evidence fully gone into. 17 C. L. J. 38 = 17 C. W. N. 280. Where the plaintiff in disregard of

the provisions of the Code has united in the same suit not merely several causes of action, but several suits against separate defendants with the result that litigation was conducted as though the defendants were a community with common interests, the procedure though highly irregular, nevertheless prevents the landlord from objecting to the use of evidence given in the case of some tenants as evidence in favour of all the parties. 43 Mad. 567 = 47 I. A. 76 = 38 M.L. J. 476 (P.C.) (On appeal from 24 M. L. J. 571). The deposition of a handwriting expert signed by him and admitted in evidence does not vitiate the trial though it is not signed by the Judge. 68 I. C. 664 = 1923 Nag 7 (1). The exclusion of evidence in the lower Court is not sufficient ground for reversing that Court's decision, unless the Appellate Court comes to the conclusion that the evidence referred, if it had been received, ought to have varied the decision. 8 B. 408. Error in rejecting documents already admitted by the predecessor of the judge is not one affecting the merits. 13 B. 449. The second Appellate Court cannot set aside the decree of the first Appellate Court on the ground of improper admission of additional evidence unless it is satisfied that the decision on the merits is wrong, and that the additional evidence might have resulted in the wrong decision. 26 I. C. 50 = (1914) M. W. N. 864 (36 Mad. 477, Foll.). When an unstamped promissory note is treated as a bond and received in evidence on payment of stamp duty and penalty, the receipt of such document is not an irregularity affecting the merits of the case. 1 A. 725. The omission to explain the non-production of a document before tendering secondary evidence is only a mere irregularity. 59 I. C. 461. Recording evidence in a language which is not the language of the Court is a mere irregularity which can be cured by this section. 34 C. 396. Also the disposing of a suit on a Sunday. 29 A. 562. If the power of attorney, on the strength of which a suit is instituted is defective as when it is a special and not a general power, there is merely an irregularity in proceedings not effecting the merits of the case. 24 Bom. L. R. 1302 = 47 B. 227. Where the plaintiff filed the plaint through an agent and did not even sign the plaint, and there was no power of attorney on the record and no explanation was apparently obtained for her failure to sign the plaint and no objection however appeared to have been taken. Held, S. 99 of the C.P.C., applies to the case. 1 Rang. 42 = 1923 Rang. 206. Defect of signature does not justify reversal of the decree. 59 I. C. 282 = 1 Pat. L. T. 647. Defect in signing of plaint can be remedied in appellate court. 104 I. C. 747. Irregularity in signing Vakalatnama is only formal. 74 I. C. 1033. Where the mother of a minor refuses to act as guardian, the Court ought to appoint one of its officers as guardian *ad litem*. An omission to appoint one is a serious defect not curable by S. 99. 62 I. C. 464 = 25 C. W. N. 525. Absence of a formal order appointing a guardian may sometimes be a mere irregularity. 30 I. A. 182. But not when the minor's interests had been entirely disregarded. 29 A. 679. Where the order amounts impliedly to a redemption decree, it may be treated as such under S. 99 of the Code notwithstanding an irregularity in form. 26 I. C.

Appeals from Appellate Decrees.

100. [S. 584.] (1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree

Second appeal.

701=10 N. L. R. 150. A remand under O. 41, R. 23, when the first Court decided the suit on the merits, is an irregularity within S. 99 not affecting the merits of the case. 41 Cal. 108=18 C. L. J. 613 (28 Cal. 324, Foll.). Where order passed under O. 39, Rr. 5 and 6 should have been passed under O. 21, R. 42, the High Court refused to set aside as in substance the order was right. 41 I. C. 89. Execution sale—Want of attachment in execution does not interfere with power of Court to sell property. 37 I. C. 964= (1917) M. W. N. 89 (21 All. 311, Foll.). Subsequent mistakes, and irregularities may be condoned under this section, provided the suit has been instituted in such a way as to give the Court authority to try it. 26 B. 259.

Sec. 100. QUESTION OF FACT—ILLUSTRATIVE CASES.—Interference with findings of fact by the High Court is subject to limits prescribed by S. 100. 46 Cal. 189=45 I. A. 188 (P. C.). See for a full discussion 3 O. W. N. 645=97 I. C. 853=A. I. R. 1926 Oudh 578. See also 47 Cal. 107=37 M. L. J. 36. A finding of fact is binding on a second Appellate Court, if the lower Appellate Court committed no error of law in arriving at the finding. 21 I. C. 251; 30 I. C. 503; 52 I. C. 739; 35 I. C. 392; A. I. R. 1926 All. 130; A. I. R. 1926 Nag. 192. But when there is (i) no evidence (12 Cal. 672), or (ii) no sufficient legal evidence (16 I. C. 887), or (iii) important evidence is ignored (103 P. L. R. 1915; 54 M. L. J. 600), or (iv) only a colourable pretence of considering an evidence is made (38 I. C. 561), or (v) there is no honest and complete consideration, a finding of fact can be contested in second appeal. Otherwise it is final 18 Cal. 23 (P. C.); 3 Lah. 389; 35 I. C. 392 (wrong application of law). Inferences of fact which are not unreasonable and are justified by evidence cannot be interfered with in second appeal. 62 I. C. 1002=20 I. C. 523. See also 8 L. R. 314 (Rev.); 96 I. C. 14=A. I. R. 1926 Oudh 522; 95 I. C. 463 (1)=13 O. L. J. 146. Where more than one inference is legally open from the evidence, the High Court cannot in second appeal refuse to be bound by that inference drawn in the Court below. 1923 Lah. 239 (1); 73 I. C. 232; 46 I. C. 794; 21 Bom. 91; 74 I. C. 843. The High Court is not entitled to go behind the findings of fact of the District Judge which did not result from the misconstruction of a document or the misapplication of law or procedure but upon the oral evidence in the case. 37 M. L. J. 199=52 I. C. 497 (P. C.); 42 I. C. 68=11 Bur. L. T. 229; 54 Cal. 586=101 I. C. 359 (2)=A. I. R. 1927 P. C. 117=53 M. L. J. 117 (P. C.). See also A. I. R. 1928 Mad. 377. The finding of fact of a lower Appellate Court which proceeds on an erroneous view of the law, and which is inconsistent with the facts recited can be interfered with by the High Court. 44 A. 602. 95 I. C. 636=A. I. R. 1926 Nag. 416. Question of fact—Evidence when open to examination. 1 Lah. L. J. 72. A finding of fact arrived at on a consideration of evidence which is

inadmissible and which proceeds partly on such evidence can be assailed in second appeal. 64 I. C. 929=2 Lah. 271 (57 I. C. 561, Foll.). An erroneous finding of fact is different from an error in procedure. Where there is no error or defect in the procedure the finding of fact by the Court of First Appeal is final. 63 I. C. 575; 59 I. C. 885=3 Lah. L. J. 86; 40 I. C. 772. Erroneous findings of fact however gross or inexcusable cannot be questioned in second appeal. 98 I. C. 1035; 99 I. C. 199=A. I. R. 1927 Oudh 89; 98 I. C. 1072; 99 I. C. 183; 103 I. C. 215=A. I. R. 1927 Lah. 574; 98 I. C. 869=A. I. R. 1927 Mad. 217; 52 M. L. J. 674; 99 I. C. 769=A. I. R. 1927 Nag. 158; 100 I. C. 792; 96 I. C. 283 (2). See also 92 I. C. 327. Vague finding of fact may be subject to question in second appeal. 37 I. C. 27; 40 I. C. 496. Finding of fact becoming irrelevant by change in law—High court can consider in second appeal, the altered aspect of the finding on the evidence. 96 I. C. 775=A. I. R. 1926 All. 725.

THE FOLLOWING ARE QUESTIONS OF FACT.—Grant by Government of grazing land. 36 All. 256. That a gift was an absolute one enuring for the benefit of the donees' descendants. 4 Lah. L. J. 457. Whether a land was abandoned. 91 I. C. 493=A. I. R. 1926 Cal. 751. Inference of a lost grant from a certain set of facts. 23 N. L. R. 192=A. I. R. 1928 Nag. 87; 57 I. C. 350. See also A. I. R. 1925 Pat. 748; 31 I. C. 501. Question whether building is movable or immovable property. L. R. 3 A. 128=1922 All. 45. A finding as to the state of mind of a person when he performed a certain act. 12 I. C. 730=8 A. I. J. 1154. Question of *bona fides*. 92 I. C. 602=A. I. R. 1925 Lah. 505; 94 I. C. 927=A. I. R. 1926 Oudh 501. Care and good faith. 91 I. C. 988. Reasonable cause in a malicious prosecution. 91 I. C. 112; 28 O. C. 387=A. I. R. 1925 Oudh 359. Wilful negligence. 24 A. L. J. 825=96 I. C. 1046=A. I. R. 1926 All. 394. Whether a transaction, e.g., heba was entered into with intent to defeat or delay creditors. 63 I. C. 169. The question whether a particular person did a certain act with a particular intention or not. 45 I. C. 303. Negligence of the guardian *ad litem* of a minor. (1927) M. W. N. 523=104 I. C. 405=A. I. R. 1927 Mad. 668=52 M. L. J. 709; 107 I. C. 702=A. I. R. 1928 A. 166. But see (1926) M. W. N. 350=95 I. C. 707 (1)=A. I. R. 1926 Mad. 905. Existence of relationship of landlord and tenant—Presumption—Entry in record of rights. 64 I. C. 190. Question of breach of contract. 4 Lah. L. J. 317. The question of an implied obligation under S. 70 of the Contract Act. 40 Bom. 646=35 I. C. 794. Finding of undue influence is a finding on the merits. 40 I. C. 215. The question whether time is or is not of the essence of a contract. 67 I. C. 157. Question of good faith under S. 14, Lim. Act. 8 L. R. (Rev.) 23; see also 102 I. C. 628. Question whether there was sufficient cause for non-production of evidence under O. 17 R. 1; 103 I. C. 301 (2). A decision of an Appellate Court upon

passed in appeal by any Court subordinate to a High Court, on any of the following grounds, namely :—

the ordinary meaning of a word. 32 I. C. 240 = 20 C.W.N. 584. "Manufacture" meaning of is one of fact. 42 Cal. 888. Whether one heir of a tenant represents other heirs. 10 I. C. 116 = 14 C. L. J. 180. Question of plaintiff's status is a finding of fact. 1923 Lah. 626. See also 97 I. C. 570. Question whether parties follow Mahomedan law is one of fact. 34 I. C. 219. The conclusion that the plaintiff was a full owner and not merely a dohildar is clearly a finding of fact and cannot be impugned in second appeal. 1923 Lah. 611. That certain property is not wakf and does not belong to it is a finding of fact. 5 Lah. L. J. 11. Also the Question as to what lands are included in the permanent settlement. 100 I. C. 507 = A. I. R. 1927 Cal. 457. Though the finding on the question of legitimacy is one of fact, it would not be upheld in second appeal, where the Lower Appellate Court has ignored important pieces of evidence and the strong presumption of law in favour of legitimacy. 60 I. C. 375. A finding as regards the factum of marriage between the parties is a finding of fact. 5 Lah. L. J. 117. The finding that a woman has taken to a life of immorality is a finding of fact. 31 I. C. 797. See also A. I. R. 1926 Lah. 461. Question whether certain persons were members of a joint Hindu family is a finding as to status and is one of fact. 67 I. C. 789 = 3 Lah. L. J. 552 ; 27 Punj. L. R. 223 = 97 I. C. 817 (1) = A. I. R. 1926 Lah. 443 but see 95 I. C. 183 = A. I. R. 1926 Nag. 389. A question of what constitutes exclusion from a joint estate may well in many cases be a question of law. 21 C. W. N. 1142 = 42 I. C. 258. Family arrangement—Binding nature of, is question of fact. 4 Lah. L. J. 40. A finding that the subsequent purchaser had notice and knew that there was a contract of sale with the plaintiff is one of fact. 3 Lah. L. J. 447. Also whether a certain sum of money was necessary for personal necessities. 100 I. C. 943 = 8 Lah. 340 = A. I. R. 1927 Lah. 605. Existence of antecedent death. A.I.R. 1926 Oudh 33. Where both the Courts below have found that the suit lands did not form part of an estate so as to oust the jurisdiction of Civil Courts, the decision is binding on the High Court. 18 L. W. 324 = 75 I. C. 465. Question as to whether oral will was executed is one of fact. 66 I. C. 413. Genuineness of a document is a question of fact. 13 O. L. J. 176 = 91 I. C. 1046 = A. I. R. 1926 Oudh 257. Effect of attestation is a question of fact. 51 I. C. 621. Waiver is primarily and in most cases an inference from facts. 37 Bom. 480 ; 38 I. C. 302 ; 59 I. C. 607. The finding that a mortgagee has never been in actual possession of the land, is one of fact. 67 I. C. 152. Also whether certain persons are legal representatives. 97 I. C. 489 ; A. I. R. 1927 Cal. 81. Whether a place is a town or village. 27 Punj. L. R. 73 = 94 I. C. 127 = A. I. R. 1926 Lah. 542. Whether a transaction is a mortgage or sale. 92 I. C. 42 = 26 Punj. L. R. 799. Whether a mortgage is proved. 96 I. C. 253 = A. I. R. 1926 Oudh 546.

QUESTION OF LAW—ILLUSTRATIVE CASES.
—Questions of law and of fact are sometimes difficult to separate. The proper legal effect of a proved fact is essentially a question of law ; so

also is the question of admissibility of evidence and the question whether any evidence has been offered on one side or the other ; but the question whether the fact has been proved when evidence for and against has been properly admitted, is necessarily a pure question of fact. The High Court has no jurisdiction in second appeal to revise the evidence and set aside the decree of the Lower Appellate Court on the ground that it had applied the wrong standard of measurement to land of which the rent was in question. 46 Cal. 189 = 51 I. C. 760. Gross negligence of guardian is a question of law. A.I.R. 1926 Mad. 905 = (1926) M.W.N. 350 also question of amount of dower to be paid. A. I. R. 1926 Oudh 128. The question whether in determining the infringement of certain legal rights the correct tests have been applied is a pure question of law. 42 Cal. 46 = 27 M. L. J. 117. The meaning of words is a question of fact in all classes ; the effect of the words is a question of law. 75 I. C. 686 = 1923 A. 337 ; 46 I. C. 794. Also 4 O. W. N. 1229 ; A. I. R. 1926 Lah. 21 ; A. I. R. 1926 Oudh 260 ; A. I. R. 1926 All. 461. A Court of second appeal is not bound to entertain a question of law raised for the first time before it. It can however take the point of itself or if some good cause is shown it may permit that point to be argued. 43 All. 193 = 59 I. C. 116 (F. B.). The question as to what is the legal result of certain facts is a question of law. 20 I. C. 951 = 11 A.L.J. 713 ; 96 I. C. 356 A.I.R. 1926 Nag. 494 ; 399 25 A.L.J. 1014. The appellant cannot in second appeal take a point of law which involves the taking of additional evidence. 72 I. C. 993 = 1923 Bom. 37. Inferences drawn from documentary evidence are not questions of law and cannot be challenged in second appeal. 74 I. C. 811 ; 37 C.L.J. 580 ; 7 L.W. 210 ; 35 M. L.J. 304. Legal inference from proved fact—Finding of fact and inferences from facts—Liability to be disturbed in second appeal. 73 I. C. 795 ; 3 Lah. 257 = 68 I. C. 551. See also 95 I. C. 630 = A.I.R. 1926 Nag. 416, relying on 31 C.W. N. 677 (P.C.) see also 32 C. W. N. 184. In second appeal, the High Court can make deductions from facts found without disturbing the findings of the Lower Appellate Court. 32 I. C. 119 = 19 C.W.N. 1330. The conclusion that a certain process was not scientific involves a question of law. 95 I. C. 614 = A. I. R. 1926 Nag. 435. The question whether reversioner's consent to an alienation can be inferred from the established facts is a point of law. 18 M.L.T. 521 = 31 I. C. 487. A wrong decision based upon findings contrary to the facts found raises a point of law. 18 I. C. 148. An allegation of absence of evidence to support a specific finding of fact is a ground of law. 40 I. C. 139. Status of tenant. 29 Punj. L. R. 162 ; 38 Cal. 278 = 9 I. C. 394 ; 55 Cal. 355. An objection that the appeal to the Lower Appellate Court was presented out of time is a question of law. 65 I. C. 580 = 1922 Lah. 240. Question of plaintiff's right of suit is a question of law. 4 Rang. 500 = 99 I. C. 998 = A. I. R. 1927 Rang. 83. The question of *onus probandi* is a question of law. 64 I. C. 901 = 2 Lah. 240. The question whether a stipulation in a deed as to payment of interest is one by way of penalty is

(a) the decision being contrary to law or to some usage having the force of law;

open to consideration in second appeal. 64 I.C. 350. A decision by the Lower Appellate Court opposed to the admissions of the parties amounts to a substantial error or defect in procedure. 41 I.C. 163. The plea of *res judicata* is a question of law and may be raised at any stage of suit. 47 I.C. 685. The question if a trustee could divest himself of his office is a question of law. 21 I.C. 232.

MIXED QUESTION OF LAW AND FACT.—A finding as to a mixed question of law and fact can be interfered with in second appeal. 36 All. 231 = 25 I.C. 162 = 12 A.L.J. 303. Mixed question of law and fact is not to be allowed in second appeal if it involves a remand, 51 I.C. 862; 72 I.C. 177; 37 Mad. 22 = 24 M.L.J. 652; (1911) 1 M.W.N. 6 = 9 I.C. 41. A mixed question of law and fact cannot be allowed to be raised for the first time in second appeal. 22 I.C. 802. Adverse possession being a mixed question of law and fact cannot be raised for the first time in appeal. 102 I.C. 476 = A.I.R. 1927 Lah. 522. Nuisance—Mixed question of law and fact. 64 I.C. 169. Whether the facts found attract the operation of provision of law is a mixed question of law and fact. 101 I.C. 674 = A.I.R. 1927 Pat. 256; also whether reasonable care has been taken 99 I.C. 1 = A.I.R. 1927 All. 158. Whether a gift offends against the doctrine of *musha* is also a mixed question of law and fact. 101 I.C. 126. Also question of adverse possession. 94 I.C. 38 = A.I.R. 1926 Cal. 881. Question as to what passed in a sale of family properties is a mixed question of law and fact open to second appeal. 23 L.W. 349 = 94 I.C. 68 = A.I.R. 1926 Mad. 851.

JURISDICTION.—Where a decree has been made by the Appellate Court without jurisdiction an appeal lies against it precisely in the same way as if it had been made with jurisdiction. 45 Cal. 926 = 43 I.C. 758. See also 94 I.C. 1 = A.I.R. 1926 All. 401. The question of jurisdiction can be for the first time agitated in second appeal. 1923 Lah. 551; see also 49 I.C. 137 = 29 C.L.J. 48; 75 I.C. 1053. Decision of District Court on appeal from forest officer—Madras Forest Act (V of 1882), Ss 10 and 16—Second appeal to High Court is competent. 39 Mad. 617 = 31 M.L.J. 324. A decree of a Deputy Collector in a suit under S. 213 of the Madras Estates Land Act—If second appeal lies. 38 Mad. 655 = 24 I.C. 754 = 1 L.W. 89. See also 37 Mad. 443 = 27 M.L.J. 451 (P.C.). Where the amendment was allowed after the expiration of the limitation period, the High Court can take notice of it in second appeal though the point was not pressed in the lower Appellate Court. 36 All. 370 = 24 I.C. 255. A second appeal is not maintainable against an order rejecting cross objections but the Courts might interfere in revision. 44 I.C. 812. In a suit of a small nature, order in execution proceedings is not appealable. 45 M. L.J. 651 = 76 I.C. 750.

PRACTICE AND PROCEDURE.—Refusal by the Appellate Court in the exercise of its discretion to admit additional evidence given under O. 41, R. 27, is not a substantial defect or error in procedure. 33 All. 379 = 9 I.C. 265. Admission of additional evidence erroneously—Second appeal. See

92 I.C. 661 = A. I. R. 1926 Mad. 864. The High Court will reverse a finding in second appeal if there was substantial error in procedure resulting in a finding not *secundum allegata et probata* and not sustainable in law. 39 Bom. 149 = 28 I. C. 921. Where the appellate court made a new case not raised by the parties and not warranted by pleadings or evidence High Court will interfere. 104 I.C. 781. Also in a case of misuse of judicial discretion. 94 I.C. 396 = A.I.R. 1926 Lah. 445 (2). Procedure—Finding of fact—False case on both sides. 45 I.C. 795 = 22 C. W. N. 149. Failure to appreciate true question in controversy is a defect in procedure and the appeal should be reheard. 13 I. C. 455 = 2 C. L. J. 380. See also 34 I.C. 30 = 23 C.L.J. 600; 35 I.C. 631; 43 I. C. 488. Where the lower appellate court decided a question of fact not upon the evidence but holding that a superior court decided a similar case between different parties in a particular way, there was a defect in procedure and a second appeal lay. 6 Pat. 698 = 105 I. C. 633 = A. I. R. 1927 Pat. 209 (F.B.). Decision based on finding of fact contrary to case set up can be questioned at second appeal. A.I.R. 1926 Lah. 535.

PROCEDURE—EX-PARTE HEARING OF APPEAL.—Interference on second appeal. 3 Lah. 357 = 69 I.C. 499. The failure to determine the critical question between the parties to a suit and to consider the oral evidence adduced on behalf of the defendant is a substantial error of procedure. 56 I.C. 40. It is a substantial error or defect in the procedure of a lower Appellate Court if it gives decree not based on evidence. 26 I.C. 240. Where both parties agreed to proceed not only on the evidence taken before the Munsif but also on evidence recorded by the Commissioner, and the lower appellate court discarded the evidence recorded before the Commissioner, there was defect of procedure with cl. (1), (c) 106 I.C. 841 = 46 C.L.J. 558. The Appellate Court has no power to go behind a finding of the Trial Court, when the appellant has accepted it in his ground of appeal. The carelessness of the appellant's counsel in drafting the grounds makes no difference. 59 I.C. 689.

NEW PLEA IN SECOND APPEAL.—A plea not raised in either of the Courts below cannot be entertained for the first time in further appeal to the Chief Court. 25 I.C. 761. See also 29 I. C. 895; 45 I.C. 101; 67 I.C. 919 = 2 Lah. L.J. 255; 3 Lah. L. J. 470; 21 L. W. 60 = 86 I. C. 4; 40 C.L.J. 564; 47 M.L.J. 686; 28 Punj. L.R. 181 = 102 I.C. 426 = A.I.R. 1927 Lah. 426 = 96 I.C. 304. Point not pressed in Courts below not to be raised in second appeal. 7 O.L.J. 17 = 55 I.C. 441. In second appeal a question of law cannot be dealt with by the High Court if its determination is based upon a question of fact not raised in the Courts below. 51 I.C. 256; 3 Pat. L.T. 623; 65 I.C. 277; 3 Pat. L. W. 213; 1 Pat. 23. A new plea involving an issue of fact requiring fresh evidence cannot be raised in second appeal. 97 I. C. 342 = A.I.R. 1926 All. 707. Where there is no reference to a plea in the judgments of the Courts below or in the pleadings of the parties, the point cannot be allowed to be raised in second appeal. 1923 Lah. 56, 491. So also an alternative plea

(b) the decision having failed to determine some material issue of law or usage having the force of law.

not put forth in court below. 1926 P. H.C.C. 29 = 7 Pat. L. T. 145 = A. I. R. 1926 Pat. 156. An objection which is taken in the Trial Court but is not urged in the Lower Appellate Court cannot be raised in second appeal. 43 All. 555 = 63 I. C. 366. See also 3 O. W. N. 937. Matters of procedure dependent upon facts cannot be raised in second appeal. 94 I. C. 417 (2). The High Court may be justified in an exceptional case, in permitting a point of law to be taken in second appeal which goes to the root and the merits of the whole case. 71 I. C. 381 = 1923 A. 343. A point of law which does not require any questions of fact to be determined but can be decided on the record as it stands may be allowed to be raised in second appeal for the first time. 66 I. C. 856; 21 A. 446; 25 Bom. L. R. 245 = 72 I. C. 226; 38 Bom. 227 = 24 I. C. 716 = 16 Bom. L. R. 111; 47 All. 324. See also 47 All. 932 = A. I. R. 1925 All. 783. A mixed question of fact and law cannot be raised on second appeal for the first time. 4 Lah. L. J. 432. A question of jurisdiction is one of pure law, which though not raised in the lower Court can be entertained and adjudicated upon in second appeal. 57 I. C. 206 = 18 A.L.J. 923. See also 53 M. L.J. 688 but see 100 I. C. 37 = A. I. R. 1927 Nag. 164. A question of notice cannot be allowed to be raised for the first time in second appeal. 25 I. C. 118 = 41 Cal. 418. Where the defendant did not raise in the Court of first appeal the point as to whether the notice to quit was legal and sufficient, the point could not be raised in second appeal. 2 Pat. L. J. 595 = 42 I. C. 655. See also 52 I. C. 517 = 10 L. W. 137. New plea of *res judicata* when can be raised for the first time in second appeal. 5 Iah. L. J. 163 = 74 I. C. 577; but see 25 L. W. 11 = 100 I. C. 40 = A. I. R. 1927 Mad. 406. Objections as to maintainability of suit if raised for the first time in appeal, cannot be allowed. 3 Lah. 239 = 68 I. C. 557. The contention that the parties did not constitute joint Hindu family cannot be raised for the first time in second appeal. 66 I. C. 881 = 3 Lah. L. J. 137. Points under the Limitation Act not taken in the Court below should not ordinarily be allowed to be raised in the High Court. 17 L. W. 169 = 72 I. C. 131. The plea of limitation or estoppel involving questions of fact which are not admitted or undisputed cannot be taken for the first time in appeal. 27 I. C. 933. Plea abandoned in Courts below not to be raised in second appeal. 55 I. C. 481. Finding arrived on mistaken view of pleadings, how far binding on High Court. See 13 O. L. J. 536. A legal plea going to the root of the plaintiff's claim and arising on the facts found and not affected by any facts outside those findings can be taken for the first time in second appeal 41 I. C. 45.

EVIDENCE.—(1) ADMISSIBILITY OF EVIDENCE.—Objections as to the admissibility of evidence will not as a general rule be entertained for the first time in second appeal. 39 M. L. T. 198 = 104 I. C. 518. The appellant cannot raise objections to the admissibility of documents received in evidence in the lower Court if under the circumstances the application is too late. 34 I. C. 57 (F.B.); 41 C. L. J. 374 = 86 I. C. 734. Finding of a Lower Appellate Court based on inad-

missible evidence can be impeached in second appeal. 74 I. C. 383 = 1923 Cal. 261; 72 I. C. 985 = 1923 Cal. 378. The Court hearing the second appeal can challenge a finding of fact arrived at by illegally relying upon irrelevant and inadmissible evidence. 15 I. C. 459. See also 15 I. C. 515 = 17 C. W. N. 37; 103 I. C. 889 = A. I. R. 1927 Lah. 448; 2 Luck. 172. also 51 Bom. 231 = 101 I. C. 155 = 29 Bom. L. R. 269 = A. I. R. 1927 Bom. 157; A. I. R. 1926 Nag. 99. Relevancy and proof of document is a question of law and can be raised at any stage, but the question as to the proof of a document is one of procedure and can be waived. 3 Pat. L. T. 149 = 63 I. C. 625; 2 Pat. L. T. 343 = 63 I. C. 226; 5 Pat. L. J. 410 = 57 I. C. 561.

(2) APPRECIATION OF EVIDENCE.—Where the High Court differed from the lower Courts, not only in the estimate of the evidence, but also with regard to the inferences derivable from document produced in the case and other circumstances, their Lordships dealt with the case on its merits. 49 I. A. 399 = 2 Pat. 38 = 45 M. L. J. 460. If a finding of fact is recorded on a misinterpretation of the evidence it can be interfered with in second appeal. 1923 Lah. 585; 31 I. C. 695; 19 C. W. N. 1015; 32 I. C. 862. A second appeal lies on a finding on no evidence. 104 I. C. 781; 8 Lah. 30; 99 I. C. 1046; 38 M. L. T. (H. C.) 1 = 25 L. W. 550 = 99 I. C. 571 = A. I. R. 1927 Mad. 256 = 52 M. L. J. 20. A finding cannot be contested in a second appeal if it is based on a misreading of first Court's judgment. 1923 Lah. 502 (2). Although in second appeal findings of fact cannot be impugned it is nevertheless open to a party to challenge the correctness of the conclusions drawn from such findings. 1923 Lah. 407 (2); 65 I. C. 475 = 1 Lah. L. J. 72. Findings of fact are conclusive in second appeal even though there has been an error on the part of the Court below in weighing the evidence. 53 I. C. 137; 92 I. C. 104 = A. I. R. 1926 Cal. 727; 4 Lah. L. J. 426. The ignoring of an important plea of evidence by the Lower Appellate Court is a good ground for second appeal. 42 I. C. 76. The credibility of witnesses accepted by the Courts below cannot be considered in second appeal but the sufficiency of evidence can be considered in second appeal. 25 I. C. 869.

(3) CONSIDERATION OF EVIDENCE.—Question of proper inference from facts found is a question of law. 54 I. A. 178 = 8 Lah. 573 = 28 Punj. L. R. 658 = 25 A. L. J. 959 = 29 Bom. L. R. 870 = 31 C. W. N. 677 = 101 I. C. 355 = A. I. R. 1927 P. C. 102 = 52 M. L. J. 663 (P.C.). Finding based on inadmissible evidence can be set aside by High Court. 66 I. C. 313 = 1022 All. 439. See also A. I. R. 1926 Oudh 464; 82 I. C. 822 = 1925 Cal. 469 (finding inconsistent with evidence); 63 I. C. 813; see also 43 I. C. 525; 65 I. C. 504; 25 C. W. N. 1022 = 63 I. C. 954 = 35 C. L. J. 19. A finding of fact based on no evidence or against express *prima facie* reliable evidence can be set aside in second appeal. A. I. R. 1926 Oudh 37; A. I. R. 1926 Pat. 187; 28 I. C. 555; 30 I. C. 505; 38 I. C. 62; 38 I. C. 586; 42 I. C. 282. Where an Appellate Court fails to come into close quarters with the evidence, the findings must

(c) a substantial error or defect in the procedure provided by this Code or by

be held to be vitiated and there must be a re-hearing of the appeal. (1920) M.W.N. 163 = 53 I.C. 305 = 10 L.W. 525. See also 100 I.C. 306 = A.I.R. 1927 Mad. 493; 103 I.C. 486 = A.I.R. 1927 Nag. 166; A. I. R. 1924 Nag. 91. An unsatisfactory discussion of evidence, is not, like absence of evidence or disregard of it a ground for interference in second appeal. (1914) M.W.N. 833 = 1 L.W. 772. The mere fact that the Court of first appeal has not made special mention of a document which is a piece of relevant evidence is not sufficient to show that he has not considered it at all. 43 I.C. 857 = 3 Pat. L.W. 213; 42 I.C. 397 = 2 Pat. L.W. 183.

(4) SUFFICIENCY OF EVIDENCE.—A decision that there is no evidence to support a finding is a decision of law on which the Privy Council will interfere with the findings of fact of the Courts below. 41 Cal. 972 = 27 M.L.J. 80 (P.C.). See also 58 I.C. 482; 88 I.C. 584 = 1925 Cal. 1133. Judgment based on opinions of experts open to challenge in second appeal. 21 A.L.J. 811 = 75 I. C. 502. The mere question of sufficiency of the evidence adduced to establish a custom is not a ground of second appeal. 25 C.L.J. 613 = 21 C. W.N. 972 = 41 I.C. 959 = 45 C. 285; 69 I.C. 800. Even from a finding of fact a second appeal may be taken if the finding is not supported by any evidence on record. 30 I. C. 375; 65 I. C. 398. The sufficiency or insufficiency of evidence as proof of title cannot be debated in second appeal. 9 I. C. 427; but a finding on conjectures and presumptions can be questioned in second appeal. 8 Lah. L. J. 485 = 97 I. C. 241 (2) = 127 Punj. L. R. 721 = A. I. R. 1926 Lah. 659; 7 L. R. 104 (Rev.).

(5) MISREADING OF EVIDENCE.—The misapprehension of evidence is no ground for a second appeal. 21 I.C. 393; but see A.I.R. 1926 Lah. 541. Where a finding of fact is arrived at as a result of a complete misreading of a document a second appeal is competent. 42 I. C. 218. A.I. R. 1926 Pat. 725.

(6) EXCLUSION OF EVIDENCE.—The High Court is not empowered to interfere in second appeal with an order of the Lower Appellate Court rejecting an application made to it for the admission of additional evidence. 42 Mad. 737 = 37 M. L. J. 125. Where evidence is excluded by an Original Court and such exclusion is not objected to in the first Appellate Court such objection cannot be allowed in second appeal. 16 I.C. 213; 12 I.C. 751 = (1911) 2 M.W. N. 495. The fact that the lower appellate court improperly refused to admit fresh evidence in appeal is not a ground upon which a second appeal is maintainable (1927) M.W.N. 63 (1) = 99 I. C. 669 (1) = 38 M.L.T. (H. C.) 24. A finding of fact after ignoring a piece of evidence which is really admissible can be attacked in second appeal. 91 I.C. 1026 = A.I.R. 1926 Cal. 603.

(7) CONSTRUCTION OF DOCUMENT.—The question of the construction of document is a question of law, on which the High Court can entertain a second appeal. 43 Cal. 1104 = 31 M.L.J. 745 (P.C.); 4 Pat. L.T. 627; 45 M.L.J. 663. See also A.I.R. 1926 Oudh 131; but see A.I.R. 1926 Lah. 21; A.I.R. 1926 Pat. 49; 5 O.W.N. 275 = A. I. R. 1928 Oudh 269. A question of how a document should be construed if it is a document

of title and not merely a piece of evidence in the case is a question of law. 52 I.C. 119; 48 A. 588 = A.I.R. 1926 M. 542; A.I.R. 1926 Bom. 493; 5 Pat. L.J. 251. See also A.I.R. 1926 Mad. 652 = 93 I.C. 307 = 24 L. W. 88. A wrong construction of a document coupled with a wrong inference from certain facts constitute an error of law where there is no other evidence accepted by the Court. 55 I. C. 366 = 18 A. L. J. 195. Finding based on construction of or inferences drawn from documentary evidence cannot be questioned in second appeal. 99 I. C. 183; 100 I.C. 631; 104 I.C. 760. See also A. I. R. 1926 All. 75. A finding based on a recital of consideration in a mortgage deed is conclusive in second appeal. 21 I.C. 841. The misconstruction of a document which is the foundation of a suit is no doubt a question of law but the misconstruction of a document which is alleged to contain an admission, that is to say a misappreciation of the meaning and effect of an admission is not a question of law which can be raised in second appeal. 35 C.L.J. 182 = 68 I. C. 1003. Construction of document in case of a deed open to one of two constructions is question of law. 65 I.C. 580 = 1922 Lah. 240; but see A.I. R. 1926 Lah. 672. The question whether the parties to a deed of transfer intended that certain property should pass under the deed is one of fact and cannot be agitated in second appeal. 63 I. C. 746. Also question regarding whether a lease confers a heritable right or not see 13 O.L.J. 565. The construction of a deposition is what the Court thinks is proved by it and it is wrong to speak of it as a construction so as to make it a question of law. 63 I.C. 575. Where the lower Court arrives at a finding of fact by a wrong construction of the pleading and without any evidence, the finding is liable to be questioned in a second appeal. 56 I.C. 466; 3 C.W.N. 460 = 94 I.C. 779 = A. I. R. 1926 Oudh 353; 69 I. C. 800. Where a document leaves part of the subject-matter ambiguous, and evidence is let in to remove the ambiguity, the interpretation becomes a question of fact. 103 I.C. 255; A.I.R. 1927 All. 689.

OTHER ILLUSTRATIVE CASES.—Where the appellant expressly abandons a point in the Court below he ought not to be allowed to take it in second appeal. 69 I.C. 44 (1). As to abandonment by tenant of holding, see 4 Pat. 838. Abandonment is a finding of fact. 32 I. C. 355. 91 I.C. 493 = A.I.R. 1926 Cal. 751. The question of acquiescence is a matter of legal inference to be drawn from the facts proved in the case and can be taken up in second appeal. 41 I. C. 927; 36 I. C. 700; 82 I. C. 309; 73 I. C. 137.

ADVERSE POSSESSION.—Where the question of adverse possession is one of inference from documents the concurrent findings of the Indian Courts may be upset by Privy Council as the question was not one of fact. 42 All. 152 = 38 M.L. J. 259 (P.C.). See also 87 I.C. 1021. The question of adverse possession is a mixed question of fact and law. 26 C. W. N. 890; 40 I. C. 420; 75 I. C. 672; 71 I.C. 762 = 4 Lah. L.J. 309 and cannot be allowed to be pleaded for the first time in appeal. 102 I. C. 476 = A. I. R. 1927 Lah. 522; but see also 04 I.C. 38 = A. I. R. 1926 Cal. 881 A.I.R. 1926 Lah. 482.

any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits.

BENAMI.—A question of benami of fraud is not a question of pure facts; it is a mixed question of fact and law. 43 I. C. 49=3 Pat. L. W. 339. *Bona fides*, finding as to is question of fact. 49 M. L. J. 549; 7 Lah. L. J. 358.

BURDEN OF PROOF AND PRESUMPTION.—The question of onus is not necessarily and in all cases one of law. How much or what evidence is sufficient to discharge the onus is a question which will depend upon the weight to be attached to the evidence adduced. 12 I. C. 691=13 Bom. L. R. 1021. *See also* 9 I. C. 4. The adjustment of the burden of proof in a case is a question of law. 43 I. C. 478; 59 I. C. 973=12 L. W. 170; 58 I. C. 982=1 Lah. 429; 64 I. C. 901=2 Lah. 249; 7 L. R. 230 (Rev.)=94 I. C. 944=24 A. L. J. 513=A. I. R. 1926 All. 453. A fact resulting from a finding on wrong burden of proof and disregard of evidence on record is not binding in second appeal. 2 Pat. L. T. 919=76 I. C. 347. After evidence was given by both sides and the Lower Court has preferred that of one side, the objection as to wrong shifting of burden of proof is groundless in second appeal. 38 I. C. 817=1 Pat. L. W. 194. The question whether the presumption of the correctness of the Record of Rights has been rebutted in a particular case is more a question of fact than of law. 65 I. C. 527; 45 I. C. 65=22 C. W. N. 449. Failure to invoke a presumption under S. 114, Evid. Act, is ground for second appeal. 25 A. L. J. 833.

COSTS.—A second appeal on a question of costs can be maintained. 2 Lah. L. J. 310=64 I. C. 962; *see also* 27 Punj. L. R. 391, 100 I. C. 598, but *see* 93 I. C. 1008=A. I. R. 1926 All. 419.

COURT-FEE.—A second appeal lies from an order of Appellate Court rejecting a memo. of appeal from non-payment of deficit Court-fees if there is an error in calculating the amount of Court-fees. 51 I. C. 114.

CUSTOM.—Question as to the existence of an ancient custom are questions of mixed law and fact. 40 Mad. 709=33 M. L. J. 1 (P.C.). On this point, *see also* 27 Bom. L. R. 880=88 I. C. 891; 88 I. C. 752=23 A. L. J. 932; 93 I. C. 363, A. I. R. 1926 All. 215 20 A. L. J. 57=64 I. C. 956. Whether the facts found in any given instance prove the existence of the essential attributes of a custom is a question of law which may be discussed in second appeal. 21 C. W. N. 972=45 Cal. 285; 38 M. L. J. 275=55 I. C. 380; 41 Mad. 374=34 M. L. J. 104; 40 Mad. 1108=32 M. L. J. 237. A finding of custom cannot be challenged in second appeal on the ground that the evidence is insufficient. 35 I. C. 630; 102 I. C. 596=A. I. R. 1927 All. 605; 100 I. C. 605=A. I. R. 1927 All. 471; 99 I. C. 292=A. I. R. 1927 All. 201; 4 O. W. N. 1229; 7 L. R. 94 (Rev.)=91 I. C. 942=13 O. L. J. 121=A. I. R. 1926 Oudh 143; but *see* 3 O. W. N. (Supp.) 10=94 I. C. 987=A. I. R. 1926 Oudh 460; A. I. R. 1926 All. 153. The question whether a custom is reasonable or not is a question of law and not of fact. 29 I. C. 312=19 C. W. N. 1188. When there is legally insufficient evidence to prove a custom, a finding of the existence of custom may be questioned in second appeal, but when the insufficiency depends on the weighing of the evidence it cannot be

contested in second appeal. 9 I. C. 839 (29 Mad. 24; 28 All. 98, ref.); 70 I. C. 858=(1923) Lah. 53; 3 Lah. 344. *See also* 92 I. C. 126=A. I. R. 1926 Oudh 211. A decision as to the existence of a custom is a question of fact, but an appellant in second appeal is entitled to show that the evidence even if true, does not establish the customs. 14 I. C. 12. Whether a wakf is established by user is a question of fact. 100 I. C. 626=A. I. R. 1927 All. 377.

DAMAGES.—When the amount of damages is fixed arbitrarily, it cannot be taken as an amount arrived at on a finding which is binding on the High Court. 1923 All. 199. The amount of damages is a question of fact. 9 I. C. 984; (34 All. 333; 3 C. L. J. 140, ref.).

DEDICATION.—The question whether certain property if wakf property is a question of law at any rate a mixed question of law and fact. 17 I. C. 303=16 O. C. 76.

DEFAMATION.—The question whether a writing is defamatory of the plaintiff the questions of fair comment, justification, *bona fides* and the quantum of damages awardable to the plaintiff in an action for libel, are all questions of fact on which the High Court in second appeal, is bound by the findings of the Lower Appellate Court. 32 M. L. J. 392. Finding of fact based only on the local investigation is not sustainable. 1923 Lah. 208 (1). Even if the judgment of the Appellate Court was meagre and not in conformity with the rule, unless a substantial error affecting the merits of the case is shown, High Court will not interfere. 31 M. L. J. 870=38 I. C. 26. Where a judgment is of a most unsatisfactory and perfunctory character, the finding of fact contained in it can be challenged in second appeal. 70 I. C. 853=1922 P. 503; 51 I. C. 385; 2 Pat. L. W. 12. Defective procedure and error of law. 85 I. C. 958=22 L. W. 352.

DISCRETION.—Where two Courts fully acquainted with the case exercise a discretion, the High Court will not interfere with the exercise of such discretion. 54 I. C. 731; 13 I. C. 943=9 A. L. J. 15; 11 I. C. 736=15 C. W. N. 1083; 66 I. C. 147=1922 Lah. 355. If Court's discretion to extend the limitation for an appeal under S. 5, Limitation Act, has not been exercised in a legal manner the High Court is entitled to reverse the decision arrived at. 52 I. C. 225=4 Pat. L. R. 381. Where discretion is exercised arbitrarily on a question of costs a second appeal will lie. 100 I. C. 598. Discretion under S. 90 of Evid. Act. *See* 93 I. C. 13=A. I. R. 1926 Oudh 362. Where a discretion is given to adopt one of two methods to enforce the attendance of a witness in O. 16, R. 10. High Court will not interfere with its exercise. 101 I. C. 257 (2)=A. I. R. 1927 Lah. 424.

DOCUMENT.—Rejection of document not produced at first hearing, not interfered with in second appeal. 90 I. C. 602; A. I. R. 1926. Cal. 106.

DOWER.—A finding as to the amount of dower is a mixed question of fact and law. 89 I. C. 672.

EASEMENT.—Failure to draw inference of easement is question of law. 85 I. C. 81=

(2) An appeal may lie under this section from an appellate decree passed *ex parte*.

Second appeal on no other grounds, **101. [S. 585.]** No second appeal shall lie except on the grounds mentioned in section 100.

102. [S. 586.] No second appeal shall lie in any suit of the nature cognizable by Courts of Small Causes, when the amount or value of the subject-matter of the original suit does not exceed five hundred rupees.

1925 Nag. 270 ; 7 N. L. J. 232 = 85 I. C. 84 = 1925 Nag. 168.

LANDLORD AND TENANT.—A finding as to the status of a tenant is a finding of fact and should not be interfered with in second appeal except on the ground of some clear error of law. 46 I. C. 351. *See also* 40 I. C. 513 = 21 C. W. N. 809 ; 87 I. C. 757 = 1925 Cal. 1238 ; 1925 Pat. 294 ; 85 I. C. 636 = 1925 Cal. 761 ; A. I. R. 1926 Cal. 264 (Recognition of tenancy) ; 41 C.L.J. 135 = 29 C. W. N. 500 = 86 I. C. 316 = 1925 Cal. 632 ; A. I. R. 1926 Cal. 350 (question of uniform payment of rent). *See also* 6 Pat. 698 = 105 I. C. 633 = A. I. R. 1927 Pat. 209. The question whether a tenancy is one at will or of permanent nature on certain given facts is mixed question of law and fact. 44 Cal. 119 = 35 I. C. 605 ; but *see* 92 I. C. 899 (2) = A. I. R. 1926 Cal. 592. The nature of a tenancy is a question of law when it turns on the construction of some written instrument. 20 I. C. 363 = 17 C. W. N. 1073. The question whether a legal right, such as the right of tenant in the land, has determined is a question of law. 15 I. C. 857. Which of the heirs represent the tenancy is a question of fact. 91 I. C. 748 = A. I. R. 1926 Cal. 517.

LEGAL NECESSITY.—The finding as to the existence of necessity is a finding of fact and can not be impugned in second appeal. 1923 Lah. 669 ; 70 I. C. 815 ; but *see* 100 I. C. 943 ; 96 I. C. 1006 = A. I. R. 1926 Nag. 486.

LEGITIMACY.—Question of legitimacy cannot be gone into in second appeal, it being a question of fact. 2 Lah. L. J. 505.

MISJOINER.—A finding of fact on a question of misjoinder arrived at on evidence cannot be disturbed in second appeal. 33 I. C. 118 = (1916) 1 M. W. N. 9.

NON-JOINDER.—If an objection as to non-joinder of parties is not taken in the first Appellate Court, it cannot be taken for the first time in second appeal. 44 Mad. 344 = 40 M. L. J. 282. Notice to quit validity of notice to quit is one of law. 29 C. W. N. 620 = 87 I. C. 708. The question of negligence is very largely a question of fact. 71 I. C. 346 = 1922 Cal. 317.

Sec. 102. SCOPE OF SECTION.—The provisions of S. 42 are controlled by those of this section when a Court of Small Causes transfers a decree for execution to another Court. 25 C. 872. *See also* 26 A. 358 (360) ; 50 I. C. 629 ; 32 Bom. 356 ; 2 Bom. 248 ; 46 All. 73 = 1924 All. 263 ; 103 I. C. 344. The words " of a nature cognizable " seem to have reference to the subject-matter of the suit as distinguished from the amount of the claim. 23 M. 547 (F. B.) : *overruling* 22 M. 229. If a prayer for a declaration is withdrawn pending suit, it does not become

one of a small cause nature. 16 M. L. J. Recent Cases. 46. The mere fact that a question of title is raised does not prevent the suit from being one of a small cause nature. 6 C. W. N. 687 ; 24 C. 557 ; 36 I. C. 202 = 4 L. W. 245. The value of the subject-matter of the suit must be determined by reference to the value put by the plaintiff not only for fiscal purpose but also for purposes of jurisdiction. 27 A. 202 ; 32 I. C. 998 ; 13 I. C. 493 ; 12 N.L.R. 47. The section assumes the original character of the suit rather the character it may assume by reason of the findings of the lower Courts. 6 Bom. L.R. 781 ; 50 I. C. 629 ; 32 Bom. 356 ; 2 Bom. 248 ; (1911) 2 M. W. N. 587 = 13 I. C. 174 = 22 M.L.J. 47. The suit as originally brought must be looked to. 13 I. C. 493. But *see* 34 I. C. 909 ; 41 Bom. 367 = 38 I. C. 881. A suit of a nature cognizable by a Small Cause Court does not cease to be so because the Court in which it was instituted as a small cause suit returned the plaint to be filed on the regular side. 15 M. 98 ; *See also* 24 C. 557 ; 65 I. C. 7 (20 All. 480 ; 12 A. L. J. 1032. (Pol.) ; 57 I. C. 557 = 23 O. C. 117 ; 107 I. C. 193 (2) (small cause suit tried as regular suit. *See also* 12 ; I. C. 957 = 10 M. L. T. 500). A suit for the recovery of rent other than house rent is a suit of the nature cognizable in Courts of Small Causes—4 M. 419 (F. B.) ; 56 I. C. 845 ; 1922 Pat. 154 ; 1922 Pat. 184. As to suits for rent, not being cognizable by S. C. Court, *See also* 34 M. L. J. 104 = 41 Mad. 374 (F. B.). (*Thundu varam* payable to mirasidar) ; 14 L.W. 349 = 42 M. L. J. 118 (suit for arrears of *kattubadi* is of Small cause nature) ; 17 I. C. 704 = 23 M. L. J. 517 (suit for rent, where there is only an incidental prayer for declaration). No second appeal lies from a decision in a suit for mesne profits when the value of the suit is less than Rs. 500. 24 M. 118. What must be looked at is not the shape in which the case comes up to the High Court, but the shape in which the suit was originally instituted in the Court of First Instance. 11 A. 13 *See also* 35 M. L. J. 377 = 45 I. C. 11. The section does not apply to appeals from orders. An order on appeal from a decree in an original suit of the nature cognizable in a Court of Small Causes, remanding the suit for retrial, is appealable. 3 A. 18 (F. B.). When the original suit is of the nature cognizable in Courts of Small Causes and the subject does not exceed Rs. 500 in value, no second appeal will lie in respect or an order made in execution proceedings relating thereto. 12 A. 579 ; 18 A. 481 (F. B.) ; 12 M. 116. *See also* 46 All. 73 = 1924 All. 263 ; 3 Lah. 141 = 1922 Lah. 290 ; 37 M.L.J. 303 = 53 I. C. 408 ; 29 I. C. 740 = 11 N. L. R. 99 (section applies no less to orders in execution

103. In any second appeal, the High Court may, if the evidence on the record

Power of High Court to determine issues of fact.

is sufficient, determine any issue of fact necessary for the disposal of the appeal [which has not been determined by the Lower Appellate Court, or which has been wrongly determined by such Court by reason of any irregularity, omission, error or defect, such as is referred to in sub-Section (1) of Section 100]¹.

*Appeals from Orders.***104. [S. 588, para. 2.]** (1) An appeal shall lie from the following orders, and

Orders from which appeal lies.

save as otherwise expressly provided in the body of this Code or by any law for the time being in force from no other orders :—

than to the decree itself); *see also* on this point 46 I. C. 82; 18 I. C. 245; 43 I. C. 15=1917 Pat. 80; 34 C. L. J. 477.

THE FOLLOWING ARE SUITS COGNIZABLE BY SMALL CAUSE COURT.—A suit for compensation for money realised by the defendants from the actual occupants of land, who are stated to be plaintiff's tenants. 24 C. 557; Suits for recovery of money under Ss. 69 and 70 of the Contract Act. 15 C. 652. *See also* 40 I. C. 578=15 A. L. J. 534; 34 I. C. 697=23 C. L. J. 557 (Suit for rent or damages. *See also* 33 I. C. 346=22 C. L. J. 564.) Suit to recover *kattari* or tax for homestead, 1 Pat. L. W. 541=39 I. C. 949. Suit against Government, for less than Rs. 500 for repairs made. 23 M.L.J. 732=37 Mad. 533. Suit against District Board President for damages. 46 Mad. 808=45 M. L. J. 125. Suit for damages for wrongfully cutting and carrying off trees. 36 I. C. 202=4 L. W. 245. Suit for damages for removal of trees. 27 C.W.N. 469=1923 Cal. 568. Suit for refund of money paid under S. 73 as rateable distribution. 21 A.L.J. 248=45 All. 359. *But see also* 13 I. C. 907=15 C. L. J. 49. Suit for money forceably taken. 57 I. C. 505. For profits of plaintiffs wrongfully appropriated. 31 I. C. 797. Suit for declaration of title to moveables. 21 I. C. 638; 11 A. L. J. 599. Suit for money due. 17 I. C. 522. Suit to recover deficiency from defaulting purchaser. 45 Bom. 223. Suit for recovery of compensation for want of title to lands sold. 100 I.C. 327=A. I. R. 1927 Rang. 90. Suit for share of profits of an office received by co-sharer. 37 Bom. 700. Suit for price of fish taken from a tank. 68 I. C. 626=1923 Cal. 321. Suit for grazing fee. 59 I. C. 595=32 C.L.J. 83. Suit for recovery of price of coal. 59 I. C. 188. Suit for recovery of money advanced in partnership business with profits. 51 I. C. 435. (Unnecessary prayer for declaration does not alter the nature of suit. 41 I. C. 627.) Suit for damages for infringement of monopoly. 69 I. C. 431=1923 L. 244. Suit on agreement to share proceeds of tenancy. 67 I. C. 841. Suit for interest on mortgage money. 66 I.C. 285. "Choutayi" dues are not cess within Art. 13 of Sch. II. 38 M. L. T. (H.C.) 385=(1927) M. W. N. 748=103 I. C. 120 (1)=A.I.R. 1927 Mad. 670=52 M. L. J. 706. *So also* swatantrams are not cess. (1927) M. W. N. 826=26 L. W. 676=39 M.L.T. 490=53 M.L. J. 727.

THE FOLLOWING ARE NOT SUITS COGNIZABLE BY SMALL CAUSE COURT.—A suit under O. 21, R. 93 is not of a nature cognizable by a

Small Cause Court. 11 M. 269. But a suit for the profits of land wrongfully received by defendant is. 25 B. 625. Also a suit for rent containing a prayer for the enforcement of a charge is not Small Cause one. 26 M. 308. Also a suit to recover defendant's share in the land revenue paid. 26 B. 437. Suit for recovery of presents, made on promise of marriage is not Small Cause suit. 14 I. C. 837=5 Bur. L. T. 57. Suit for *haq chaharum* 63 I. C. 202=19 A. L. J. 719. Suit for contribution 32 I. C. 200=23 C. L. J. 125. Suit for damages in respect of water flow. 21 I. C. 393. Suit for declaration of title to immoveable property (hut) 9 I. C. 1.

Sec. 103.—¹ Substituted by Act VI of 1926, S. 2. This section is new and supersedes the rulings in 9 A. 147 (F.B.); 9 A. 26 (30).

POWERS OF HIGH COURT.—Findings called for by High Court not returned—Power of High Court to find on the evidence. 43 Mad. 567=38 M.L.J. 476=47 I.A. 76 (P.C.) (On appeal from 24 M.L.J. 571). *Also* 99 I.C. 189=A.I.R. 1927 Cal. 1; 29 Bom. L.R. 327=51 Bom. 258=101 I.C. 416=A.I.R. 1927 Bom. 228; 8 P.L.T. 74=102 I.C. 371=A.I.R. 1927 Pat. 167. When the lower Court has not framed the appropriate issue, the Second Appellate Court may raise and decide it itself if there is sufficient evidence on record for deciding it. 47 Cal. 107=46 I.A. 140 (P.C.). When the Lower Court has not given any finding on a question of fact the High Court can under S. 103 arrive at a finding on the evidence on record—28 I. C. 673=1 I.W. 249. *See also* 47 I. C. 950; 3 Pat. L.T. 303. To avoid gross miscarriage of justice resulting from the omission by the Lower Appellate Court to determine any issue of fact or to come to definite conclusion on a set of facts the High Court has the power of determining the issue left undetermined by the Lower Appellate Court on the evidence on record, or of remitting the case to the lower court for a finding on that issue with liberty to the parties to adduce additional evidence. 40 I.A. 286=45 Mad. 586=43 M.L.J. 640. (P.C.). Where the judgment of a court of appeal is reversed on a question of custom or usage on a preliminary point, the High Court should not take on itself to examine the evidence as to usage but should remand the case for disposal on the merits by the Lower Appellate Court 40 Mad. 1108=32 M.L.J. 237.

Sec. 104. SCOPE AND APPLICABILITY OF SECTION.—Where a court is seized with a matter under a particular rule and an order thereunder is appealable, then the order actually made by the Court in that matter is also appealable.

- (a) an order superseding an arbitration where the award has not been completed within the period allowed by the Court ;
- (b) an order on an award stated in the form of a special case ;
- (c) an order modifying or correcting an award ;
- (d) an order filing or refusing to file an agreement to refer to arbitration ;
- (e) an order staying or refusing to stay a suit where there is an agreement to refer to arbitration ;
- (f) an order filing or refusing to file an award in an arbitration without the intervention of the Court ;
- [(ff) an order under section 35-A ;] ¹
- (g) an order under section 95 ;

45 Bom. 99=22 Bom. L. R. 1126. See also 3 Lah. L.J. 463. It was not intended by S. 104 (2), C.P.C., to override the express provision of the Letters Patent or to take away by implication a right of appeal conferred thereunder. 3 Lah. 188 ; (14 A. 226 ; 39 A. 191 ; 9 C. 482 ; 11 A. 375 ; 26 C. 361 ; 25 M. 555 *Ref.*) Execution sale before new Code. Alienation to set aside after new code—Right of appeal—No vested right in procedure—16 I. C. 436.

(1) Cl. (ff) was added by Act IX of 1922.

Cl. (g). Supersedes. 22 A. 81 and 24 Mad. 62. An appeal lies under S. 104 (g) from an order refusing relief under S. 95 as well as from one granting such relief. 49 I. C. 86=9 I. W. 69. An appeal lies against an order awarding compensation for improper attachment. 11 I. C. 349=21 M. L. J. 460.

Cl. (h). Does not apply to order as to penalties under Stamp Act—5 Cal. 311. Whether the decision of a question of fraud before the execution and conduct of an execution sale brings the case within the scope of S. 47, C. P. C. 40 I. C. 246=25 C. L. J. 399.

AWARD AND ARBITRATION.—S. 104 (1) (f) applies to arbitrations under the Code. 5 Bur. L. T. 155=17 I. C. 902. See also 1 Rang. 265=1923 Rang. 199 ; 22 I. C. 690 ; 73 I. C. 820 ; 125 P. R. 1912. Neither clause (d) nor (f) sanctions an appeal against an order of a Court in arbitration proceedings. 117 P. R. 1916=34 I. C. 192 ; see also 39 I. C. 508=62 P. R. 1917. An agreement to refer to arbitration made by certain parties to the suit and the order thereon is appealable under the new Code as under the old Code. 36 Mad. 353=21 M. L. J. 990. Appeal from order rejecting application for reference to arbitration. 27 I. C. 721. The decision of a Court on an application to file a private award, part of it being on a matter outside the scope of the arbitration, is an "order" and it is open to first appeal and not to a second appeal. 66 P. R. 1915=31 I. C. 80 ; see also 47 I. C. 171 ; 60 I. C. 590. An order refusing to file an award made under the Arbitration Act, is appealable. 43 All. 348 ; 47 I. C. 171=154 P. W. R. 1918 ; 60 I. C. 590 ; see also 7 L. B. R. 277=25 I. C. 7=8 Bur. L. T. 44 (Order of Appellate Court setting aside order of the Lower Court refusing to file award made without intervention of Court—No appeal.) Appeal lies from order modifying award. 15 I. C. 519=17 C. W. N. 617. Order refusing to set aside award is not appealable. 46 I. C. 687=45 C. 502. An order refusing to set aside an *ex parte* decree passed in accordance with an award

is appealable. 38 All. 297.

OTHER CASES WHERE NO SECOND APPEAL LIES.—No second appeal lies against an order of a Small Cause Court. 36 M. L. J. 435 (26 I. C. 359, *diss.*) An order passed in execution of a decree under S. 9 of the Specific Relief Act is not appealable. Also an order passed in execution of such a decree directing the arrest of the judgment-debtor. 39 I. C. 379=18 P. L. R. 1917 ; See also 39 I. C. 375. No second appeal lies from an order of the Appellate Court against an order passed under O. 21, R. 72 (3). 28 I. C. 270=13 A. L. J. 351 ; see also 39 All. 191=39 I. C. 460. No appeal lies from an order passed in appeal remanding for trial on merits a case in which the plaintiff had been returned for presentation. 33 All. 479. There is no appeal from the order of an Appellate Court restoring suit dismissed for want of process fee. 9 I. C. 484. Orders under O. 21, R. 90 setting aside or refusing to set aside sale on appeal by the High Court deal finally with the rights of parties and are appealable to the Privy Council. 40 Cal. 635=40 I. A. 140 (P. C.) ; 2 Pat. L. T. 401=6 Pat. L. J. 319. There is no second appeal against an appellate order confirming an order refusing to set aside a sale on the ground of fraud. 14 I. C. 53=17 C. W. N. 524. See also 15 I. C. 679=16 C. W. N. 1051. No second appeal lies from an appellate order disallowing an application under O. 21, R. 89. 38 Cal. 339=15 C. W. N. 844 ; 107 I. C. 488=1928 Lah. 444 ; 45 Cal. L. J. 557 (No second appeal from order under O. 21, R. 90). Order of District Court in appeal in terms of compromise is final and is not appealable. 3 Lah. 175. An order in appeal setting aside the order of the lower Court returning the plaint for presentation to the proper Court is not open to Second Appeal nor is such order open to revision, though it may be erroneous in law or in fact. 43 All. 334. No appeal lies against an appellate order setting aside an order of the Court of first instance refusing to set aside an *ex parte* decree. 9 I. C. 55=9 M. L. T. 269.

MISCELLANEOUS.—Though a surety for failing to satisfy a decree is arrested under S. 104, Cl. (h) yet he is given a right to appeal under Ss. 42, 47 and 145 of C. P. C. 30 I. C. 684=19 C. W. N. 1085. An appeal lies against an order refusing to take action under O. 39, R. 2 (3). 39 Mad. 907=30 M. L. J. 523. An appellate Court under this section has no power to stay execution of decrees. 102 I. C. 11=A. I. R. 1927 Lah. 494.

¹ S. 104 (ff) added by Act IX of 1922.

(h) an order under any of the provisions of this Code imposing a fine or directing the arrest or detention in the civil prison of any person except where such arrest or detention is in execution of a decree ;

(i) any order made under rules from which an appeal is expressly allowed by rules.

[Provided that no appeal shall lie against any order specified in cl. (ff) save on the ground that no order, or an order for the payment of a less amount, ought to have been made.]¹

(2) No appeal shall lie from any order passed in appeal under this section.

105. [S. 591.] (1) Save as otherwise expressly provided, no appeal shall lie from any order made by a Court in exercise of its original or appellate jurisdiction ; but, where a decree is

Other orders. appealed from, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal.

¹ S. 104 (Proviso) added by Act IX of 1922.

Sec. 105. SCOPE OF SECTION.—Sub-S. (2) is new and supersedes the ruling in. 12 A. 510 (F. B.); 18 M. 421; 12 C. 45; 14 B. 232. See 10 I. C. 514 = 15 C. W. N. 830; as to the meaning of words "Decision"; see 90 I. C. 180 = 1925 All. 610 (F. B.); "Affecting the decision of the case, see 41 C. L. J. 136 = 1925 Cal. 711; 47 All. 555 = 23 A. L. J. 444. The policy of the Legislature in enacting S. 105 was to give finality to orders of remand. 72 I. C. 588 = 1923 Cal. 385; 37 I. C. 844; 89 I. C. 1009; 22 L. W. 460 = 1925 Mad. 1019; 68 I. C. 608 = 1925 Mad. 916; 47 All. 853 = 1925 All. 768. There is no appeal from an order setting aside an *ex parte* decree. 51 Bom. 495 = 103 I. C. 262 = 29 Bom. L. R. 925 = A. I. R. 1927 Bom. 415 but the order can be questioned in the appeal from the subsequent decree. 5 Rang. 80 = 102 I. C. 379 = 1927 Rang. 150. But see also 85 I. C. 468 (469) = 1925 Oudh 27. Remand order not conclusive on points not specially decided therein beyond possibility of revision. 23 A. L. J. 656 = 1925 All. 566. (Order in pending suit superseding award can be questioned in appeal from decree.)

Sub-S. (2) only prevents a party from agitating in an appeal a question which he could have objected to in the appeal against an order. 29 M. L. J. 772; 48 Mad. 267 = 47 M. L. J. 710. Order setting aside abatement of suit is not final and can be attacked in appeal against final decree. 47 All. 555; 52 Cal. 472. Plea not raised in Appellate Court—Appeal. 35 I. C. 571. The sub-section does not to apply to appeals to the Privy Council. 33 All. 391; 40 C. 635 (P. C.). The section does not restrict Art. 15 of the Letters Patent. 25 M. 525 and embodies so much of the principle contained in. 7 M. I. A. 283; 10 M. I. A. 340; 10 M. I. A. 413. The phrase "affecting the decision of the case" in S. 105 means affecting the decision of the case with reference to its merits. 3 Lah. L. J. 59 = 59 I. C. 676. But see 12 All. 200; 22 Cal. 981. 9 C. W. N. 584 at p. 587. Error, defect or irregularity within the meaning of this section, mean error, defect of irregularity in procedure or in law, *i.e.*, affecting the decision on the merits 35 I. C. 209 = 14 A. L. J. 610. But see also 12 All. 200; 25 All. 280. Unless the objection is taken in the memorandum of appeal it is not open to the appellant at the hearing of an appeal, to question the validity of the order. 15 A. 119. See also 20 A. 370; 18 A. 19 (F. B.); 14 B. 232 and 22 A. 366.

INTERLOCUTORY ORDERS.—The principle of S. 105 is applicable not only to decrees and inter-

locutory orders but also to orders and interlocutory orders leading to the final decree. 35 I. C. 74 = 4 L. W. 411. Notwithstanding the dismissal of an appeal against an interlocutory order it is open to a party to complain of any defect or irregularity in the order in an appeal from the final decree itself. 44 All. 533 = 20 A. L. J. 349 = 1922 All. 118. But see also 33 I. C. 208. A plaintiff does not lose his right to raise a question of the propriety of an intermediate order with which he has complied, for the right under S. 105, C. P. C., is not a qualified right. 53 I. C. 644 = 1 L. 54.

REMAND ORDER.—Where remand was ordered on one of the two points, any one of which would have been sufficient to dispose of the case, the remand order must be deemed to have confirmed the decision on the other point 26 C. W. N. 739 = 74 I. C. 597 = 16 L. W. 447 = 1922 P. C. 51. (P. C.) Where a decree after remand is appealed against, the appellant cannot question the correctness of the remand order. 63 I. C. 845; 46 I. C. 816; 65 I. C. 745; 2 Lah. 252; 1923 Rang. 29; 10 I. C. 514 = 15 C. W. N. 830; (32 C. 1023 = 12 C. W. N. 590 *fol.*, 30 A. 479. *diss.*, 32 M. 83 *dist.*) Remand order, whether can be ignored. 2 Pat. L. J. 669. The court remanding the case after deciding certain points can afterwards refuse to re-consider those issues. 20 C. W. N. 43; see also 46 I. C. 922. Under S. 105 (2) a Lower Court cannot treat an order of remand of the appellate court as a nullity owing to the want of jurisdiction in the latter to pass it. 47 I. C. 886. Where on appeal by the plaintiff the case is remanded on the ground that the burden of proof was on the defendants and not on the plaintiff section 105 (2) precludes the defendants from questioning the correctness of that decision in second appeal. 1923 Nag. 283. Right of appeal against a remand order is unaffected by the disposal of the suit on remand before institution of the appeal. 14 I. C. 673 = 8 N. L. R. 42. (12 All. 510; 3 A. L. J. 40 *rel.*) A Court hearing an appeal against an order of remand has power not only to decide whether the order of remand is in accordance with law or not, but also whether the decision is correct or not and to dispose of the suit accordingly. 15 I. C. 181 = 15 O. C. 33; 16 A. 252; 3 A. 675; 5 C. 144; 20 M. 152. The reversal of the previous order has the effect of nullifying the final order. 37 Mad. 29 = 21 M. L. J. 1063.

MISCELLANEOUS.—Under O. 43, R. 1 (d), an appeal lies against an order refusing to set aside an *ex parte* decree but no appeal lies against an order setting aside such a decree—31 I. C. 914 = 40 P. R. 1916. See also 34 I. C. 713; 12 I. C.

(2) Notwithstanding anything contained in sub-section (1), where any party aggrieved by an order of remand made after the commencement of this Code from which an appeal lies does not appeal therefrom, he shall thereafter be precluded from disputing its correctness.

106. [S. 589]. Where an appeal from any order is allowed it shall lie to the Court to which an appeal would lie from the decree in the

What Court to hear appeals.

suit in which such order was made, or where such order is made by a Court (not being a High Court) in the exercise of appellate jurisdiction, then to the High Court.

General Provisions relating to Appeals.

107. [S. 582, para. 1.] (1) Subject to such conditions and limitations as may be prescribed, an Appellate Court shall have power—

- (a) to determine a case finally;
- (b) to remand a case;
- (c) to frame issues and refer them for trial;
- (d) to take additional evidence or to require such evidence to be taken.

(2) Subject as aforesaid, the appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Code on Courts of original jurisdiction in respect of suits instituted therein.

108. [Ss. 587, 590]. The provisions of this Part relating to appeals from original decrees shall, so far as may be, apply to appeals—

Procedure in appeals from appellate decree and orders.

795=7 N.L.R. 162. Abatement—Order setting aside—Objection to, in an appeal from the decree can be made. 71 I. C. 587=1923 Lah. 230; 35 I. C. 209=14 A. L. J. 610 (25 All. 280 foll.) Decision as to legal representative—Appeal whether lies. 5 L. W. 266=31 I. C. 371. In an appeal against the decision passed on review, objection may be taken that the review was improperly granted. 1 A. 363. An appeal lies under this section from an order improperly adding a person as a plaintiff in a suit. 7 C. 148.

Sec. 106. A Sub-Court should not be deemed to be subordinate to the District Court, as regards suits the subject-matter of which exceeds Rs. 5,000. 3 M. L. J. 97. See also 17 C. 680.

Sec. 107. SCOPE OF SECTION.—This section is intended to affect only proceedings under the Code, and is not intended to extend the operation of any portion of the Limitation Act. 12 C. 590, 593 (F. B.). O 7, R. 10 applies to appeals by virtue of S. 107. 74 I. C. 93=1923 Nag. 310=8 N.L.J. 63. S. 107 does not confer powers not conferred by O. 41. 42 I. C. 972=7 L. W. 10.

POWERS OF APPELLATE COURT—ILLUSTRATIVE CASES.—An appellate Court is competent to examine any of the parties to ascertain the facts of the case, if necessary for the ends of justice. 47 All. 48=52 I. C. 289. Discretion to admit additional evidence should be exercised only in the interests of justice. 28 Bom. L. R. 1391 (P. C.). To refer to arbitration with the consent of parties matters in dispute in an appeal. 3 M. 78; 18 C. 507; 12 C. 173. Has power under Ss. 107 and 151 to add a new party in an appeal. 3 Pat. L. J. 409=46 I. C. 398=1918 Pat. 276. Non-joinder of absolutely necessary parties cannot be condoned in appeal. 87 I. C. 904=1925 Oudh 606. To add necessary party on appeal and remand the case. 18 C. W. N. 259=21 I. C. 928=26 M. L. J. 86 (P. C.) affirming. 35 Cal. 618. Where parties are transposed in appeal no question of limitation arises. 24 L. W. 826=99 I. C. 687=A. I. R. 1927

Mad. 204=52 M. L. J. 33. Has an inherent power to remand even cases not coming within O. 41. R. 23. 37 M. L. J. 536=53 I. C. 417 (44 Cal. 929; 36 Mad. 492, rel.). See also 43 Cal. 938=20 C. W. N. 547; 33 I. C. 576=18 Bom. L. R. 27. Can pass an order of remand by consent of parties in excess of its powers under the Code. 22 I. C. 41=(1914) M. W. N. 90. The powers of the High Court as to remand are not restricted by the provisions of O. 41, Rr. 23 and 25 and the High Court can always make an order of remand if the exigencies of the case require it. 43 Cal. 1001=20 C. W. N. 1192, see also 36 I. C. 813. No appeal lies against an order returning memorandum of appeal for presentation to proper court. Revision however is competent. 56 I. C. 865=2 Lah. L. J. 366. The appellate Court can return a plaint presented in a Court of a grade lower than that competent to try it, for presentation to the proper Court. 25 A. 174 (F. B.). Even where an appeal from the final decree lies interlocutory orders may be dealt with under the court's powers of superintendence and revision to avoid irreparable injury to the parties. 5 Pat. L. J. 550=1 P. L. T. 668. Appellate court can entertain application to have *ex parte* decree set aside, where the applicant is a party to appeal from the whole decree. 42 I. C. 972=7 L. W. 10. The appellate Court can pass an order which the Court of first instance might have passed. 39 Mad. 907=30 M. L. J. 523. Can award costs against the estate of a deceased plaintiff. 8 C. 440; 42 I. C. 451.

Sec. 108. The words "so far as may be" should be taken to mean so far as is consistent with the principles on which second appeals are admitted and determined. 7 M. 52 (53). See also 9 A. 147, 152 (F. B.). This section must be read with Art. 175. Cl. (c) of the Limitation Act—34 C. at p. 1023. In second appeal the High Court can bring on record persons who had been originally joined in the suit, but who were not joined in the Lower Appellate Court. 19 M. 151.

(a) from appellate decrees, and
 (b) from orders made under this Code or under any special or local law in which a different procedure is not provided.

Appeals to the King in Council.

109. [S. 595]. Subject to such rules as may, from time to time, be made by

When appeals lie to King in Council.

His Majesty in Council regarding appeals from the Courts of British India, and to the provisions hereinafter contained, an appeal shall lie to His Majesty in Council—

See also 28 M. 498. The Code does not require the appellant in second appeal to file a copy of the decree of the Court of first instance, 4 M. 419 (F. B.). An appellate Court can pass an interim order of injunction pending an appeal against the order of the Lower Court refusing it, 14 M. L. J. 491.

Sec. 109. SCOPE AND APPLICATION OF SECTION.—Leave to appeal can be granted only when the decree appealed against is a final decree, 13 M. 349. It does not mean the same thing as "final order" referred to in S. 109 (a). 26 C. W. N. 819=49 C. 967; (48 I. A. 31; 23 A. 227; 21 C. L. J. 281 *ref.*); The word "order" referred to in S. 109 (c) is intended to be not merely a final order but it is wide enough to include an interlocutory order. 26 C. W. N. 819=49 C. 967. As a general rule, leave ought not to be given in the case of interlocutory orders. 2 A. 65; 23 A. 220 (P. C.); 25 A. 629; *see also* 8 B. 548; 6 B. 260. The words "any decree or order" in S. 109 (c) do not mean any decree or order other than the decree or final order passed on appeal by High Court or by any other court of final appellate jurisdiction. 54 I. C. 828=6 O. L. J. 664. How far decision in scheme suit is appealable to Privy Council. *See* 41 C. L. J. 623=1925 P. C. 155=87 I. C. 313=49 M. L. J. 25 (P. C.). Appeal where High Court on appeal reverses the decision of the Court below. *See* 49 Cal. 560=43 M. L. J. 41=67 I. C. 124=49 I. A. 108 (P. C.). Leave to appeal will not be granted upon a mere question of practice, *e.g.*, an order for inspection. 9 Bom. H. C. R. 398. The fact that appeal lies under the Letters Patent does not preclude an appeal to the Privy Council. 7 B. L. R. 730. Consent decree is not appealable to His Majesty in Council. 5 Pat. L. J. 383. The certificate cannot be refused on the ground that no appeal lies against a judgment pronounced in accordance with an award and a decree following it. Sch. II, para. 21 (2) of the C. P. Code does not affect appeals to the Privy Council. 15 I. C. 2=15 O. C. 55. No appeal lies to the Privy Council against an order of the Calcutta High Court dismissing a Munsiff under cl. (2) of S. 26 of Bengal Regulation V of 1831. 13 M. I. A. 343. Also against an order cancelling a notification under which a person is admitted as a vakil 6 A. 163.

"FINAL ORDER"—WHAT IS.—Final order—Suit dismissed on preliminary point—Order of remand is final order. 62 I. C. 776=25 C. W. N. 896. An order is final only if it finally disposes of the rights of the parties and as an order refusing a stay would not finally dispose of those rights, but leave them to be determined by the Courts in the ordinary way it was not final. 47 I. A. 124=24 C. W. N. 721=39 M. L. J. 27 (P. C.) (Order rejecting

application to sue as pauper is not final). 88 I. C. 575=1925 Oudh 548; 6 P. 67=100 I. C. 886=A. I. R. 1927 Pat. 175; Order refusing to record compromise is not final. 29 C. W. N. 832=89 I. C. 94=1925 Cal. 857.

A final order means an order which finally decides any matter directly at issue in the case in respect of the rights of the parties. 10 I. C. 439=13 C. L. J. 507; 13 C. L. J. 90=15 C. W. N. 848. The word "final" in S. 109, C. P. Code, is used in its ordinary sense and therefore means in order which puts an end to the litigation between the parties, or at all events disposes so substantially of the matters in issue between them as to leave merely subordinate or ancillary matters for decision. 24 Bom. L. R. 925=47 Bom. 106. *See also* 1 A. L. J. 26. The term "final order" denotes an order which finally decides any matter directly at issue in the case in respect of the rights of the parties. 28 I. C. 569=21 C. L. J. 281. Dismissal of appeal from judgment of single judge on the original side as barred by limitation, if final order. A. I. R. 1927 Rang. 20.

ORDERS WHICH ARE NOT FINAL—NO APPEAL LIES.—An order by the High Court refusing the stay of execution under O. 41, R. 15 is not a final order passed on appeal within S. 109, 10 I. C. 444=13 C. L. J. 681. Order excusing delay in filing appeal under S. 5, Lim. Act is not a final order. 90 I. C. 723. Order refusing to stay proceedings under S. 19 of the Arbitration Act is not appealable. 47 I. A. 124=24 C. W. N. 721=39 M. L. J. 27 (P. C.). There is no appeal from a non-existent suit. *See* L. R. 6 P. C. 128=26 Punj. L. R. 526=89 I. C. 185=1925 P. C. 174. An order of remand made by the High Court which decided only one issue out of several raised in the first court is not a "final order." 14 A. L. J. 50=38 All. 150. *See also* 60 I. C. 522=2 Lah. 106; 46 I. C. 922; it is final if it decides a cardinal point in the suit. 1 A. L. J. 26; 1925 Rang. 147. *See also* 23 A. L. J. 12=47 All. 335. An order of remand can be appealed against to His Majesty in Council provided the order decides a cardinal point in the case. 3 Pat. L. J. 339. *See also* 33 All. 391=9 I. C. 932=8 A. L. J. 192 (10 M. I. A. 340; 8 B. 548; 17 A. 112; 23 A. 220 *con.*); 48 I. C. 132=(1918) M. W. N. 844; 33 I. C. 756; 43 I. C. 290=19 O. C. 36; 38 Mad. 509=26 M. L. J. 96. An order of the High Court remanding a case for trial with the direction that a person should be sued as a residuary legatee, is not a decree or order within the Code. 46 I. C. 681=22 C. W. N. 640. Nor an order setting aside a compromise decree for certain technical defects and directing the judge to re-hear the application for recording the compromise. 6 P. 282=8 Pat. L. T. 615=A. I. R. 1927 Pat. 363. An order of the High Court deciding that a certain person should

(a) from any decree or final order passed on appeal by a High Court or by any other Court of final appellate jurisdiction ;

be allowed to sue as a pauper is not a final decree passed in appeal. 8 C. W. N. 296. Also an order refusing to admit an appeal presented after the prescribed period 9 Bom. L. R. 566. An order of the High Court directing execution to proceed is not a final order. 1 C. L. R. 354 ; 4 Pat. L. J. 461. No appeal lies against an order appointing or refusing the appointment of a Receiver—22 C. 928 ; 10 I. C. 439=13 C. L. J. 507 ; 6 P. L. T. 119=1925 Pat. 173. An order refusing to extend time for deposit of courtfees in an appeal is not a final order under S. 109, C. P. C. and hence not appealable. 50 I. C. 79=17 A. L. J. 443. A High Court's order refusing to entertain an application for restoring an appeal which was dismissed for default, is not appealable to His Majesty in Council. 37 I. C. 832. No appeal lies from an order dismissing an appeal in default of the appellant's compliance with the rules of the Court as to the composition of the paper book in the case. 2 Pat. L. T. 112=5 Pat. L. J. 719. Where a decree has been made directing accounts to be taken, leave to appeal must be given. 15 B. 155 (P.C.) Temporary injunction—Refusal to issue, not final order. 28 I. C. 569=21 C. L. J. 281. An order rejecting an application for review is not an order appealable under S. 109 (a). 22 I. C. 259=16 O. C. 264. An order which only determines the competency of an incorporated body as a judicial person, to apply for probate but does not determine whether it would be entitled to a grant of it if it applies is not final. 60 I. C. 208=23 O. C. 34. Probate proceedings, appeal in. See 1925 Pat. 712=(1925) P. H. C. C. 337. Order under S 8 of the Presidency Towns Insolvency Act, if appealable to Privy Council. See 22 L. W. 362=1925 Mad. 243.

CASES WHERE APPEAL LIES.—Order of High Court in revision, reversing order granting leave to sue *in forma pauperis* is a final order—Appeal to Privy Council lies. 13 C. L. J. 688=15 C. W. N. 879. An order passed on appeal by a High Court, determining a question mentioned in S. 47 is a final decree. 3 A. 633 (F. B.). A decision on a question relating to execution discharge or satisfaction of a decree is a decree provided the judgment conclusively determines the rights of the parties. 3 Pat. L. J. 339. An order of the High Court on appeal setting aside or refusing to set aside a sale in execution is a final order and is appealable to the Privy Council 40 Cal. 635=40 I. A. 140=25 M. L. J. 140 (P. C.). Order for a personal decree in mortgage suit is final order—Appeal to Privy Council lies 21 A. L. J. 686=45 A. 741. Final decree or order—Decision that suit is not barred by *res judicata*. 54 I. C. 504=18 A. L. J. 83. An order passed by the High Court upon an appeal made to it under S. 86 of the Prob. and Admn. Act is final and no appeal lies to the Privy Council. 12 Bur. L. T. 87=51 I. C. 596=(40 Cal.-21 Rel.). An order which deprives a party of the benefit of a final decree and directs the suits against him to be tried again is a final order and an appeal lies to the Privy Council. 23 I. C. 567=21 C. L. J. 279. An order of the High Court setting aside an order of the Subordinate Court dismissing a parti-

tion suit for default after preliminary decree has been passed is a final order. 2 Pat. L. T. 155=60 I. C. 479=6 P. L. J. 116.

CERTIFICATE AS TO FITNESS—"FIT CASE."—Interlocutory orders are within the ambit of cl. (c). 31 C. W. N. 540=103 I. C. 561=A. I. R. 1927 Cal. 481. A certificate granted under S. 109 (c) must show on its face that the discretion conferred by that section has in fact been exercised. 44 Mad. 243=48 I. A. 31=40 M. L. J. 229 (P. C.). See also 64 I. C. 959=23 Bom. L. R. 1132. Discretion to be used in granting certificate is a judicial discretion. 10 I. C. 439=14 C. L. J. 507. Mere questions of law are not sufficient. 21 I. C. 783=15 Bom. L. R. 1021. There must be questions of public or private importance or precedents covering numerous other cases (*Ibid.*) 31 C. W. N. 540=103 I. C. 561=A. I. R. 1927 Cal. 481 ; 45 M. L. J. 514=1924 Mad. 231 ; 21 I. C. 738 ; 43 M. L. J. 728 ; 1923 Mad. 125 ; 23 I. C. 739 ; 24 I. C. 620 ; 61 I. C. 131. See also 1 Pat. L. T. 239=56 I. C. 615 ; 6 Pat. L. J. 125. Conditions for grant of certificate, 40 I. C. 680=33 M. L. J. 481. For case of order of remand, see 71 I. C. 339=10 O. L. J. 289. Where two Judges have arrived at diametrically opposite conclusions on vital points leave can be granted. 54 I. C. 828=6 O. L. J. 664. Valuation of suit above Rs. 10,000. Appeal valued at less than Rs. 10,000. Leave—Question of Law. 54 I. C. 450. Order of High Court refusing to enrol a legal practitioner is one under its disciplinary jurisdiction and administrative powers and is not a fit case for appeal to Privy Council. 1 Pat. 590. Question of construction of agreement may be a fit case. 45 M. L. J. 514=1924 Mad. 231. Fit case—Certificate conclusive—See 45 Mad. 475=43 M. L. J. 323=1022 P. C. 257.

"ON APPEAL"—MEANING.—Order refusing to admit appeal as to time barred is order "on appeal." 127 P. W. R. 1917=42 I. C. 893=131 P. L. R. 1917 ; 62 I. C. 216=33 C. L. J. 128 (Order refusing an application under S. 5, Lim. Act).

"SUBSTANTIAL QUESTION OF LAW"—As to what are substantial questions of law rendering a case fit for appeal to Privy Council. See 44 M. L. J. 217=1923 Mad. 232 ; A. I. R. 1927 Oudh 43. See also 38 All. 188=33 I. C. 345=14 A. L. J. 143 (Position of holder of succession certificate), 40 Cal. 685=17 C. W. N. 752 (Competency of District Judge to dismiss insolvency application); 44 M. L. J. 424=1923 Mad. 602. (Different suits involving substantial same question) ; 17 L. W. 445=72 I. C. 918=1923 Mad. 443. (Question of land tenure and forfeiture on alienation. See also 45 Mad. 394 ; 26 A. L. J. 336=108 I. C. 238=A. I. R. 1928 All. 220 ; 43 M. L. J. 728=69 I. C. 385=1923 Mad. 125. Substantial question of law must be such that it may result in a precedent governing numerous other cases or decide a case of great public or private importance). High Courts in granting permission may impose conditions as to payment of costs. See 44 M. L. J. 217 *supra*. High Court in granting leave must also consider whether the subject-matter is above or below appealable value. See 2 L. W. 992=31 I. C. 46=(1915) M. W. N. 916. The question whether fraud of the mortgagor would vitiate registration and disentitle the mortgagee to enforce his mort-

(b) from any decree or final order passed by a High Court in the exercise of original civil jurisdiction ; and

(c) from any decree or order, when the case as hereinafter provided, is certified to be a fit one for appeal to His Majesty in Council.

110. [S. 596.] In each of the cases mentioned in clauses (a) and (b) of Section 109, the amount or value of the subject-matter of

Value of subject matter.

the suit in the Court of first instance must be ten thousand

gage was a substantial question of law and fit for appeal to the Privy Council. 18 A. L. J. 137.

Sec. 110. SCOPE OF SECTION.—The Madras Civil Courts Act III of 1873 does not control the construction of this section. 15 M.237 (F.B.). See also 42 I.C. 966: 1917 Pat. 301 (Effect of N.W.P. and Assam. Civil Courts Act, S. 21). Ss. 5 and 12 of the Limitation Act do not apply to applications under this section. 28 A. 391. The assent of the respondent to the issue of a certificate cannot give effect to it in the absence of the conditions required to give the right of appeal. 23 A. 227 (P. C.). See 32 C. 963.

'DECREE OR FINAL ORDER MUST INVOLVE.'

—These words refer to suits in existence and not to suits in *gr:mio futuro*. 24 A. 236 (238).

CONCURRENT FINDINGS OF FACT.—No appeal lies to the Privy Council when there are concurrent findings upon questions of fact and when upon such findings no question of law arises. 28 C. 1 (P.C.); 25 B. 332 (P. C.). 23 A. 227 (P. C.). See also = 103 I. C. 31 = A. I. R. 1927 Mad. 443 = 53 M.L.J. 375 = 25 A. L. J. 970.

AFFIRMS THE DECISION.—The word "decision" means merely the decision of the suit by the Court. In order to "affirm the decision of the Court below" it is sufficient to affirm the decree ; it is not necessary to affirm the grounds of fact on which the judgment was passed. The appellate Court affirms the decision of the Court below although the reasons given by it are not the same as those of the Lower Court in respect of some matters of fact. 25 A. 109 (P. C.); 30 C. 303 (P. C.); 20 A. 367 ; 20 B. 699, 703 ; 23 A. 415 (P. C.); 20 A. 118. 21 C. 523 ; 1 Bur. L. J. 215 = 11 L.B.R. 410 = 1923 Rang. 55 ; 70 I. C. 283 = 25 O. C. 277 = 1923 Oudh 49 ; 63 I. C. 292 = 24 O. C. 164 ; 23 M. L. J. 219 = 12 M.L.T. 269 = 16 I. C. 486 = (1922) M. W. N. 962 ; 31 C. W. N. 540 = 103 I. C. 561 = A.I.R. 1927 Cal. 481. A case where one Court has relied on the oral, and the other on the documentary evidence is within the rule. 30 C. 303 (P. C.). A decree of the High Court dismissing an appeal for want of prosecution is a decree affirming the decision of the Court below. 20 A. 367. Where the findings of fact of the Courts are in effect the same, the mere fact that the findings of the appellate Court do not in terms coincide with the findings of the original Court is immaterial. 21 C. 525 ; 22 P. R. 1915 = 26 I.C. 402. See also 6 Pat.L.T. 349 = (1925) P.C. 122 = 48 M. L. J. 611 (P. C.). Extending period of grace in an appeal from a preliminary decree in a mortgage suit is not reversing the decree. 103 I. C. 703 = A. I. R. 1927 Pat. 379.

'AFFIRMING JUDGMENT'.—Where there is a judgment of the High Court, affirming the judgment of the lower appellate Court, there is no

appeal to Privy Council. See 44 All. 200 = 20 A.L. J. 9 = 64 I. C. 916 = 1922 All. 89 ; 22 P.R. 1915 = 19 P.W.R. 1915 = 26 I. C. 402 = 66 P.L.R. 1915 ; 54 I. C. 400. Where there was a modification in part, appeal to Privy Council must be confined to such part; appeal cannot be directed to such portion of the judgment as was affirmed by the High Court. 44 All. 200; See also 43 All. 220 = 19 A. L. J. 3 = 64 I. C. 3 ; 31 C. W. N. 572 = 45 C. L. J. 426 = 103 I. C. 65 (2) = A. I. R. 1927 Cal. 543 where extension of period for redemption is held to be no modification. 106 I. C. 243.

THE FOLLOWING ARE AFFIRMING JUDGMENTS.—(1) Appeal dismissed for default 29 I. C. 469 = 13 A. L. J. 633. (20 A. 367, fol.). (2) Appeal dismissed with a variation as to costs. 34 C. L. J. 299 = 66 I. C. 407 = (1922) Cal. 316. See also 30 M. L. T. 337 (H. C.) = 16 L. W. 262 = 1923 M. 30 ; 51 Cal. 869 = 51 I. A. 319 = 86 I. C. 504 = 1925 P. C. 60. (3) Appeal dismissed for want of proper court-fees. 1 P. L. R. 1920 = 54 I. C. 400 = 16 P. W. R. 1920. (4) Modification of lower Court decree with consent of appellant or his vakil. 66 I. C. 621 = 25 C. W. N. 775. (5) Appeal dismissed as time barred. 23 M. L. J. 219 = 12 M. L. T. 260 = 16 I. C. 486 = (1912) M. W. N. 962. Partial variation of decree is not affirmation of judgment, 18 M. L. T. 387 = 31 I. C. 272 = (1916) M. W. N. 122. Even in case of affirmation of judgments, if the subject-matter is over Rs. 10,000 and there is a substantial question of law, an appeal lies to P. C. as of right. 30 I. C. 372 ; 9 I. C. 1040. (10 O. C. 65 fol. ; 8 C. W. N. 294 ; 62 P.W. R. 1908, not fol.) ; 89 I. C. 941 ;

SUBSTANTIAL QUESTION OF LAW.—As to the meaning of these words, "substantial question of law", See 45 C. L. J. 458 = 103 I. C. 625 = A. I. R. 1927 Cal. 619 ; 17 C. 146 ; 18 C. 23 ; 18 I. C. 305 ; 36 I. C. 1 ; 1 Bur. L. J. 62 = 11 L. B. R. 335 = 68 I. C. 690 = 1923 Rang 71 ; 1 Pat. L.R. 314 = 1924 P. 271 ; 106 I. C. 531. Mere question of law is not substantial question of law. 106 I. C. 362 ; 30 M. L. T. 337 = 16 L. W. 262 = 1923 Mad. 30 ; (Question as to the applicability of S. 47, C. P. C., is not a substantial question of law.) 26 Punj. L. R. 614. Question of law which is not doubtful or of general interest or without previous decisions of the P.C. is not "substantial question of law". 85 I. C. 409 = 1925 Oudh 545 ; 39 M. L. T. 655. Substantial question of law means as between the parties in the case and not a question of general importance. 54 I. A. 126 = 26 L.W. 70 = 102 I. C. 889 = 31 C. W. N. 495 = 2 Luck. 93 = A.I.R. 1927 P. C. 110 (P. C.). Where no substantial question of law is involved, leave to appeal should not be granted. 16 A. 274 (P. C.); see also 28 C. 1 (P. C.); 25 B. 332 (P. C.); and 23 A 227 (P. C.).

rupees or upwards, and the amount or value of the subject-matter in dispute on appeal to His Majesty in Council must be the same sum or upwards,

But *also see* 16 C. 287; 43 All. 513; 45 All. 667. The majority of cases between riparian owners give rise to questions of law. 106 I. C. 538. To justify the grant of a certificate for leave to appeal to the Privy Council a substantial question of law must be involved in the case, *i.e.*, question of law in respect of which there is a difference of opinion. 43 All. 513=63 I. C. 837=19 A. L. J. 462. *See also* 45 All. 667=21 A. L. J. 665=75 I. C. 100=1924 A. 66; Interpretation of Privy Council decision is a question of general importance justifying appeal. 56 I. C. 526 *See also* 27 C.W.N. 204=1923 Cal. 451. Where the subject-matter is less than Rs. 10,000 in value and sole question is one of evidence the point is not one of general importance and interest to justify the grant of a certificate. 54 I. C. 463. The rejection of an application to receive additional evidence does not involve any substantial question of law. 21 C. 484. Misconstruction of a part of the evidence concerning certain facts is not a "substantial question of law" within the section. 30 I. C. 372; so also sufficiency of evidence to prove custom. 90 I. C. 270; 83 I. C. 180=1924 Lah. 473. Nor is the question of binding nature of document by widow on estate and reversioners. 103 I. C. 654. The construction of any particular document is not a substantial question of law within the meaning of S. 110 of C. P. C. 25 A. L. J. 970; 40 I. C. 110; 14 I. C. 269; 25 O. C. 349=73 I. C. 407=1922 Oudh 214; 30 I. C. 372 (Misconstruction of evidence); 83 I. C. 90=1925 Oudh 219. Mere questions of construction of particular documents cannot be treated as questions of general importance or substantial question of law within the meaning of S. 110. 25 O. C. 349=73 I. C. 407=1922 Oudh 214. The construction of a difficult document such as an indemnity bond is a mixed question of law and fact and involves a substantial question of law so as to form a valid ground for leave to appeal to Privy Council. (1927) M. W. N. 213=103 I. C. 31=A. I. R. 1927 Mad. 443=53 M. L. J. 375. High Court dismissing appeal on appellant's failure to furnish security. Leave not granted. 36 All. 325=23 I. C. 532=12 A. L. J. 451. Whether a document was validly presented for registration is a substantial question of law. 18 I. C. 126. The question of rightful or wrongful exercise of its discretion by the High Court does not involve any substantial question of law. 46 Bom. 249=24 Bom. L. R. 196=1922 Bom. 11; 61 I. C. 131=8 O. L. J. 1. No appeal lies to the Privy Council, if the question of law which is the ground for appeal, has already been decided by the Privy Council. 30 I. C. 239=2 O. L. J. 214. Case relating to transaction common in the country. Law on the subject not clear question if can be certified. 28 Bom. L. R. 1437=100 I. C. 143=A. I. R. 1927 Bom. 19. That a suit to set aside a decree obtained by fraud was brought by a person who was not a party to the suit in which that decree was passed is not a question of such public importance as to justify the issue of a certificate under S. 110. 14

I. C. 626=5 Bur. L. T. 13. No certificate can be granted to appeal to P. C. when the Chief Court affirms the decisions of the Court next below solely on facts as there was no substantial question of law and the case was not otherwise fit for appeal to P. C. 15 P. L. R. 1917=35 I. C. 583=64 P. R. 1916. On this point *see also* 129 P. W. R. 1917=41 I. C. 781=133 P. L. R. 1917; 63 I. C. 222; 11 I. C. 159=13 C. L. J. 501; 62 I. C. 205=33 C. L. J. 131; 26 C. W. N. 651=70 I. C. 933=1923 Cal. 215; 30 I. C. 372. *See also* 45 I. C. 182 (Question of limitation); 38 I. C. 141. *See also* 102 I. C. 433=4 O.W.N. 613. Question of intention of legalities attesting will is not substantial question of law. 2 O.W.N. 394=88 I. C. 579=1925 Oudh 541.

VALUATION.—S. 110 of the Code of Civil Procedure applies to the value of an annuity which is sought to be recovered, not the value of the property upon which that annuity is charged. 45 M. L. J. 253=(1913) M. W. N. 590=33 M. L. T. 232 (P. C.); 10 O. L. J. 288=28 C. W. N. 289=75 I. C. 502 (1)=18 L. W. 146=1923 P. C. 102 (P. C.) *See also* 46 I. C. 576=22 C. W. N. 282 (P. C.) (Valuation of subject-matter—Counter claim more than Rs. 10,000. Effect of appeal from portion of decree. 38 All. 488=14 A. L. J. 100=20 C. W. N. 1279=31 M. L. J. 571=18 Bom. L. R. 850=24 C. L. J. 303=35 I. C. 939=5 L. W. 456 (P. C.) (Cause of action different against several defendants. *See* 16 L. W. 262=30 M. L. T. 337=1923 Mad. 30.) Not only must the value of the suit exceed Rs. 10,000 but the subject-matter of the appeal to the Privy Council should be Rs. 10,000 or over in value. 24 A. 174. The part decreed by the High Court could not be included for purposes of valuation by plaintiff. 57 I. C. 40. The mere fact that the history of the property in dispute was the same as another valued at more than Rs. 10,000 would not bring it under S. 110 of the C. P. C. so as to give the applicant a right of appeal to His Majesty in Council. 26 I. C. 6. The value of the subject-matter of the suit in the Court of first instance must also be Rs. 10,000 or upwards. 39 Mad. 843=30 M. L. J. 317=31 I. C. 296=2 L. W. 1057 (24 A. 174, foll.). Where the plaintiffs had estimated the market value of the property in dispute at Rs. 2,500 for purposes of court-fee of first instance and on appeal they could not be allowed to change their valuation for the Privy Council. 43 M. L. J. 728=69 I. C. 385=16 L. W. 517=1923 Mad. 125. For the purpose of valuation for a Privy Council appeal the value at the date of a decree is to be considered and not the value at the institution of the suit. 44 Cal. 119=24 C. L. J. 350=35 I. C. 605=21 C. W. N. 530. Appeal lies where the amount indirectly involved is more than Rs. 10,000. 35 All. 445=21 I. C. 617=11 A. L. J. 654. The question whether a decree involves indirectly a claim to property worth more than 13,000 rupees in value must be decided with reference to actual circumstances at the time and not to circumstances which are remote, and not in particular to a mere possibility

or the decree or final order must involve, directly or indirectly, some claim or question to or respecting property of like amount or value,

that future suits as to all or part of a large extent of the property alleged to be concerned may be instituted at some time in the future. (1922) M. W. N. 683=43 M.L.J. 728=31 M. L. T. 335 =69 I. C. 385=16 L. W. 517=1923 Mad. 125. (15 L. W. 140; 24 A. 236; 35 A. 445; 8 C. 210; 4 C. L. R. 125, ref). 84 I. C. 581=1923 Cal. 451; 52 Cal. 650 (P. C.). Interest subsequent to suit may be included in the valuation. 16 L. W. 682=43 M. L. J. 622=74 I. C. 596=1923 Mad. 135; 44 I. C. 475=3 Pat. L. J. 317; 3 Rang. 405; 42 All. 445=55 I. C. 976=18 A. L. J. 445; 72 I. C. 395=1923 Nag. 239. The value of the subject-matter must be taken to be the amount or value which the plaintiff obtained or would have obtained had he been successful, at the time when the decree was passed, 60 I. C. 523=2 Pat. L. T. 340; 6 Bom. L. R. 403. To determine the value prescribed by S. 110 of the C.P.C. the decree has to be looked at, as it affects the interests of the parties prejudiced by it. 4 Pat. L. J. 415=52 I. C. 723=1919 Pat. 257. A party taking advantage of the other party's valuation cannot object to it. 104 I. C. 577=A. I. R. 1927 Mad. 862, and plaintiff's own valuation does not absolutely bar him from setting up higher valuation (*Ibid*). Also 44 C.L.J. 572=31 C. W. N. 268=99 I. C. 921=A. I. R. 1927 Cal. 225. The rules under the Suits Valuation Act in accordance with which the land is valued for the purposes of jurisdiction do not apply in determining the value for the purpose of S. 110, but it is the market value which has to be ascertained. 6 A. L. J. 44; 75 I. C. 520=4 Lah. 185=1924 Lah. 82. See also 10 I. C. 990=13 C.L.J. 505; 75 I. C. 654=1923 Lah. 286 (2). In cases of probate proceedings regarding estate of value of over ten thousand rupees leave can be granted. 5 Bur. L. J. 176=99 I. C. 759 (1)=5 Rang. 119=A. I. R. 1927 Rang. 56. Future mesne profits should be taken into consideration in assessing the value of the subject-matter for the purposes of S. 110. 6 Pat. L. J. 246=63 I. C. 492=2 Pat. L. T. 675. See also 5 Pat. L. W. 327=3 Pat. L. J. 377=46 I. C. 137=1918 Pat. 246; 2 Pat. L. T. 463=62 I. C. 955=1921 Pat. 229; 32 Cal. 1286; 38 Cal. 400; 18 All. 196. Arrears of pension accrued due may also be added. 4 Pat. L. W. 240=44 I. C. 475=3 Pat. L. J. 317. Costs of suit cannot be added to swell up valuation. 6 P. 444=104 I. C. 267=8 Pat. L. T. 714=A. I. R. 1927 Pat. 328. Under S. 110 the value of the subject-matter of the suit is real market value. The fact that for the purpose of stamp duty the plaintiff under the option given to him by S. 7 of the Court Fees Act valued it at less than its market value cannot deprive him of his right to appeal to the Privy Council. 5 L. W. 542=39 I. C. 911=(1917) M. W. N. 422 (15 M. 237; 31 I. C. 401 foll.). See also 1 I. A. 317. See 45 C.L. J. 225. Where decrees obtained in a number of rent suits follow a single judgment and the total amounts recoverable are more than Rs. 10,000, though the amount involved in each decree is small, the condition as to pecuniary values satisfied and special leave can be granted. 22 I. C. 390=(1914) M. W. N. 162. See also 28 Bom. L. R. 1437=100 I. C. 143=A. I. R. 1927 Bom. 19. Valuation of mortgage suit. See 25 O.

C. 349=73 I. C. 407=1922 Oudh 214. Valuation when there is variation in appeal. 3 Pat. L. T. 550=66 I. C. 663=1922 Pat. 555. Valuation of suit for damages. See 66 I. C. 606=11 L. B. R. 152. In a suit for damages for libel, plaintiff cannot ensure an appeal to the Privy Council by merely placing his damages at a high figure. 9 C. W. N. 370. In a suit for partition, the value of the matter in dispute is the value of the whole estate sought to be partitioned. 10 C. W. N. 564. See also 60 P. W. R. 1915=29 I. C. 759=140 P. L.R. 1025 which distinguished (10 M. I. A. 252; 10 C.W.N. 564 and 6 C.W.N. 411 But see *contra* 26 Bom. L.R. 126 *infra*. In partition and partnership suits it is the value of appellant's share and not the value of the whole property that determines valuation. 26 Bom. L.R. 1261=85 I.C. 101=49 Bom. 149=1925 Bom. 137. Valuation in suit for enhanced rent. 1925 Cal. 414=82 I. C. 744; 82 I. C. 414=47 M. L. J. 379. The second paragraph of S. 110 is intended to deal with property other than that forming part of the actual subject-matter in dispute and which would be affected by the final decree or order. If a decree affects the petitioner's rights in or to such other property, that may be taken into consideration in estimating the amount or value of the subject-matter in dispute on appeal to His Majesty in Council. 66 I. C. 606=11 I. B. R. 1. See also 106 I.C. 538. In a mortgage suit the amount payable to a puisne mortgagee who is a party to the suit can also be added to ascertain value of appeal. 103 IC. 831=AIR 1927 Pat. 391. The fact that the appeal involves a mere question of law is no ground for granting leave, in cases where the value is less than Rs. 10,000. 23 A. 415.

CONNECTED CASES.—Where in two connected suits the points are identical but one only exceeds Rs. 10,000 in value and is certified as fit for appeal to the Privy Council, the other suit should also be similarly certified though its subject-matter is less than Rs. 10,000 in value. 43 All. 223=18 A. L. J. 1119=59 I. C. 794. See also 48 I. C. 124=16 A. L. J. 864; 33 I.C. 369=13 A.L.J. 1075. Connected appeals—Certificate given in one—other also entitled to appeal. 27 I.C. 378=13 A. L. J. 57=37 All. 124. See also 50 I. C. 760=23 C. W. N. 582; 10 I. C. 967 (1)=13 C. L. J. 503.

CONSENT DECREE.—No appeal lies against a consent decree to His Majesty in Council and leave to appeal cannot be granted. 5 P. L. J. 383=1 P. L. T. 599=57 I. C. 245 (2)=1920 Pat. 349. But see 6 Pat. L. J. 171=62 I. C. 235=1921 Pat. 193.

DISCIPLINARY PROCEEDINGS.—S. 39, Letters Patent, empowers the High Court to declare the fitness of an appeal in a non-criminal matter, if it is a final judgment or order, of the Court made on appeal or in the first instance. A proceeding under cl. 10, Letters Patent, does not fall under any of the jurisdictions specified in the Letters Patent, Cl. 39 and therefore no leave to appeal could be granted. 41 Cal. 734=15 C. L. J. 383 19 C. W. N. 593=22 I. C. 324.

PRACTICE AND PROCEDURE.—See (1925) Mad. 1223=49 M. L. J. 309; 26 Punj. L. R. 123=(1925) Lah. 468. Where leave to appeal is

and where the decree or final order appealed from affirms the decision of the Court immediately below the Court passing such decree or final order, the appeal must involve some substantial question of law.

Bar of certain appeals.

111. [S. 597] Notwithstanding anything contained in section 109, no appeal shall lie to His Majesty in Council—

(a) from the decree or order of one Judge of a High Court established under the Indian High Courts Act, 1861 [or the Government of India Act, 1915]¹ or of one Judge of a Division Court, or of two or more Judges of such High Court, or of a Division Court constituted by two or more Judges of such High Court, where such Judges are equally divided in opinion and do not amount in number to a majority of the whole of the Judges of the High Court at the time being; or

(b) from any decree from which under section 102 no second appeal lies.

Savings.

112. [S. 616.] (1) Nothing contained in this Code shall be deemed—

(a) to bar the full and unqualified exercise of His Majesty's pleasure in receiving or rejecting appeals to His Majesty in Council, or otherwise howsoever, or

(b) to interfere with any rules made by the Judicial Committee of the Privy Council, and for the time being in force, for the presentation of appeals to His Majesty in Council, or their conduct before the said Judicial Committee.

(2) Nothing herein contained applies to any matter of criminal or admiralty or vice-admiralty jurisdiction, or to appeals from orders and decrees of Prize Courts.

PART VIII.

REFERENCE, REVIEW AND REVISION.

113. [S. 617.] Subject to such conditions and limitations as may be prescribed, any Court may state a case and refer the same for the opinion of the High Court, and the High Court may make such order thereon as it thinks fit.

Reference to High Court.

granted the certificate granting leave should show on its face that discretion of the Court was invoked and exercised. 25 C. W. N. 770 = 6 Pat. L. J. 163 = 2 P. L. T. 132 = (1921) M. W. N. 87 = 62 I. C. 320 = 13 L. W. 365 (P. C.). Under S. 110 (2). C. P. C., the question directly or indirectly involved must be one between the parties to the suit. 93 P. R. 1913 = 340 P. L. R. 1913 = 21 I. C. 624 = 229 P. W. R. 1913. The High Court has no jurisdiction to grant leave to appeal to the Privy Council *in forma pauperis*. 44 I. C. 731 = 3 Pat. L. J. 179. See also 42 Mad. 32 = 35 M. L. J. 258 = 24 M. L. T. 207 = 47 I. C. 646 = 8 L. W. 460. If the appellant takes up a new position while appealing to Privy Council leave cannot be granted. 58 I. C. 179.

LEAVE TO APPEAL.—Grounds.—Point not allowed to be raised for the first time in second appeal. 76 I. C. 516 = 1923 All. 463. Decree of High Court partly affirming and partly reversing decree of lower Court. 66 I. C. 721 = 1923 All. 243. See also as to affirming judgments. 62 I. C. 71 = 10 L.B.R. 307 and cases cited under S. 109. See also 2 Pat. L. T. 173 = 60 I. C. 500 = 1921 Pat. 129 (Defendant taking no interest in the proceedings).

Sec. 111. SCOPE AND APPLICATION OF SECTION.—S. 111 applies to a single judge of a High Court established under the Charter Act, 1861. 127 P. W. R. 1917 = 42 I. C. 893 = 131 P. L. R. 1917. Appeal from single judge acting in revision does not lie. 46 M. 958 = 18 I. W. 655

= 75 I. C. 604 = 46 M. L. J. 117 = 1924 Mad. 399.

¹ Sec. 111 (a)—The words "or the Government of India Act, 1915" were added by Act XIII of 1916.

Sec. 112.—The Code of Civil Procedure does not limit the prerogative right of the Crown to admit appeals, where leave to appeal is refused by the High Court. 15 B. 155. Where a question of great public importance arises, special leave to appeal will be granted, even though the subject-matter in dispute is under the appealable value. 8 M. I. A. 1. Also where an important principle of law is involved. 8 M. I. A. 203. In 1 I. A. 72. Special leave was granted to try the question whether a District Court can review an order refusing to register a document. See notes under Ss. 109 and 110. As regards the power of the High Court to grant an extension of time for furnishing security in Privy Council appeals in so far as there is any conflict between Act XXVI of 1920 and O. 45, R. 7, C. P. C., on the one hand and R. 9 of the Privy Council rules on the other, the Privy Council rule must prevail by reason of this section. 29 Bom L. R. 352 = 101 I. C. 555 = 51 Bom. 430 = A. I. R. 1927 Bom. 217 (F.B.)

Sec. 113.—Where it was difficult to hold that the Judge making the reference entertained any reasonable doubt as to what his decision should be or as to what decision was correct, but the respondent withdrew any objection on this ground, as he said the questions that arose would affect a very large number of cases and must affect a

Review.

114. [S. 638.] Subject as aforesaid, any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed by this Code, but from which no appeal has been preferred,

(b) by a decree or order from which no appeal is allowed by this Code, or

(c) by a decision on a reference from a Court of Small Causes, may apply for a review of judgment to the Court which passed the decree or made the order, and the Court may make such order thereon as it thinks fit.

115. [S. 622.] The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such

Revision.

very large amount of money, reference was entered. Rang. 220=1923 Rang. 193. On this section see also 14 I. C. 782=14 Bom. L. R. 259 (Powers of Collector). Reference ought not to be made in a case covered by authority. 39 M. L. T. 606.

Sec. 114.—Public Prosecutor was given sanction to prosecute an attorney—Leave to appeal to Privy Council against order was granted. Review allowed. 41 Cal. 734=19 C. W. N. 593=15 Cr. L. J. 52=22 I. C. 324. Reversal of High Court's decision in a connected case by the Privy Council is not a sufficient cause for review. 43 M. L. J. 33=15 L. W. 593=(1922) M. W. N. 304=70 I. C. 741=31 M. L. T. 473=1922 M. 227. Review cannot be granted on the ground of mistake of law or on the merits. 8 N. L. J. 31=87 I. C. 125=1925 Nag. 266. Review can be allowed in respect of probate proceedings. 3 Rang. 261=1925 Rang. 314. Applicability to appeals under letters patent—Review. 29 Bom. L. R. 371.

Sec. 115 SCOPE OF SECTION.—The powers of revision under S. 25 of the Provincial Small Cause Courts Act are more extensive than those exercisable under this section. 27 A. 192; L. R. 3 A. 17. Under this section the High Court can revise orders of Presidency Small Cause Courts. 7 C. W. N. 547. "Any court subordinate" whether includes single judge of Chief Court of Oudh. 2 Luck. 1=99 I. C. 547=A. I. R. 1927 Oudh 59 "Court" meaning of. 50 Mad. 121=99 I. C. 148(2)=A. I. R. 1927 Mad. 93; 4 Rang. 304=98 I. C. 902=A. I. R. 1927 Rang. 1 (F. B.). Courts in the exercise of superintending powers will not ordinarily interfere except in cases of grave and otherwise irreparable injustice. 31 Bom. 138. The High Court may deal with a case under this section without there being an application by any of the parties. 28 C. 680; 4 M. 217. But see 7 C. L. R. 191. Whether revision lies against order under O. 26, R. 1. See 32 C. W. N. 128, against order under O. 39, R. 1. See 38 M. L. T. 358 (H. C.); against order under O. 47, R. 7. See 5 Rang. 121; against order under S. 73 of the Madras Village Courts Act. See (1927) M. W. N. 420. Against order under Part VII of the Succession Act. See 102 I. C. 622. What cannot be obtained by an appeal ought not to be available in revision. 103 I. C. 670=A. I. R. 1927 Mad. 859.

CONSTRUCTION OF SECTION.—S. 115 being merely an empowering section granting jurisdiction regulated by the discretion of the High Courts, it ought to receive a liberal rather than a narrow interpretation. 40 Bom. 86=33 I. C. 358; 65 I. C. 37.

INTERLOCUTORY ORDERS.—As to interference in revision with interlocutory orders. See 75 I. C. 107=1923 Lah. 301; 54 C. 1038; 106 I. C. 57. (As a general rule no interference with interlocutory orders). But interference would be justified, if otherwise irreparable damage would result. 4 Lah. L. J. 176=65 I. C. 282; 44 Bom. 619; 5 M. L. J. 75; or there are other special and exceptional circumstances necessitating interference. 26 I. C. 954=20 C. L. J. 426; or where there are other most cogent reasons. 43 I. C. 684. On this point see also 85 I. C. 619=1925 Cal. 1118; 28 C. W. N. 991=82 I. C. 1008. Interlocutory orders that can be rectified on appeal are not revisable although there may be no appeal directly from such orders. 5 M. L. J. 75. But see 14 C. 768. See also 9 M. 256; 5 A. 293; and 18 B. 35.

THE FOLLOWING INTERLOCUTORY ORDERS ARE OPEN TO REVISION.—Where the order is arbitrary and unwarranted in law. 58 I. C. 729=18 A. L. J. 486; (1927) M. W. N. 218 (as) where the lower Court wrongly refused to grant commission for examination of witnesses. 35 C. L. J. 78=68 I. C. 9; improper orders under Guardian and Wards Act. 42 I. C. 240; where amendment was improperly refused. 67 I. C. 335; defect of jurisdiction causing failure of justice. 67 I. C. 278=2 L. L. J. 673; 60 I. C. 481; where irreparable damage may result. 4 Lah. L. J. 176=1922 Lah. 100; or where irreparable waste of time and money would result, 2 Lah. L. J. 555=64 I. C. 387; allowing a part to adduce evidence after closing of the case. 59 I. C. 450; order as to misjoinder of parties and causes of action. 43 M. L. J. 277=70 I. C. 684; misjoinder of causes of action. 43 M. L. J. 218=69 I. C. 966; 42 M. L. J. 97; order directing trial piecemeal on certain issues only. 60 I. C. 528=2 Pat. L. T. 154; improper order of remand. 1922 Pat. 79=A. I. R. 1922 P. 359=50 I. C. 470; 45 C. L. J. 194. Cannot go into merits of the order of remand. 39 M. L. T. 120. Order setting aside *ex parte* decree. 32 C. W. N. 507.

THE FOLLOWING INTERLOCUTORY ORDERS ARE NOT OPEN TO REVISION.—Order granting adjournment on payment of costs. 25 I. C. 207=12 A. L. J. 460; order deciding preliminary issue, in a suit where such order would be appealable after final decision in the suit. 56 I. C. 248. But see also 58 I. C. 729=18 A. L. J. 486; 39 All. 254=38 I. C. 828; defect of jurisdiction, where no failure of justice is caused. 67 I. C. 278=2 Lah. L. J. 673; order directing a party in scheme suit to give evidence.

subordinate Court appears—

16 I. C. 3; order deciding admissibility of certain evidence. 101 I. C. 385=29 Bom. L. R. 304; order refusing to add parties. 25 A. L. J. 991. Orders which are open to appeal. 16 L. W. 312=74 I. C. 812; 22 I. C. 279=(1914) M. W. N. 95; 24 I. C. 781=1 L. W. 232; 71 I. C. 911; 41 I. C. 942; order disallowing interrogatories. 58 I. C. 721; refusing to frame additional issues. 29 I. C. 876; A. I. R. 1923 Pat. 518=72 I. C. 148. Order dismissing application to examine witness on commission. 64 I. C. 821; order as to appointment of guardian *ad litem* is not open to revision. 46 I. C. 316=5 Pat. L. W. 92; where another remedy is open to the party and no irreparable harm would be done. 5 Pat. L. J. 400=56 I. C. 649. Order giving directions as to taking accounts. 3 Pat. L. T. 638=A. I. R. 1922 P. 598.

OTHER REMEDY OPEN.—Where another remedy is open to the party, *e.g.*, by a suit or appeal or otherwise, the Court will not entertain an application for revision. *See* 45 C. L. J. 213=31 C. W. N. 615=98 I. C. 89=A. I. R. 1927 Cal. 114; 29 Bom. L. R. 1355=1927 Bom. 599; (1927) M. W. N. 795=A. I. R. 1927 Mad. 1030; 64 I. C. 469; 38 I. C. 299; 63 I. C. 809; 40 All. 216; 44 Bom. 595; 47 I. C. 190; 18 L. W. 105; 41 M. L. J. 373; 31 M. L. J. 827; 37 I. C. 348; 30 I. C. 845=18 M. L. T. 243; 1 L. W. 905; 29 M. L. J. 53; 1 L. W. 233; (1914) M. W. N. 95=22 I. C. 279; 23 M. L. J. 381; (1912) M. W. N. 956; 1 P. 68=65 I. C. 135. The ordinary rule is that the High Court cannot interfere in revision if the party has a remedy by way of appeal or second appeal. But this rule has its exceptions, and each case must be judged upon the circumstances peculiar to it. 28 A. 72. *See also* 9 Lah. L. J. 19; 15 All. 405; 34 All. 592; 8 Pat. L. T. 677; 103 I. C. 32=A. I. R. 1927 Pat. 316; 4 Lah. L. J. 71=67 I. C. 945. (Revision entertained in case of gross injustice, though other remedy open. *See also* 10 All. 119; 5 Rang. 742. When another remedy is open to a party, but it is very inconvenient and practically is no remedy, the Court should give relief by way of revision. 2 A. L. J. 370; 65 I. C. 476; 26 L. W. 76=104 I. C. 371=A. I. R. 1927 Mad. 799; 39 M. L. T. 590=53 M. L. J. 903; 27 L. W. 286=A. I. R. 1928 Mad. 416.

FAILURE TO EXERCISE JURISDICTION AND WRONG EXERCISE OF JURISDICTION.—The High Court is bound to interfere where it appears that the Court of First Instance has exercised a jurisdiction not vested in it by law. 26 M. 176; 21 M. L. J. 1020; 53 I. C. 41; 51 I. C. 873=4 P. L. J. 340; 51 I. C. 189=4 Pat. L. J. 277; 49 I. C. 442=4 Pat. L. J. 57. "Jurisdiction" in S. 115 of C. P. C. means a jurisdiction local, pecuniary, personal or with reference to the subject-matter of the suit. 23 I. C. 977=41 Cal. 323; 15 I. C. 669.

JURISDICTION.—Meaning of term. 46 C. L. J. 182=103 I. C. 468=31 C. W. N. 818. This term is used in contradistinction to "the merits," and denotes a tribunal designated by the Legislature as competent to entertain the case under reference. 11 M. 220 (F. B.); 7 A. 345, 350; 8 A. 519. A court's decision regarding its own jurisdiction in a particular matter is open to revi-

sion. 104 I. C. 342=A. I. R. 1927 Sind. 239. Where the lower Court exercises jurisdiction in a proper manner, the High Court will not interfere. 45 All. 548=73 I. C. 538; 45 A. 425. To justify interference by the High Court under S. 115, C. P. C., on the ground of want of jurisdiction the facts ousting jurisdiction must be patent on the face of the record. 44 B. 595; 65 I. C. 50. Ordinarily interference in revision is inadvisable in cases of decisions as to jurisdiction and should only be made in exceptional cases to remedy injustice. 1923 Lah. 565; 73 I. C. 755=1923 Lah. 524. The High Court's interference under S. 115. If confined only to question of jurisdiction. 20 C. W. N. 1080=1 Pat. L. J. 465=77 I. C. 129. On the mere ground that the decision was wrong, a High Court certainly will not interfere but where the lower Court had no jurisdiction to enquire into the question, High Court has power to interfere in revision. 1 Rang. 265=76 I. C. 504; *see also* 106 I. C. 901=10 Lah. L. J. 51 relying on 6 Lah. 487 (P. C.) High Court can act *suo motu*. 4 M. 217; 32 C. 146; 28 A. 72; 65 I. C. 122=1 P. 232. If a Court has jurisdiction, the mere fact that it decided wrongly is no ground for revision. 27 M. 504; (1903) A. W. N. 1; 30 C. 397; 46 C. L. J. 182=103 I. C. 468=31 C. W. N. 818. The order of a Court wrongly refusing to entertain an application on the ground that it did not lie at all, is on account of the declining of jurisdiction, liable to be set aside. 38 M. L. J. 322; 48 J. C. 139=8 L. W. 436; 31 I. C. 536=2 L. W. 1115; 31 I. C. 209; 28 I. C. 707=2 L. W. 366.

ILLUSTRATIVE CASES OF WRONGFUL EXERCISE OF JURISDICTION.—The High Court can interfere in revision when a civil Court has wrongly entertained a suit cognizable by a Revenue Court. 56 I. C. 946=23 O. C. 281. District Munsiff exercising small cause jurisdiction when not invested with such powers—Revision lies, 22 I. C. 909=12 A. L. J. 109. But High Court would not interfere in revision, in a suit cognizable by a Small Cause Court, but tried by a District Munsiff and appeal suit heard by the District Court without any objection. 21 B. 417; 75 I. C. 769. Revision lies against order wrongfully refusing to file appeal. 99 I. C. 690. Jurisdiction, want of—Plea to be substantiated by evidence. 52 I. C. 32. An order without enquiry is without jurisdiction. 24 L. W. 839=99 I. C. 383=A. I. R. 1927 Mad. 188. Omission to refer to evidence. 104 I. C. 321; 99 I. C. 946=44 C. L. J. 565. The High Court has jurisdiction to interfere under section 115 (c) when a lower appellate Court erroneously decides in the exercise of its admitted jurisdiction as an appellate Court that the Court of first instance has or has not jurisdiction to entertain a suit. 76 I. C. 1010=1923 Lah. 412. The omission of an appellate Court to deal with an appeal before it on the merits is a failure to exercise jurisdiction vested in it by law. 40 Cal. 518=20 I. C. 420. The High Court has power to set aside the order of the lower appellate Court on the ground that no appeal lay to it at all. 5 Pat. L. J. 97=55 I. C. 15. An order of the appellate Court directing the rehearing of a suit without any finding as to the sufficiency of the cause for the non-appearance

- (a) to have exercised a jurisdiction not vested in it by law, or
 (b) to have failed to exercise a jurisdiction so vested, or

of the defendant is illegal and without jurisdiction. 54 I. C. 965 = 1 Pat. L. J. 69. *See also* 100 I. C. 135 = A. I. R. 1927 Mad. 335. An erroneous decision of the lower appellate Court that the first Court had or had not jurisdiction to entertain a suit, can be interfered with in revision. 39 Mad. 195 = 24 M. L. J. 112. Where a Court assumes jurisdiction to pass an order on an erroneous view of the law, in a matter where it has in fact no jurisdiction, it is a case for interference of the High Court. 46 Mad. 536 = 44 M. L. J. 1; 100 I. C. 936 = A. I. R. 1927 Lah. 342. Jurisdiction—Refusal to exercise—Court misinterpreting S. 73 of the C. P. C. and consequently refusing help. 10 I. C. 527 = 15 C. W. N. 872. *See also* A. I. R. 1927 Mad. 1030. When a Court, upon an erroneous view as to the scope of a section of the Code, applies it to a case to which it has no application it acts without jurisdiction. 35 C. 487; 99 I. C. 425 = A. I. R. 1927 Mad. 427. A mere misconstruction by a subordinate Court of S. 87 of the Negotiable Instruments Act, is not a ground for revision by the High Court under S. 115. C. P. C. 12 I. C. 138. Case of misconstruction of pleadings. A. I. R. 1927 Lah. 44. A Judge who passes a decree which is not supported by any evidence on the record, has taken upon himself a jurisdiction not vested in him by law. 10 C. W. N. 14; 9 A. 398, 404. Finding of fact without evidence, 64 I. C. 85. Ordinarily the question of admission of evidence is question of law only. But when a document has some legal effect on the decision, its exclusion can be treated as a refusal to exercise jurisdiction, 25 I. C. 204. Where a subordinate Court proceeds with the trial of a suit in contravention of S. 10, C. P. Code, it usurps a jurisdiction not vested in it by law and its order refusing to stay the suit though interlocutory, is open to revision by the High Court. 42 A. 409; 70 I. C. 5 = 16 L. W. 607. An order under S. 10 staying a suit amounts to a decision that the Court has no jurisdiction to try the suit. If wrongly used, it is a refusal to exercise jurisdiction and is open to revision under S. 115. 50 I. C. 212; 14 I. C. 711; 14 I. C. 221. Where a Judge refused to try the issues raised before him, he has declined to exercise a jurisdiction vested in him by law and the High Court can interfere. 39 A. 297 = 38 I. C. 335. The failure of a District Judge to decide a plea amounts to a refusal to exercise a jurisdiction and his decision is liable to be set aside in revision. 54 I. C. 662. Omission to decree claim admitted. 1922 Pat. 355 = A. I. R. 1923 P. 41. Where an objection to the place of suing is overruled and embodied in a formal order the High Court has power to revise the order. 41 All. 602 = 51 I. C. 331. An order directing a plaintiff to be returned for amendment without a prayer being without jurisdiction, is open to revision by the High Court. 24 M. L. J. 455 = 19 I. C. 672; (1913) M. W. N. 1024. Also an order dismissing summarily an application by plaintiff to restore a suit dismissed for default. 100 I. C. 677 = A. I. R. 1927 Lah. 239. Failure to exercise jurisdiction vested by the Calcutta Rent Act, can be interfered with under S. 115, C. P. C. 26 C. W. N. 711 = 49 Cal. 928. Failure to deal with question of limitation arising

in the case is no material irregularity requiring interference in revision. 32 I. C. 785 = 3 L. W. 176. But *see* 18 I. C. 391 = 17 C. W. N. 667. Where a suit was withdrawn by the plaintiff without the Court's considering the terms of withdrawal especially as to costs, it was held that the omission to consider the question of costs which resulted in injustice to defendant is a failure to exercise the jurisdiction vested in the Court. 31 I. C. 617 = 13 A. L. J. 10 (Rev.). Application for decree absolute—Declining to entertain objections. 5 Pat. L. J. 342. When a date is appointed for the hearing of parties in order to ascertain valuation on sale proclamation, the Court acts without jurisdiction in fixing valuation at an earlier date without hearing the parties. 3 P. L. T. 342 = 65 I. C. 360. Jurisdiction—Execution sale—Deposit by person not entitled, allowed. 26 C. W. N. 167 = 70 I. C. 127 = 1922 Cal. 95; 45 All. 425 = 21 A. L. J. 313; 52 I. C. 344. The High Court has jurisdiction to interfere with the wrong exercise by the Courts below of powers vested in them under O. 21, Rr. 89 to 92 dealing with confirmation and setting aside of auction sale. 67 I. C. 286; 32 C. W. N. 57 = 45 C. L. J. 566 = 104 I. C. 199 = A. I. R. 1927 Cal. 633.

CLAUSE (a).—Where a Court professing to act under O. 21, R. 90 sets aside a sale without proof of substantial injury, such an order is one passed without jurisdiction within the meaning of this section. 9 M. 145; *see also* 106 I. C. 568 (Application not conforming to R. 89 of O. 21). Proceedings under O. 41, R. 23 instead of under O. 41, R. 25 does not create a point of jurisdiction as to justify interference. 64 I. C. 436. A Court has jurisdiction to hear an application for review though insufficiently stamped and the High Court will not interfere on that ground. 21 I. C. 943 (Cal.); 43 All. 288; 2 L. W. 366. A general order of remand by an appellate Court which misunderstands its own duties and in substance declines jurisdiction is liable to be revised by the High Court. 63 I. C. 358. The investigation contemplated by O. XXXIII, R. 7 must be confined to the applicant's pauperism, and if the Court receives evidence on the merits, it exercises a jurisdiction not vested in it by law. 13 M. L. J. 292 (F. B.).

Cl. (b).—By taking a mistaken notion of his legal powers, a Judge fails to exercise a jurisdiction vested in him by law. 12 M. L. J. 473. Where a Judge puts an erroneous construction upon the provisions of an Act, this does not amount to failing to exercise a jurisdiction vested by law. 13 C. 90, (93). Where no application is made under O. 21, R. 90 but nevertheless, the Court refuses to confirm the sale under O. 21, R. 92 it has failed to exercise a jurisdiction vested in it. 20 C. 8 (11) (P. C.) When a Court refuses to investigate a claim under O. 21, Rr. 58 to 60 it refuses to exercise jurisdiction vested in it by law. 4 C. L. R. 74. Where the lower court has failed to take notice of the real point in the case the High Court can interfere in revision. 106 I. C. 226 (2) = A. I. R. 1928 Lah. 299; 5 Rang. 803. When a Judge refuses to accept a plaintiff he fails to exercise a jurisdiction vested in him by law. 32 C. 146.

(c) to have acted in the exercise of its jurisdiction illegally or with material

Cl. (c).—For the meaning of the words "illegally" and "material irregularity", see 7 B. 341; (F.B.) at p. 358. Order allowing plaintiff to withdraw suit on grounds not covered by O. 23, R. 1. See 25 A. L. J. 870=103 I. C. 229=A. I. R. 1927 All. 704; 25 A. L. J. 943; 103 I. C. 372. When the only issue tried by the lower Court is not one upon which the dispute between the parties can be properly adjudicated, Court acts with material irregularity. 7 Bom. L. R. 12 (16). The expression, "material irregularity" was held to include an irregularity of procedure materially affecting the merits of the case. 13 C. 225. See also 28 C. 574 (583); (1928) M. W. N. 49. A mere error in law is not an illegality or material irregularity. 23 B. 177. See also cases under "Error of Law". Clauses (a) and (b) of S. 115 embody what this section refers to in the word "illegally". Clause (c) indicates the meaning of the expression "material irregularity". 8 A. 111 (F. B.).

ILLUSTRATIVE CASES—ADDITION OF PARTIES.—Addition and substitution of parties when open to revision. 45 C. L. J. 146; (1927) M. W. N. 301. No revision lies from an order striking out a defendant, as such an order does not decide anything between the parties. 14 I. C. 263; 32 A. 623. See also where parties are added. 64 I. C. 563; 90 I. C. 721. When in a suit the mortgagee claimed land from a third party through the mortgagor and the suit was decreed though the mortgagor not a party the Court acted with material irregularity. 54 Cal. 338=25 A. L. J. 61=25 L. W. 90=99 I. C. 749=29 Bom. L. R. 755=31 C. W. N. 413=52 M. L. J. 368 (P. C.) Where addition of parties causes not only misjoinder of parties, but also causes of action, revision lies. 90 I. C. 721. Where the right to raise an objection as to non-joinder came into existence during the suit, and such objection was not taken in the trial Court, it cannot be raised in revision. 46 I. C. 648. But see 44 I. C. 564. Where an order for addition of parties was made due to devolution of interest during pendency of suit, appeal and not revision is the remedy. 54 C. 716. Addition of parties—Order refusing to make a transposition of parties when open to revision. 34 I. C. 186=20 C. W. N. 752. See also 45 M. L. J. 703=50 I. C. 58 (Scheme suit); 39 I. C. 160=5 L. W. 207; 25 A. L. J. 991. As to exercise of power under O. 1, R. 10 see 47 I. C. 725.

AMENDMENT OF PLAINT AND PLEADINGS.—The High Court has power to interfere under S. 115 with an order directing that a plaint should be amended. 63 I. C. 419=4 N. L. J. 58. See also 1925 Mad. 188; 89 I. C. 782; 87 I. C. 90=48 M. L. J. 349; (1922) Lah. 394 (1). See *contra* 15 C. W. N. 682=10 I. C. 308; 101 I. C. 701 (1)=9 Lah. L. J. 357. A Court is not empowered to accept additional written statement to meet allegations not raised in the plaint. The proper course is to amend the plaint, if allowable, and direct filing of written statement, and frame issues and decide. 30 I. C. 41=29 M. L. J. 53. Where a Court dismisses a suit refusing an opportunity to amend the plaint, if necessary, the High Court can interfere under S. 115. 1 Pat. L. T. 188; 55 I. C. 445; 22 M. L. J. 136=12 I. C. 173; 15 L. W. 667=68 I. C. 167; 98 I. C.

458=A. I. R. 927 Mad. 212. Where there is another remedy open to a party, such as an appeal, if eventually the judgment is passed against him, the High Court would not entertain revision. 10 I. C. 308=15 C. W. N. 682; 15 L. W. 667=68 I. C. 167.

APPEAL.—An appeal can be treated as an application under this section. 17 M. L. J. 119; 28 R. 458 (460); 4 A. L. J. 492; 45 C. L. J. 194 and *vice versa*. 6 C. W. N. 346; 50 I. C. 931=9 L. W. 596. See also 34 I. C. 264; 31 I. C. 812=23 C. L. J. 235; but not one filed after limitation for appeal has expired. 2 Lah. L. J. 734. See also 41 Mad. 554=34 M. L. J. 309; 9 L. W. 81; 30 M. L. J. 486=34 I. C. 372. Incompetent appeal entertained by Appellate Court can be set aside in revision. 25 Bom. L. R. 147=72 I. C. 256.

ARBITRATION.—Where in arbitration proceedings an appeal is not allowed, revision would be still more objectionable. 47 All 121. Order of reference to arbitration—jurisdiction of court challenged—Revision. See A. I. R. 1927 Cal. 52; 106 I. C. 93.

AWARD.—Where in superseding an award the Court acted illegally and with material irregularity the High Court could interfere in revision. 20 A. L. J. 125=64 I. C. 934=1922 All. 69. On this point see also 87 I. C. 371. Where a Court sets aside an award of arbitrators on the ground of misconduct on the part of the arbitrators its order is not open to revision. 47 Bom. 721=73 I. C. 464; 43 All. 101=59 I. C. 667=18 A. L. J. 952; 59 I. C. 811=45 Bom. 832. Where no notice was given of the filing of the award as required by the rules, the High Court can interfere in revision with a decree passed in terms of the award. 63 I. C. 243. If a Court passing a decree on an award has committed an error in procedure or has misused the jurisdiction prescribed by Sch. II, if there is revision against the decree. See 64 I. C. 363; 64 I. C. 294; 38 I. C. 769; 105 I. C. 105. Interference in revision is not rightful where there is no irregularity in the proceedings or error in procedure or misuse of a jurisdiction and the decree of the Court is passed according to an award of arbitrators. 16 I. C. 996; 28 I. C. 427. The Court on filing an award not containing decision on a point in dispute cannot be considered to have exercised a jurisdiction not vested in it by law or failed to exercise a jurisdiction vested in it by law. 17 I. C. 33= (1912) M. W. N. 1076. The High Court should not interfere with the award if no illegality is apparent and the irregularities in procedure are formal. 12 I. C. 269=21 M. L. J. 1005. Also in case of arithmetical error in award. (1927) M. W. N. 242. Whether revision lies from order refusing to give opportunity to party to produce evidence in support of objections to award. See 37 I. C. 400. The High Court has power to revise the proceedings of the lower Court after the delivery of the award to it and can rectify any illegality or material irregularity in the lower Court's procedure in dealing with the award. 34 I. C. 845=9 S. L. R. 183. See also 50 I. C. 52=4 Pat. L. J. 265; 65 I. C. 50.

"CASE DECIDED".—Meaning of—Order under S. 10 of the Religious Endowment Act—

irregularity,

Revision—Powers of interference. 40 Mad. 793 = 40 I. C. 650 (P. C.). Order deciding that Sikh Gurdwari Act applies terminates proceedings and revision lies. 8 Lah. 362 = 101 I. C. 171 = A.I.R. 1927 Lah. 394. S. 115 applies to jurisdiction alone, the irregular exercise or non-exercise of it or the illegal assumption of it; it is not directed against conclusions of law or fact in which jurisdiction is not involved. 40 Mad. 792 (P. C.) *supra*. "Case" is not defined in the Code; it cannot be confined to litigation in which there is a plaintiff who seeks to obtain a particular relief against a defendant before the Court but includes an *ex parte* application praying that persons in the position of trustees or officials should perform their trust or discharge their judicial duties. (*Ibid.*)

The word "case" in S. 115 is a word of wider import than such words as "suit" or "appeal" 40 Bom. 86 = 33 I. C. 358; 48 Bom. 43; 41 Cal. 632. The decision on a single issue by a subordinate Court in a suit which is still pending in that Court is not a 'case' decided. 43 All. 564 = 63 I. C. 15. An application under S. 10 for the stay of a suit is not a "case" and an order for stay passed on that application is not the decision of a case within S. 115. 58 I. C. 90 = 42 A. 409. See also 27 M. L. J. 494; 15 C. W. N. 666; 42 Cal. 926; 4 Lah. L. J. 425. Where on the objection of the defendant that the Court has no jurisdiction to entertain the suit the Court decides it has jurisdiction, the order of the court does not amount to a decision of a case and no revision lies against it. 5 L.L.J. 140 = 71 I. C. 487; 41 A. 43; 42 A. 564; 59 I. C. 680. "Case"—Refusal to issue interrogatories. 69 I. C. 417 = 1923 Lah. 282 (2). Case—Order directing verification of pleadings—Order as to costs. 64 I. C. 207. Orders under S. 34 of the Guardians and Wards Act are open to examination by the High Court on revision side. 55 I. C. 587. Order dismissing an appeal summarily is a decree and is open to revision by High Court, if there is no second appeal provided for. 36 Mad. 128 = 21 M. L. J. 387. Appeal against order in application under O. 21, R. 90. Revision 45 C. L. J. 537. Case decided—Proceedings under Legal Practitioner's Act—No power to revise. 56 I. C. 433 = 21 C. L. J. 449. Where a Court allows or refuses to allow a suit to be withdrawn with liberty to bring a fresh suit, it 'decides' within the meaning of S. 115 of the Code and the High Court has jurisdiction to interfere. 61 I. C. 584; 103 I. C. 229. The refusal by a Court to adjourn the hearing of a suit in order to enable the applicant to pay the court-fee is not an order which should be revised by the High Court. 45 All. 212 = 20 A. L. J. 1005 = 69 I. C. 921; 64 I. C. 211. Dismissal for default. See 53 C. 827.

COURT-FEE—CONFLICT OF RULINGS.—An order under S. 149 requiring the plaintiffs to pay the additional court-fee is not open to revision. 51 I. C. 581; 104 I. C. 145 = A. I. R. 1927 Mad. 1021 (2) = 53 Mad. 452; 102 I. C. 877. As to when orders relating to court-fees are open to revision. See also 29 C. W. N. 627 = 86 I. C. 853; 21 L. W. 649 = 87 I. C. 660 = 48 M. L. J. 688; 27 L. W. 286 = A. I. R. 1928 Mad. 416. A decision of a Sub-court on a question of

valuation determining the amount of Court-fee, is subject to revision. 10 B. 610. But not an order directing to pay additional court-fees. 12 C. L. R. 141. Revision lies to the High Court from an erroneous order for payment of additional court-fee, and the plaintiff need not wait for the dismissal of the suit by disobeying the order and then move the High Court in appeal or revision. 36 I. C. 381. See also 15 I. C. 46 = 17 C. W. N. 160; 103 I. C. 268 (2) = A.I.R. 1927 Nag. 256. The Patna High Court has held that, the High Court will not revise an interlocutory order demanding *ad valorem* court-fee on a plaint, as the order of rejection on the plaint is appealable. 5 Pat. L. J. 400 = 56 I. C. 649. See also 51 I. C. 581. The High Court has power to interfere in revision with interlocutory orders of lower Courts, e. g., direction to pay court-fee. 50 I. C. 470 = 4 Pat. L. J. 195. See also 55 I. C. 786 = 1 Pat. L. T. 5.

COMMISSION.—Order issuing commission for examination of plaintiff may be interfered with in revision. 1925 P. H. C. C. 326; (1927) M.W. N. 218.

CRIMINAL PROSECUTION.—An order punishing a person for contempt of Court can be revised. 27 A. 380. Also an order granting sanction under S. 195 of the Criminal Procedure Code. 17 M. L. J. 123. But see also 3 All. 508. An order of a judge passed under S. 195 or 476, Cr.P. Code directing the trial of a person under S. 193, I.P.C. is open to revision. 23 Cr. L. J. 291 = 1922 All. 438. See also 1923 A. 490 (1); 48 I. C. 499. Prosecution order of a Collector under S. 476, Cr P.C., while acting under S. 70, C.P.C., cannot be revised by High Court. 38 I. C. 419 = 14 A. L. J. 1077. The High Court can revise an order under S. 476, Cr. P. C., passed by a Civil Court if it fails to specify the charges. 38 All. 695 = 36 I. C. 836. A petition to revise proceedings under S. 195 Cr. P. C., of a Civil Court should not be under S. 439, Cr. P. Code. 17 Cr. L. J. 184 = 33 I. C. 824; *Contra* 19 I. C. 197 = 40 Cal. 477. See also 28 I. C. 334 = 19 C. W. N. 447; 40 Cal. 477 = 17 C. L. J. 245 = 33 I. C. 824; 32 I. C. 330 = 18 M. L. T. 591.

DELAY.—Revision is a privilege and not a right and it corresponds to the remedies in England known as *Certiorari* and *Mandamus*. The invariable rule in these cases is that a party aggrieved must come to the High Court for relief at the earliest possible moment and also must come with no ulterior purpose. 39 I. C. 570; 43 I. C. 470; 19 C. L. J. 9; (1923) M.W.N. 159 = 72 I. C. 137. As a general rule the High Court does not entertain revision petitions after 3 months, but the High Court may in a proper case excuse the delay in the exercise of its discretion. 16 L. W. 760 = (1922) M. W. N. 130 = 65 I. C. 732. See also 93 I. C. 723 (1). As to delay of over three years, see 86 I. C. 329.

DISCRETION.—Failure to exercise discretion in executing delay on insufficient grounds for filing application for review after time falls under this section. 100 I. C. 727 = A. I. R. 1927 All. 386. Where an appellate Court refused to admit additional evidence offered three days after the argument was closed, the High Court would not interfere with its order in revision. 67 I. C. 252.

the High Court may make such order in the case as it thinks fit.

As to interference in revision with discretion of lower Court, *see* 7 Lah. L. J. 290=90 I. C. 632; 85 I. C. 660; 1925 Cal. 293; 90 I. C. 243=L. R. 6 A. 586; 83 I. C. 133=1925 All. 218. The High Court will not interfere in revision with the lower Court's order directing the Commissioner to ascertain mesne profits. 16 L. W. 312=74 I. C. 812. Where a subordinate court not only has made a mistake in law but has entirely misunderstood the nature of the judicial discretion it was called upon to exercise the High Court will interfere in revision under S. 115. 42 M. L. J. 97=45 M. 194; 25 M. L. T. 116=(1918) M. W. N. 888; 26 M. L. J. 467=23 I. C. 572. A High Court ought not to interfere with every exercise of discretion by the court below, even if no appeal is allowed, but must do so only where there has been a wanton abuse of process. 23 I. C. 522=15 M. L. T. 339; 31 C.W.N. 653; 32 C.W.N. 128. The issue or a refusal to issue by a subordinate court, a commission to examine witnesses is not an abuse of process warranting an interference by the High Court. 23 I. C. 522=15 M.L.T. 339. Where a judge uses his discretion to grant or refuse leave to institute a suit he does not act illegally nor with material irregularity nor is any question of jurisdiction involved. 17 I. C. 400=12 M.L.T. 359. The High Court will not interfere in revision with an order for payment of adjournment costs for not complying with a provision of law, when the amount awarded is neither excessive nor unreasonable. 57 I. C. 506. The High Court's interference with the discretion of a court is confined only to an ignorant or perverse exercise of it. 20 C.W.N. 1080=1 Pat. L.J. 465; 37 I. C. 129=3 Pat. L.W. 55; (1927) M.W.N. 838.

ELECTION MATTERS.—As to interference in election disputes, *see* 90 I. C. 771=49 M. L. J. 381; 1925 Mad. 707=48 M.L.J. 451; 22 L.W. 24=90 I.C. 1055; 52 M.L.J. 392=103 I.C. 821=A.I.R. 1927 Mad. 935; (1927) M.W.N. 842; 106 I. C. 398=A.I.R. 1928 Mad. 199 (1).

EX PARTE DECREE.—Order setting aside *ex parte* decree is open to revision. *See* 88 I. C. 46; 52 M. L. J. 477; 90 I. C. 329; especially when after 30 days from date of decree. 100 I. C. 936=A.I.R. 1927 Lah. 342.

ERROR OF LAW.—Error of law by itself is no ground for revision. 75 I. C. 472=1923 A. 465 (2); 106 I. C. 829=A. I. R. 1928 Lah. 102; 107 I. C. 273 (1). *See also* 18 A.L.J. 373=58 I. C. 182; 83 I. C. 334=1924 Rang. 212; 90 I. C. 430; (1912) M.W.N. 993=1 L.W. 59; 38 M. 775; 21 M.L.J. 1013; 100 I. C. 76 (1)=A.I.R. 1927 All. 573; 106 I. C. 851=46 C.L.J. 527. Error of law is no ground for interference under S. 115 or S. 107 of the Government of India Act. 35 M.L.J. 604; 16 C.W.N. 1015; 40 M.L.J. 497=13 L.W. 498=44 Mad. 554 (F. B.). The High Court cannot interfere when the lower Court has fallen into an error of law. It can only interfere in case the lower court has acted illegally. 30 C. 397; 16 C. 482. (486); 17 M. 410 (F.B.); 6 A. 125; 7 A. 345 (350); 24 M. 685; 11 M. 144; 11 M. 332; 12 B. 617; 17 M. 37; 28 C. 574. An erroneous construction of the rules framed by the High Court as regards costs of proceedings in subordinate courts is no ground for revision. 3 P.L.T. 314=

65 I. C. 355. Mere decisions in matters of law and fact are not within the scope of S. 115, Cls. (a) and (b) deal with the question of jurisdiction and Cl. (c) refers to illegal procedural acts. 52 I. C. 767=23 C.W.N. 759. *See also* 64 I. C. 563; 52 I. C. 4=30 C.L.J. 64; 54 I. C. 757; where in the exercise of its jurisdiction the lower court commits an error of judgment this is not a matter upon which revision can lie. 66 I. C. 509=1922 All. 441. The High Court will not interfere in revision on the ground that the Court below has wrongly decided a question of limitation. 55 I. C. 871=2 U. P. L. R. (All.) 72; 47 C. L. J. 62; 98 I. C. 892=A. I. R. 1927. Lah. 43; 4 O W.N. 1123; 26 L.W. 15=101 I. C. 514=A. I. R. 1927 Mad. 660; 49 A. 454=25 A.L.J. 399=100 I. C. 638=A.I.R. 1927 All. 358; 103 I. C. 113. Erroneous decision on point of limitation may sometimes make interference proper. 21 A. L. J. 861=L. R. 4 A. 591=46 A. 1173; 24 I. C. 872; *See also* 35 I. C. 74=4 L.W. 411; 19 M.L.T. 24=32 I. C. 3 (1)=3 L.W. 36; 30 I. C. 264=2 L. W. 609; 25 I. C. 592=(1914) M. W. N. 738. The High Court will interfere when a Subordinate Court issues an order which is erroneous in law, and as a result of that order the Court acts beyond or in derogation of its jurisdiction. 30 I. C. 38=21 C. L. J. 614. *See also* 41 I. C. 919=27 C. L. J. 294; 37 I. C. 19; 23 C. L. J. 557; 31 I. C. 346=22 C. L. J. 564; 32 I. C. 982; 23 I. C. 977=41 Cal. 323; 19 I. C. 594; 18 I. C. 715. An erroneous decision on a question of limitation or *res judicata* cannot be revised. 20 A. 78; 11 B. 488; 103 I. C. 68. The fact that a Court has misconstrued the effect of a document is no ground for revision. 16 A. 39; *see also* 107 I. C. 273 (1). Also the fact that document has been considered to be inadmissible in evidence. 23 B. 177 at 179. Refusal to amend a clerical error in the form of probate may be a ground for revision. 27 C. 5. An illegal order passed under O. 31, R. 93 can be revised. 9 M. 437. But not an order rejecting a memorandum of appeal. 7 A. 42. Revision of order refusing to set aside an *ex parte* decree, *see* 8 C. 832; 53 M. L. J. 110; A. I. R. 1927 Lah. 55. When a Court rejects an application to set aside a sale on the ground that the applicant had no *locus standi*, the case does not fall under this section. 32 C. 572.

LEAVE TO SUE IN FORMA PAUPERIS.—Where an application for leave to sue as pauper is dismissed for non-production of a Succession Certificate, the High Court will interfere. 16 M. 454. In an application for leave to sue in *forma pauperis* a Court acts without jurisdiction in going into the evidence elaborately and trying the question of title in order to see if he has a good cause of action; so also failure to take evidence on the question of pauperism amounts to not exercising jurisdiction vested in it by law and the order can be interfered with in revision. 45 A. 548=73 I. C. 538. No application in revision lies against an order admitting an application for leave to sue *in forma pauperis*. 20 A. L. J. 471=67 I. C. 641=1922 All. 208. But *see* (where it is admitted without notice). 104 I. C. 364=8 Pat. L. T. 794. An order rejecting an application for leave to sue *in forma pauperis*

PART IX.

SPECIAL PROVISIONS RELATING TO THE CHARTERED HIGH COURTS.

116. [S. 631.] This Part applies only to High Courts which are or may hereafter be established under the Indian High Courts Act, 1861 [or the Government of India Act, 1915].¹

117. [S. 632.] Save as provided in this Part or in Part X or in rules, the provisions of this Code shall apply to such High Courts.

118. [S. 634.] Where any such High Court considers it necessary that a decree passed in the exercise of its original civil jurisdiction should be executed before the amount of the costs incurred in the suit can be ascertained by taxation, the Court may order that the decree shall be executed forthwith except as to so much thereof as relates to the costs ;

and, as to so much thereof as relates to the costs, that the decree may be executed as soon as the amount of the costs shall be ascertained by taxation.

119. [S. 635.] Nothing in this Code shall be deemed to authorize any person on behalf of another to address the Court in the exercise of its original civil jurisdiction, or to examine witnesses, except where the Court shall have in the exercise of the power conferred by its charter authorized him so to do, or to interfere with the power of the High Court to make rules concerning advocates, vakils and attorneys.

120. [S. 638.] (1) The following provisions shall not apply to the High Court in the exercise of its original civil jurisdiction, namely, sections 16, 17 and 20.

[639.] (2) [* * * * *]2.

PART X.

RULES.

121. The rules in the First Schedule shall have effect as if enacted in the body of his Code until annulled or altered in accordance with the provisions of this Part.

is not open to revision. 44 All. 248=65 I.C. 255. *See contra* 104 I. C. 198 ; 105 I. C. 30.

NEW PLEA.—A question of want of jurisdiction dependent on the investigation of facts cannot for the first time be dealt with by the High Court in revision. 24 I. C. 862. *See also* 6 P. L. T. 295=87 I. C. 381=1925 P. 461=100 I. C. 37 ; 103 I. C. 68 ; where the appellate Court sets up a new case for defendant it acts with material irregularity. 98 I. C. 867 (2)=A. I. R. 1927 Lah 73. Where the legal representative of a deceased plaintiff was allowed to set up a claim not open to original plaintiff, the High Court will interfere in revision and set aside the order. 42 M. L. J. 43=68 I. C. 703.

ORDERS.—An appeal lies against an order made by a single Judge of the High Court under this section, when such order amounts to a judgment. 22 M. 68 (F. B.). No appeal lies from an order setting aside an order rejecting an appeal for failure of the appellant to give security for costs nor is the order open to revision when it is made in the interests of justice.

60 I. C. 81=42 A. 626. The High Court will not interfere in revision with orders disallowing or allowing claims to rateable distribution except in very exceptional circumstances. 60 I. C. 371 ; 14 L. W. 582=70 I. C. 20 (2).

Sec. 116.—The Code applies to the Vice-Admiralty jurisdiction of the High Court. 17 C. 66 ; 17 C. 337.

¹The words "or the Government of India Act, 1915" were added by Act XIII of 1916.

Sec. 119.—A rule of Court authorizing one legal practitioner to appoint another to hold his brief and appear for him is valid. 9 A. 613. An Advocate may perform all the duties that may be performed by a pleader. 9 A. 617. A vakil cannot practise on the Original Side of the Calcutta High Court. 30 C. 986.

²**S. 120—Sub-sec. 2** [Nothing in this Code shall extend or apply to any Judge of a High Court in the exercise of jurisdiction as an Insolvent Court] was repealed by the Pres. Towns Insolvency Act III of 1909, S. 127.

122. [Cf. S. 652, first para.] High Courts established under the Indian High Courts Act, 1861 [or the Government of India Act, 1915]¹ [and the Chief Courts of Oudh]² [and Sind]³ [* * *]⁴ and may, from time to time, after previous publication, make rules regulating their own procedure and the procedure of the Civil Courts subject to their superintendence, and may by such rules annul, alter, or add to all or any of the rules in the First Schedule.

Power of certain High Courts to make rules.

123. (1) A Committee, to be called the Rule Committee, shall be constituted at [the town which is the usual place of sitting of each of the High Courts (and Chief Courts)] * * * * referred to in section 122].⁵

(2) Each such Committee shall consist of the following persons, namely :—

(a) three Judges of the High Court established at the town at which such Committee is constituted, one of whom at least has served as a District Judge or [* *] a Divisional Judge for three years,

(b) a barrister practising in that Court,

(c) an advocate (not being a barrister) or vakil or pleader enrolled in that Court,

(d) a Judge of a Civil Court subordinate to the High Court, and

(e) in the towns of Calcutta, Madras and Bombay, an attorney.

(3) The members of each such Committee shall be appointed by the Chief Justice or Chief Judge, who shall also nominate one of their number to be president :

Provided that, if the Chief Justice or Chief Judge elects to be himself a member of a Committee, the number of other Judges appointed to be members shall be two, and the Chief Justice or Chief Judge shall be the President of the Committee.

(4) Each member of any such Committee shall hold office for such period as may be prescribed by the Chief Justice or Chief Judge in this behalf ; and whenever any member retires, resigns, dies or ceases to reside in the province in which the Committee was constituted, or becomes incapable of acting as a member of the Committee, the said Chief Justice or Chief Judge may appoint another person to be a member in his stead.

¹ Sec. 122.—The words “ or the Government of India Act, 1915 ” were inserted by Act XIII of 1916.

² After the figures “ 1915 ” the words “ and the ... Oudh ” were inserted by Act XXXII of 1925, schedule.

³ Inserted by Act XXXIV of 1926.

⁴ The words “ the Chief Court of Lower Burma ” which were substituted for the words “ the Chief Court of Punjab and Lower Burma ” by Act XVIII of 1919 were repealed by Act XI of 1923, Sch. II.

Sec. 122. POWERS OF HIGH COURT—RULES—The High Court has power to alter, amend and add to rules of procedure laid down in the Code, but it has no power to alter the period of limitation provided by the Limitation Act, 68 I. C. 777 = 1923 Lah. 96. S. 5 of the Limitation Act, as it stands, does not extend to applications to set aside *ex parte* decrees, but the High Court acting under S. 122 can frame a rule making it applicable to the periods of limitation prescribed in that Act, 32 I. C. 975. In order to have the effect of varying the rules in the first schedule to the Code, the rules under S. 122 must first have been considered and submitted by a Rule Committee appointed under S. 123. 74 I. C. 330 = 1923 Pat. 19. Under the rules of the Lahore High Court framed under S. 122, the memo. in the case of second appeal shall be

accompanied by a copy of the First Court's judgment. 2 Lah. 227.

RULE ULTRA VIRES.—Under S. 122 the Chief Court framed a new rule in place of R. 2, O. 34 which allowed interest at Court rate and not at mortgage rate as stipulated. The new rule was held to be *ultra vires* as it limited the substantive right of the mortgagee to the stipulated rate. 12 I. C. 18 = 4 Bur. L. T. 207. Rule made by High Court in conflict with the sections of C. P. Code is void. 28 O. C. 169 = 85 I. C. 455 = 1925 Oudh 492.

⁵ **Sec. 123 (1).**—The words “ The town which is the usual place of sitting of each of the High Courts and Chief Courts referred to in Section 122 ” were substituted for “ each of the towns of Calcutta, Madras, Bombay, Allahabad, Lahore and Rangoon ” by Act XIII of 1916 and the words “ of the Chief Court ” which were substituted for “ Chief Courts ” by Act XVIII of 1919 were repealed by Act XI of 1923. The words “ and Chief Courts ” were inserted by Act XXXII of 1925; and Act XXXIV of 1926.

Sec. 123 (2).—The words “ in Burma ” were substituted for “ in the Punjab or Burma ” by Act XVIII of 1919. The words were later repealed by Act XI of 1923.

Sec. 123.—Ss. 122 and 123 do not apply to Patna High Court. 2 Pat. L. T. 112 = 5 Pat. L.J. 719.

(5) There shall be a Secretary to each such Committee, who shall be appointed by the Chief Justice or Chief Judge and shall receive such remuneration as may be provided in this behalf by the Governor-General in Council or by the Local Government, as the case may be.

124. Every Rule Committee shall make a report to the High Court established at the town at which it is constituted on any proposal to annul, alter or add to the rules in the First Schedule or to make new rules, and before making any rules under section 122 the High Court shall take such report into consideration.

125. High Courts, other than the Courts specified in section 122, may exercise the powers conferred by that section in such manner and subject to such conditions [as in the case of the Court of the Judicial Commissioner of Coorg, the Governor-General in Council, and in other cases the Local Government, may determine]¹ :

Provided that any such High Court may, after previous publication, make a rule extending within the local limits of its jurisdiction any rules which have been made by any other High Court.

126. Rules made under the foregoing provisions shall be subject to the previous [approval]² of the following authorities, namely:—

(a) if the rule is made by a High Court established under the Indian High Courts Act, 1861, [or the Government of India Act, 1915]³ to the [approval]² of the authority prescribed by [the proviso to section 107 of the latter Act]⁴ for rules made under that section ;

(b) if the rule is made by any other High Court, to the [approval]² of the Local Government.

127. Rules so made and [approved]⁵ shall be published in the *Gazette of India* or in the local official Gazette, as the case may be, and shall from the date of publication or from such other date as may be specified have the same force and effect, within the local limits of the jurisdiction of the High Court which made them, as if they had been contained in the First Schedule,

128. (1) Such rules shall be not inconsistent with the provisions in the body of this Code, but, subject thereto, may provide for any matters relating to the procedure of Civil Courts.

(2) In particular, and without prejudice to the generality of the powers conferred by sub-section (1), such rules may provide for all or any of the following matters, namely :—

(a) the service of summonses, notices and other processes by post or in any other manner either generally or in any specified areas, and the proof of such service ;

(b) the maintenance and custody, while under attachment, of live-stock and other moveable property, the fees payable for such maintenance and custody, the sale of such live-stock and property, and the proceeds of such sale ;

(c) procedure in suits by way of counterclaim, and the valuation of such suits for the purposes of jurisdiction ;

¹Sec. 125.—The words “as in the case of . . . may determine” were substituted for the words “as the Governor-General in Council may determine” by Act XXXVIII of 1920, Sch. I.

²Sec. 126.—The word “approval” for the word “sanction” was substituted by Act XIII of 1916.

³The words “or the Government of India Act, 1915” were inserted by Act XIII of 1916.

⁴The words “the proviso to section 107 of

the latter Act” were substituted for the words “Section 15 of that Act” by Act XIII of 1916.

⁵Sec. 127.—The words “approved” was substituted for the word “sanctioned” by Act XXIV of 1917.

Sec. 128.—Whether S. 128 which allows delegation of judicial duties validates rules which were in existence prior to the Code of 1908 when such delegation was *ultra vires* see 42 I. C. 623=21 C. W. N. 1052.

(d) procedure in garnishee and charging orders either in addition to or in substitution for, the attachment and sale of debts ;

(e) procedure where the defendant claims to be entitled to contribution or indemnity over against any person whether a party to the suit or not ;

(f) summary procedure—

(i) in suits in which the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising—

on a contract express or implied ; or

on an enactment where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty ; or

on a guarantee, where the claim against the principal is in respect of a debt or a liquidated demand only ; or

on a trust ; or

(ii) in suits for the recovery of immoveable property, with or without a claim for rent or mesne profits, by a landlord against a tenant whose term has expired or has been duly determined by notice to quit, or has become liable to forfeiture for non-payment of rent, or against persons claiming under such tenant ;

(g) procedure by way of originating summons ;

(h) consolidation of suits, appeals and other proceedings ;

(i) delegation to any Registrar, Prothonotary or Master or other official of the Court of any judicial, quasi-judicial and non-judicial duties ; and

(j) all forms, registers, books, entries and accounts which may be necessary or desirable for the transaction of the business of Civil Courts.

129. [S. 652, para. 3.] Notwithstanding anything in this Code, any High

Power of Chartered High Courts to make rules as to their original civil procedure.

Court established under the Indian High Court Act, 1861 [or the Government of India Act, 1915]¹ may make such rules not inconsistent with the Letters Patent establishing it to regulate its own procedure in the exercise of its original civil jurisdiction as it shall think fit, and nothing herein contained shall affect the validity of any such rules in force at the commencement of this Code.

130. [S. 652, para. 2.] A High Court not established under the Indian High

Power of other High Courts to make rules as to matters other than procedure.

Courts Act, 1861 [or the Government of India Act, 1915]¹ may, with the previous [approval]² of the Local Government, make, with respect to any matter other than procedure, any rule which any High Court so established might,

under section 15 [or section 107, respectively, of those Acts]³ make with respect to any such matter for any part of the territories under its jurisdiction which is not included within the limits of a Presidency-town.

131. [S. 652, para. 4.] Rules made in accordance with section 129 or section

Publication of rules.

130 shall be published in the *Gazette of India* or in the local official Gazette, as the case may be, and shall from

the date of publication or from such other date as may be specified have the force of law.

PART XI.

MISCELLANEOUS.

132. [S. 640.] (1) Women who, according to the customs and manners of the country, ought not to be compelled to appear in public, shall be exempt from

Exemption of certain women from personal appearance.

personal appearance in Court.

¹ Secs. 129 and 130.—The words " or the Government of India Act, 1915 " were inserted by Act XIII of 1916.

Sec. 129.—Rules made by the High Court are valid only if they are consistent with the Letters Patent. 34 C. 619, 624 Rule. 725 of the Rules of Bombay High Court is the governing rule of appeals from the Original Side and not O. 41,

R. 10. 37 Bom. 572.

² Sec. 130.—The word "approval" was substituted for the word, "sanction" by Act XIII of 1916.

³ Added by XIII of 1916.

Sec. 132. SCOPE AND APPLICATION OF SECTION.—S. 132 of the Code applies not merely to witnesses but also to the examination of parties

(2) Nothing herein contained shall be deemed to exempt such women from arrest in execution of civil process in any case in which the arrest of women is not prohibited by this Code.

133. [S. 641.] (1) The Local Government may, by notification in the local official Gazette, exempt from personal appearance in Court any person whose rank, in the opinion of such Government, entitles him to the privilege of exemption.

Exemption of other persons.

(2) The names and residences of the persons so exempted shall from time to time, be forwarded to the High Court by the Local Government and a list of such persons shall be kept in such Court, and a list of such persons as reside within the local limits of the jurisdiction of each Court subordinate to the High Court shall be kept in such subordinate Court.

(2) Where any person so exempted claims the privilege of such exemption, and it is consequently necessary to examine him by commission, he shall pay the costs of that commission, unless the party requiring his evidence pays such costs.

134. The provisions of sections 55, 57 and 59 shall apply, so far as may be, to all persons arrested under this Code.

Arrest other than in execution of decree.

135. [S. 642.] (1) No Judge, Magistrate or other judicial officer shall be liable to arrest under Civil process while going to, presiding in, or returning from, his Court.

Exemption from arrest under civil process.

(2) Where any matter is pending before a tribunal having jurisdiction therein, or believing in good faith that it has such jurisdiction, the parties thereto, their pleaders, mukhtars, revenue-agents and recognized agents, and their witnesses acting in obedience to a summons, shall be exempt from arrest under civil process other than process issued by such tribunal for contempt of Court while going to or attending such tribunal for the purpose of such matter, and while returning from such tribunal.

(3) Nothing in sub-section (2) shall enable a judgment-debtor to claim exemption from arrest under an order for immediate execution or where such judgment-

to a suit or proceeding before a Court. 11 I. C. 668. S. 132 is not confined to purdanashin women strictly so called. An old Hindu lady belonging to a high family but not belonging to the purdanashin class ought not to be compelled having regard to her social position and the feeling of her class, to appear in the witness-box, but must be examined on commission, the costs of the commission being costs in the cause. 45 Cal. 492=22 C. W. N. 147. A purdanashin lady may be included in the statutory description of "women who according to the customs and manners of the country ought not to be compelled to appear in public." When a transformation of customs has taken place, she can no longer claim, as of right, the statutory exemption formulated in S. 132. 45 Cal. 697. A purdanashin lady is entitled to be examined on commission although she has previously appeared in public, and has been examined in Court in a Palki 26 C. 650. If she is in fact a purdanashin lady she is not deprived of the statutory protection merely because she may have previously appeared in public. 45 Cal. 697. An unmarried girl of 12 who belongs to a class, the female members of which never go out in public, is entitled to the privilege afforded by this section. 24 W. R. 375. In the case of a woman who was in mourning, and therefore according to custom, was not to leave her house for two or three years, a commission was refused in 14 B. 584. Proof of custom regarding seclusion of recently widowed ladies necessary before issue of

Commission (1927) M. W. N. 218. As regards criminal cases, there has, perhaps, been a slight divergence of judicial opinion on the question of the examination of purdanashin ladies on commission. (Case-law discussed.) 45 Cal. 697=26 C. L. J. 319=41 I. C. 610=22 C. W. N. 197.

Sec. 135.—Sub-section (3) is new and supercedes the decision in 4 M. H. C. R. 145. See also 14 Bom. L. R. App. 13; 5 C. 106; 4 M. 317; 5 C. L. R. 170. The words "other than a process issued for contempt of Court" give effect to the ruling in 4 B. L. R. O. C. 90. A judgment-debtor is protected from arrest in the circumstances mentioned in the section, and a person who causes the arrest and the Officer arresting are guilty of an offence under S. 342, Penal Code. 36 I. C. 493=17 Cr. L. J. 525=121 P. L. R. 1916 (Cr.). A defendant who appears in Court to defend his suit is exempt from arrest under S. 135. 37 M. L. J. 435=53 I. C. 367=10 L. W. 533. A surety for the appearance of the defendant cannot therefore initiate proceedings under O. 38, R. 3 with a view to obtain his discharge when the defendant appears in Court to defend his suit. The appearance of the defendant on that occasion does not amount to a "voluntary surrender". 37 M. L. J. 435=53 I. C. 367=10 L. W. 533. (4 M. H. C. R. 145 and 24 I. C. 513, ref.) It is not open to the Court to issue a warrant of arrest against a bankrupt who is in attendance in Court as witness, but the proceedings need not be set aside for this reason alone. 24 I. C. 513.

debtor attends to show cause why he should not be committed to prison in execution of a decree.

Exemption of members of legislative bodies from arrest and detention under civil process.

[135-A. (1) No person shall be liable to arrest or detention in prison under civil process—

(a) if he is a member of either Chamber of the Indian Legislature or of a Legislative Council constituted under the Government of India Act, during the continuance of any meeting of such Chamber or Council ;

(b) if he is a member of any committee of such Chamber or Council, during the continuance of any meeting of such committee ;

(c) if he is a member of either Chamber of the Indian Legislature, during the continuance of a joint sitting of the Chambers, or of a meeting of a conference or joint committee of the Chambers of which he is a member ; and during the fourteen days before and after such meeting or sitting.

(2) A person released from detention under sub-section (1) shall, subject to the provisions of the said sub-section, be liable to re-arrest and to the further detention to which he would have been liable if he had not been released under the provisions of sub-section (1).¹

136. [S. 648.] (1) Where an application is made that any person shall be arrested or that any property shall be attached under any provision of this Code not relating to the execution of decrees, and such person resides or such property is situate outside the local limits of the jurisdiction of the Court to

Procedure where person to be arrested or property to be attached is outside district.

which the application is made, the Court may, in its discretion, issue a warrant of arrest or make an order of attachment, and sent to the District Court within the local limits of whose jurisdiction such person or property resides or is situate a copy of the warrant or order, together with the probable amount of the costs of the arrest or attachment.

(2) The District Court shall, on receipt of such copy and amount, cause the arrest or attachment to be made by its own officers, or by a Court subordinate to itself, and shall inform the Court which issued or made such warrant or order of the arrest or attachment.

(3) The Court making an arrest under this section shall send the person arrested to the Court by which the warrant of arrest was issued, unless he shows cause to the satisfaction of the former Court why he should not be sent to the latter Court, or unless he furnishes sufficient security for his appearance before the latter Court or for satisfying any decree that may be passed against him by that Court, in either of which cases the Court making the arrest shall release him.

(4) Where a person to be arrested or moveable property to be attached under this section is within the local limits of the ordinary original civil jurisdiction of the High Court of Judicature at Fort William in Bengal or at Madras or at Bombay, or of the Chief Court of Lower Burma, the copy of the warrant of arrest or of the order of attachment, and the probable amount of the costs of the arrest or attachment, shall be sent to the Court of Small Causes of Calcutta, Madras, Bombay or Rangoon, as the case may be, and that Court, on receipt of the copy and amount, shall proceed as if it were the District Court.

137. [S. 645.] (1) The language which, on the commencement of this Code, is the language of any Court subordinate to a High Court shall continue to be the language of such subordinate Court until the Local Government otherwise directs.

Language of subordinate Courts.

Sec. 135-A—¹Added by Act XXIII of 1925, S. 3.

Sec. 136—The section does not apply to a case in which the defendant resides within the same District in which the Court issuing a warrant is situate. 2 B. 560 ; 8 M. 205. The section

applies only to cases in which a decree passed in one District has to be executed in another district. 4 C. 823. Applicability of section—Appointment of receiver—Disobedience of Court's orders—Contempt—Arrest outside jurisdiction. See 32 C. W. N. 114.

(2) The Local Government may declare what shall be the language of any such Court and in what character applications to and proceedings in such Courts shall be written.

(3) Where this Code requires or allows anything other than the recording of evidence to be done in writing in any such Court, such writing may be in English; but if any party or his pleader is unacquainted with English a translation into the language of the Court shall, at his request, be supplied to him; and the Court shall make such order as it thinks fit in respect of the payment of the costs of such translation.

138. [S. 185-A.] (1) The [High Court]¹ may, by notification in the local official Gazette, direct, with respect to any Judge specified in the notification, or falling under a description set forth therein, that evidence in cases in which an appeal is allowed shall be taken down by him in the English

Power for Local Government to require evidence to be recorded in English.

language and in manner prescribed.

(2) Where a Judge is prevented by any sufficient reason from complying with a direction under sub-section (1), he shall record the reason and cause the evidence to be taken down in writing from his dictation in open Court.

Oath on affidavit by whom to be administered.

139. [S. 197.] In the case of any affidavit under this Code—

(a) any Court or Magistrate, or

(b) any officer or other person whom a High Court may appoint in this behalf,

or

(c) any officer appointed by any other Court which the Local Government has generally or specially empowered² in this behalf, may administer the oath to the deponent.

140. [S. 645-A.] (1) In any Admiralty or Vice-Admiralty cause of salvage, towage or collision, the Court, whether it be exercising its original or its appellate jurisdiction, may, if it thinks fit, and shall, upon request of either party to such cause, summon to its assistance, in such manner as it may direct or as may be prescribed, two competent assessors; and such assessors shall attend and assist accordingly.

Assessors in causes of salvage, etc.

(2) Every such assessor shall receive such fees for his attendance, to be paid by such of the parties as the Court may direct or as may prescribe.

141. [S. 647.] The procedure provided in this Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction.

Miscellaneous proceedings.

Sec. 138.—¹ The words "High Court" were substituted for the words "Local Government" by Act IV of 1914.

Sec. 139.—² For notification empowering Courts of the District Judge in the Punjab to appoint an officer subordinate to itself to administer oaths to process-servers, bailiffs, etc., see *Punjab Gazette*, 1909, Pt. I, p. 13.

Sec. 141. SCOPE OF SECTION.—The procedure prescribed by the Code is applicable as widely as possible to miscellaneous proceedings. 21 C. 479. The section was intended to apply to such matters as applications for the appointment of guardians, and for the custody of infants, and to proceedings under the Divorce Act, and to the recording of evidence in probate cases, and many other similar matters other than suits and appeals. 9 A. 36 (41). See also 18 C. 635 at p. 638; 15 I. C. 559=116 P. R. 1912; 29 C. W. N. 521=1925 Cal. 391 (applicability of section to proceedings before Rent Collector); 106 I. C. 408 (Proceedings under the Indian Companies Act). "S. 141 applies only to original

matters in the nature of suits such as proceedings in probate, guardianship, and so forth." The expression "original matters" means matters which originate in themselves and not those which spring up from a suit or from some other proceeding or arise in connection therewith. Thus it does not apply to O. 9, R. 9 for restoration of a suit dismissed for default. 54 Cal. 405=31 C. W. N. 576=103 I. C. 69=A. I. R. 1927 Cal. 534. The power conferred by this section should not be exercised without sufficient cause. 8 M. 548 (550) (F. B.).

MEANING OF TERMS.—The term "suit" applies to suits in the strict sense, and is not intended to cover proceedings for the enforcement of rights decreed in a suit. 12 A. 392 (F. B.).

PROCEEDINGS TO WHICH SECTION IS APPLICABLE.—Applicable to proceedings in original suit. 4 Pat. L.T. 735=1924 P. 346. S. 141 is wide enough to make the provisions of S. 10 apply to arbitration proceedings. 66 I. C. 796=1922 Sind 6. The procedure prescribed by S. 98 applies to miscellaneous proceedings. 3 B. 204.

142. [S. 94.] All orders and notices served on or given to any person under the provisions of this Code shall be in writing.

143. [S. 95.] Postage, where chargeable on a notice, summons or letter issued under this Code and forwarded by post, and the fee for registering the same, shall be paid within a time to be fixed before the communication is made :

Provided that the Local Government, [* * * * *]¹ may remit such postage, or fee, or both, or may prescribe a scale of court-fees to be levied in lieu thereof.

144. [S. 583.] (1) Where and in so far as a decree is varied or reversed, the Court of first instance shall, on the application of any party entitled to any benefit by way of restitution or other-

An appeal lies under this section against an order of the District Court under S. 5 of the Religious Endowments Act. 4 M. 295. Section is not applicable to a Judge acting under S. 10, Religious Endowments Act. See 29 M.L.J. 671. See also 40 Mad. 793=44 I.A. 261=33 M.L.J. 69 (P.C.) ; 37 M. L. J. 162=53 I. C. 56 ; 38 C. L. J. 358=1924 Cal. 327. Also to decisions of the Additional Judge appointed to hear cases under the Land Acquisition Act. 16 C. 31. The Court under the Companies Act is governed by the general provisions of the Civil Procedure Code as made applicable by S. 141. 1 Lah. 187=55 I. C. 820. This section empowers the High Court to transfer to its own file proceedings for the winding up of a Company under the Companies Act. 9 A. 180. Under S. 141 its provisions are applicable to proceedings under the Lunacy Act. 22 C. W. N. 547=27 C. L. J. 205. A procedure to compel registration under the Registration Act is governed by the procedure laid down in the Code. 2 C. 131 (P.C.). A Receiver may be appointed in original proceedings as in suits according to O. 40, R. 1 read with S. 141. 43 Cal. 986=20 C. W. N. 1009. Under this section an executor can apply for probate *in forma pauperis*. 18 B. 237. Probate proceeding against minor—O. 32 is made applicable. 59 I. C. 664=24 C. W. N. 541. When an application under O. 21, R. 58 is struck off for default, this section enables the claimant to apply under O. 9, R. 9. 10 A. 119. Proceedings under S. 144 are not proceedings in execution. Consequently S. 141 applies to them. 20 A. L. J. 226=44 A. 407, (40 M. 780 diss.). Where an application under O. 9, R. 4 is itself dismissed for default, a fresh application to restore such application is maintainable. 50 I. C. 401=1 P. L. R. 1919. See also 56 I. C. 25 ; 1 Lah. 339=58 I. C. 748 ; 47 All. 878. Applicability to proceedings under O. 9, R. 9—Appeal. 36 C. L. J. 184=69 I. C. 1003 ; 47 All. 878=1925 All. 773. Under S. 141 application for re-admission can be made if an application to set aside an order dismissing a suit for default is itself dismissed for default. 10 I. C. 705=7 N. L. R. 32. See also 9 O. L. J. 627=74 I. C. 380=1923 Oudh 146 ; 47 All. 878=1925 All. 773.

PROCEEDINGS TO WHICH SECTION IS NOT APPLICABLE.—This section does not apply to appeals under the Letters Patent. 26 M. 123. It does not make the provisions of the Code applicable to proceedings under S. 195 of the Criminal Procedure Code. 30 M. 311. Non-

applicability of section to proceedings under S. 105 of the Bengal Tenancy Act. 1923 Pat. 273=3 Pat. 67=A I.R. 1924 P. 104. The Civil Procedure Code is not applicable to proceedings under the Mamlatdar Courts Act. 16 I. C. 675=6 S. L. R. 67. This section does not render an order under S. 5 of the Court Fees Act appealable as a decree. 12 A. 129. S. 114 does not apply to proceedings under the Guardian and Wards Act. 15 I.C. 559=116 P.R. 1912 See also 9 A. 36 ; 18 C. 635. Legal Practitioners' Act, S. 14—Proceedings under. See 50 I. C. 806=23 C. W. N. 560. See also 1 Pat. L. T. 576=37 I. C. 484. Where a surety bond is executed by a guardian and his sureties the proper remedy to proceed against the sureties on the bond is to assign the bond to enable the assignee to sue on the bond and not by issuing execution on the strength of this section. 103 I.C. 493.

EXECUTION PROCEEDINGS.—S. 141 does not apply to applications for execution. 29 I.C. 395=19 C.W.N. 758. See also 45 All. 148=A.I.R. 1923 All. 460 ; 18 Cal. 635 ; 20 A.L.J. 226=44 All. 407=66 I.C. 144=1922 All. 223 ; 89 I.C. 360 ; 52 C. 559 ; 83 I.C. 749 ; 48 M.L.J. 89=1925 Mad. 145 ; 41 C. L. J. 286=1925 Cal. 510. S. 141 does not apply to execution proceedings and they cannot be restored under O. 9. 2 Pat. 372=71 I. C. 484 ; 4 P. L. J. 135 (F.B.) ; 4 Pat. L. J. 330 ; 35 I. C. 337. The dismissal of an execution application for default is no bar to a subsequent application. 11 I. C. 385=13 C. L. J. 532.

Sec. 143—¹ The words "with the previous sanction of the Governor-General in Council" were omitted by Act XXXVIII of 1920.

Sec. 144.—"COURT OF FIRST INSTANCE," MEANING OF.—See 61 I. C. 962=13 L. W. 67.

"PARTY." MEANING OF.—See 44 All. 555 ; 98 I. C. 1042=A. I. R. 1927 All. 182.

SCOPE AND APPLICATION OF SECTION.—S. 144 is confined to cases in which the decree of a trial Court is varied or reversed by some superior Court or by reason of some order passed by a superior Court. 1 Pat. L.J. 43=34 I. C. 747=3 Pat. L. W. 95. See also 21 Bom. L. R. 157=43 Bom. 433 (F.B.) ; 39 I. C. 763=2 Pat. L. J. 361 ; 1917 Pat. 153=37 I. C. 863 ; 84 I. C. 75=1924 All. 713 (decree against minor). Application under section whether application for execution of the decree. 1 Luck. 40=13 O. L. J. 731. Right to restitution not restricted to reversal on appeal only. 30 M. L. J. 366=33 I. C. 739 ; 65 I. C. 797=1922 Mad. 70. Section applies also to appellate decrees. 38 Mad. 1120=27 M. L. J.

wise, cause such restitution to be made as well, so far as may be, place the parties in

112. In the matter of restitution power of Court not confined to section. 103 I. C. 657=A. I. R. 1927 Lah. 635.

Section does not apply to decrees passed before the passing of this Code. 29 I. C. 380. Object of the section is to shorten litigation and afford speedy relief. 17 I. C. 121=16 C. L. J. 135; and to restore the *status quo ante* of the parties. 55 I. C. 356. Application for restitution to be made to Court which passed the decree—Separate suit, if lies. 44 A. 283=20 A. L. J. 13. The power of restitution expressed in S. 144, C. P. Code, is inherent in all Courts, Civil or Revenue. 46 I. C. 475=11 Bur. L. T. 3. Section is imperative and mandatory and no discretion is given to the Court. 42 I. C. 523=6 L. W. 568. A special direction as to restitution is unnecessary, when the final decree is in favour of the applicant. 29 I. C. 380. Restitution may be granted even when the decree is set aside on review. 28 A. 665. Although a Court goes beyond the terms of a decree and gives possession, it can order restitution. 9 C. W. N. 381. Even if the section does not apply to possession taken on the strength of a declaratory decree which is upset in appeal, the Court can grant restitution. 6 C. W. N. 710. Execution sale—Setting aside—Repayment of purchase-money—Payment of encumbrances by purchaser. 25 Bom. L. R. 643=2 P. 10=4 P. L. J. 61=44 M. L. J. 735=49 I. A. 351 (P. C.). Damages—Wrongful attachment—Sale by court—Deposit under O. 21, R. 89—Loss from private sale. A. I. R. 1927 Mad. 353. As to restitution of money paid to a surety, see 38 Mad. 1120=27 M. L. J. 112. Inherent power of restitution exists—Order for repayment of money mistakenly paid out can be made. 26 C. W. N. 408=64 I. Q. 864=35 C. L. J. 53. Execution under mistake—Court can set right the wrong. 72 I. C. 879=1923 Oudh 16. See also 18 N. L. R. 15=67 I. C. 225=1922 N. 62. Suit for restitution can be converted into an application. 67 I. C. 319=1922 Nag. 198. Payment under decree subsequently declared in a separate suit to be null and void—Failure to ask for payment. 53 I. C. 552=13 S. L. R. 153. On this section see also 67 I. C. 546=42 M. L. J. 473 (Restitution of money paid under rateable distribution); 42 M. L. J. 308=1922 Mad. 228 (Distribution of proceeds among several decree-holders—Sale subsequently set aside—Right to refund of purchase-money); 42 M. L. J. 315=1922 Mad. 96 (Reduction of decree amount subsequent to execution sale—Right to refund); 47 I. C. 628=41 Mad. 467 (auction-purchaser not a party to suit); 55 I. C. 356 (what evidence has to be taken in proceedings under this section); 1925 Lah. 177 (Pre-emption decree). Landlord and tenant—Ejectment decree reversed—Tenancy revived. 8 L. R. 319 (Rev.).

FOR WHOM RESTITUTION CAN BE ORDERED.—Where an execution sale is set aside as void the auction-purchaser can demand a refund of the holder. 18 I. C. 381=15 Bom. L. R. 41. See also 43 Bom. 235. But see *contra* 3 Rang. 251=1925 Rang. 215. Where a judgment-debtor is dispossessed under wrong order of Court subsequently set aside, it is the duty of Court to restore him to possession. 18 N. L. R. 24=1922 N.

82. Execution sale set aside—Purchaser paying revenue. 51 I. C. 706. Where an assignment takes place even after the appellate decree which is the basis of the claim for restitution, the assignee is entitled to the benefits of S. 144. 1918 Pat. 243=46 I. C. 465. See also 38 Mad. 36=23 M. L. J. 513; 30 Cal. 857. Where certain alienations were set aside but the decree was reversed on appeal by the alienor alone, the alienees could apply for restitution. 98 I. C. 1042=A. I. R. 1927 All. 182.

AGAINST WHOM RESTITUTION CAN BE ORDERED.—A co-plaintiff in whose favour a decree is not passed is not a decree-holder and restitution cannot be ordered against him. 41 I. C. 23. Restitution cannot be had against a *bona fide* purchaser for value at an auction-sale held by a competent Court even though the decree is set aside on appeal. 38 All. 240=14 A. L. J. 302; 30 M. L. J. 497 (auction-purchaser not a party to suit, see 41 Mad. 467); 1925 Lah. 176. S. 144, C. P. Code, only applies to parties to the erroneous decree but not to third parties. 16 O. C. 225=21 I. C. 570. S. 144, C. P. Code, allows restitution to be made against the decree-holder who obtains any benefit under a decree which is afterwards reversed in appeal. It does not allow restitution against a third party such as a stranger auction-purchaser. 75 I. C. 238=L. R. 4 A. 526. See also 48 Mad. 767=49 M. L. J. 452. As to restitution against an assignee decree-holder, see 38 Mad. 36=23 M. L. J. 513; 42 I. C. 527. The party sued for restitution on the reversal of a decree in appeal cannot plead his rights acquiesced during the pendency of the litigation in some other capacity by way of defence and his remedy to establish such rights is by independent suit. 5 O. W. N. 162=A. I. R. 1928 Oudh 208.

INTEREST AND COSTS.—The Court has power to award interest on costs which the judgment-debtor may be liable to refund to him. 20 O. C. 327=43 I. C. 337. See also 19 A. L. J. 771=63 I. C. 513. As to right to interest, see also 27 Bom. L. R. 485=1925 Bom. 313; 16 L. W. 587=1922 Mad. 70; 41 Mad. 316; 21 C. W. N. 564=24 C. L. J. 467; 37 M. L. J. 591. If money lies in Court and no person is benefited no interest is payable. 3 Rang. 251. A party realising costs awarded under a decree must refund the amount on reversal of the decree quite apart from the fact that property in the suit was given to a charity or applied to another purpose. 54 I. C. 816. In S. 144 there is an express provision that the Court shall in its discretion award such interest as it chooses and the fact that the principal only is secured by the bond given by the executing creditor who withdrew the money from Court does not affect his liability to pay interest under this section. 39 I. C. 22=2 Pat. L. J. 149.

INTEREST AND MESNE PROFITS.—Mesne profits—Interest—Pre-emption decree—Execution of—Reversal on appeal. 19 I. C. 1. As to mesne profits and interest thereon, see also 2 Lah. L. J. 207; 53 I. C. 119; 18 L. W. 30=45 M. L. J. 323=73 I. C. 1041=1924 Mad. 87 (8 L. W. 179, foll.); 13 L. W. 449; 44 Mad. 961, rel. on); 3 L. W. 405=34 I. C. 2; 17 I. C. 121=16 C. L. J. 135. Mesne profits—Order to pay—Restitution

the position which they would have occupied but for such decree or such part thereof as has been varied or reversed; and, for this purpose, the Court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation or reversal.

(2) No suit shall be instituted for the purpose of obtaining any restitution or other relief which could be obtained by application under sub-section (1).

Enforcement of liability of surety. **145. [S. 253.]** Where any person has become liable as surety—

—Power of Court, 38 All. 163=43 I. A. 43 (P. C.) Court cannot order mesne profits by way of restitution where it has not been claimed in plaint, 39 M. L. T. 94=104 I. C. 768=A. I. R. 1927 Mad 898. Order of remand—Order for mesne profits is not a consequential one. 76 I. C. 255=18 N. L. R. 200=1923 Nag. 101 (1).

PEACEFUL POSSESSION NOT IN EXECUTION OF DECREE.—If a decree-holder instead of executing the decree gets possession of the property in question the owner of the property is entitled to restitution on the decree being set aside in appeal. 18 A. L. J. 729=42 A. 568=57 I. C. 148; 8 Lah. L. J. 551=28 Panj. L. R. 62=8 Lah. 41=99 I. C. 952=A. I. R. 1927 Lah. 37. See also 27 I. C. 813=21 C. L. J. 75; 26 I. C. 890=19 C. W. N. 1167. But see contra in 8 L. 356.

NATURE OF PROCEEDINGS UNDER THE SECTION.—EXECUTION PROCEEDINGS.—Proceedings under the section, if proceedings in execution—"Party," meaning of. 44 All. 555=20 A. L. J. 456; 1 Luck. 40=13 O. L. J. 731; 6 P. 252=102 I. C. 614=A. I. R. 1927 Pat. 208. See also 3 Pat. 371=5 Pat. L. T. 145 (F. B.) (resembles execution only superficially); Proceedings under S. 144 of the Code are proceedings in execution of a decree. 28 C. W. N. 988. S. 141, C. P. Code, applies to restitution proceedings. 44 A. 407=1922 A. 223. See also L. R. 3 A. 443; 40 Mad. 780. An application for restitution under S. 144 is neither a suit nor a proceeding in execution. It is a miscellaneous proceeding to which the rules applicable to execution proceedings do in substance apply. 47 I. C. 47=3 Pat. L. J. 367.

LIMITATION—CONFLICT OF RULINGS.—An application for restitution under S. 144, C. P. Code, not being an application for execution, Art. 181 of the Limitation Act applies. 8 Bur. L. T. 165=30 I. C. 680; 3 Pat. 371 (F. B.). Limitation for application for restitution. 19 A. L. J. 549=63 I. C. 184; 21 C. W. N. 564 (dependant judgment). An application for restitution under S. 144, C. P. Code, is one for execution of decree of the Appellate Court and is thus governed by Art. 182, Lim. Act. 45 Bom. 1137=23 Bom. L. R. 480. See also 22 Bom. L. R. 403=44 B. 702; 2 P. 277=72 I. C. 912; 67 P. R. 1918; 33 M. L. J. 413=42 I. C. 530. (32 Mad. 136; 20 Mad. 448; 40 Mad. 780; 22 M. L. J. 146, ref.)

SUCCESSIVE APPLICATIONS.—Starting point—Lim. Act, Art. 181. 47 I. C. 47=3 Pat. L. J. 367. See also 32 I. C. 46.

BAR TO SUIT.—Where restitution cannot be obtained by application under S. 144 (1), C. P. Code, there is no bar to the institution of a suit. 44 All. 687=20 A. L. J. 636. See also 44 All. 283=20 A. L. J. 13. See also 101 I. C. 733. Where restitution can be enforced in execution, no separate suit lies, 13 I. C. 179=22 M. L. J.

146. Consequently a suit for recovery of damages by a successful defendant against an unsuccessful plaintiff for bringing a false suit which involved great injury to the defendant is maintainable. 44 All. 687=20 A. L. J. 636.

APPEAL.—An order passed under this section is a decree see S. 2 and an appeal lies against such order. 8 M. L. J. 276. But see 10 P. R. 1914 (order dismissing application for restitution is not appealable). 20 I. C. 203. An order under this section is a decree. As to the principle upon which the doctrine of restitution is based, see 23 M. 306 (310). Second appeal also lies, 86 I. C. 376=1925 Cal. 1074.

Sec. 145. SCOPE AND APPLICATION OF SECTION.—Section is merely procedural and does not in any way define a surety's liability, 5 Rang. 494=A. I. R. 1927 Rang. 316. The "person" need not now have become liable as surety "before the passing of the decree," as was held in 30 B. 506. The words "for the fulfilment of any condition" will supersede the ruling in 8 M. L. J. 199. As to extent of surety's liability, see 1925 Lah. 170; 7 Lah. L. J. 343=1925 Lah. 552; 83 I. C. 870=1925 Sind 25; 84 I. C. 998=1925 Rang. 135=2 Rang. 567 (Surety not to be made liable simply because judgment-debtor was produced somewhat late); 89 I. C. 342=19 S. L. R. 390. (Section not applicable to surety under Guardian and Wards Act). S. 145 applies only where the surety has rendered himself personally liable for the decretal amount and such liability can only be enforced against him to the extent to which he has become personally liable. 29 I. C. 149=19 C. W. N. 961. See also 22 C. W. N. 919; 19 C. W. N. 178; 17 C. L. J. 267 (F. B.). The section prescribes a summary remedy in execution for the realisation of the security in execution to the extent to which the surety has made himself personally liable. 34 I. C. 407= (1916) 2 M. W. N. 273; 21 I. C. 612. Where immoveable property is given by a judgment-debtor as security for the due performance of a decree the property can be realised by the decree-holder in execution and no separate suit is either necessary or maintainable. 34 M. L. J. 84=41 M. 327. Before proceedings are started under S. 145 it must be established that the person against whom execution is sought has become liable as surety in Court. 71 I. C. 46. See also 41 Mad. 40. S. 145 does not apply to proceedings for the enforcement of surety bonds taken by the decree-holder outside the Court. The bond has to be enforced by suit. 8 L. W. 507=48 I. C. 940. A condition precedent in a surety bond that the debtor should be produced if he failed to appear after notice, is a benefit which the surety may waive. 34 I. C. 407= (1916) 2 M. W. N. 273. The liability of a judgment-debtor's surety should

(a) for the performance of any decree or any part thereof, or

(b) for the restitution of any property taken in execution of a decree, or

(c) for the payment of any money, or for the fulfilment of any condition imposed on any person, under an order of the Court in any suit or in any proceeding consequent thereon,

the decree or order may be executed against him, to the extent to which he has rendered himself personally liable, in the manner herein provided for the execution of decrees, and such person shall, for the purposes of appeal, be deemed a party within the meaning of section 47 :

Provided that such notice as the Court in each case thinks sufficient has been given to the surety.

not ordinarily be enforced in execution against any property which he might have mortgaged under the surety bond without a suit for the purpose. 39 All 225. See also 38 All. 327 ; 54 Cal. 1. The Court has a discretion to refuse execution against the surety. 23 Bom. L. R. 1263 = 46 Bom. 702.

EXTENT OF LIABILITY.—*Ex parte* decree, setting aside of. 44 Bom. 34 = 21 Bom. L. R. 861. The liability of the surety cannot be determined until the time for execution has arrived. The death of defendant for whom the opponent stood as surety does not discharge him. 19 Bom. L. R. 112 = 41 Bom. 402. A surety bond for performance of a decree or for restitution in case the decree is reversed is enforceable by a regular suit and the obligee need not enforce the bond by a proceeding in execution. 13 Bom. L. R. 909 = 36 Bom. 42. Forfeiture of security is to be applied in satisfaction of the decree. 59 I. C. 778 = 25 C. W. N. 36. Previous notice to surety is essential before attachment of his property, see 2 Rang. 567 = 89 I. C. 998 = 1925 Rang. 135. But see also 1925 Oudh 152. Notice under section and warrant of arrest may both be issued simultaneously. 99 I. C. 518 (2) = A. I. R. 1927 Lah. 131. Where sureties agreed to produce the judgment-debtor but did not produce, without further notice they can be made liable on their bonds for their failure, 75 I. C. 830 = 1924 Mad. 241 ; 1925 Oudh 152. The liability of a surety for a debt ceases to exist when his principal's debt is extinguished by an act which causes the merger of the estate of the debtor and the creditor. 44 M. L. J. 171 = 1923 Mad. 340. A third party who has given security for the performance of a decree cannot apply to the executing Court to cancel the bond on the ground that it was obtained by fraud. His remedy is only by way of suit. 43 Mad. 325 = 38 M. L. J. 65. See also 34 I. C. 247 = 10 Bur. L. T. 15 ; 28 Punj. L. R. 525. Where a person has become surety for the release of a judgment-debtor arrested in execution of a decree, and the bond is filed in Court, it must be regarded as a matter of record in the Court as much as if it had been executed to the Court itself. The bond is consequently enforceable against the security in execution proceedings. 53 I. C. 673 = 10 L. W. 172. Under S. 145, a decree-holder cannot execute a decree against a surety under O. 21, R. 43 as amended by the High Court, in respect of property entrusted to him. The proper mode of enforcing such a bond is by assigning it in favour of the decree-holder. 25 M. L. T. 220 = (1919)

M. W. N. 219 = 52 I. C. 410 = 9 L. W. 476. See also 12 L. W. 329 = 39 M. L. J. 472. A Court is not competent to pay the surety's money to the judgment-creditor, without finding that the conditions of the bond were not complied with and without issuing notice to the surety to show cause against the order. 30 I. C. 517. Notice may be given either by the Court which passes the decree, or by the Court to which the decree is sent for execution. 29 B. 29 (34) ; 26 C. 224 ; 12 B. 76 ; 19 B. 578 ; 15 M. 203 ; 3 A. 806. S. 145 deals with procedure and not with the extent of the surety's liability. Where there is a refusal to enforce liability other interested parties than the sureties may appear. 26 I. C. 76 = (1914) M. W. N. 714. The security given by a depository for safe custody of livestock attached under O. 21, R. 43 cannot be enforced in execution by summary process. 47 I. C. 956 = 16 N. L. R. 178. (13 C. P. L. R. 104, foll ; 12 C. P. I. R. 149, diss.) See also 28 Punj. L. R. 525. Extent of liability—Decree-holder not confined to properties given as security for stay of execution. 3 Pat. L. J. 176 = 43 I. C. 454 = 4 Pat. L. W. 216. A property mortgaged by a surety under this section cannot be sold as mortgaged property. 38 I. C. 130. See also 2 Pat. L. J. 197 = 39 I. C. 648. Surety for production of judgment-debtor—Imprisonment of judgment-debtor—Failure to produce—Surety is liable. 19 A. L. J. 968 = 44 A. 174. But see 1 Bur. L. J. 236 ; 41 C. 50. Under S. 145 a surety for a Receiver can be asked to pay the sum which he has bound himself to pay. 59 I. C. 844 = 13 Bur. L. T. 91. Mistake in receiver's accounts—Surety's liability. 6 Bur. L. J. 15. A person who has executed a bond under S. 55 (4) is a party to a suit within the meaning of S. 47. 34 I. C. 247 = 10 Bur. L. T. 15. But see also 43 Mad. 325 ; 20 S. L. R. 362. A decree-holder is not bound to give the principal judgment-debtor an opportunity of paying before taking proceedings against the surety, 20 I. C. 540 = 7 S. L. R. 19. But see *contra* 102 I. C. 710 (1).

MISCELLANEOUS—Extent of surety's liability—Mode of enforcement—Decree-holder asked to furnish security—Mesne profits. 42 All. 158 = 46 I. A. 228 (P. C.) ; see also 30 Bom. L. R. 19. Forfeiture of bond—Personal attendance of party—Service of summons. 36 I. C. 73.

APPEAL.—Even under the old Act, the surety had a right to appeal. 12 B. 71.

RIGHT OF SUIT.—Suit by surety to cancel security on ground of fraud. See 26 Punj. L. R. 561 = 7 Lah. L. J. 457 = 1925 Lah. 618.

146. Save as otherwise provided by this Code or by any law for the time being in force, where any proceeding may be taken or application made by or against any person, then the proceeding may be taken or the application may be made by or against any person claiming under him.

Proceedings by or against representatives.

147. In all suits to which any person under disability is a party, any consent or agreement, as to any proceeding shall, if given or made with the express leave of the Court by the next friend or guardian for the suit, have the same force and effect as if such person, were under no disability and had given such consent or made such agreement.

Consent or agreement by persons under disability.

148. Where any period is fixed or granted by the Court for the doing of any act prescribed or allowed by this Code, the Court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.

Enlargement of time.

Sec. 146—Under S. 146 a transferee from an auction-purchaser is entitled to delivery of possession. 40 All. 216=42 I. C. 936=16 A. L. J. 150. See also 84 I. C. 665=1924 Mad. 470. Legal representative not actually brought on record can apply under O. 9, R. 13. 27 O. C. 299=85 I. C. 529=1925 Oudh 370. Representative—Transferee of decree-holder's interest during pendency of suit. 17 I. C. 512. Expression 'claiming under' is wide enough to cover cases of devolution, etc., mentioned in O. 21, R. 10. 48 I. C. 840=41 M. 510. Execution application by one of several surviving coparceners though cannot be given effect to as being defective, is yet not altogether invalid. 51 Bom. 143=29 Bom. L. R. 75=100 I. C. 619=A. I. R. 1927 Bom. 123. Where merits are on the side of appellant he can be allowed to appeal even though he is a transferee from a party after the decree. 40 I. C. 846=(1917) M. W. N. 306. The assignee after decree and before appeal ought to be allowed to join in the appeal under this section. 38 I. C. 511=20 O. C. 31. See also 69 I. C. 959=3 Pat. L. T. 625. See on this section 12 M. L. J. 435; 29 C. 33.

Sec. 148. SCOPE AND APPLICATION.—S. 148 does not apply to the extension of time for deposit of printing charges under R. 13 of the Oudh Rules of Practice. 50 I. C. 789=22 O. C. 13. Extension of time for doing acts under mortgage or other decrees does not fall within S. 148, C. P. Code. 39 Mad. 876=20 M. L. J. 708. See also 34 A. 388; 10 A. L. J. 520; 1 L. W. 882; 24 I. C. 825. 2 Luck. 425=101 I. C. 258=4 O. W. N. 252. The time fixed by a decree in a mortgage suit cannot be extended under S. 148. 28 I. C. 862=18 O. C. 58. When a certain point decided by the lower appellate Court was not appealed against by the party aggrieved in time, but the same point was allowed to be raised in appeal admitted after time, the High Court was deemed to have impliedly extended time for appeal. 43 Mad. 550=47 I. A. 33=38 M. L. J. 444 (P. C.) (affirming 30 I. C. 286=29 M. L. J. 110); 4 Pat. 190=1925 Pat. 299. When time granted for any matter to be done by a party is exceeded and there is an application by the party to excuse the delay and enlarge the time and the Court acted upon the matter as though it was in time it should be considered that the Court had enlarged the time. 34 I. C. 625=20 C. W. N. 615.

Time fixed by decree of first Court—Confirmation on appeal. Time runs from date of appellate decree. 70 I. C. 76=34 C. L. J. 415. The section does not empower an executing Court to extend the time fixed for payment of the decretal amount. 49 I. C. 573, 840=15 N. L. R. 39. Section applies to proceedings antecedent to the passing of the decree but does not enable the Court to extend the time for doing acts allowed by a decree. 87 I. C. 12=21 N. L. R. 111; 74 I. C. 573; 28 I. C. 852=18 O. C. 58; 2 Luck. 425=101 I. C. 258=4 O. W. N. 252. Section allows the Insolvency Court to grant an extension of time even when made after the expiry of the period for discharge fixed by the adjudication order. 86 I. C. 115=26 Punj. L. R. 126=1925 Lah. 416.

ILLUSTRATIVE CASES : CASES WHERE COURT CAN EXTEND TIME—Sec. 148 gives a Court power to enlarge the period of redemption if it thinks fit. 27 I. C. 706. See also 28 I. C. 458; 27 I. C. 419; 35 All. 582; 18 I. C. 86; 64 I. C. 242; 73 I. C. 891; 1923 Cal. 612; 86 I. C. 397=1925 Nag. 258. In a redemption suit the Court could extend the time fixed in the decree for payment of decretal amount to a prior mortgagee only under O. 34, R. 8 and not under S. 148; 34 All. 388. As to power of Court extend time for payment of decretal amount, see 42 I. C. 613=15 A. L. J. 511. Time agreed upon by parties for the payment of decretal amount of mortgage money may be extended by the Court in a proper case. 50 I. C. 937=23 C. W. N. 439.

CASES WHERE COURT CANNOT EXTEND TIME—A Court is unable to extend a period fixed for doing an act after the final decree is made. 99 P. R. 1912. See also 37 M. L. J. 695; 74 I. C. 573. Where time has been fixed by a decree of Court for payment of court-fee, the Court has no jurisdiction to amend the decree so as to enlarge the time for payment. 37 C. L. J. 395=27 C. W. N. 720. See also 10 I. C. 268=13 C. L. J. 432. The Court cannot enlarge the time for the making of an award when time has expired and the award has already been made. 12 I. C. 13=38 Cal. 522. The Court has power under S. 148 to extend the time fixed for payment of costs on an *ex parte* decree being set aside or to pass a fresh conditional order. 36 All. 77. S. 148 does not authorise the Court to grant extension of time for doing an act prescribed by Pro. Sm. C. C. Act. 1 Pat. L. T. 323=56 I. C.

149. [Cf. S. 582-A.]

Power to make up deficiency of court-fees.

Where the whole or any part of any fee prescribed for any document by the law for the time being in force relating to court-fees has not been paid, the Court may, in its discretion, at any stage, allow the person, by whom such fee is payable, to pay the whole or part, as the case may be, of such court-fee; and upon such payment the document, in respect of which such fee is payable, shall have the same force and effect as if such fee had been paid in the first instance.

810. Conditional decree—Time fixed by, cannot be extended. 73 I. C. 922=1923 Lah. 372. Where a decree was granted for possession on payment of a certain amount in a fixed time, the Court has no jurisdiction to extend the period. 57 I. C. 16=18 A. L. J. 826=42 A. 639. See also 40 All. 579=47 I. C. 4=16 A. L. J. 625. Time fixed by compromise decree—Court cannot extend time. 66 I. C. 273=1922 O. 145. See also 6 Pat. L. T. 511=1925 P. 691. Pre-emption decree—Court cannot extend time fixed by. 19 N. L. R. 8=1923 Nag. 210. See also 23 O. C. 254=57 I. C. 483; 1 Pat. L. J. 92=34 I. C. 38; 2 Luck. 425=101 I. C. 258=4 O. W. N. 252 (but the appellate court can); 28 Bom. L. R. 1446.

REVISION.—A Court arbitrarily granting an application for restoration of a suit long after the period of limitation expired acts without jurisdiction and its order is open to revision. 52 I. C. 439=4 Pat. L. J. 428.

Sec. 149. SCOPE OF SECTION.—The section is intended to remedy the hardship caused by the rulings in 20 M. 319; 27 C. 376; 28 A. 310; 10 C. W. N. 844; and follows 29 A. 749 (F. B.). Where a deficient court-fee is paid within the time allowed by Court but after the period of limitation, the suit is not barred. 23 I. C. 408=12 A. L. J. 709. See also 21 A. L. J. 333=1923 A. 349 (1); 45 A. 518; 84 I. C. 946; 4 Pat. 190; 107 I. C. 223. The Court will not in its discretion allow the deficiency of court-fee to be made up on the day of the hearing unless it is satisfied that some grounds exist for the exercise of its discretion and that a *bona fide* mistake was made. 44 I. C. 398. See also 38 Bom. 41. *Bona fide* mistake of pleader—Extension of time to be given. 49 I. C. 188=10 P. R. 1919. In case of gross negligence of pleader see 28 Punj. L. R. 338. Where a court-fee cannot be definitely ascertained until record is received or the amount is in doubt, Court may extend time but not where it is purposely not fully paid. 3 Pat. L. J. 74. The appellant cannot get any indulgence by extending time for payment of Court-fees the law upon the point being settled, when there could have been no misapprehension as to the Court-fees payable. 73 I. C. 788. Under S. 149 a Court has a discretion to allow the payment of court-fee at any time. 26 I. C. 33=27 M. L. J. 677. (38 B. 41, dist.) When an application for leave to sue *in forma pauperis* is dismissed, the plaint still remains and may be validated by payment of Court-fees within a time to be fixed by Court. This depends upon the discretion of the Court. 46 M. L. J. 254=76 I. C. 767. See also 55 P. R. 1913. Application to sue *in forma pauperis* withdrawn—Court-fee paid beyond limitation—Suit barred. 1 Rang. 196=1923 Rang. 256. Under S. 149 the appellate Court when dismissing an application for leave to appeal as pauper can grant him time

to pay requisite Court-fee and if the same is paid within time the Court will admit the appeal. 40 Mad. 68=31 M. L. J. 269. Where an application for leave to appeal *in forma pauperis* is rejected and a regularly stamped appeal was filed later on it is only on the latter date that the appeal must for purposes of limitation be deemed to have been presented. 5 Bur. L. T. 294=18 I. C. 518. Payment of the deficit Court-fees after several orders but in conformity with the last is within S. 149. Discretion exercised properly under S. 149 is unchallengeable in appeal. 24 C. L. J. 88=29 I. C. 571. See also 41 Cal. 1092; 21 I. C. 866; 1923 Lah. 629; 56 I. C. 47; or in revision. 89 I. C. 419. Where there is no *bona fide* mistake in the payment of a smaller court-fee and the omission is deliberate, a Court should not extend time to pay up the deficiency. 75 I. C. 667=1923 Lah. 309. See also 3 P. L. J. 74; 1 Lah. 234. An extension of time will not be allowed for payment of Court-fee for an appeal which has been insufficiently stamped in the absence of satisfactory explanation of the mistake, if any. 67 I. C. 130. See also 67 I. C. 901; 3 Lah. L. J. 370=57 I. C. 215; 1 Lah. 234; 67 I. C. 106=1922 Lah. 440. S. 149 should not be used so as to allow an appellant who files an appeal on insufficient stamps on account of his poverty to pay the balance at his leisure. 49 I. C. 871. See also 53 I. C. 256; 56 I. C. 143=2 Lah. L. J. 486=2 Lah. 1. Reasons for not paying the entire court-fee must be considered before granting extension. 60 I. C. 493. An appellate Court cannot go into the question as to whether the lower Court exercised its discretion in making various orders of payment of court-fees if the order is not objected to when made or in the Court which made it. 56 I. C. 47 (Pat.) Extension of time for payment of court-fee, when implied. 5 Pat. L. J. 544=58 I. C. 216=1 Pat. L. T. 544. No express order is required for extending the time for paying up deficit court-fee. 5 Pat. L. J. 544=1 Pat. L. T. 544. Time fixed by decree—No extension to be given. 72 I. C. 879=1923 Oudh 16; 85 I. C. 352=1924 Rang. 375. Time fixed for payment of costs on payment of which appeal was accepted cannot be extended. 1925 Pat. 153.

LIMITATION.—In the case of a suit in which an insufficiently stamped plaint is filed within the limitation period, though the deficiency in the Court-fee is made up after the limitation period, the suit is deemed to have been instituted on the date of the actual filing of the plaint under S. 149. 1 Pat. L. J. 420. Where a plaint is filed in time but with an insufficient court-fee and the deficiency is made good under O. 7, R. 11, no question of limitation arises. The law is otherwise as regards memoranda of appeal. 3 Pat. L. T. 142.

150. Save as otherwise provided, where the business of any Court is transferred to any other Court, the Court to which the business is so

Transfer of business.
transferred shall have the same powers and shall perform the same duties as those respectively conferred and imposed by or under this Code upon the Court from which the business was so transferred.

Saving of inherent powers of Court.

151. Nothing in this Code shall be deemed to limit

Sec. 150.—S. 150 applies not merely to cases where the whole of a business of a Court with reference to the whole of its jurisdiction is transferred to another Court but also to cases of partial territorial adjustment of jurisdiction and the transfer of the business with reference to that part alone to another Court. 46 Mad. 1 = 42 M.L.J. 344. The word "transfer" in the section is not used in a limited sense of transfers under the special provisions of the Code. It implies that the whole business can be transferred to another Court without an order from a superior Court under S. 24. When all proceedings are transferred *ipso facto* to the new Court, such new Court has power to continue execution proceedings relating to lands situated in the transferred area pending in the former Court at the time of transfer. 37 Mad. 462 = 26 M.L.J. 189. See *contra* 42 M. 821 = 37 M.L.J. 284 (F.B.); and 47 M.L.J. 448. See also 35 I. C. 296 = 31 M.L.J. 22. Territorial jurisdiction—Transfer of—Execution of decree. 38 I. C. 152. Transfer of jurisdiction—Application to set aside *ex parte* decree. 46 M. 1 = 42 M.L.J. 344. Injunction—Disobeying of—Transfer of venue—Application for contempt. 43 M. L. J. 713 = 46 M. 83 = 86 I.C. 650. See also 26 C.W.N. 216.

Sec. 151. SCOPE OF SECTION—INHERENT POWERS OF COURT.—Scope of section pointed out. 47 C.L.J. 87. Inherent powers are not limited to Ss. 151 and 152. 1925 Cal. 420. S. 151, C. P. Code, is intended for exceptional cases for which there is no remedy except the Court's inherent powers. It is not intended to enable Court to evade or ignore the provisions of law which govern procedure. Where after passing a decree, a court *suo motu* set aside its own decree on the ground it had discovered some documentary evidence on the record the procedure is illegal. 21 A. L. J. 447 = 73 I. C. 494; 86 I. C. 1045 (S.). See also A. I. R. 1928 Mad. 522. A Court cannot amend a decree which is in conformity with the judgment. 100 I. C. 142 = A.I.R. 1927 Lah. 403; A. I. R. 1927 Cal. 203. Remedy by way of appeal may bar exercise of powers under this section. 27 Bom. L. R. 1511. A court is not only entitled but is bound to brush aside a mere technicality which stands in the way of justice and to amend such mistakes, slips or omissions as may appear to prevent justice in order to give effect to the real and substantial right of the parties. Ss. 151, 152 and 153 are just as applicable to Courts of first instance as to Courts of appellate jurisdiction and the Appellate Court ought to take steps by way of amendment which were clearly open to the first or other lower Court. 34 I. C. 79 = 38 All. 398; 1 Luck. C. 187 = 105 I.C. 146 = A. I. R. 1927 Oudh 276. S. 151 empowers Courts to deal with their own decrees and orders and does not give authority to superior Courts by way of conferring jurisdiction over inferior courts. 42

Bom. 363 = 45 I. C. 552. The inherent power of a Court can be invoked only for the attainment of the ends of substantial justice. 19 C. W. N. 835 = 25 I. C. 267. Court may do what is fair and equitable. 84 I. C. 134 = 48 Mad. 494. It must not be used to defeat the imperative provisions of S. 3 of the Lim. Act. 66 I. C. 270; 7 Lah. L. J. 13 = 1925 Pat. 321. The doctrine of inherent power has no scope for application where there is express statutory provisions on the point in controversy. 69 I. C. 718; 75 I. C. 487 = 1923 Lah. 506 (2); 106 I. C. 575; 15 I. C. 53 = 16 C. W. N. 1029. A *reductio ad absurdum* can be avoided by a Judge under the provisions of the above sections, which are wide enough for the purpose. 37 I. C. 282. The inherent powers of a Court are not to be used in order to relieve a party from the consequences of his own mistakes or to enable him to evade the law of limitation. 43 M. L. J. 184 = 70 I. C. 743; 89 I. C. 427. Excusing delay to sue as pauper. 101 I. C. 320 (1) = A. I. R. 1927 Nag. 197. Inherent power is that which inheres in a Court by the very fact of its being empowered to exercise any jurisdiction at all so that it comes within the express sense of the law or within the consequences that may be gathered from it. 1 I. W. 882 = 26 I. C. 63. The power mentioned in S. 151 must be used very sparingly and only in the last resort. 67 I. C. 296; 34 I. C. 787; 33 M. L. J. 184 = 70 I. C. 743 = 1922 Mad. 417. If a suit is dismissed by the trial Court for certain reasons, it is open to the Court of appeal to dismiss it for completely different reasons. 4 O. W. N. 862 = 104 I. C. 824 = A. I. R. 1927 Oudh 455.

APPLICABILITY OF SECTION.—S. 151 does not apply where there is an express provision of law. 69 I. C. 718 = 3 Pat. 654; 82 I. C. 813 = 1925 Pat. 47; 4 Pat. 180; 8 L. R. 18 (Rev.); 102 I. C. 543 = A. I. R. 1927 Nag. 262; 52 M. L. J. 670. Where an appellate Court is asked to set aside the proceedings in an appeal on the ground that on the date of hearing of the appeal the respondent was not living, the procedure is to apply within the period of limitation for a review of the judgment passed in the appeal and not to apply under S. 151; 54 I. C. 284. High Court cannot consolidate suit pending in District or other Courts. 39 Bom. 604 = 30 I. C. 560; 27 L. W. 366 = (1928) M. W. N. 271 (consolidation of appeals). Consent of parties not necessary. 40 I. C. 182; 4 Pat. 448. Inherent power of Court to deal with two appeals together. 45 A. 506 = 74 I. C. 411. Consolidation is an inherent power in an appellate Court and is not barred by absence of application therefor in lower Court. 45 I. C. 463 = 34 M. L. J. 279. A Court has inherent power to consolidate suits and this jurisdiction can be exercised even without the consent of the parties. 3 Pat. L. T. 584 = 67 I. C. 1000 = 1922 P. 566. (17 C.

or otherwise affect the inherent power of the Court to make such orders as

W. N. 526, ref.); 3 P. L. J. 446=45 I. C. 551=1918 Pat. 259.

ENDS OF JUSTICE.—The section recognizes the inherent powers of a Court to make orders to prevent a miscarriage of justice. 38 All. 147=36 I. C. 585; 86 I. C. 882=1925 Cal. 1145. *See also* 1 P. 149, 235. Cognizance of cases which cut at root of controversy. 98 I. C. 280=A. I. R. 1927 Mad. 143. S. 151 has been enacted to deal effectually with abuse of process of Court. The institution of a second suit against the same party for the same relief on the same cause of action is not an abuse of the process of the Court. 27 M. L. J. 405=25 I. C. 597. A Court in India has power to pass a conditional decree as it can impose a condition doing complete justice to the parties. 23 M. L. J. 652=17 I. C. 987. Where decree-holder is permitted to bid at an auction-sale, subject to certain conditions being fulfilled and he fails to fulfil the condition, the Court has power to refuse to confirm the sale. 69 I. C. 872=1 Pat. 235. The High Court has full power to pass proper orders to give relief to parties and it can set aside an order of a Subordinate Court although in the revision petition the petitioner has not moved against it. 64 I. C. 496=2 Pat. L. T. 739. Ends of justice—Wrong execution of decree—Interference. 48 I. C. 107=3 Pat. L. J. 435.

LIMITATIONS ON THE EXERCISE OF COURT'S POWERS.—The section applies only when there is no other express provision of law. 30 I. C. 38=21 C. L. J. 614; 55 C. 219=103 I. C. 864=A. I. R. 1927 Cal. 850=47 C. L. J. 69. Court cannot do what is prohibited by the Code. 3 Pat. 766=6 P. L. T. 309=84 I. C. 320=1925 Pat. 36; 100 I. C. 518=A. I. R. 1927 Cal. 420. S. 151 does not authorise the Court to override the express provisions of Limitation Act or Bengal Tenancy Act. 9 I. C. 246; 7 Lah. I. J. 13=86 I. C. 256. S. 151 does not authorise the Court to exercise its inherent powers so as to break the provisions of the Limitation Act. 1 Lah. 363=58 I. C. 789=2 Lah. L. J. 249. *See also* 57 I. C. 15; 23 N. L. R. 193. But *see* 47 C. L. J. 87. In exercising the inherent powers the decision of the Court should be based on general legal principles subject to any special provisions contained in the Code, meeting the necessities of the case in question. 56 I. C. 255; 98 I. C. 70=A. I. R. 1927 Cal. 158.

WHO CAN MOVE THE COURT.—The inherent powers of a Court cannot be used for the benefit of the litigant who has his remedy under the Code of Civil Procedure, much less for one who having his remedy has lost it by his own delay. 26 I. C. 46=27 M. L. J. 605. A stranger to the litigation cannot intervene after the suit or proceedings are disposed of and claim the protection of S. 151 or appeal to the inherent powers of the Court to do justice. 42 M. L. J. 563=68 I. C. 910. Court can order restitution to surety. 28 Punj. L. R. 525.

ILLUSTRATIVE CASES: AMENDMENT OF DECREE.—Where a purely clerical error is brought to the notice of a High Court when it is seized of the matter as Court of Appeal it can correct the error. 45 A. 53. A Court cannot vary or set aside under S. 151 a consent decree made by it when the decree and Solehanamah are not in variance. 36 I. C. 239. The Court has inherent powers to amend or vary a perfected order and to make

necessary orders at any time even after an appeal has been perferred against it where the decree is not in accordance with the intention of the Court as gathered from the judgment as a whole. 26 I. C. 946=18 C. W. N. 772. Amendment of decree after disposal of appeal. 8 Pat. L. T. 143. S. 151 would enable a Court to alter a decree when it does not correctly express what the Court actually decided or intended to decide. 73 I. C. 679=1923 Lah. 147. Where the decree has not been signed the Court has power to make alteration to make decree consistent. 17 L. W. 254=74 I. C. 416; 37 I. C. 352. It is not competent to a Court to amend the decree of another Court transferred to it for execution even though the error may be obvious. 15 L. W. 301=65 I. C. 710; 34 I. C. 787=3 L. W. 499. An application to amend a plaint on the ground that the correct view has subsequently been laid down by the High Court should be allowed. 26 I. C. 383. Where the parties allowed a decree to be enforced for 6 years before attempting to amend it, it should not be amended specially when there is no clerical or arithmetical mistake. 67 I. C. 310. A court has inherent power to amend a decree for pre-emption and deduct the amount due to the pre-emptor from the vendee as a charge of the property sold, from the pre-emption money. 54 I. C. 34. Court cannot amend a decree which is in conformity with judgment. 100 I. C. 142=A. I. R. 1927 Lah. 403.

ADDING PARTIES.—An appellate Court has power to implead only such persons as parties to the appeal as were parties in the trial Court and were not made parties to the appeal but not those who were complete strangers to the suit. 56 I. C. 726=31 C. L. J. 130; 67 I. C. 10=34 C. L. J. 405. Powers of a Court to implead parties under S. 151 are circumscribed by O. 41, R. 20 and it is only in exceptional circumstances that the inherent powers under S. 151 could be invoked. 73 I. C. 136=1923 Lah. 490. Also 8 Lah. 161, power of High Court to transpose parties. A. I. R. 1927 Cal. 37.

CONTEMPT OF COURT.—The effect of the section is to give absolute power to Courts to summarily punish contempts by fine or imprisonment. 50 I. C. 981=23 C. W. N. 389; 86 I. C. 650=1923 Mad. 02.

CONVERSION OF ONE PETITION INTO ANOTHER.—The petition under S. 151 can be treated as one for review. 43 M. I. J. 290=70 I. C. 425. Restoration application of an application under O. 9, R. 9 dismissed for default can be treated as one for review. 54 Cal. 405=31 C. W. N. 576=103 I. C. 69=A. I. R. 1927 Cal. 534. High Court can condone misapplications of special provisions; it can convert application for revision into memo. of appeal. The High Court's power cannot be exercised if law is not complied with as regards limitation and court-fees. 48 I. C. 779.

DISMISSAL FOR DEFAULT.—The Court in a proper case can re-admit an appeal-dismissed for default. 45 Bom. 648=60 I. C. 919. *See also* A. I. R. 1927 Cal. 76. Where the next friend of a minor-appellant is of unsound mind, the minor's absence at the hearing cannot be treated as default and his appeal will be re-admitted by Court in exercise of inherent powers. 45 Bom. 648=

may be necessary for the ends of justice or to prevent abuse of the process

60 I.C. 919. When the application itself shows that it is one for the restoration of a suit, justice should not be denied simply because there is a technical objection to the word "review" which has been employed in the application. As the Code cannot be said to be exhaustive, it is not necessary in every case to have the support of a section of the C.P. Code to pass an order not expressly or impliedly forbidden which is required in the interests of justice. 1 L. 339=58 I.C. 748. Restoration of execution application dismissed for default. 25 L.W. 192=99 I.C. 954=A.I.R. 1927 Mad. 355=52 M.L.J. 123; 50 Mad. 67=26 L.W. 878; see also 26 A.L.J. 382.

EX PARTE DECREES AND ORDERS.—The High Court can under the section or under its inherent jurisdiction set aside an *ex parte* decree which is shown conclusively to be irregular by the record. 38 I.C. 673=15 A.L.J. 24. See also 16 I.C. 677=34 All. 518. *Contra* 101 I.C. 617=A.I.R. 1927 Lah. 312. A Court which has on an *ex parte* application granted an extension of time to file an appeal can revoke or alter its order before the appeal is admitted. 45 I.C. 725. Where an *ex parte* application is made by a party for granting extension of time for filing an appeal it is the duty of the party to show to the Court the points of law or fact in his favour as well as against him 45 I.C. 725. There is no inherent power in a Court to set aside an *ex parte* decree by summary procedure and the power of the Court in that connection is limited to the circumstances mentioned in O. 9, R. 13. 43 Mad. 94=37 M.L.J. 599; 27 I.C. 812; 98 I.C. 658=A.I.R. 1927 Nag 95. The inherent power should be exercised not capriciously or arbitrarily but *ex debito iustitiae* on sound general principles and so as not to conflict with the intentions of the legislature. 43 Mad. 94=37 M.L.J. 599; 100 I.C. 518=A.I.R. 1927 Cal. 420; 32 C.W.N. 10. Where a definite period of limitation has been prescribed by Art 164 of the Lim. Act for an application to set aside an *ex parte* decree, the Court would not be entitled by purporting to act under S. 151 in effect to extend that period. 65 I.C. 341=1 Pat. 277. A Court can set aside an *ex parte* decree passed by an oversight. 60 I.C. 368=2 Pat. L. J. 251. See also 62 I.C. 113=2 Pat. L. J. 270. A Court can restore to file a suit in which an *ex parte* decree was obtained against a minor without a guardian, which decree was subsequently declared void. 106 I.C. 575.

EXECUTION OF DECREE.—Where execution is delayed Court can award mesne profits. 63 I.C. 43. Power to grant time to judgment-debtor for payment of decree amount. 84 I.C. 134=48 Mad. 494; 31 C.W.N. 653. A Court has authority to set aside its order confirming a sale in favour of a person other than the bidder and there can be no question of limitation 30 I.C. 230.

EXECUTION, STAY OF.—The High Court has inherent power to stay execution in view of an intended appeal to the Privy Council. 40 Cal. 955=18 I.C. 207. See also 7 Lah. L.J. 457; 89 I.C. 588. An Insolvency Court has no power under S. 151 to stay execution proceedings in another Court. 32 I.C. 897=3 L.W. 250. A High Court has an inherent jurisdiction to stay

any suit which is an abuse of the process of the Court. 27 I.C. 455=27 M.L.J. 645. See also 75 I.C. 419=1923 Lah. 514; 40 Cal. 955=18 I.C. 207. The High Court has inherent jurisdiction as a Court of Appeal where an appeal is made to it, to stay proceedings in the lower Court as ancillary to its powers of reversing the order of the inferior Court. 1919 Pat. 145=52 I.C. 185.

EXTENSION OF TIME.—Extension of time cannot be granted for payment of money under a decree in a suit to set aside a mortgage. He should not be allowed to calculate his month from the date he got the copies of the decrees. 42 A. 639=57 I.C. 16. In a partition suit the Court has inherent power to fix time for filing objection to the report of the Commissioner and to reject objections filed afterwards. 50 I.C. 152=17 A.L.J. 498. S. 151 does not give the Court any new powers and the Court cannot extend the time fixed by Art. 163 of the Lim. Act for setting aside dismissal for default. 55 I.C. 55. Courts cannot extend the time for making deposits prescribed by the Code and their inherent powers under S. 151 cannot be invoked for the purpose. 33 I.C. 996=3 L.W. 271. In a suit for specific performance of a contract of sale, neither the original nor the Appellate Court has jurisdiction to extend the time fixed by a decree for specific performance of a contract to sell. 19 M.L.T. 137=32 I.C. 401=3 L.W. 29. But see 32 I.C. 509=9 Bur. L.T. 83. Time fixed by a decree cannot be extended under S. 151 of the C.P. Code. That section is not meant to empower the executing Court to alter the decree, or in any way affect its finality. 49 I.C. 840. The Court has power under S. 151 to extend time on an application made after the date fixed for payment of money, if it is necessary for the ends of justice, in a suit for specific performance of a contract to sell. 32 I.C. 509.

EXPUNGING FROM RECORD.—Where the judgment of a Subordinate Court has not been brought before the High Court on appeal or revision the High Court has no power to expunge adverse remarks on the character and credibility of a witness from the judgment. 66 I.C. 1005=44 All 401. The High Court has power to expunge irrelevant and scandalous matters in the judgments of Subordinate Courts on an application by a person not a party to the proceeding. The power must be exercised in extremely exceptional cases and with caution. 47 I.C. 981=35 M.L.J. 368. See also 33 I.C. 608=3 L.W. 283.

FRAUD.—The Court has inherent power to investigate questions of fraud for preventing injustice. 48 I.C. 135=20 Bom. L. R. 929. Not only has the Court the power but it is its duty to set aside a consent decree obtained by fraud practised upon the Court when apprized of it. It is an inherent power of every Court to correct its own proceedings when it has been misled. 27 I.C. 628=19 C. W. N. 419. See also 1923 Pat. 197=2 P. 731; 6 P. 108; 1 Luck. 341. But see 23 N. L. R. 79=100 I.C. 220=A. I. R. 1927 Nag. 212. A Court can vacate an order obtained by manifest fraud on it, in the exercise of its inherent power. 25 I.C. 213=27 M. L. J. 172.

MISTAKE.—The Court has inherent power to correct its own order passed on a mistaken basis.

of the Court.

56 I. C. 4=31 C. L. J. 48. See also 19 I. C. 916=19 C. L. J. 251; 39 Cal. 265=12 I. C. 151; 47 All. 546=87 I. C. 225; 38 Mad. 387=25 M. L. J. 198. But all persons not parties to the action but who have acquired interests on the existing record acting in good faith and being purchaser for valuable consideration without notice of the existence of matters made clear by the amendment, are not prejudiced thereby without a hearing by the Court determining that they have no equities as entitled them to be exonerated from the effect of the amendment. 39 Cal. 265=12 I. C. 151; 47 All. 304=84 I. C. 746. Where the order of a Court fails to give effect to its intention it is the duty of the party to have it corrected. The Court has power to do so. 40 Mad. 259=32 M. L. J. 477 (F. B.). Where an application to set aside the decree passed in pursuance of compromise by a lady whose signature was obtained by mistake of fraud of an agent, the remedy is by way of review petition. 43 M. L. J. 290=70 I. C. 42. The Court has inherent power to rectify mistakes in judicial orders arising from the ignorance of the Court or of its subordinate officers. 69 I. C. 112; 39 I. C. 763=2 Pat. L. J. 851.

GUARDIAN AD LITEM.—To appoint a guardian *ad litem* without issuing notice to the natural guardian is illegal and the Court has inherent power under S. 151 to correct the errors or mistakes committed by itself. 31 M. L. J. 215=70 I. C. 867. Guardian giving up relief against one defendant—Court can re-open on application by minor. 22 L. W. 629.

GUARDIAN AND WARD.—The District Judge has ample powers under S. 151 to recall the records of an order made under the Guardian and Wards Act on being apprized that the order was made on a misrepresentation of facts. 26 I. C. 275=19 C. W. N. 84.

INJUNCTION.—The Code is not exhaustive. The Court possesses inherent powers to act *ex debito justitiæ*. A person asking the Court to exercise its discretionary jurisdiction must make out a strong case and must show that there is no other remedy open to him by which he can protect himself from the consequences of the injury complained of. 55 I. C. 403=2 Lah. L. J. 283. See also 1925 Lah. 242; A.I.R. 1925 L. 618; 9 Lah. L. J. 536. The Court will issue a temporary injunction if plaintiff shows that injunction is an appropriate relief and unless defendant is forthwith restrained, irreparable injury will follow. 55 I. C. 403=2 Lah. L. J. 283; 38 M. L. T. 358 (H. C.); 24 L. W. 854=1927 M. 210.

INSOLVENCY.—An Insolvency Court has the same jurisdiction that the ordinary Courts of law possess under the C. P. Code to correct any mistake either of a clerk or the parties themselves upon a question of fact when a mistake is proved. 51 I. C. 55.

ISSUES.—A Court has inherent power to frame issues going to the root of the matter in controversy between the parties at any stage of the case. 35 Mad. 607=23 M. L. J. 321.

JURISDICTION AND PROCEDURE.—A Court is not justified in applying its powers of inherent jurisdiction to introduce a new form of procedure for which no provision is made by law. 1922 Cal. 1 (1). Even if an order has been passed it can

be recalled if it transpires that it has been made without jurisdiction. 20 C. L. J. 213=26 I. C. 275. Apart from the power to correct clerical or arithmetical errors, or to review a judgment, a Court has no inherent power to alter an order passed in Court. 74 I. C. 110=1924 P. 136. Jurisdiction—Recalling an order passed by the predecessor is beyond jurisdiction and invalid. 69 I. C. 742=1922 P. 204.

RECONSTRUCTION OF RECORDS.—Where owing to accident or other cause the records of a Court of Justice have been destroyed or lost, the Court has an inherent power to reconstruct its records. An appellate Court has the same power to reconstruct the records of the Court from which an appeal lies to it. 46 Mad. 679=44 M. L. J. 673 (F. B.). Where a judgment has been lost the proper course for the Judge is to write it from memory and from materials before him and place it on record. 38 Mad. 488=25 M. L. J. 445. If any credible witness who read the judgment or the part of the judgment which contained the decision can depose to what he heard a decree can be drawn up. There is nothing in the C. P. Code, to prevent that. 1923 R. 113. Judge could not take evidence regarding the question as to the matter on which a Court of law based its judgment in order to consider whether there was any arithmetical or clerical error in the judgment and he must rely solely on what it contained in the judgment itself. 44 C. L. J. 441=100 I. C. 309=A. I. R. 1927 Cal. 203.

REFUND OF MONEY.—The Court has inherent power to recall money paid out of Court in a land acquisition case. 21 I. C. 111=17 C. W. N. 1057. See also 43 Cal. 269=20 C. W. N. 188. The new C.P. Code contains no provision for the refund of amount, deposited as security; Courts can deal with them under S. 151. 23 M. L. J. 190=12 I. C. 692. S. 151 empowers the Courts to order refund of Court fees which was paid by mistake. 3 P. L. J. 452=46 I. C. 271=(1918) Pat. 273. But not Court-fees paid on an appeal dismissed as not maintainable. 6 P. 599=105 I. C. 740.

RESTITUTION.—Execution Court has inherent powers to make restitution orders in cases that may not fall under S. 144, C.P.C.; it has powers to direct refund of money paid out of Court. 35 C. L. J. 53=64 I. C. 864; 21 C. L. J. 624=30 I. C. 49; 24 I. C. 384. Under S. 151, Court can apply the principle of S. 144 to cases to which it would not ordinarily apply and can order such restitution as may be necessary. 63 I. C. 43; see also 14 I. C. 456=15 C. L. J. 187; 42 M. L. J. 308=67 I. C. 369; 42 M. L. J. 473=67 I. C. 546. Where the High Court passed an order as to mesne profits pending disposal of appeal, the order could be given effect to by the executing Court. 28 Punj. L. R. 178=103 I. C. 328=A. I. R. 1927 Lah. 346. But S. 151 cannot enlarge the scope of S. 144 and cannot convert an application for relief which has nothing to do with restitution into an application for restitution. 34 I. C. 774=4 L. W. 400. An appellate Court can direct refund where a Subordinate Court mistakenly orders payment to a decree-holder when that order is set aside. 21 C. L. J. 624=30 I. C. 49. An application by the judgment-debtors for compensation during the period they were kept out

152. Clerical or arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission may at any time be corrected by

Amendment of judgments, decree or orders.

of possession of their property under an execution sale which they subsequently got set aside does not fall within S. 144 but would be covered by S. 151, C. P. C. 2 Pat. L. J. 206=39 I. C. 653.

REMAND.—Remand (*See also* O. 41, Rr. 23, 25). 19 A. L. J. 553=63 I. C. 501; 1925 Pat. 760; 87 I. C. 575=1925 Cal. 1157. Where both the primary and the first appellate Court gave a decision in a case without understanding, it is not a proper decision and the High Court should in second appeal remit the case for re-trial. 19 A. L. J. 553=63 I. C. 501; 9 Lah. L. J. 268 =103 I. C. 854=A. I. R. 1927 Lah. 480. An order refusing an adjournment is appealable and the appellate Court has power to set aside the decree and order a re-trial if the adjournment had been wrongly refused. 63 I. C. 478=23 Bom. L. R. 769. An appellate Court has the power to order a re-trial and this power is to be adopted in exceptional circumstances where the Code does not provide adequate procedure. 64 I. C. 599. *See also* 35 C. L. J. 345=70 I. C. 547. An appellate Court has power to make an order of remand under S. 151 when O. 41, R. 23 does not apply. 73 I. C. 915. *See also* 44 Cal. 929=41 I. C. 598; 25 L. W. 198=38 M. L. T. (H. C.) 15 (2)=100 I. C. 135=A. I. R. 1927 Mad. 335=52 M. L. J. 90; 9 I. C. 306 is not good law. 52 I. C. 985=29 C. L. J. 419=64 I. C. 599; 39 I. C. 651. But the power is one that must be cautiously exercised and there is no appeal from an order of remand in such a case. 3 Pat. L. J. 253=43 I. C. 959; 56 I. C. 834; 37 M. L. J. 535=53 I. C. 417; 70 I. C. 665. Where the order of remand is held invalid the subsequent judgment after remand will also be invalid. 58 I. C. 538. Whether an anomalous order of remand falls under the section. 45 C. L. J. 557.

RESTORATION OF SUIT.—Where owing to the death of a sole plaintiff before the hearing of the suit there was no appearance for him on that date, it is not competent to the Court to dismiss the suit for default of appearance under O. 9, Rr. 8 and 9. If, however, the Court dismisses the suit inadvertently as for default, it has inherent power to set aside the dismissal. The legal representative of the deceased plaintiff could apply to be made a party within six months of the death under Art. 176 of the Lim. Act. 35 All. 31=25 M. L. J. 148 (P. C.). *See also* 14 I. C. 22; 87 I. C. 438 (restoration without notice to the other party); 3 Rang. 488; 89 I. C. 350=47 All. 878. It is open to a District Judge acting under S. 114, C. P. Code, or under the inherent powers of the Court to reconsider an order granting letters of administration. 37 All. 380=29 I. C. 133. Restoration—Suit dismissed for want of letters of administration—Subsequent production of letters. 24 Bom. L. R. 778=70 I. C. 910. A Court has jurisdiction under its inherent power under S. 151 to restore a suit dismissed for default when it finds that it cannot be restored under O. 9, R. 9 of the Code. 63 I. C. 440. *Contra see* (regarding dismissal under O. 9, R. 3) 103 I. C. 620=A. I. R. 1927 Pat. 369. Restoration—Appeal—Act of Court not to prejudice party. 56 I. C. 4=31 C. L.

J. 48. Appellate Court can restore and remand an *ex parte* decree. 32 C. W. N. 101.

REVIEW.—Every Court has an inherent power to review an erroneous decision. 53 I. C. 39=30 C. L. J. 1. *See also* 47 I. C. 917; 89 I. C. 946; 2 Rang. 659=85 I. C. 284=31 C. W. N. 822. A review if forbidden by C. P. Code cannot be granted under S. 151. 42 I. C. 711=45 Cal. 519. The power of a Court to review its order exists only if it is conferred by statute, except possibly in cases where the order is made without jurisdiction. 63 I. C. 56=37 M. L. J. 162. Every Court has inherent power to review its judgment by setting aside orders passed either under a mistake or obtained by a fraud upon the Court. 32 I. C. 527. The Court has power to review its order rejecting the petition under O. 7, R. 11. 2 P. 504=72 I. C. 629. **MISCELLANEOUS.**—Power to stay criminal proceedings pending civil suit, *see* 7 Lah. L. J. 73=88 I. C. 526. The power to discharge and remove or to give directions to a Receiver are inherent in the Court which appointed the Receiver and the Appellate Court has got all the powers of the Original Court. 17 I. C. 583=(1912) M. W. N. 1208. Assuming the Court has jurisdiction to allow an appellant to continue an appeal *in forma pauperis* it can be exercised only if on a perusal of the judgment and decree appealed from and the appeal memorandum the Court is of opinion that that decree is contrary to law. 38 M. L. J. 146=54 I. C. 761.

APPEAL.—No appeal against an order under the section. 104 I. C. 331=A. I. R. 1927 Cal. 867; 26 Punj. L. R. 130; 102 I. C. 28 (1)=(1927) M. W. N. 286. But *see* 31 C. W. N. 290=100 I. C. 735 (2)=A. I. R. 1927 Cal. 285; 6 P. 381.

Sec. 152. SCOPE AND APPLICATION OF SECTION.—According to the section an amendment can be made "at any time." 11 A. 267 at p. 288 (F. B.); 12 M. L. J. 96; 74 I. C. 842=1924 All. 127. Distinction between this section and S. 151. *See* 102 I. C. 124=A. I. R. 1927 All. 585. An application for amendment of a decree presented long after date of the decree is not sustainable. 7 P. L. R. 1915=27 I. C. 639=32 P. W. R. 1915. *See also* 15 L. W. 393=1922 Mad. 192 (effect of allowing time for review expire). *See also* 99 I. C. 655=1927 Mad. 435. Correction of error is discretionary. 47 All. 44=82 I. C. 1030=1925 All. 187. Amendment not to be refused to be considered on merits on ground of decree having been approved and signed by party's pleader. 2 O. L. J. 141=87 I. C. 333=1925 Oudh 373. S. 152 is confined to correction of clerical errors made by the Court itself and has no concern with the mistakes of parties. 51 I. C. 55; 50 I. C. 497=4 Pat. L. J. 205. *See also* 44 Cal. 28=38 I. C. 584; 21 I. C. 540=7 S. L. R. 53 (Court can amend of its own motion). A Court can correct a clerical error in a plaint in whatever subsequent record it is repeated by slip or inadvertence or by mistake. 62 I. C. 652=14 L. W. 445. Section does not contemplate a practical reversal of the Court's finding even on a formal issue. 24 I. C. 831=7 S. L. R. 186. The Court of first instance can amend its decree when an appeal against it is pending.

the Court either of its own motion or on the application of any of the parties.

11 A. 267 at p. 288; 44 I. C. 248=7 L.W. 8; 28 I.C. 377=17 M.L.T. 224. *See also* 25 Bom. L.R. 888=77 I.C. 171=1924 Bom. 166. Also a successor in office of Judge that passed the decree. 2 Pat. L.T. 236=63 I.C. 840. Where a decree is confirmed on appeal, the only Court competent to amend the decree is the Appellate Court and not the Court against whose decree appeal was preferred. 31 M. L. J. 438=(1916) 2 M. W. N. 249=35 I. C. 891=4 L. W. 225 (24 M. 646, dist.); 63 I. C. 799; 21 I. C. 540=7 S.L.R. 53; 31 I. C. 320; 28 I. C. 586; 43 I.C. 360; 23 A.L. J. 518=86 I. C. 396=1925 All. 556. Appellate Court can amend the decree of the First Court. 19 A. L. J. 375=62 I. C. 910. *See also* 46 I.C. 376=16 A.L.J. 451; 42 I.C. 970; 31 I.C. 478=(1915) M.W.N. 914; A.I.R. 1927 Rang. 57. Amendment of decree after disposal of appeal, *see* 8 Pat. L. T. 143. A District Court could not rectify an error in its final decree copied from High Court's preliminary decree. 31 I. C. 320. Errors in High Court decree must be rectified by High Court. 24 I. C. 283=1 L. W. 298. High Court can revise and set aside or modify a decree of a Small Cause Court. 58 I. C. 630; 1 Lah. 322. A Court should not amend its decree except in accordance with this section. 8 A. 377. Courts in India can amend or vary decrees in order to bring them into accord with the judgments even if the amendments do not fall within S. 152. 52 I.C. 574=92 P. R. 1919; 37 Cal. 649, *ref.* *See also* 31 I. C. 478=(1915) M.W.N. 914. A clerical error in a decree must be rectified by an application under this section, and not by an application for review. 6 C. 22. When an order has been made in an improper form, the Court can rectify it. 16 B. 104. Clerical errors copied from pleading can be corrected. 15 M. L. T. 102=22 I. C. 774=(1914) M. W. N. 107. *See also* 66 I. C. 693=8 O. L. J. 416; 74 I. C. 1020=1924 Rang. 104 (omission of one of the mortgaged properties in plaint); 13 I. C. 113=11 M. L. T. 33. Mistakes anterior to suit cannot be corrected under this section. 8 N. L. R. 13=14 I.C. 407. Rectification may be ordered for mistake and not where there is gross negligence of the party. 11 I. C. 537; 9 I. C. 433. Where a right has been extinguished by a decree, it cannot be reviewed by any subsequent act of the Court or the party at fault. 19 I. C. 347=16 O. C. 5. Calculation of amount due—Overlooking of order of Court is mistake which can be corrected at any time. 74 I. C. 842=1924 A. 127. Pre-emption decree—Amount entered wrongly—Correct amount paid in time—Decree can be amended even after expiry of time fixed for payment. 2 O. W. N. 218=87 I. C. 987=1925 Oudh 418. Sale ordered for a sum larger than what was due under the decree—Court has power to set aside sale. 27 Bom. L. R. 657=89 I. C. 569=1925 Bom. 389. Where there is no variation between decree and judgment no amendment can be allowed. 11 I. C. 896; 101 I. C. 147=A. I. R. 1927 Lah. 403; 103 I. C. 298 (2). But *see* (1927) M. W. N. 38=25 L. W. 102=99 I.C. 655=A. I. R. 1927 Mad. 435. But *see* 42 I. C. 66=4 O. L. J. 475 (obvious error in judgment may be corrected). A

consent decree can be varied only by consent. 27 I. C. 830=16 Bom. L. R. 668. *See also* 27 I. C. 134=16 Bom. L. R. 670 (Note); 50 I. C. 497=4 Pat. L. J. 205; 21 I. C. 115. A judgment ordering a decree to be entered up in terms of a compromise, is not such a judgment as is contemplated by this section. 7 C. W. N. 880. Court cannot under this section correct a judgment based on an award wherein the error lies. (1927) M. W. N. 242=103 I. C. 829=A. I. R. 1927 Mad. 720=53 M. L. J. 38. If a compromise decree does not embody all the terms of the compromise the decree could be corrected. 21 I. C. 115. *See also* 50 I. C. 497=4 Pat. L. J. 205. An application by the plaintiff to amend the decree to bring it in conformity with the judgment must be made to the Court which passed it and not to the Appellate Court. 57 I. C. 710. Any divergence between the decree and the judgment is a matter for amendment of the decree and not for a fresh suit for setting the decree aside. 43 Cal. 217=31 I. C. 13=19 C.W. N. 1228; 31 I. C. 478=(1915) M. W. N. 914. Mere delay in applying for amendment does not amount to gross negligence. 99 I. C. 655. The exercise of the power of amendment under S. 152 is discretionary, and an application for amendment of a decree should be rejected as too late if the rights of third parties acting in good faith have intervened. 16 L. W. 623=43 M. L. J. 559=(1922) M. W. N. 731=1923 M. 57. Mistake in suit record owing to misdescription of suit property in plaint may be corrected by the Court under this section. 21 A. I. J. 328=72 I. C. 483=1923 All. 349; 25 L. W. 102=99 I. C. 655=A. I. R. 1927 Mad. 435. It is open to the successor in office of a judge to rectify an accidental error in the judgment of his predecessor. If the Judge declines to do so, the High Court might interfere in revision. 18 A. L. J. 501=55 I. C. 963 *See also* 37 All. 323=29 I. C. 50=13 A. L. J. 449; 2 Pat. L. T. 296=63 I. C. 840. But successor cannot construe judgment and amend decree. A. I. R. 1927 Pat. 25. A decree should not be amended except in the presence of the parties concerned, or after service of notice on them to attend. 2 W. R. (Mis.) 15. *See also* 8 A. 377; 63 I. C. 799=(1921) 4 U.B.R. 1 (Necessity for notice to other parties). Court can extend time for performances in case of decree for specific performance. 5 Rang. 615=105 I. C. 467=A. I. R. 1927 Rang. 311.

ILLUSTRATIVE CASES.—A decree against one person cannot be amended by adding another as judgment-debtor when no decree has been passed against him. 40 I. C. 47. Where a munsif by a clerical error recorded in his final order an order dismissing the suit instead of decreeing it and the decree was prepared accordingly. *Held*, that the munsif is competent under S. 152 to subsequently correct the error. 29 I. C. 144. *See also* 22 I. C. 935=7 L. B. R. 81 (decree for foreclosure inadvertently passed in place of decree for sale). A mere clerical error in the relief claimed and in the decree that was prepared in accordance therewith can be corrected throughout the record. 23 I.C. 344=12 A. L. J. 185. *See also* 27

153. The Court may, at any time and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be

made for the purpose of determining the real question or issue raised by or depending on such proceeding.

Saving of present right of appeal.

154. [S. 3, para. 3.] Nothing in this Code shall affect any present right of appeal which shall have accrued to any party at its commencement.

I. C. 922=13 A. L. J. 60; 21 I.C. 540=7 S.L.R. 53. A Court has no jurisdiction for amendment of a certificate of sale so as to alter the share of the property sold according to the sale proclamation. 18 I.C. 725. A clerical mistake regarding costs can be amended under this section. 6 C. 22; (1904) A. W. N. 94; 54 I. C. 821. But see also 17 I. C. 418=47 P. R. 1913=25 P. W. R. 1913. Court can add costs to judgment already pronounced. 57 I. C. 739; 54 I.C. 821. An amended decree which has not been appealed against cannot be questioned in the course of execution proceedings. 9 C. W. N. 605; 44 I. C. 958=16 A. L. J. 262. Grounds for amendment being change of circumstances—Proper remedy. 27 I. C. 300. Where a decree passed on an award by mistake or inadvertence embodied a relief as to payment of costs not mentioned in the award the defect can be cured only by an appeal or review. 34 I. C. 787=3 L. W. 499.

RIGHT OF SUIT.—Mistake anterior to suit can be rectified only by separate suit. 8 N.L.R. 13=14 I. C. 407.

BAR TO SUIT.—A suit for amending a judgment or decree passed by a competent Court on the ground of mistake is not maintainable in a Civil Court. 15 C. L. J. 675=14 I. C. 93=17 C. W. N. 82 (10 C. W. N. 1024; 6 C. W. N. 889; 3 C. W. N. 575, *rel.*; 8 C. W. N. 473, *dist.*).

APPEAL.—There is no appeal from an amendment under S. 152. 54 I. C. 387; 24 P. R. 1911=186 P. L. R. 1911=10 I. C. 850; 73 I. C. 679=1923 Lah. 147 (2) But see 3 Lah. L. J. 341=61 I. C. 992 (appeal lies where the whole system of calculation adopted by the Court was challenged). No appeal lies against an order granting an amendment, but an appeal lies against the amended decree. 3 C.L.J. 188; 1 A. L. J. 701; 22 M. 646. No appeal lies to His Majesty in Council. 33 C. 679; nor under the Letters Patent. 14 A. 226 (F.B.). An application for amendment on the ground that costs had been assessed on an erroneous principle is bad. The proper remedy is by way of appeal. Amendment would not be granted on the ground that an appeal is barred. 25 P. W. R. 1943=17 I. C. 418=47 P. R. 1913. When the judgment simply states "decreed as prayed for and costs" and the sum awarded in the decree differs from that claimed in the plaint the decree can be rectified under this section. 22 B. 370. An appeal lies against an order under this section extending time for performance in the case of a decree for specific performance. 105 I.C. 467=A. I. R. 1927 Rang. 311.

REVISION.—An order under this section is subject to revision. 28 C. 177; 7 A. 876 (F. B.); 31 B. 447; 24 P. R. 1911=186 P. L. R. 1911=10 I. C. 850=56 P. W. R. 1911; 18 A. L. J. 501

=55 I. C. 963; 37 All. 323=29 I. C. 50=13 A. L. J. 449.

REVIEW.—Circumstances might, however, arise, which would render amendment necessary on review, as when the description of the mortgaged property as given in the decree differs from that given in the bond, the remedy was one by way of review. See 16 M. 424; (1906) A.W. N. 220. If judgment is attacked the matter is one for review. 5 Pat. L.J. 253=1 Pat. L. T. 219=58 I. C. 510.

LIMITATION.—Applications under this section are not governed by the Limitation Act. 10 M. 51; 11 B. 284; 21 C. 259; 11 A. 267; 74 I. C. 842=1924 All. 127; 21 I. C. 540=7 S. L. R. 53.

Sec. 153.—The Court ought to give all reasonable indulgence with regard to amending. However negligent or careless the first omission, and however late the proposed amendment, the amendment should be allowed, if it can be allowed without injustice to the other side. Per Lopes J. in 19 Q. B. D. 394, cited in 32 C. 600. To proceed to recall and cancel an invalid order is the duty of the Judge. 5 C. L. J. 611. Also an order improperly or fraudulently obtained. 6 C. L. J. 662. Overvaluing suit to get round a previous decision which will operate as *res judicata*—Decision is an abuse of process of Court. L. R. 5 A. 709=83 I. C. 1=1925 All. 142. The section allows the Court to give leave for amendment at any time in any proceeding in a suit. 25 Bom. L. R. 888=77 I. C. 171=1924 Bom. 166. Where a decree is passed if it is final, the original Court is, generally speaking, *functus officio*, and the occasion for amendment of pleading cannot arise. (*Ibid.*) Addition of legal representatives in a suit against a dead man is illegal. 18 L. W. 54=(1923) M. W. N. 408=45 M. L. J. 231=75 I. C. 739=1924 Mad. 56. Appeal against dead respondent—Amendment of cause title allowed. 1925 Mad. 1210=49 M. L. J. 590 (F. B.). Mistake discovered on appeal may be corrected. 20 A. L. J. 159=L. R. 3 A. 115=66 I.C. 208=1922 All. 81. See also 66 I. C. 693=8 O. J. J. 416. Amendment of sale certificate without notice to judgment-debtor is irregular. (1922) M.W.N. 130=65 I. C. 732=16 L. W. 760=1922 Mad. 63. Want of signature and verification does not entail rejection of the plaint as they can be supplied at any stage. 25 M. L. J. 174=17 I. C. 580=(1912) M. W. N. 1207. Application for sale after dismissal of execution application is defective, but can be cured under this section. 25 I.C. 883=1 L. W. 665. On this section, see also 1922 Pat. H. C. C. 5=3 Pat. L. T. 149=A. I. R. 1922 P. 121.

Sec. 154.—This section has no bearing on the powers of an Appellate Court in dealing with appeals before it. 9 I. C. 815. The general law

155. The enactments mentioned in the Fourth Schedule are hereby amended to the extent specified in the fourth column thereof.

Amendment of certain Acts. **156.** [* * * *
Repeals. * * * *]

157. [S. 3, 2nd sentence.] Notifications published, declarations and rules made, places appointed, agreements filed, scales prescribed, forms framed, appointments made and powers conferred under Act VIII of 1859 or under any Code of Civil Procedure or any Act amending the same or under any other enactment hereby repealed, shall, so far as they are consistent with this Code, have the same force and effect as if they had been respectively published, made, appointed, filed, prescribed, framed and conferred under this Code and by the authority empowered thereby in such behalf.

158. [S. 3, para. 2.] In every enactment or notification passed or issued before the commencement of this Code in which reference is made to or to any Chapter or section of Act VIII of 1859 or any Code of Civil Procedure or any Act amending the same or any other enactment hereby repealed, such reference shall, so far as may be practicable, be taken to be made to this Code or to its corresponding Part, Order, section or rule.

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Sec. 156.—¹S. 156 was repealed by Act XVII of 1914.

Sec. 157.—The expression "Rules made" must mean rules properly and validly made, in other words, made with jurisdiction by the proper authority. Rules under old Code which were *ultra vires* then are not valid because they could be made under the new Code. 29 M. L. J. 663=31 I. C. 924. The words "consistent with the Code" mean only consistent with the sections of the Code and not with the rules which are alterable by the High Court. 24 M. L. J. 637=20 I. C. 775=37 Mad. 17. Rules framed by the Local Government under S. 269 of the old Code are in force until rules are made by the High Court under the power given by S. 128 (2) of the new Code. 24 M. L. J. 637=37 Mad. 17.

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21. Service of summons where defendant resides within jurisdiction of another Court.
- 21-A. [Added by Rangoon]
22. Service, within Presidency towns and Rangoon, of summons issued by Courts outside. [B]
23. Duty of Court to which summons is sent. [R]
24. Service on defendant in prison.
25. Service where defendant resides out of British India and has no agent. [M]
- 25-A. [added by Allahabad]
26. Service in foreign territory through Political Agent or Court. [M & A]
27. Service on civil public officer or on servant of railway company or local authority. [A & M]
28. Service on Soldiers. [A, M & O]
29. Duty of person to whom summons is delivered or sent for service.

RULES.

- 29-A. *Service on Public Officer sued in official capacity.* [M]
30. Substitution of letter for summons.
31. *Form of application for issue of summons.* [A]

ORDER VI.

PLEADINGS GENERALLY.

1. Pleading.
2. Pleading to state material facts and not evidence.
3. Forms of pleading.
4. Particulars to be given where necessary.
5. Further and better statement, or particulars.
6. Condition precedent.
7. Departure.
8. Denial of contract.
9. Effect of document to be stated.
10. Malice, knowledge, etc.
11. Notice.
12. Implied contract or relation.
13. Presumptions of law.
14. Pleading to be signed.
15. Verification of pleadings.
16. Striking out pleadings.
17. Amendment of pleadings.
18. Failure to amend after order.

ORDER VII.

PLAINT.

1. Particulars to be contained in plaint.
2. In money suits. [L]
3. Where the subject-matter of the suit is immovable property. [C]
4. When plaintiff sues as representative.
5. Defendant's interest and liability to be shown.
6. Grounds of exemption from limitation law.
7. Relief to be specifically stated.
8. Relief founded on separate grounds.
9. Procedure on admitting plaint. [A, M & O]
10. Concise statements.
11. Return to plaint.
12. Procedure on returning plaint.
13. Rejection of plaint.
14. Procedure on rejecting plaint.
15. Where rejection of plaint does not preclude presentation of fresh plaint.

DOCUMENTS RELIED ON IN PLAINT.

14. Production of document on which plaintiff sues.
15. List of other documents. [O]
16. Statement in case of documents not in his possession or power. [O]
17. Suits on lost negotiable instruments.
18. Production of shop-book.
19. Original entry to be marked and returned. [A]
20. Inadmissibility of document not produced when plaint filed.
21. *Plaint or original petition to contain address of service for plaintiff.* [A]
22. *Address for service to be within the limits of the District.* [A]
23. *Dismissal of suit on plaintiff's omission to file address for service.* [A]
24. *Service of notice or process on person not found at the address given for service.* [A]
25. *Service on party engaging pleader.*
26. *Change of address for service.*
27. *Power of Court to direct mode of service.* [A]

RULES.

26. *Rules inapplicable to notice under O. 21.*
R. 22. [A]

19 to 27. [Added by Oudh]
ORDER VII.

WRITTEN STATEMENT AND SET-OFF.

1. Written Statement. [O]
2. New facts must be specially pleaded.
3. Denial to be specific.
4. Evasive denial.
5. Specific denial.
6. Particulars of set-off to be given in written statement.

Effect of set-off.

7. Defence or set-off founded on separate grounds.

8. New ground of defence.
9. Subsequent pleadings.
10. Procedure when party fails to present written statement called for by Court.

11. *Defendant required to file address for service.* [A]

12. *Applicability of O. 7, Rr. 20, 22, 25 and 26.* [A]

11-13. [Added by Oudh]

ORDER IX.

APPEARANCE OF PARTIES AND CONSEQUENCE OF NON-APPEARANCE.

1. Parties to appear on day fixed in summons for defendant to appear and answer.

2. Dismissal of suit where summons not served in consequence of plaintiff's failure to pay costs.

3. Where neither party appears, suit to be dismissed.

4. Plaintiff may bring fresh suit or Court may restore suit to file.

5. Dismissal of suit where plaintiff, after summons returned unserved, fails for a year to apply for fresh summons.

6. Procedure when only plaintiff appears.

When summons duly served.

When summons not duly served.

When summons served, but not in due time.

7. Procedure where defendant appears on day of adjourned hearing and assigns good cause for previous non-appearance.

8. Procedure where defendant only appears.

9. Decree against plaintiff by default bars fresh suit. [L]

10. Procedure in case of non-attendance of one or more of several plaintiffs.

11. Procedure in case of non-attendance of one or more of several defendants.

12. Consequence of non-attendance, without sufficient cause shown, of party ordered to appear in person.

SETTING ASIDE DECREES *ex parte*.

13. Setting aside decree *ex parte* against defendant. [A, M & O]

14. No decree to be set aside without notice to opposite party.

ORDER X.

EXAMINATION OF PARTIES BY THE COURT.

1. Ascertainment whether allegations in pleadings are admitted or denied.

2. Oral examination of party, or companion of party.

3. Substance of examination to be written.

4. Consequence of refusal or inability of pleader to answer.

RULES.

ORDER XI.

DISCOVERY AND INSPECTION.

1. Discovery by interrogatories.
2. Particular interrogatories to be submitted.
3. Costs of interrogatories.
4. Form of interrogatories.
5. Corporations
6. Objections to interrogatories by answer.
7. Setting aside and striking out interrogatories.
8. Affidavit in answer, filing
9. Form of affidavit in answer.
10. No exception to be taken.
11. Order to answer or answer further.
12. Application for discovery of documents.
13. Affidavit of documents.
14. Production of documents.
15. Inspection of documents referred to in pleadings or affidavits.
16. Notice to produce.
17. Time for inspection when notice given.
18. Order for inspection.
19. Verified copies.
20. Premature discovery.
21. Non-compliance with order for discovery.
22. Using answers to interrogatories at trial.
23. Order to apply to minors.

ORDER XII.

ADMISSIONS.

1. Notice of admission of case.
2. Notice to admit documents.
3. Form of notice.
4. Notice to admit facts.
5. Form of admissions.
6. Judgment on admissions [M & P]
7. Affidavit of signature.
8. Notice to produce documents.
9. Costs.

ORDER XIII.

PRODUCTION, IMPOUNDING AND RETURN OF DOCUMENTS.

1. Documentary evidence to be produced at first hearing. [O & R]
2. Effect of non-production of documents.
3. Rejection of irrelevant or inadmissible documents.
4. Endorsements on documents admitted in evidence. [R]
5. Endorsements on copies of admitted entries in books, accounts and records. [R]
6. Endorsements on documents rejected as inadmissible in evidence.
7. Recording of admitted and return of rejected documents. [M & R]
8. Court may order any document to be impounded.
9. Return of admitted documents. [B, M & P]
10. Court may send for papers from its own records or from other Courts. [R]
11. Provisions as to documents applied to material objects.
12. *Translation of document not in English or in Court vernacular to be filed in Court.* [A]
13. *Marking of documents exhibited.* [A]

ORDER XIV.

SETTLEMENT OF ISSUES AND DETERMINATION OF SUIT ON ISSUES OF LAW OR ON ISSUES AGREED UPON.

1. Framing of issues.
2. Issues of law and of fact.

RULES.

3. Materials from which issues may be framed.
4. Court may examine witnesses or documents before framing issues.
5. Power to amend and strike out issues.
6. Questions of fact or law may by agreement be stated in form of issues.
7. Court, if satisfied that agreement was executed in good faith, may pronounce judgment.

ORDER XV.

DISPOSAL OF THE SUIT AT THE FIRST HEARING.

1. Parties not at issue.
2. One of several defendants not at issue.
- [M] 3. Parties at issue.
4. Failure to produce evidence.

ORDER XVI.

SUMMONING AND ATTENDANCE OF WITNESSES.

1. Summons to attend to give evidence or produce documents. [B]
2. Expenses of witness to be paid into Court on applying for summons. [A, B, C, L, P & R]
Experts.
Scale of expenses. [R]
3. Tender of expenses to witness. [B, C, L, P & R]
4. Procedure where insufficient sum paid in.
Expenses of witnesses detained more than one day.
- 4-A. *Summons to Public Officer.* [M]
5. Time, place and purpose of attendance to be specified in summons.
6. Summons to produce document
7. Power to require persons present in Court to give evidence or produce document.
8. Summons how served.
9. Time for serving summons.
10. Procedure where witness fails to comply with summons.
11. If witness appears, attachment may be withdrawn.
12. Procedure if witness fails to appear.
13. Mode of attachment.
14. Court may of its own accord summon as witnesses strangers to suit.
15. Duty of persons summoned to give evidence or produce document.
16. When they may depart.
17. Application of rules 10 to 13.
18. Procedure where witness apprehended cannot give evidence or produce document.
19. No witness to be ordered to attend in person unless resident within certain limits.
20. Consequence of refusal of party to give evidence when called on by Court.
21. Rules as to witness to apply to parties summoned.
22. *Scale of travelling and other expenses.* [A]

ORDER XVII.

ADJOURNMENTS.

1. Court may grant time and adjourn hearing.
Costs of adjournment.
2. Procedure if parties fail to appear on day fixed.
3. Court may proceed notwithstanding either party fails to produce evidence, etc.

RULES.

ORDER XVIII.

HEARING OF THE SUIT AND EXAMINATION OF WITNESSES.

1. Right to begin.
2. Statement and production of evidence.
3. Evidence where several issues.
4. Witnesses to be examined in open Court.
5. How evidence shall be taken in appealable cases.
6. When deposition to be interpreted.
7. Evidence under section 138.
8. Memorandum when evidence not taken down by Judge.
9. When evidence may be taken in English.
10. Any particular question and answer may be taken down.
11. Questions objected to and allowed by Court.
12. Remarks on demeanour of witnesses.
13. Memorandum of evidence in unappealable cases.
14. Judge unable to make such memorandum to record reasons of his inability.
15. Power to deal with evidence taken before another Judge.
16. Power to examine witness immediately.
17. Court may recall and examine witness.
18. Power of Court to inspect.

ORDER XIX.

AFFIDAVITS.

1. Power to order any point to be proved by affidavit.
2. Power to order attendance of deponent for cross-examination.
3. Matters to which affidavits shall be confined.
4. *Cause title of affidavits* [A]
5. *Paragraphing and numbering of affidavits* [A]
6. *Description of deponent.* [A]
7. *Knowledge of deponent or deponents.* [A]
8. *Form of declaration.* [A]
9. *Affidavit to be passed on declarant's knowledge or information.* [A]
10. *Description of place, person, etc., referred to in affidavit.* [A]
11. *Identification of deponent.* [A]
12. *Identification of pardanashin women.* [A]
13. *Person before whom affidavit is made to ascertain deponent's knowledge of contents of affidavit.* [A]
14. *Time and place where affidavit is sworn to be noted at the foot thereof.* [A]
15. *Correction of clerical errors in affidavit.* [A]

ORDER XX.

JUDGMENT AND DECREE.

1. Judgment when pronounced.
2. Power to pronounce judgment written by Judge's predecessor.
3. Judgment to be signed.
4. Judgments of Small Cause Courts.
Judgments of other Courts
5. Court to state its decision on each issue.
6. Contents of decree.
7. Date of decree.
8. Procedure where Judge has vacated office before signing decree.
9. Decree for recovery of immoveable property.
10. Decree for delivery of moveable property.

RULES.

11. Decree may direct payment by instalments. Order, after decree, for payment by instalments.
12. Decree for possession and mesne profits.
13. Decree in administration-suit.
14. Decree in pre-emption-suit.
15. Decree in suit for dissolution of partnership.
16. Decree in suit for account between principal and agent.
17. Special directions as to accounts.
18. Decree in suit for partition of property or separate possession of a share therein.
19. Decree when set-off is allowed. Appeal from decree relating to set-off.
20. Certified copies of judgment and decree to be furnished.
21. *Notice of drawing up of decree and disposal of objections to draft decree.* [A]

ORDER XXI.

EXECUTION OF DECREES AND ORDERS.

PAYMENT UNDER DECREE.

1. Modes of paying money under decree.
 2. Payment out of Court to decree-holder
- COURTS EXECUTING DECREES.
3. Lands situate in more than one jurisdiction.
 4. Transfer to Court of Small Causes.
 5. Mode of transfer.
 6. Procedure where Court desires that its own decree shall be executed by another Court.
 7. Court receiving copies of decree, etc., to file same without proof.
 8. Execution of decree or order by Court to which it is sent.
 9. Execution by High Court of decree transferred by other Court.

APPLICATION FOR EXECUTION.

10. Application for execution.
11. Oral application. Written application.
12. Application for attachment of moveable property not in judgment-debtor's possession.
13. Application for attachment of immoveable property to contain certain particulars.
14. Power to require certified extract from Collector's register in certain cases.
15. Application for execution by joint decree-holder.
16. Application for execution by transferee of decree.
17. Procedure on receiving application for execution of decree.
18. Execution in case of cross-decrees.
19. Execution in case of cross-claims under same decree.
20. Cross-decrees and cross-claims in mortgage suits.
21. Simultaneous execution.
22. Notice to show cause against execution in certain cases.
23. Procedure after issue of notice.

PROCESS FOR EXECUTION.

24. Process for execution.
25. Endorsement on process.

STAY OF EXECUTION.

26. When Court may stay execution. Power to require security from, or impose conditions upon, judgment debtor.
27. Liability of judgment-debtor discharged.

RULES.

28. Order of Court which passed decree or of appellate Court to be binding upon Court applied to.

29. Stay of execution pending suit between decree-holder and judgment-debtor.

- 29-A. *Stay of execution pending suit under O. 21, R. 63.* [P]

MODE OF EXECUTION.

30. Decree for payment of money.
31. Decree for specific moveable property.
32. Decree for specific performance, for restitution of conjugal rights or for an injunction.
33. Discretion of Court in executing decrees for restitution of conjugal rights.
34. Decree for execution of document, or endorsement of negotiable instrument.
35. Decree for immoveable property.
36. Decree for delivery of immoveable property when in occupancy of tenant.

ARREST AND DETENTION IN THE CIVIL PRISON.

37. Discretionary power to permit judgment-debtor to show cause against detention in prison.
38. Warrant for arrest to direct judgment-debtor to be brought up.
39. Subsistence allowance.
40. Proceedings on appearance of judgment-debtor in obedience to notice or after arrest.

ATTACHMENT OF PROPERTY.

41. Examination of judgment-debtor as to his property.
 42. Attachment in case of decree for rent or mesne profits or other matter, amount of which to be subsequently determined.
 43. Attachment of moveable property, other than agricultural produce, in possession of judgment-debtor.
 - 43-A. *Disposal of attached property.* [M]
 - 43-B. *Charges of feeding and maintaining live-stock after attachment.* [M]
 44. Attachment of agricultural produce.
 - 44-A. *Copy of warrant of attachment to be sent to Collector if agricultural produce is attached.* [B]
 45. Provisions as to agricultural produce under attachment.
 46. Attachment of debt, share and other property not in possession of judgment-debtor.
 47. Attachment of share in moveable.
 48. Attachment of salary or allowances of public officer or servant of railway company or local authority.
 49. Attachment of partnership property.
 50. Execution of decree against firm.
 51. Attachment of negotiable instruments.
 52. Attachment of property in custody of Court or public officer.
 53. Attachment of decrees.
 54. Attachment of immoveable property.
 55. Removal of attachment after satisfaction of decree.
 56. Order for payment of coin or currency notes to party entitled under decree.
 57. Determination of attachment.
- INVESTIGATION OF CLAIMS AND OBJECTIONS.
58. Investigation of claims to, and objections to attachment of, attached property. Postponement of sale.
 59. Evidence to be adduced by claimant.
 60. Release of property from attachment.

RULES.

61. Disallowance of claim to property attached.
62. Continuance of attachment subject to claim of incumbrancer.
63. Saving of suits to establish right to attached property.

SALE GENERALLY.

64. Power to order property attached to be sold and proceeds to be paid to person entitled.
65. Sales by whom conducted and how made.
66. Proclamation of sales by public auction.
67. Mode of making proclamation.
68. Time of sale.
69. Adjournment or stoppage of sale.
70. Saving of certain sales.
71. Defaulting purchaser answerable for loss on re-sale.
72. Decree-holder not to bid for or buy property without permission

Where decree holder purchases, amount of decree may be taken as payment.

72-A. Leave to bid to mortgage decree-holder to be granted on terms. [B]

73. Restriction on bidding or purchase by officers.

SALE OF MOVEABLE PROPERTY.

74. Sale of agricultural produce.
75. Special provisions relating to growing crops.
76. Negotiable instruments and shares in corporations.
77. Sale by public auction.
78. Irregularity not to vitiate sale, but any person injured may sue.
79. Delivery of moveable property, debts and shares.
80. Transfer of negotiable instruments and shares.

81. Vesting order in case of other property.

SALE OF IMMOVEABLE PROPERTY.

82. What Courts may order sales.
83. Postponement of sale to enable judgment-debtor to raise amount of decree
84. Deposit by purchaser and re-sale on default.
85. Time for payment in full of purchase-money.
86. Procedure in default of payment.
87. Notification on re-sale.
88. Bid of co-sharer to have preference.
89. Application to set aside sale on deposit.
90. Application to set aside sale on ground of irregularity or fraud.

91. Application by purchaser to set aside sale on ground of judgment-debtor having no saleable interest.

92. Sale when to become absolute or be set aside.

93. Return of purchase-money in certain cases.

94. Certificate to purchaser.

95. Delivery of property in occupancy of judgment-debtor.

96. Delivery of property in occupancy of tenant.

RESISTANCE TO DELIVERY OF POSSESSION TO DECREE-HOLDER OR PURCHASER.

97. Resistance or obstruction to possession of immoveable property.

98. Resistance or obstruction by judgment-debtor.

RULES.

99. Resistance or obstruction by *bona fide* claimant.

100. Dispossession by decree-holder or purchaser.

101. *Bona fide* claimant to be restored to possession.

102. Rules not applicable to transferee *pendente lite*.

103. Orders conclusive subject to regular suit.

104. Entry of result of execution in suit register. [A]

105. Attachment of moveable property to be through Court Amin. [A]

106. Encumbrance certificate to be filed before sale of immoveable property. [A]

107. Determination of ancestral character of the land. [A]

108. Notice to Collector before sale of revenue free or revenue paying land. [A]

109. Reports of Collector and Sub-Registrar to be open to public inspection.

110. Results of enquiry under Rule 66 to be made on order of Court in Judge's own hand. [A]

111. Notification of material facts not stated in proclamation of sale. [A]

112. Costs of proceedings under Rr. 66, 108 and 109 [A]

113. Court to inform officer conducting sale, if other decree-holders are entitled to share in proceeds. [A]

114. Procedure in case of sale in execution of house or building within limits of Military Cantonment. [A]

115. Procedure on sale of guns, ammunition, etc., requiring license. [A]

116. Decree-holder applying for attachment of livestock to deposit cost of maintenance, etc. [A]

117. Custody of attached livestock.

118. Removal of livestock to the nearest pound. [A]

119. Levy of charge for animals committed to the pound. [A]

120. Maintenance charges of animals impounded. [A]

121. Period for which charges are payable. [A]

122. Animals impounded not to be released except on order of Court. [A]

123. Custody of moveables other than livestock. [A]

124. Persons in special charge of attached property. [A]

125. Fees payable for attendance. [A]

126. Attaching officer to certify to attendance. [A]

127. Refund of charges where attachment is withdrawn, etc. [A]

128. Fees paid to be entered in register of petty receipts and re-payments. [A]

129. Procedure on remitting amount levied to treasury. [A]

130. Cost of attachment and sale to be paid by decree-holder to officer of Court. [A]

ORDER XXII.**DEATH, MARRIAGE AND INSOLVENCY OF PARTIES.**

1. No abatement by party's death, if right to sue survives.

2. Procedure where one of several plaintiffs or defendants dies and right to sue survives.

3. Procedure in case of death of one of several plaintiffs or of sole plaintiff.

RULES.

4. Procedure in case of death of one of several defendants or of sole defendant
5. Determination of question as to legal representative.
6. No abatement by reason of death after hearing.
7. Suit not abated by marriage of female party.
8. When plaintiff's insolvency bars suit.
Procedure where assignee fails to continue suit or give security.
9. Effect of abatement or dismissal.
10. Procedure in case of assignment before final order in suit.
11. Application of Order to appeals.
- 11-A. *Entry of legal representative on the record a quasi-judicial act.* [M]
12. Application of Order to proceedings.

ORDER XXIII.

WITHDRAWAL AND ADJUSTMENT OF SUITS.

1. Withdrawal of suit or abandonment of part of claim.
2. Limitation law not affected by first suit.
3. Compromise of suit.
4. Proceedings in execution of decrees not affected.

ORDER XXIV.

PAYMENT INTO COURT.

1. Deposit by defendant of amount in satisfaction of claim.
2. Notice of deposit.
3. Interest on deposit not allowed to plaintiff after notice.
4. Procedure where plaintiff accepts deposit as satisfaction in part.
5. Procedure where he accepts it as satisfaction in full.

ORDER XXV.

SECURITY FOR COSTS.

1. When security for costs may be required from plaintiff.
Residence out of British India.
2. Effect of failure to furnish security.

ORDER XXVI.

COMMISSIONS.

COMMISSIONS TO EXAMINE WITNESSES.

1. Cases in which Court may issue commission to examine witness.
2. Order for commission.
3. Where witness resides within Court's jurisdiction.
4. Persons for whose examination commission may issue.
5. Commission or request to examine witness not within British India.
6. Court to examine witness pursuant to commission.
7. Return of commission with depositions of witnesses.
8. When depositions may be read in evidence.

COMMISSIONS FOR LOCAL INVESTIGATIONS.

9. Commissions to make local investigations.
10. Procedure of Commissioner.
Report and depositions to be evidence in suit.

Commissioner may be examined in person.

COMMISSIONS TO EXAMINE ACCOUNTS.

11. Commission to examine or adjust accounts

RULES.

12. Court to give Commissioner necessary instructions.

Proceedings and report to be evidence.

Court may direct further enquiry.

COMMISSIONS TO MAKE PARTITIONS.

13. Commission to make partition of immoveable property.

14. Procedure of Commissioner.

GENERAL PROVISIONS.

15. Expenses of commission to be paid into Court.

16. Powers of Commissioners.

17. Attendance and examination of witnesses before Commissioner.

18. Parties to appear before Commissioner.

ORDER XXVI-A. [M]

1. *Commissions to translate documents.* [M]

ORDER XXVII.

SUIT BY OR AGAINST THE GOVERNMENT OR PUBLIC OFFICERS IN THEIR OFFICIAL CAPACITY.

1. Suits by or against Government.
2. Persons authorized to act for Government.
3. Plaints in suits by or against Government.
4. Agent for Government to receive process.
5. Fixing of day for appearance on behalf of Government.
6. Attendance of person able to answer questions relating to suit against Government.
7. Extension of time to enable public officer to make reference to Government.
8. Procedure in suits against public officer.

ORDER XXVIII.

SUITS BY OR AGAINST MILITARY MEN.

1. Officers or soldiers who cannot obtain leave may authorize any person to sue or defend for them.
2. Persons so authorized may act personally or appoint pleader.
3. Service on person so authorized, or on his pleader, to be good service

ORDER XXIX.

SUITS BY OR AGAINST CORPORATIONS.

1. Subscription and verification of pleading.
- 1-A. *Time to be allowed for appearance in suits against Local Authority.* [M]
2. Service on corporation.
3. Power to require personal attendance of officer of corporation.

ORDER XXX.

SUITS BY OR AGAINST FIRMS AND PERSONS CARRYING ON BUSINESS IN NAMES OTHER THAN THEIR OWN.

1. Suing of partners in name of firm.
2. Disclosure of partners' names.
3. Service.
4. Right of suit on death of partner.
5. Notice in what capacity served.
6. Appearance of partners.
7. No appearance except by partners.
8. Appearance under protest.
9. Suits between co-partners.
10. Suit against person carrying on business in name other than his own.

ORDER XXXI.

SUITS BY OR AGAINST TRUSTEES, EXECUTORS AND ADMINISTRATORS.

1. Representation of beneficiaries in suits concerning property vested in trustees, etc.
2. Joinder of trustees, executors and administrators.

RULES.

3. Husband of married executrix not to join.

ORDER XXXII.

SUITS BY OR AGAINST MINORS AND PERSONS OF UNSOUND MIND.

1. Minor to sue by next friend.
2. Where suit is instituted without next friend, plaint to be taken off the file.
3. Guardian for the suit to be appointed by Court for minor defendant.
4. Who may act as next friend or be appointed guardian for the suit.
5. Representation of minor by next friend or guardian for the suit.
6. Receipt by next friend or guardian for the suit of property under decree for minor.
7. Agreement or compromise by next friend or guardian for the suit.
8. Retirement of next friend.
9. Removal of next friend.
10. Stay of proceedings on removal, etc., of next friend.
11. Retirement, removal or death of guardian for the suit.
12. Course to be followed by minor plaintiff or applicant on attaining majority.
13. Where minor co-plaintiff attaining majority desires to repudiate suit.
14. Unreasonable or improper suit.
- 14-A. *Appointment or removal of guardian or next friend, a quasi-judicial act.* [M]
15. Application of rules to persons of unsound mind.
16. Saving for Princes and Chiefs.
17. *Time for appearance where defendant is under the superintendence of the Court of Wards.* [M]

ORDER XXXIII.

SUITS BY PAUPERS.

1. Suits may be instituted *in forma pauperis*.
2. Contents of application.
3. Presentation of application.
4. Examination of applicant.
- If presented by agent, Court may order applicant to be examined by commission.
5. Rejection of application.
6. Notice of day for receiving evidence of applicant's pauperism.
7. Procedure at hearing.
8. Procedure if application admitted.
9. Dispaupering.
10. Costs where pauper succeeds.
11. Procedure where pauper fails.
12. Government may apply for payment of court-fees.
13. Government to be deemed a party.
14. Copy of decree to be sent to Collector.
15. Refusal to allow applicant to sue as pauper to bar subsequent application of like nature.
16. Costs.

ORDER XXXIV.

SUITS RELATING TO MORTGAGES OF IMMOVEABLE PROPERTY.

1. Parties to suits for foreclosure, sale and redemption.
2. Preliminary decree in foreclosure-suit.
3. Final decree in foreclosure-suit.
Power to enlarge time.
Discharge of debt.
4. Preliminary decree in suit for sale.
Power to decree sale in foreclosure-suit.

RULES.

5. Final decree in suit for sale.
6. Recovery of balance due on mortgage.
7. Preliminary decree in redemption-suit.
8. Final decree in redemption-suit.
Power to enlarge time.
9. Decree where nothing is found due or where mortgagee has been overpaid.
10. Costs of mortgagee subsequent to decree.
11. Right of mesne mortgagee to redeem and foreclose.
12. Sale of property subject to prior mortgage.
13. Application of proceeds.
14. Suit for sale necessary to bring mortgaged property to sale.
15. Charges.

ORDER XXXV.

INTERPLEADER.

1. Plaint in interpleader-suit.
2. Payment of thing claimed into Court.
3. Procedure where defendant is suing plaintiff.
4. Procedure at first hearing.
5. Agents and tenants may not institute interpleader-suits.
6. Charge for plaintiff's costs.

ORDER XXXVI.

SPECIAL CASE.

1. Power to state case for Court's opinion.
2. Where value of subject-matter must be stated.
3. Agreement to be filed and registered as suit.
4. Parties to be subject to Court's jurisdiction.
5. Hearing and disposal of case.

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5. Where defendant may be called upon to furnish security for production of property.
6. Attachment where cause not shown or security not furnished.
7. Mode of making attachment.
8. Investigation of claim to property attached before judgment.
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10. Attachment before judgment not to affect rights of strangers, nor bar decree-holder from applying for sale.

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TEMPORARY INJUNCTIONS AND

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7. Detention, preservation, inspection, etc., of subject-matter of suit.

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Stay by Court which passed the decree.

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10. Appellate Court may require appellant to furnish security for costs.

Where appellant resides out of British India.

11. Power to dismiss appeal without sending notice to Lower Court.

12. Day for hearing appeal.

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14. Publication and service of notice of day for hearing appeal.

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17. Dismissal of appeal for appellant's default. Hearing appeal *ex parte*.

18. Dismissal of appeal where notice not served in consequence of appellant's failure to deposit costs.

19. Re-admission of appeal dismissed for default.

20. Power to adjourn hearing, and direct persons appearing interested to be made respondents.

21. Re-hearing on application of respondent against whom *ex parte* decree made.

22. Upon hearing, respondent may object to decree as if he had preferred separate appeal.

Form of objection and provisions applicable thereto.

23. Remand of case by Appellate Court.

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25. Where Appellate Court may frame issues and refer them for trial to Court whose decree appealed from.

26. Findings and evidence to be put on record.

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27. Production of additional evidence in Appellate Court.

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JUDGMENT IN APPEAL.

30. Judgment when and where pronounced.

31. Contents, date and signature of judgment.

32. What judgment may direct.

33. Power of Court of Appeal.

34. Dissent to be recorded.

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35. Date and contents of decree
Judge dissenting from judgment need not sign decree.

36. Copies of judgment and decree to be furnished to parties.

37. Certified copy of decree to be sent to Court whose decree appealed from.

38. Address for service on appeal. [A]

ORDER XLI-A. [M]

1. Rules of O. 41 to apply to appeals to High Court subject to modifications in this order. [M]

2. Fees for service of notice to accompany memorandum of appeal. [M]

Period for entry of appearance by respondent. [M]

3. Respondent intending to contest appeal to file memorandum of appearance within prescribed period. [M]

Respondent not entering appearance in time not entitled to print records except on application supported by affidavit explaining omission. [M]

4. Memorandum of appeal and appearance to state address for service on pleader or party in person. [M]

5. Power of Court to direct service of notice of appeal or other notice by post. [M]

6. Sufficiency of service if notice left at address for service. [M]

RULES.

7. *Notices to be sent by registered post unless otherwise directed by Court.* [M]
8. *Respondents not appearing by same pleader to give notice of appearance to each other.* [M]
9. *List of cases wherein notice is to be issued to respondent to be affixed to notice-board of the Court.*
10. *Power of Court to dismiss appeal when records are not printed owing to default of party, Court not bound to read unprinted records.* [M]
11. *Costs of application and adjournments.* [M]
12. *Respondent to file copies of memorandum of objections and fees for service.* [M]
13. *Power of Registrar to dispense with service of copies, if appellant refuses to accept copies tendered by party.*
14. *Provisions of O. 41, R. 31, inapplicable to High Court.* [M]

ORDER XLIB. [M]

1. *Rules of O. 41-A applicable to appeals under Cl. 15 of the Letters Patent.* [M]
2. *Notice of appeal.* [M]

ORDER XLII.

APPEALS FROM APPELLATE DECREES.

1. Procedure.
2. *What to accompany memorandum of appeal.* [M]

ORDER XLIII.

APPEALS FROM ORDERS.

1. Appeals from orders.
2. Procedure.
3. *Memorandum of appeal from appellate order.* [M]

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PAUPER APPEALS.

1. Who may appeal as pauper.
Procedure on application for admission of appeal.
2. Inquiry into pauperism.

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APPEALS TO THE KING IN COUNCIL.

1. "Decree" defined.
2. Application to Court whose decree, complained of.
3. Certificate as to value of fitness.
4. Consolidation of suits.
5. Remission of dispute to Court of first instance.
6. Effect of refusal of certificate.
7. Security and deposit required on grant of certificate.
8. Admission of appeal and procedure thereon.
9. Revocation of acceptance of security.
10. Power to order further security or payment.
11. Effect of failure to comply with order.
12. Refund of balance deposit.
13. Powers of Court pending appeal.
14. Increase of security found inadequate.
15. Procedure to enforce orders of King in Council.
16. Appeal from order relating to execution.

ORDER XLVI.

REFERENCE.

1. Reference of question to High Court.

RULES.

2. Court may pass decree contingent upon decision of High Court.
3. Judgment of High Court to be transmitted, and case disposed of accordingly.
4. Costs of reference to High Court.
5. Power to alter, etc., decree of Court making reference.
6. Power to refer to High Court questions as to jurisdiction in small causes.
7. Power to District Court to submit for revision proceedings had under mistake as to jurisdiction in small causes.
8. *Applicability of O. 41, R. 38 to proceedings under this order.* [A]

ORDER XLVII.

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1. Application for review of judgment.
2. To whom applications for review may be made.
3. Form of applications for review.
4. Application where rejected.
Application where granted.
5. Application for review in Court consisting of two or more Judges.
6. Application where rejected.
7. Order of rejection not appealable.
Objections to order granting application.
8. Registry of application granted, and order for re hearing.
9. Bar of certain applications.
10. *Applicability of O. 41, R. 38 to proceedings under this order.* [A]

ORDER XLVIII.

MISCELLANEOUS.

1. Process to be served at expense of party issuing. Costs of service.
2. Orders and notices how served.
3. Use of forms in appendices.

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1. Who may serve process of High Courts.
2. Saving in respect of Chartered High Court.
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PROVINCIAL SMALL CAUSE COURTS.

1. Provincial Small Cause Courts.

ORDER LI.

PRESIDENCY SMALL CAUSE COURTS.

1. Presidency Small Cause Courts.

ORDER LII. [A]

Applicability of O. 41, R. 38 to proceedings under S. 115. [A]

APPENDICES TO THE FIRST SCHEDULE.

FORMS.

A.—PLEADINGS.

1. Titles of suits.
2. Description of parties in particular cases.
3. Plaints.
4. Written statements.

B.—Process.

C.—Discovery, inspection and admission.

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THE FIRST SCHEDULE.

ORDER I.

PARTIES TO SUITS.

1. [S. 26.] All persons may be joined in one suit

Who may be joined as plaintiffs. as plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative,

O. 1, R. 1. SCOPE OF.—The rule is only an enabling one allowing a number of plaintiffs, with the same right to relief, to join in one suit, instead of bringing separate suits. 24 C. 388. The words "in respect of the same transaction" are wider than the words "in respect of the same cause of action". 25 M. 745. Suit by one member for recovery of family debt other members being impleaded as defendants not bad for non-joinder. 90 I. C. 565 = A. I. R. 1927 Lah. 129 (1); 39 M. L. T. 442 = A. I. R. 1927 Mad. 984.

APPLICABILITY.—Rule applies to appeals also. 75 I. C. 950 = 1923 Lah. 638.

PERSONS—A ship is a person. 12 B. 241.

EFFECT OF.—The words "in the alternative," apply to cases in which there is a doubt as to who is the person entitled to sue. 6 M. 243; see also 18 A. 433.

WHO MAY BE JOINED AS PLAINTIFFS.—Where the interests of two plaintiffs are identical and not antagonistic, they can sue jointly. 16 B. 119. Plaintiffs who have separate interests in the subject-matter of the suit may join. 4 A. 261. All persons having a common cause of action are entitled to join as plaintiffs. 15 B. 300. A plaintiff is entitled to join as co-defendants persons against whom he has different causes of action in cases where common questions of law and fact are involved. 55 C. 164. Suits by different sets of plaintiffs claiming in the alternative is maintainable, provided there is a common question of law or fact. 10 P. R. 1916 = 32 I. C. 526. Several persons having distinct shares in certain properties can join in a suit against a person in possession under a deed of gift, sought to be set aside. 4 A. 261 (F. B.). See also 33 C. 367. Several persons could not file a joint suit for damages for their wrongful detention in jail after the expiry of their term of imprisonment. 11 C. 524. Suit by several plaintiffs—Each plaintiff having separate cause of action in which others are not interested—Misjoinder of causes of action arises. (1926) M. W. N. 723 = 1926 Mad. 1140. Parties and causes of action—Misjoinder—Suit by temple servants to set aside order of dismissal by temple trustee if and when bad for misjoinder. 1926 Mad. 57 = 91 I. C. 525. Co-plaintiffs—Alternative relief—Suit by two sets of plaintiffs maintainable. 43 M. L. J. 277 = 1922 M. 174. Co-plaintiffs—All defendants not interested in relief—Joinder of different causes of action—Effect of. 17 L. W. 25 = 69 I. C. 402 = 1923 M. 331 (2). Same person can be plaintiff and defendant in two distinct capacities in the same suit. 93 I. C. 214 = 1926 Sindh 4.

CO-MORTGAGEES.—Suit for sale by one—Others refusing to join to be added as defendants—Form of decree to be passed. 46 I. A. 272 = 37 M. L. J. 483 (P. C.).

CO-SHARERS.—The co-sharer landlords can

sue the tenants collectively even if they collect rent separately and the rent refers to different periods. 10 I. C. 891 = 14 C. L. J. 373. A co-owner of immoveable property can sue for injunction against intending trespassers without joining the other co-owners as parties. 35 I. C. 147 = 3 L. W. 542. Where the auction-purchaser of a residuary share of an estate sued the co-sharers for joint possession in separate suits, no secret arrangement among the co-sharers regarding the mode of enjoyment of the property will bind the purchaser and the suits will not be bad for splitting up of claim. 44 C. L. J. 293 = 99 I. C. 177 = A. I. R. 1927 Cal. 237. One co-sharer cannot sue for the enhancement of his share of the rent. 4 C. 96 (F. B.). See also 20 C. 107; 19 C. 610. All co-sharers are necessary parties in a suit for profits for jeraat land held by defendants in addition to their shares. 1 Pat. L. J. 573 = 35 I. C. 868 (F. B.). All the co-owners must join in a suit to recover their property. 10 B. 32. One of several joint proprietors cannot sue in ejectment. 4 C. 961. One of several joint lessors cannot sue for his share of rent, payable under a lease to all the lessors. 5 A. 40. See also 4 C. 89.

OTHER ILLUSTRATIVE CASES.—A benamidar for another in a transaction need not be joined in a suit in respect of such transaction. 10 I. C. 779 = 4 Bur. L. T. 74. A trustee of temple properties cannot sue singly for rent without making other co-trustees parties to the suit. 1 Pat. L. J. 437; 24 I. C. 806. But see 30 M. L. J. 619 = 33 I. C. 52 *contra*. A manager of a joint family can sue on a contract entered into by him in his own name without impleading the other members as parties to the suit. 35 M. 685 = 21 M. L. J. 508; 71 P. R. 1911 = 13 I. C. 305; 23 Pom. L. R. 1135 = 46 Bom. 358. Mortgage suit by manager on behalf of all members is maintainable. 39 I. C. 427; 38 I. A. 45; 35 M. 685. A karnavan of a Malabar tarwad can alone sue for the tarwad property. 15 M. 19.

WHO ARE NECESSARY PARTIES.—All the members of a tarwad are necessary parties to a suit by one member against the karnavan for an increased rate of maintenance. 7 M. 428. The Receiver is a necessary party to an appeal by a claimant whose claim with regard to property sold by the Receiver as belonging to an insolvent has been dismissed. 94 I. C. 660 (1) = 1926 Lah. 696. The transferee of property sold in execution is a necessary party to set aside the sale if the proceedings have been commenced after the transfer. 15 I. C. 176 = 39 Cal. 881. It is not open to some of the executors under a will to maintain an action without impleading the other executors. 44 M. L. J. 249 = 1923 Mad. 337. In a suit for accounts of the partnership on the death of a partner, all the representatives of the deceased partner should join. 33 I. C. 564. All

where, if such persons brought separate suits, any common question of law or fact would arise.

2. Where it appears to the Court that any joinder of plaintiffs may embarrass or delay the trial of the suit, the Court may put the plaintiffs to their election or order separate trials or make such other order as may be expedient.

Power of Court to order separate trials.

3. [S. 28.] All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative,

Who may be joined as defendants.

where, if separate suits were brought against such persons, any common question of law or fact would arise.

the members of a firm are proper parties to a suit on a pro-note in favour of the firm when the obligation on it was contracted. 15 I. C. 380 = 11 M. L. T. 246. In an appeal against an order in a partition suit that the property be sold as it was incapable of partition all the sharers are necessary parties. 100 I. C. 17 (2) = A. I. R. 1927 Lah. 189. See also 91 I. C. 567 = A. I. R. 1926 Cal. 741.

WHO ARE NOT NECESSARY PARTIES.—A person remotely or indirectly interested is not a necessary party. 17 C. W. N. 835 = 16 C. L. J. 385. See also 59 I. C. 292. In respect of a private water-course, where no relief is asked against Government, the latter is not a necessary party. 50 I. C. 299 = 177 P. W. R. 1918. In a partition suit, persons who have no interest whatsoever in the suit properties need not be made parties. 39 I. C. 160 = 5 L. W. 207. But all the interested parties should be joined as parties either as plaintiffs or as defendants. 23 O. C. 62 = 56 I. C. 304. A dormant partner is not a necessary party, in a suit on a contract either with the firm or with one of its members. 31 I. C. 913 (2), 33 A. 272 (P. C.). In an appeal by a secured creditor, or an insolvent debtor, where the Receiver is a party, it is not necessary to join all the creditors. 58 I. C. 10 = 24 C. W. N. 401. When the defendant's tenants in a rent suit plead the title of a third person, the third person is not a necessary party to the proceedings. 32 I. C. 553. A suit by one lessee against another lessee for possession is not bad for not joining the landlord as party. 94 I. C. 3 = 1926 Oudh 422. In a suit under S. 9 of the Specific Relief Act, the owner who is not in physical possession is not a necessary party. 5 B. 208. It is doubtful whether alienees or trespassers on trust property can be joined as parties to a suit under S. 92. 38 M. 1064 = 27 M. L. J. 266. A Hindu widow and her two daughters can sue for maintenance and for the marriage expenses of the daughters. 6 A. 632. Strangers to the contract claiming adverse possession are not proper parties to a suit for specific performance of the contract. 35 I. C. 871 = 4 I. W. 397. See also 5 B. 177; 10 C. 1061. A suit under S. 53 of the Transfer of Property Act for a declaration that a conveyance is voidable must be brought by or on behalf of all the creditors. 34 C. 999. One of two partners cannot sue in his own name an agent of the firm for breach of contract. 27 M. 80. The Political Agent and Superintendent of a State cannot sue for the recovery of property belonging to the State. 2 A. 690. A person has no right to sue

for damages for slander of his sister. 1 M. 383. Neither can a father sue for defamation of his daughter. 11 A. 104. A plaintiff will not be bad as contravening this section, because it prays for a decree in favour of all the plaintiffs on certain allegations, or in the alternative in favour of one of them. 28 M. 500. See also 29 M. 50; 26 M. 647. Secretary of State is not necessary party to a suit for setting aside sale under Punjab Excise Act, S. 60. 96 I. C. 927 (1) (25 Cal. 833 (P. C.), F.). A suit is not liable to be dismissed because the plaintiff claims in the alternative over the same plot of ground rights—(1) of ownership and (2) of easement. 34 C. 51 (F. B.) Where a plaintiff joins as defendant a person who ought to have been joined as plaintiff, the suit should not be dismissed merely because plaintiff fails to show that the person so joined refused to appear with him as plaintiff. 24 A. 226. See also 29 M. 302; 26 M. 649 (F. B.).

O. 1, R. 2.—See 18 I. C. 181; 21 I. C. 438.

O. 1, R. 3. SCOPE OF.—A. I. R. 1928 Bom. 91 = 30 Bom. L. R. 162. This rule must be read with rules 9 and 10 (2). 27 C. 493, 07. The general principle regarding the joinder of defendants would seem to be that, there must be a cause of action in which all the defendants are more or less interested, although the relief asked against them may vary; and that separate causes of action against separate defendants cannot be joined in one action. 31 B. 516; 49 M. 836 (see also rules 5 and 7). O. I. R. 3 relates to a joinder of parties and it assumes the existence of a suit in a proper forum, the court having jurisdiction to try the suit. 49 Cal. 895 = 27 C. W. N. 82. Rule is not limited to joinder of parties but it applies to joinder of causes of action also. 45 Cal. 111 = 21 C. W. N. 794. This rule and R. 3 of O. 11 must be read together. 5 A. 163, 70 (F. B.); 11 A. 33. See also 1 C. W. N. 300; 29 C. 257; 27 B. 41; 8 C. 238, 45, 25 B. 606; 12 I. C. 357. Requirements of the rule. 77 I. C. 1028.

APPLICABILITY OF R. 3, CONDITIONS FOR.—See 49 Mad. 836 = 97 I. C. 212 = 51 M. L. J. 194 = 1926 Mad. 911 = 24 L. W. 186.

WHO ARE PROPER PARTIES.—Creditors are proper parties to a suit by sons against a Hindu father for partition and for declaration that the debts contracted by the father were not valid and binding on the family. 45 M. 194 = 42 M. L. J. 97. A single suit against all the tenants, where every one of them removes crops on the land and when conspiracy is neither alleged nor proved, is bad for misjoinder of causes of action. 24 I. C.

4. [Ss. 26, 28.] Judgment may be given without any amendment—

Court may give judgment for or against one or more of joint parties.

(a) for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to ;

(b) against such one or more of the defendants as may be found to be liable, according to their respective liabilities.

Defendant need not be interested in all the relief claimed.

5. It shall not be necessary that every defendant shall be interested as to all the relief claimed in any suit against him.

6. [S. 29.] The plaintiff may, at his option, join as parties to the same suit all or any of the persons severally, or jointly and severally, liable on any one contract, including parties to bills of exchange, hundis and promissory notes.

Joinder of parties liable on same contract.

813 = 4 L. W. 399. Government is a necessary party to a suit by mirasdars for declaration that the right of fishery leased out by Government to *gramattars* belonged to them. 38 I. C. 100. Government is a necessary party to a suit by a person claiming certain lands which had been resumed by the Government and settled with another party. 11 B. L. R. 118 (F. B.). See also 3 M. H. C. R. 134 ; 15 M. 350. Only the person who prosecutes the plaintiff is liable in an action for malicious prosecution. 12 M. L. J. 389. In a suit for contribution, all the parties liable for contribution, are proper parties. 15 M. L. J. R. 24. In an administration suit a person who applies to be made a party defendant as heir of the deceased may be added as a party to avoid multiplicity of suits. 5 Rang. 159 = 103 I. C. 22 = A. I. R. 1927 Rang. 192. In a suit upon a lost cheque which has been endorsed over to a third person, the drawer of the cheque is a necessary party. 2 A. 754. All the members of a *taiwad* are necessary parties to a suit by one member against the *karnavan* for enhanced maintenance. 7 M. 428.

WHO ARE NOT NECESSARY OR PROPER PARTIES.—To a suit between rival claimants to an occupancy holding, the landlord is not a necessary party. 70 I. C. 958 = 1923 All. 11 (2). See also 104 I. C. 845. In a suit by a tenant of Ghatwali land against his landlord, the Secretary of State is not a necessary party. 35 I. C. 788. In a suit for a dissolution of partnership sub-partners are not necessary parties and any provision in the decree concerning them is unenforceable. 4 L. W. 10 = 34 I. C. 543. In the suit between landlord and tenant for rent, a third person, who once claimed to be the rightful owner need not be made a party. 50 I. C. 908. In a suit for the administration of an estate, the debtors of the estate are not necessary parties. 24 L. W. 425 = 1926 Mad. 1110. In a Suit to establish easement owners of servient tenement not resisting plaintiff's right are not necessary parties. 96 I. C. 665 = 1926 Cal. 1201. The vendor is not a necessary party to a suit for pre-emption. 26 A. 549. To a suit to enforce a mortgage, persons claiming under a title adverse to the mortgagor and mortgagee are not proper parties. 33 C. 425. The Secretary of States not a necessary party to set aside a sale for arrears of revenue. 9 C. 271. The Registrar is not a necessary party to a suit to compel registration of a document. 5 C. 445 ; 8 B. 269. In a suit

for the partition of joint family property, mortgagees are not necessary parties. 5 C. 582. An action for slander cannot be brought jointly against several defendants. 15 B. L. R. 161. In a suit under O. XXI, R. 63, the different purchasers of the attached property may be joined as defendants. 13 M. L. J. 479. As to suits against a number of alienees to recover family property. See 16 A. 279 ; 7 M. H. C. 290. The drawer and acceptor of bills of exchange can be joined as co-defendants in a suit brought by the holder of such bills. 3 C. 541. A suit under S. 73, sub-section (2) can be instituted against a number of decree-holders to whom assets have been wrongly distributed. 13 C. 159. A suit for declaration of title, *mesne profits* and possession of the property, purchased by different sets of defendants in different lots in auction sale, is bad for multifariousness. 40 All. 7 = 42 I. C. 856 = 15 A. L. J. 809. A suit by the assignee of a bond against the obligor, and in the alternative against the assignor, is not bad. 16 M. L. J. 17 (Recent Cases). A reversioner's suit for possession of properties from several alienees of a widow is not untenable for multifariousness. 36 All. 406 = 12 A. L. J. 509. A suit for possession on the ground of inheritance can be proceeded against a number of a different alienees. 59 P. R. 1918 = 44 I. C. 549 (33 B. 298, 29 C. 871, foll.). A claim to direct a trustee to render accounts of trust property for a certain period may be joined with a claim against the trustee and others to render accounts of trust property for another period. 9 M. L. T. 233 = 9 I. C. 565 = (1911) 2 M. W. N. 302 (27 M. 80 ; 29 M. 50 ; 31 M. 252, ref.). An act of State can only be question in a suit to which the Government is a party. 11 M. I. A. 517.

O. 1, R. 4.—Where the trial Court formed that one of the defendants and not the plaintiff was entitled to the suit money and transposed the defendant into the array of plaintiff, such a procedure was in accordance with the rule 105 I. C. 473 = A. I. R. 1927 Oudh 484.

O. 1, R. 6.—The drawer and acceptor of bills of exchange can be joined as co-defendants in a suit brought by the holder of such bills. 3 C. 541. See also 3 B. 182. The drawer is a necessary party to a case based on a *Hundi*. 140 P. W. R. 1914 = 25 I. C. 381 = 243 P. L. R. 1914. It is not incumbent on a person dealing with partners to make them all defendants in a suit for the recovery of money due by the firm. 21 M. 256.

7. Where the plaintiff is in doubt as to the person from whom he is entitled to obtain redress, he may join two or more defendants in order that the question as to which of the defendants is liable, and to what extent, may be determined as between all parties.

When plaintiff in doubt from whom redress is to be sought.

8. [Ss. 30, 32.] (1) Where there are numerous persons having the same interest in one suit, one or more of such persons may, with the permission of the Court, sue or be sued, or may defend, in such suit, on behalf of or for the benefit of all persons so interested. But the Court shall in such case give, at the

One person may sue or defend on behalf of all in same interest.

O. 1, R. 8. SCOPE OF RULE.—The rule is merely an enabling rule and does not prevent a representative suit being brought in any other manner than the law permits. 94 I. C. 47=28 Bom. I. R. 309=1926 Bom. 179. The rule requires that the Court should exercise a judicial discretion in permitting some definite person or persons to sue or be sued on behalf of all the persons interested. 17 C. 906 at p. 910; *see also* 9 M. 463. O. 1, R. 8 is merely permissive and is intended to provide a remedy for cases in which it might be difficult or impossible to implead all the persons it is sought to affect. 63 I. C. 963=13 Bar. L. T. 183 O. 1, R. 8, C. P. C., is subordinate to O. 34, R. 1. 36 I. C. 542=1 Pat. L. J. 468. The permission need not be express. 101 I. C. 738=A. I. R. 1927 Cal. 608. An order for representation can be made even when a party objects so to represent. 101 I. C. 738=A. I. R. 1927 Cal. 608. O. 1, R. 8 if controls S. 11, Expl. (6). 54 M. L. J. 8 (F. B.). O. 1, R. 8 has been enacted for the benefit of the defendants only to this extent, namely, to prevent multiplicity of suits. 27 L. W. 212.

APPLICABILITY OF RULE.—For principle governing representative actions, *see* 27 L. W. 212; *see* 5 Pat. 539=94 I. C. 433=1926 Pat. 321. The rule applies only to cases where many persons are jointly interested in obtaining relief, and not to cases in which an individual right has been violated. 7 A. 178 (F. B.). The rule applies not only to concurrent interests but also to similar ones, though distinct. 11 M. L. T. 257=15 I. C. 399=(1912) M. W. N. 105. *See also* 98 I. C. 553=A. I. R. 1927 All. 96. Where numerous members of a caste seek to enforce rights as against strangers or as against certain other members of the caste, O. 1, R. 8 applies. 64 I. C. 618=30 M. L. T. (H. C.) 47. One or two persons can sue in respect of maladministration of property belonging to the community. 94 I. C. 47=1926 Bom. 179. When there are numerous persons having the same interest in the same suit one or more of such persons may sue under this rule on behalf of or for the benefit of all persons so interested. 44 M. L. J. 116=1923 Mad. 276 (2). A suit for a declaration that a certain pathway was a public one, can be maintained with the permission of court under O. 1, R. 8. 69 I. C. 910=25 C. W. N. 587.

CHANGE IN LAW.—The word "persons" has been substituted for the word "parties" so as to give effect to the opinion expressed in 9 C. 604.

MEANING OF TERMS.—The "numerous persons" mentioned in the rule mean persons capable of being ascertained. The whole Hindu community is incapable of being ascertained

and a suit on their behalf if relating to any public trust, can only be instituted under ss. 91 and 92. 20 C. 397, 407; *see also* 9 M. 463; 33 C. 905.

PERMISSION WHEN TO BE OBTAINED.—Permission may be obtained before the commencement of the suit or after its commencement. 21 B. 784 (F. B.); 22 A. 269; 23 M. 29; 25 M. 399; 21 C. 180, 188; *see also* 29 C. 100, 17 C. 906, 910. The permission may be given even after the filing of the suit. 47 Bom. 809=25 Bom. L. R. 689=1923 Bom. 305; 105 I. C. 113; *see also* 6 Bur. L. J. 16=101 I. C. 290 (2)=A. I. R. 1927 Rang. 134 (1). Leave to file a suit may be granted on behalf of a whole community or body of persons, though some persons object to it. 24 M. L. T. 20=45 I. C. 423=8 L. W. 160=(1918) M. W. N. 791. Before instituting a suit under O. 1, R. 8 leave of the Court must be obtained and the requirements of the rule must be complied with before the suit can be proceeded with and unless this is done the suit must be dismissed. But its provisions may be complied with subsequent to the filing of the suit and when that has been done the suit cannot be dismissed. 44 Cal. 258=39 I. C. 773=21 C. W. N. 1144. (21 B. 784; 25 M. 399; 23 M. 28; 22 A. 269, *rel. on*; 8 C. 32; 11 C. 33; 21 C. 180; 11 C. 213, *dist.*; 9 C. 604, *diss.*). Once the permission of the Court had been obtained further permission in the Court of appeal is not necessary. 51 I. C. 437=46 P. R. 1919; 101 I. C. 738=A. I. R. 1927 Cal. 608.

NOTICE.—Notice under O. 1, R. 8 is required and the provisions of the rule are mandatory. 47 Bom. 809=1923 Bom. 305. The notice must include the names of the persons who have been permitted to represent others. 17 C. 906 (910). Even a defective notice will bind those who have appeared and contested the suit, at least. 101 I. C. 738=A. I. R. 1927 Cal. 608; or even where plaintiffs claimed a right for themselves as well as for others, but took no notice as ordered by Court, the suit can be decreed at least, so far as the plaintiffs on record are concerned. 101 I. C. 500=8 P. L. T. 267=A. I. R. 1927 Pat. 221. A president of a community authorised to file suits cannot sue in his own name and notice under O. 1, R. 8 to all the members of the community must be given. Permission also is necessary under R. 8. 46 Bom. 132=1922 Bom. 109. *See also* 101 I. C. 375=A. I. R. 1927 Mad. 666.

ILLUSTRATIVE CASES.—The Mahomedan Association of Meerut cannot institute a suit in its own name by its secretary. The Association should follow the provisions of this rule. 6 A. 284. In a suit by a junior member of a Malabar tarwad, to cancel certain mortgages executed by their karnavan, all the members of the tarwad

plaintiff's expense, notice of the institution of the suit to all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the Court in each case may direct.

(2) Any person on whose behalf or for whose benefit a suit is instituted or defended under sub-rule (1) may apply to the Court to be made a party to such suit.

9. [S. 31.] No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every suit deal with the

Misjoinder and non-joinder. matter in controversy so far as regards the rights and interests of the parties actually before it.

should be joined actually or constructively, under this rule 10 M. 322; *see also* 10 M. 79; but *see* 2 M. 328. Fishermen in a village who want to establish their right to fish in a creek, can proceed under this rule. 12 B. 221; on this Rule *see also* 11 C. 213; 11 C. 33; 20 C. 810, 816; 19 B. 391; 22 B. 646; 22 B. 729; 23 M. 99.

EXECUTION OF DECREES IN SUITS UNDER THIS RULE.—As to how decrees in suits instituted under this rule are to be executed, *see* 14 M. 57; 12 M. 356. An injunction in cases falling under O. 1, R. 8 does not bind persons not parties on record. 36 Mad. 414=22 M.L.J. 109=12 I.C. 1006. Where a plaintiff is allowed to represent the public, a judgment by consent will not bind the public, even if the consent was not purchased and *a fortiori* if such consent was purchased. 23 I. C. 72=26 M. L. J. 315. A private individual cannot obtain a declaration that a right is a public one, but he can sue for damages for injury sustained by him in the exercise of his privileges connected with a public right. 44 I. C. 367=8 L. W. 377. An individual worshipper can sue anybody interfering with his right to worship in a Mahomedan mosque. 35 All. 197. The devotees of a mutt have a sufficient interest under O. 1, R. 8 to maintain a representative suit. 41 Mad. 124=33 M. L. J. 367. A mutwalli of a waqf in respect of a mosque need not obtain the permission of Court to maintain a suit on behalf of the trust. 63 I. C. 171. A reversionary suit to set aside an alienation is a representative suit. 17 I. C. 101=8 N.L.R. 113. Suit under O. 1, R. 8—Provisions of section not complied with—Decree passed by Court—Same binding on actual defendants before court but not on community. 7 Pat. 197=9 Pat. L. T. 113. Where a suit is not properly a representative suit, a court cannot adjudicate upon a public right claimed on behalf of a community. 42 I. C. 543. Where a person was permitted to represent the public and he knew of it even though he did not contest the suit as representing the public, the public will be deemed to have been well represented. 101 I. C. 738=A. I. R. 1927 Cal. 608. The consent of the defendants on the record is not necessary to enable a court to allow a plaintiff to sue persons as representing themselves and others, having the same interest in the subject-matter of the suit. 36 Mad. 418. A suit against trespassers for recovering land can be brought by one of several co-owners on behalf of all. 37 I. C. 384. Addition of plaintiffs after decree, if competent. 72 I. C. 284=32 M. L. T. (H. C.) 212. Leave to defend granted on behalf of a number of defendants—Effect of—Death of respondents—Legal representatives to be impleaded in time. A. I. R. 1926 Lah. 31.

O. 1, R. 9. SCOPE OF THE RULE.—Rule 9 is confined to cases where the court can deal with the matter in controversy with regard to the rights and interest of the parties actually before it. 52 I.C. 18; 95 I.C. 856=24 L.W. 181=A.I.R. 1926 Mad. 806.

CONSTRUCTION.—Rules 9 and 10 should be construed together. 39 I. C. 160=5 L. W. 207. O. 1, R. 9 does not do away with the obligation to bring a necessary party on the record. 20 I. C. 262. The rule amounts to a direction to the Court not to dismiss a suit on the ground of non-joinder. 21 M. 373, 382; *see also* 11 A. 104; 26 M. 647; 28 B. 94; but *see* 44 C.L.J. 557=99 I.C. 901=A. I. R. 1927 Cal. 238.

WHO ARE NECESSARY PARTIES.—Under O. 1, R. 9 a person who is a necessary party to the suit is a necessary party to the appeal. 3 Pat. L. T. 456=66 I. C. 780. In a suit for a declaration of an easement right to dam up a stream, the riparian proprietors are proper parties. 26 M. I. J. 385=24 I. C. 547.

WHO ARE NOT NECESSARY PARTIES—In a suit by one of the several heirs of a deceased Muhammadan to recover her share in the property left by the deceased, the other heirs are not necessary parties. 20 I.C. 658=11 A.L.J. 619. *See also* 44 C. L. J. 293=99 I. C. 177=A. I. R. 1927 Cal. 237. A suit by a manager of a joint Hindu family does not necessarily fail, because of his omission to implead other members of the family in the suit. 34 All. 572. As regards non-joinder, the objection as to procedure to be followed is disposed of by the application of S. 99, C. P. C. 42 M. L. J. 133=1922 Mad. 317.

PARTITION SUIT.—Grandsons not necessary but proper parties. 67 I. C. 156=3 P. L. T. 238.

EFFECT OF NON-JOINDER.—A suit cannot be defeated for non-joinder of parties. 25 I.C. 480=3 P.R. 1915. The intention of the legislature is that a suit shall not be defeated for non-joinder of parties. 14 I.C. 35=9 A.L.J. 410. A Court should not dismiss a suit for non-joinder of necessary parties, but should add them, of its own motion, or direct the plaintiff to do so. 63 I. C. 548; 10 I. C. 212. A suit bad for multifariousness should not be dismissed without allowing the plaintiff an opportunity to amend it. 10 I. C. 737=7 N. L. R. 43. A suit is not to be defeated by reason of non-joinder or misjoinder of parties and causes of action. 25 I. C. 438=19 C. L. J. 316. A Court should not dismiss a suit for non-joinder or misjoinder where plaintiff by amendment can remedy the defect. 41 I. C. 615=21 C. W. N. 939. Where a plaintiff is ordered to take a necessary step such as to add necessary parties and he refuses to do so the Court can dismiss the suit. 63 I. C. 548=

10. [S. 27.] (1) Where a suit has been instituted in the name of the wrong person as plaintiff or where it is doubtful whether it has been

Suit in name of wrong plaintiff.

instituted in the name of the right plaintiff, the Court may at any stage of the suit, if satisfied that the suit has been instituted through a *bona fide* mistake, and that it is necessary for the

19 A. L. J. 525. An appeal cannot be dismissed for non-joinder of parties. 32 I. C. 749. But see 44 C. L. J. 557=99 I. C. 901=A. I. R. 1927 Cal. 238. Where there is a misjoinder of either plaintiffs or causes of action, the proper course is to return the plaint for amendment and not to reject it. 18 I. C. 181=5 Bur. L. T. 234. A suit for declaration of title to land entered in the Survey Khatian as *ghat masrua* is not bad for non-joinder of parties, if the general public are not made parties to it. 72 I. C. 634=1922 P. 447. A court can decide question of misjoinder or non-joinder in so far as the parties are actually before it. 13 I. C. 123=16 C. W. N. 639. Whether the entire mortgage suit is to be dismissed for impleading a puisne mortgagee beyond limitation time, see 101 I. C. 775=A. I. R. 1927 All. 488.

PLEA BY WHOM TO BE RAISED.—Plea of non-joinder of others as plaintiffs, can be raised only by the defendants who have an interest in the subject-matter of the suit and not by those, found subsequently not to have any interest therein. 22 I. C. 129.

SECOND APPEAL.—The High Court cannot make any person a party in second appeal, when he was not a party in the lower appellate Court. 37 All. 57. The expression "all questions involved in the suit" can only be questions as between parties to the litigation. (*Ibid.*)

O. 1, R. 10. SCOPE OF RULE.—Clause (2) of R. 10 cannot be read as requiring that all persons who have or claim to have or are likely to have any sort of right, title or interest in respect of any portion of the subject-matter of a suit should be made parties. 1926 Mad. 836=95 I. C. 214. O. 1, R. 10 (2) is wide enough to give a Court power to add any person, *i.e.*, whether already a party or not, so as to enable it effectually and completely to adjudicate upon and settle all the questions involved in the suit. 59 I. C. 233=12 L. W. 25; 24 L. W. 738=51 M. L. J. 148=1926 Mad. 927. A Court has large discretion under the rule and any attempt to diminish that discretion ought to be deprecated; circumstances justifying joinder of plaintiffs discussed. (1927) M. W. N. 903=105 I. C. 114=A. I. R. 1927 Mad. 834=53 M. L. J. 264; also 29 Bom. L. K. 418=103 I. C. 225=A. I. R. 1927 Bom. 424. As a general rule a plaintiff cannot be added without the consent of the existing plaintiffs, more so in the case of substitution. A simple rent suit cannot by adding of parties be converted into a title suit. 45 C. L. J. 146=101 I. C. 527=A. I. R. 1927 Cal. 340. Joinder of party after preliminary decree in mortgage suit. See 49 A. 664=101 I. C. 863=25 A. L. J. 369=A. I. R. 1927 All. 465. As to the scope of the rule in general, see (1927) M. W. N. 301; 50 Mad. 34; A. I. R. 1927 P. C. 252 (P. C.) (addition after limitation). R. 10 covers the case of an application made to implead as parties to a suit the legal representatives of a deceased defendant (wrongly impleaded as such) in their individual

capacity and not as such legal representatives. 32 I. C. 320. Scheme suit—Addition of party defendants—Whether permission of Government Advocate necessary. 5 Rang. 263. The Secretary of State is not a proper or necessary party to every suit in which any question is raised with regard to the legality of any statute. (1926) M. W. N. 575=1926 Mad. 836=95 I. C. 214. See also 1926 Mad. 927=51 M. L. J. 148=24 L. W. 738. The rule covers a case where a major is wrongly assumed as a minor and the suit is brought by a next friend. 41 I. C. 510=40 Mad. 743. O. 1, R. 10 refers to any stage short of decree. 39 I. C. 849=13 N. L. R. 69. The suit is to be dismissed in entirety where a necessary party is added after period of limitation. 100 I. C. 859. See also 104 I. C. 526. In a suit for dissolution of partnership and accounts a person who was not in partnership as a member of the firm, but possibly in a superior partnership of which he was one side and the whole firm as a unit was on the other side, is not a necessary party. 31 C. W. N. 857=25 A. L. J. 687=101 I. C. 17=A. I. R. 1927 P. C. 70=53 M. L. J. 245 (P. C.).

APPLICABILITY.—The rule does not apply to the case of substitution, dismissal, or addition of parties, in divorce proceedings. 30 C. 489; see 6 C. 370. The rule applies to suits under S. 92. The son of a hereditary trustee can be made a party to a suit for the removal of a hereditary trustee. 6 L. W. 9=38 I. C. 133=(1917) M. W. N. 550.

ORDER WHEN TO BE MADE.—"At any stage": The power given by the rule ought to be exercised before the first hearing of the case. 6 C. 370; but see 27 B. 157; 39 I. C. 849=13 N. L. R. 69. An order directing a party to be added can be made before the suit terminates. 32 C. 483.

PARTY WHEN TO BE ADDED.—Under O. 1, R. 10, C.P.C., the court may, at any stage of the proceedings, order the addition of any person as party to the suit. 35 Bom. 393. O. 1, R. 10 authorises the court to make an order for transfer of a party from the category of defendant, to that of plaintiff at any stage of the proceedings. 24 C. W. N. 110; 105 I. C. 473=A. I. R. 1927 Oudh 484; 97 I. C. 1023. A person who would be represented by a party on the record and bound by the decision against that party is entitled to be impleaded under O. 1, R. 10, Cl. (2), C. P. Code, to protect his interest. 44 M. L. J. 322=1923 Mad. 521. A party may be added on his own application. 13 C. 90. It is not desirable to add or substitute as parties to an action persons whose right to sue has already become time barred. 25 A. L. J. 991. Suit for damages for rashly driving motor car—Employer added as a party defendant—Defence that some third person was the master—Amendment of plaint so as to add such third party might be granted. 30 Bom. L. R. 162=1928 Bom. 91. Rights of party added under R. 10 (2) are safeguarded by Limitation Act, S. 22.

determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as the Court thinks just.

(2) [S. 32.] The Court may, at any stage of the proceedings, either upon or without the application of either party, and on such terms

Court may strike out or as may appear to the Court to be just, order that the add parties. name of any party improperly joined, whether as plaintiff

55 I. A. 7=6 Rang. 29=27 L. W. 1=107 I. C. 237=54 M. L. J. 88=(1928) M. W. N. 20 (P. C.). Where the judgment-debtor appellant became insolvent pending the appeal to set aside an auction sale and the Official Assignee elected not to prosecute, the appeal, *held*, that a mortgagee from the judgment-debtor who had not taken any steps to assert his rights till that stage could not be allowed to step in and prosecute the appeal. 32 C. W. N. 304. Suit filed in the name of chairman of District Board—Amendment in appeal allowing substitution of District Board as plaintiff—Permissible. 32 C. W. N. 396.

STRUCK OUT.—When a Court makes an order striking the names of certain persons off the record, it is immaterial whether their names are actually removed or not. 32 C. 315 (P. C.). An order striking out a defendant from the record cannot be made after the first hearing. 18 A. 53; 20 M. 360, 362.

POWER OF COURTS TO PASS ORDERS UNDER RULE.—Nothing in the Code of 1908 affects the inherent power of Court to make such orders as may be necessary for the ends of justice. 35 Bom. 393. A Court has, under O. 1, R. 10, power to bring on record any person as a party at any stage. 61 I. C. 378. The Court has no power for addition of plaintiffs after the passing of the decree. 44 M. L. J. 252. Neither R. 10 nor R. 8 empowers the court to join a person as plaintiff, who could not have been originally joined. 57 I. C. 784. In a partition suit, the court can make a defendant, a plaintiff and continue the suit. 23 Bom. L. R. 391=45 B. 983. A Court can make a transposition of the parties. 34 I. C. 186=20 C. W. N. 752; 32 Cal. 483; 97 I. C. 1023; 1 Luck. Cases 546=105 I. C. 473=A. I. R. 1927 Oudh 484. Withdrawal of a part of claim by the plaintiff—Transposition of some of the defendants as parties can be ordered. 12 L. W. 563. In administration suits, a person originally arraigned as a defendant can be made plaintiff to claim his share. (1918) M. W. N. 929=3 L. W. 79=49 I. C. 130=25 M. L. T. 140. Mortgage suit—Administratrix creating mortgage without sanction of Court—Beneficiaries are necessary parties to mortgage suit. 28 Bom. L. R. 1360. As to the object of the rule, see 5 M. 52; see also 9 A. 447, 449; 2 A. 738; 13 M. 32. A Receiver cannot be made a party without the leave of the Court appointing him. 30 C. 724.

PARTY WHETHER CAN BE ADDED IN APPEAL.—The appellate court has the power to transpose a respondent to the category of appellants in order to further the ends of justice. 44 C. L. J. 243=1927 Cal. 37. A person, if he is not made plaintiff or defendant, in the Courts below, cannot claim to be made a party in appeal. 31 I. C. 27. A necessary party to an appeal should be added before deciding it. 31 I. C. 814. Application to add his legal representative as parties in an appeal against a dead man is covered by S. 153 and O. 1, R. 10. 45 M. L. J. 231=1924 Mad. 56; 102

I. C. 710 (2)=38 M. L. T. (H. C.) 357. This rule applies to appeals, but there is no power in the Code to make a party to a suit a co-appellant. 10 B. 227; 2 A. 487; 18 A. 332; 2 A. L. J. 516; 12 M. L. J. 355; but see A. I. R. 1927 Cal. 880. Where parties are allowed to intervene in an appeal, they should be joined as parties to the suit, and not to the appeal. 12 M. L. J. 355. Appellate Court will not interfere with trial Court's discretion in changing plaintiff to defendant or *vice versa*. 95 I. C. 171=1926 Nag. 303. A person who does not consent to be added as plaintiff may be added as a defendant. 7 C. 242. No question of limitation can arise with respect to the Court's power to make an order adding a party defendant to a suit. 12 C. 642, 651; 24 C. 640; 27 C. 540; 17 M. 12; see also 28 B. 11, 18. There is considerable doubt as to whether S. 32 of the C. P. Code of 1882 authorises the addition of a party to a suit after decree. 42 Cal. 72=41 I. A. 251 (P. C.). A suit might be continued even where the original plaintiff had no right to sue, provided that the defective institution was due to a *bona fide* mistake. (30 M. 419; 43 M. 707, Rel.); 69 I. C. 413=1923 Mad. 180 (1).

ORDER WHETHER APPEALABLE.—An application of plaintiff to be added as co-plaintiff cannot be treated as an application under O. 22, R. 10, C. P. Code. An order passed under O. 1 is not appealable. An application to be added as co-plaintiffs cannot be treated as one under O. 22, R. 10, C. P. C. 36 I. C. 919. An order rejecting an application to be made a party is not appealable. 13 C. 100; 2 A. 904; but see 12 M. 489. Order under O. 1, R. 10 does not come within the definition of "decree" in S. 2 (2) and there can be no appeal. 42 M. L. J. 97=69 I. C. 961=45 M. 194=A. I. R. 1922 Mad. 382.

ADDITION OF PARTY, WHAT AMOUNTS TO.—An amendment of the plaint, by leave of the Judge, that the plaintiff is suing in a representative capacity as a shebait, does not amount to an addition or substitution of a new plaintiff within the Rule. 28 I. C. 818=19 C. W. N. 1193. In a suit to enforce rights of trust by persons interested in the trust, addition of more representatives out of time, does not bar the suit. 33 A. 272; 25 M. L. J. 452 (17 B. 413, Foll.). But see 43 I. A. 113; see also 9 L. W. 377=50 I. C. 358=(1919) M. W. N. 485. A *pro forma* defendant is not known to law. 41 I. C. 468=2 Pat. L. W. 108. A suit against a dead person is a nullity and no question of adding a party arises. 6 L. W. 359=(1917) M. W. N. 643=42 I. C. 530=33 M. L. J. 418. A plaintiff cannot claim the benefit of the institution of a suit against a dead person for the purpose of extending the period of limitation against his heirs. 47 I. C. 894=5 O. L. J. 546. Suit in the name of a dead person as sole plaintiff cannot be amended but suit in the name of two plaintiffs, one of whom is dead, can be amended. 104 I. C. 623=A. I. R. 1927 Cal. 880.

or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.

(3) No person shall be added as a plaintiff suing without a next friend or as the next friend of a plaintiff under any disability without his consent.

(4) [S. 33.] Where a defendant is added, the plaintiff shall, unless the Court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the complaint shall be served on the new defendant and, if the Court thinks fit, on the original defendant.

(5) [S. 32.] Subject to the provisions of the Indian Limitation Act, 1877, S. 22, the proceedings as against any person added as defendant shall be deemed to have begun only on the service of the summons.

Conduct of suit.

11. [S. 32.] The Court may give the conduct of the suit to such person as it deems proper.

12. [S. 35.] (1) Where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding; and in like manner, where there are more defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.

(2) The authority shall be in writing signed by the party giving it and shall be filed in Court.

13. [S. 34.] All objections on the ground of non-joinder or misjoinder of parties shall be taken at the earliest possible opportunity and, in all cases where issues are settled, at or before such settlement, unless the ground of objection has subsequently arisen, and any such objection not so taken shall be deemed to have been waived.

ORDER II.

FRAME OF SUIT.

1. [S. 42.] Every suit shall as far as practicable be framed so as to afford ground for final decision upon the subjects in dispute and to prevent further litigation concerning them.

Frame of suit.

Clause (5).—The proviso applies only as regards limitation. For other purposes such as calculation of costs, etc., the date on which summons is served will be the starting point. 8 L.R. 79 (Rev.).

O. 1, R. 11.—The question of conduct is one of discretion, and the appellate Court will not as a rule interfere. 20 W.R. 1024. Suit by one trustee—Death of plaintiff—Co-trustee can be made plaintiff. (1921) M. W. N. 108 = 40 M. L. J. 208 = 52 I. C. 560 = 13 L. W. 148 = 30 M. L. T. 151. The word 'person' in O. 1, R. 11, C.P.C., means a party to the suit and a person who is a stranger to the suit cannot be given the conduct of the suit within the meaning of the rule. 106 I. C. 854 = 46 C. L. J. 530.

O. 1, R. 13. GENERAL.—The words "unless the ground of objection has subsequently arisen" have been added to give effect to the rulings in 5 B. 609; 7 C. 603. No person (including a corporate body) can be made a plaintiff without his consent expressly given. 46 P. R. 1911 = 108 P.W.R. 1911 = 10 I.C. 515 = 179 P.L.R. 1911.

OBJECTIONS AS TO NON-JOINDER WHEN SHOULD BE TAKEN.—An objection as to non-

joinder of parties should be taken before the settlement of issues. The rule applies even in cases where the plaintiff claims a joint right along with others but does not make the latter parties to the suit. 41 Cal. 527 (25 Bom. 433, Dist. : 25 I. C. 122, foll. Objections as to misjoinder and jurisdiction owing to undervaluation, when not raised in the Court of first instance are no ground for reversing a decree when they do not affect the merits of the case. 25 I.C. 25 (36 C. 780; 17 I.C. 97; 22 M. L. J. 25; 7 M. L. T. 78; 9 M. L. T. 173, Foll.). An objection as to non-joinder cannot be taken for the first time in revision before the High Court. 46 I. C. 648. See also 13 I.C. 123 = 16 C. W. N. 639; 25 I. C. 122; 16 B. 119; 10 M. 322; 17 C. 580. When objection to want of parties is not raised by the defendant, it must be deemed to have been waived. But the Court can add any one as a party if it thinks it necessary. 3 A. L. J. 474.

O. 2, R. 1. OBJECT OF.—The object of this rule is to give effect to the maxim *interest rei publicae ut sit finis litium*. 27 B. 382. See also 9 C. 919; 2 M. H. C. 131; 26 M. 760, 763;

2. [S. 43.] (1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

Suit to include the whole claim.

Relinquishment of part of claim.

(2) Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

28 A. 432 (P. C.); 26 A. 236; 9 C. W. N. 498; 4 C. L. J. 367. The intention of the legislature is that all matters in dispute should be disposed of in the same suit. 25 C. 371; 31 M. 385.

SCOPE OF.—O. 2, R. 1 has reference mainly to joinder of causes of action rather than to joinder of parties. 25 I. C. 480=3 P. R. 1915. "Subject in dispute", meaning of. See 23 L. W. 13=91 I. C. 66=1926 Mad. 234. Under this rule and R. 2 plaintiffs must bring their entire claim, and every remedy enforceable in respect of that claim, into Court, at once. 9 C. 919; 2 M. H. C. 131. But all causes of action need not be joined. 59 I. C. 517.

O. 2, R. 2. SCOPE AND OBJECT OF THE RULE.

—O. 2, R. 2 is directed to securing the exhaustion of the relief in respect of a cause of action, and not to the inclusion in one action of different causes of action even though they arise from the same transactions. 41 I. A. 142=26 I. C. 228=18 C. W. N. 617 (P. C.); 38 M. 1162; 45 B. 805; 30 C. W. N. 873=97 I. C. 73=1926 Cal. 1022. O. 2, R. 2 refers to a case where there has been a suit in which there has been an omission to sue in respect of a portion of a claim and a decree has been made in that suit. 45 Cal. 305=22 C. W. N. 611. O. 2, R. 2 is directed against two evils the splitting of claims and the splitting of remedies. 1926 Lah. 509=97 I. C. 396=8 Lah. L. J. 381. O. 2, R. 2 only prevents the splitting of claims and does not bar a subsequent suit on the whole claim against a different person. 18 C. W. N. 129=19 C. L. J. 191. The rule does not contemplate claims under separate causes of action as well as claims affecting different defendants. 40 Bom. 351=18 Bom. L. R. 45; 104 I. C. 820; 1 Luck. 1=91 I. C. 976=A. I. R. 1926 Oudh 77. O. 2, R. 2 bars only those suits where the causes of action and defendants are the same. The dispossession of plaintiff from two properties held under different titles gives rise to two causes of action. 7 A. L. J. 658=50 I. C. 905. See also 25 Bom. 161. O. 2, R. 2 is framed to protect the defendant being twice vexed for one and the same cause. 41 Cal. 825. O. 2, R. 2 does not debar a plaintiff from including in his claim certain additional profits omitted in a previous suit under a misapprehension that the profits were paid annually and not, as was subsequently ascertained to be the fact half yearly. 65 I. C. 585=1923 All. 230. Two reliefs can be joined in the same suit, the parties being the same. 75 I. C. 597=1923 A. 306. Suit to declare a person mutawali—Declaration of the ownership of the property as an essential part of the plaintiff's claim. 1 Luck. C. 592=A. I. R. 1928 O. 67=109 I. C. 895.

APPLICATION OF THE RULE.—O. 2, R. 2 applies only where the defendant in the subsequent suit was the defendant in the previous suit. The rule does not apply where the subsequent suit is brought against a different defendant. 47

I. C. 896. See 17 I. C. 434=(1912) M. W. N. 1071. As to suit on alternative cause of action, see 103 I. C. 888. It applies not only to cases of deliberate relinquishments but also of accidental or involuntary omission. 35 C. L. J. 304=1922 Cal. 101. R. 2 does not apply to proceedings in the Revenue Court. 38 All. 302=14 A. L. J. 373; A. I. R. 1927 Oudh 498. The rule has no application to proceedings under S. 144 of the C. P. Code. 53 I. C. 552; 47 I. C. 47=3 P. L. J. 367. The rule does not apply to proceedings in execution of decree. 62 I. C. 507; 19 A. 98 (F. B.); 18 C. 515; 53 Cal. 582=96 I. C. 562=1926 Cal. 1019=43 C. L. J. 596. Nor to a plea raised in defence. 57 I. C. 348 (L.); 7 Lah. 297=1926 Lah. 494=96 I. C. 630; 1926 Iah. 21; nor to any part of a dismissed claim abandoned in appeal. 54 I. C. 655; nor to the amendment of plaint by the addition of the claim which had been omitted. 45 Cal. 305=22 C. W. N. 611. See also 52 I. C. 464=84 P. R. 1919. The rule does not apply where the previous suit was not a regular suit, but an application for leave to sue *in forma pauperis* which was rejected. 21 A. 359. Where the causes of action for a prior and a subsequent suit in respect of the same property are different, the rule does not apply. 41 C. 80; 104 I. C. 820. A person is not affected by R. 2 if at the time he brought his former suit, he was not in a position to know all his rights. 21 O. C. 307=49 I. C. 54. It cannot be said that the rule has no application to a suit where plaintiff is a minor. 22 M. 309. There is a distinction between splitting of the same cause of action into two or more suits, and instituting different suits upon distinct causes of action. 11 M. 210.

MEANING OF TERMS.—The word "claim" is treated as something arising out of a "cause of action," and as something distinct from the term "cause of action." 17 A. 535. The claim and the remedy mentioned in this rule have reference to the cause of action litigated in the previous suit. 10 M. 350. It has to be construed with reference to the substance, rather than the form of action. 19 C. 372. The "cause of action" for a suit is the sum total of the facts and circumstances which the plaintiff has to prove in order to entitle him to the relief claimed. 38 All. 217=14 A. L. J. 257=13 O. L. J. 448.

"CAUSE OF ACTION".—Includes every fact which it would be necessary for the plaintiff, to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved. 16 A. 65 (F. B.) See also 18 A. 131. See also 45 A. 376=21 A. L. J. 267; 2 Bur. L. J. 169=1 Rang. 694=1924 Rang. 145; 93 I. C. 269=1926 Oudh 365. "Cause of action" in R. 2 is used more comprehensively than in S. 17. 25 I. C. 579. It does not depend

- (3) A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.

Omission to sue for one of several reliefs.

upon the character of the relief prayed for but refers to the *media* upon which a court is asked to come to a conclusion. 38 Bom. 444; 60 I. C. 596=1921 Pat. 125; 52 I. C. 929. It has no relation to the defence set up by the defendant nor does it depend on the character of the relief prayed for. 52 I. C. 929. An event to which no legal effect attaches, cannot enter as an element into the creation of a cause of action. 31 C. 283. Every adjustment of account is a new cause of action. 11 I. C. 540=15 C. W. N. 862. Every alienation by Hindu widow gives a separate cause of action to reversioners. 66 I. C. 455=1922 Oudh 171. If the cause of action in the subsequent suit is different from that in the first suit, the subsequent suit is not barred. 77 I. C. 590. Where a suit is brought either on a non-existent cause of action or upon a false cause of action it will not disable a plaintiff from filing a fresh suit on the true cause of action. 7 L. W. 557=45 I. C. 969.

RELINQUISHMENT OF PORTION OF CLAIM.—A person must be taken to have relinquished or abandoned his claim on the real cause of action, when he files his suit on another known to him to be false. 6 M. L. J. 5. But *see* 26 M. 777. The relinquishment by a plaintiff of a portion of the claim under O. 2, R. 2 applies primarily to relinquishment before institution of the suit. 54 I. C. 655. Amendment of plaint, on objection, omitting one relief—Effect of on subsequent suit for the relief omitted. 6 Bur. L. J. 85=104 I. C. 370=A. I. R. 1927 Rang. 237. The possession of a right, without knowledge of it, cannot be said to be a portion of his claim, which can be intentionally relinquished. 37 I. C. 119=94 P. R. 1916 (15 Cal. 800 (P.C.), Ref.). A statement in the plaint that a portion of the claim which is not sued upon is not relinquished, is of no effect. 2 N. W. P. 90. Relinquishment may be either accidental or involuntary, as well as deliberate. 11 M. I. A. 551.

"OMITS TO SUE."—The words "to sue" mean to make a legal claim or to take legal proceedings. It does not necessarily mean to file a suit by means of a plaint. 7 Bom. L. R. 138; 38 A. 217. It is not necessary to determine whether the omission arose from a mistake or otherwise. 3 B. L. R. 265. Casual omission to include some items of property from the schedule to the plaint, does not mean abandonment of claim by plaintiff with respect to those items. 50 I. C. 331. 'Portion of claim'.—The right which a litigant possesses without knowing or ever having known that he possesses it can hardly be regarded as "a portion of his claim". 15 C. 808 (P.C.). "Shall not afterwards sue."—It is only remedy of suing which is barred. The right subsists. 7 Bom. L. R. 138. This rule is laid down with reference to suits brought under this Code. 9 C. at p. 46. *See also* 21 M. 236. It has reference to the subject-matter of the claim, and not to the persons against whom it may be brought. 10 C. at p. 929. *See also* 19 A. at p.

384. A set-off is subject, as a claim in a cross suit would be to the provisions of this rule. 32 C. 654.

TEST.—Whether the causes of action in two suits are different or identical can be ascertained by the test whether the same evidence will maintain both actions. 40 Bom. 351=33 I. C. 950=18 Bom. L. R. 45. If the cause of action in the subsequent suit is different from that in the first suit the subsequent suit is not barred by R. 2. 66 I. C. 923=34 C. L. J. 465. The mere fact that the title to the property in dispute in both suits is the same and that the property is the same does not necessarily show that the cause of action is the same. 59 I. C. 517.

PLEADINGS, PROOF AND PRACTICE.—A plea of bar under R. 2 must be specifically pleaded and established to the Court's satisfaction. 46 I. C. 119. A statement made in a previous suit by a party that he reserved the right of bringing another suit for damages cannot avoid the operation of the rule of limitation or of R. 2. 34 I. C. 51. Two suits presented on the same day must be presumed to be presented and admitted in the order in which their numbers appear on the register. 1 Rang. 682=1924 Rang 161. But *see* 49 M. 869=97 I. C. 443=1926 Mad. 934=51 M. L. J. 351. Where it has been held that the numbering is not *prima facie* evidence of respective dates of admission and it could not be said that the suit bearing the later number was afterwards presented within the meaning of O. 2, R. 2, C. P. C. *Held also*, that the plaintiff may elect as to which of the two suits should be held to be barred. (*Ibid.*) A second suit will not be barred by the rule unless the same cause of action is to be found in the four corners of the plaint in the first suit. 28 I. C. 301=82 P. L. R. 1915. Subsequent suit on alternate cause of action. 103 I. C. 888.

SPECIAL CASES: ALIENATION.—A plaintiff may either file a single suit or separate suits to set aside alienations made by a widow. 12 M. L. J. 103. *See also* 16 A. 279; 7 M. H. C. 290. *See also* 1 Luck. 1.

COMPROMISE.—When a suit is compromised, and the compromise provides for possession being given, a suit for possession based on the compromise is not barred. 2 A. L. J. 680. The fact that the previous suit is compromised is no bar to the application of the rule. 22 W. R. 424. *See also* 7 B. 182.

CONTRACT.—Where there are two breaches of one term in one contract, and both occur before any suit is brought, the cause of action is the non-performance of the promise, and only one suit will lie. 12 C. at p. 348. *See also* 19 C. 372. It is only when the party complaining of the breach of contract suffers damage that a cause of action is said to arise and till then only a term of the contract is broken. 38 M. L. J. 470. A cause of action might include claims upon several contracts provided they form part of a continuous course of dealing. 26 I. C. 209=41 Cal. 825.

Explanation.—For the purposes of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action.

When one instrument contains two separate contracts and the performance of each is secured in a different manner each gives rise to a separate cause of action, although they may be joined in the same suit. 58 I. C. 18=16 N. L. R. 136. The second suit is not barred when the former suit was one for an injunction and value of fodder taken away and the second suit is one for a refund of money advanced and damages for breach. 2 Lah. L. J. 304 (25 Mad. 669 foll.).

CONTRIBUTION.—Where one of several co-debtors satisfies the debt, his cause of action for contribution accrues against all at one and the same time. The contributories may all be included as defendants in one plaint. 3 M. H. C. 187. See also 12 A. 110.

DAMAGES.—Where A sued B on the 2nd June, 1879, for damages for not having made over possession of certain leasehold properties during 1875-76, and got a decree, a subsequent suit on the 14th June, 1880, for damages for 1876-77 to 1878-79 is barred. 9 C. 143. The same set of facts cannot give ground for two actions, i.e., for a tort and a conspiracy to cause damage. The one excludes the other. 40 Cal. 398=23 I. C. 25=18 C. W. N. 185.

DIVORCE.—A suit for divorce based on the wife's misconduct does not bar a subsequent suit for partition of the common properties of the husband and wife. 38 Cal. 629=15 C. W. N. 766 (P. C.).

INSTALMENT BOND.—Omission to sue for instruments which had accrued due bars subsequent suit therefor. 44 A. 663. Two or more causes of action to recover money may be joined, but only if they arose within the jurisdiction of the Court in which the suit is brought. 12 M. L. J. 11. As to money suits, see also 8 C. 483 (F. B.); 7 B. 134; 5 C. 597; 12 B. L. R. 37; 28 B. 447. "Claim for a portion does not bar another claim for balance." 29 M. L. J. 474.

MAINTENANCE.—A subsequent suit for a declaration that the maintenance decreed in a former suit is a charge on certain property, is barred. 12 M. 285. See also 11 M. 127. A subsequent suit for maintenance at an increased rate is not barred. 22 M. 175.

SUIT ON MORTGAGE.—See 21 B. 267; 18 M. 257; 20 A. 322; also 24 A. 429 (P. C.) and 24 M. at p. 109; 30 B. 156; 10 Bom. H. C. 369; 6 Bom. H. C. (A. C.) 97; 7 B. 377; 3 A. 857. Two mortgages.—Each can be sued on separately. 33 C. L. J. 232. A person holding two mortgages on a property may sue for sale on the second mortgage reserving his rights under the first. A mortgagee having separate mortgages has separate causes of action and is not bound to sue on them all. 38 Mad. 927=29 M. L. J. 195 (F. B.). Option to sue.—Mortgagee authorized to sue for interest or for possession in default by mortgagor.—Suit for interest.—Subsequent suit for possession not barred. 2 Lah. 13 (F. B.). See also 44 M. L. J. 123; 50 C. 126=4 Lah. 32=50 I. A. 115 (P. C.); 44 A. 121=49 I. A. 9 (P. C.); 26 A. L. J. 57; 25 L. W. 615=38 M. L. T. 211 (H. C.)=102 I. C. 187=A. I. R. 1927 Mad. 580=52 M. L. J. 636. First suit for sale of mortgaged property

for interest only may bar a second suit for recovering principal and balance of interest. See 39 All. 506; 97 I. C. 285=1926 Lah. 661. Mortgage and lease.—Suit for rent.—Subsequent suit on mortgage is no bar. 3 Lah. 1=1922 Lah. 111. See also 69 I. C. 54=1924 Lah. 190. Where a mortgage and lease form one transaction and the lease is only a mode for realizing the interest due on the mortgage, a suit on the mortgage cannot be brought subsequent to a suit for rent on the lease. 63 I. C. 928=3 Lah. L. J. 390. Where a mortgage deed and lease deed formed one transaction and the mortgagee brought a suit for principal and interest a subsequent suit for possession is barred. 97 I. C. 396=1926 Lah. 559=8 Lah. L. J. 381.

MORTGAGE, REDEMPTION OF.—A suit for redemption is barred when the plaintiff had first sued for recovery of excess balance realised by the mortgagee. 48 I. C. 799; 103 I. C. 290=A. I. R. 1927 Nag. 302. In a redemption suit all claims between the mortgagor and the mortgagee should be settled. 24 I. C. 688; A. I. R. 1927 Nag. 302. The dismissal of a suit for redemption according to the terms of a mortgage is no bar to suit for redemption on a subsequent agreement. 27 I. C. 732. Suit by mortgagee for possession.—Second suit for possession barred. 67 I. C. 281=2 L. L. J. 678. See also 103 I. C. 289.

MESNE PROFITS, SUIT FOR.—See 19 C. 615; 17 A. 533; 11 M. 151; 11 M. 210; 11 M. L. J. 332. See also 3 A. at p. 663; 24 A. 501. O. 2, R. 2 does not bar a suit for mesne profits brought subsequently to a suit for possession, as a claim for mesne profits is based on a cause of action distinct from a claim for possession. 60 I. C. 65. But see 49 A. 597=25 A. L. J. 409=A. I. R. 1927 All. 716. Where in a prior suit for possession and future mesne profits the Court did not purport to decide the question of future mesne profits a subsequent suit for mesne profits *pendente lite*, is not barred. 40 All. 292. A prior suit for partition and possession does not bar a subsequent suit for mesne profits in respect of the same property. 4 Rang. 103=95 I. C. 380=1926 Rang. 137. A prior suit for possession does not bar a suit for mesne profits due for a period subsequent to the institution of the prior suit. 71 I. C. 972=1923 Cal. 442. Claims for possession and claims for mesne profits are separate causes of action. 38 Mad. 828=28 M. L. J. 127 (F. B.). Suit for profits accrued between date of deposit of mortgage money and delivery of possession is maintainable. 35 I. C. 799. A party is not bound to include mesne profits after the institution of suit though he is required to do so for profits before suit. 32 I. C. 696. See also 49 All. 597=25 A. L. J. 409=A. I. R. 1927 All. 716. The institution of a suit for mesne profits only consequent on dispossession is a bar to a subsequent suit for possession. 29 I. C. 939=9 S. L. R. 23. A suit for proprietary profits against a lambardar does not bar a subsequent suit for mesne profits against the same lambardar and other trespassers. 41 All. 286.

PROFITS.—Where a plaint in a suit for profits one year was not represented after being returned,

Illustration.

A lets a house to B at a yearly rent of Rs. 1,200. The rent for the whole of the years 1905, 1906 and 1907 is due and unpaid. A sues B in 1908 only for the rent due for 1906. A shall not, afterwards, sue B for the rent due for 1905 or 1907.

3. [S. 45.] (1) Save as otherwise provided, a plaintiff may unite in the same suit several causes of action against the same defendant, or the same defendants jointly; and any plaintiffs having

Joinder of causes of action.

a subsequent suit for account is not barred under R. 2. 40 Mad. 291=30 M.L.J. 341.

PARTITION, SUIT FOR.—See 20 C. 385; 23 B. 597; 8 M.L.J. 92; 7 B. 182; 23 A. 216; 28 A. 39; 28 A. 50. A subsequent suit for partition of property in one district is not barred merely because the plaintiff had sued for partition and possession of some property in another district. 16 I. C. 383; 7 Bom. 182; 3 Mad. H. C. 376; 38 All. 217. A suit for partial partition though dismissed does not bar a suit for partition of all joint properties. 87 P. R. 1915=31 I. C. 463. Where a property is inherited from the collaterals of the parties to a previous suit for partition, there is no bar to a fresh suit for partitioning the property held by them jointly with other collaterals. 15 I. C. 214. Where in a suit for partition the plaintiff intentionally omitted certain property from the suit he cannot bring fresh suit for the partition of that property. 9 I. C. 424. An omission in a suit by the next friend of a minor of a portion of the property to which the minor is entitled, will not bar a second suit by the minor for the partition of property omitted. 45 Bom. 805. A minor may sue for properties for which his guardian omitted to sue in a prior suit. R. 2 does not bar such a suit. 14 I. C. 95. Where the first suit to set aside order for re-delivery under O. 21, R. 101, C.P.C., is decided against plaintiff a subsequent suit for partition is not barred. 49 M. 596=95 I. C. 209=50 M.L.J. 681=23 L. W. 551=A. I. R. 1926 Mad. 683.

POSSESSION, SUIT FOR.—See 21 C. 157 (P.C.); 4 A. 171; 27 B. at p. 389; 10 C.W.N. 8; 13 M.L.J. 475. The cause of action in a suit for a declaration and in a suit for possession are different. 38 Mad. 247=25 M. L. J. 125. A dismissal of a declaratory suit by reason of the plaintiff not being in possession at the time of suit does not bar his subsequent suit for recovery of possession. 9 L.B.R. 37=37 I. C. 15=10 Bur. L.T. 189. Suit for bare declaration—Subsequent suit for possession not barred. 95 I. C. 892=1926 Rang. 123. Suit for mere declaration that property unattachable—Subsequent suit to recover damages for wrongful attachment is not barred. 95 I. C. 219. A suit for possession of property will not be barred by reason of the dismissal of a previous suit for declaration and injunction. 52 I. C. 434; 34 All. 172=13 I. C. 154=9 A.L.J. 111. First suit for certain items bequeathed, plaintiff having no knowledge of the items bequeathed to him—Subsequent suit for further items bequeathed to him but left out in the prior suit is maintainable. 23 L.W. 415=93 I. C. 1 (2)=1926 M.W.N. 94. Where a suit is based on certain title to certain property the plaintiff is not debarred to recover some other property on some other ground in a subsequent suit. 38 Mad. 1162=16 M.L.T. 310; 26 I. C. 234; 27 M. L. J. 520 (26 A. 238; 23 W. R. 314; 29 M. 48; 12 C.L.J. 336; 13 B. 34, foll.). See also 39 C. 704; 28 M. 560; 12 M. 134; 17 C.

933; 1 A. 688 (P. C.); 19 W. R. 133 (P. C.). Purchaser at a court-sale can recover separate lots of property purchased from different sets of defendants in separate suit. 44 Bom. 352. A decree in a suit for the specific performance of an agreement to lease does not bar a fresh suit for possession of the properties. 48 I. C. 188=14 N. L.R. 176. See also 38 Mad. 693. A claim for possession can be joined to a claim for specific performance of a contract for sale of immoveable property against the vendor but not a claim for possession against the usufructuary mortgagee of the vendor. 32 I. C. 237=(1916) 1 M. W. N. 77. See also 5 Bur. L. J. 113=98 I. C. 160=A. I. R. 1927 Rang. 197. Claim to recover part of the property as owner and to pre-empt the rest if maintainable. 49 A. 219=25 A.L.J. 48. A party suing on a negotiable instrument can ask for a decree on the original consideration for the note. 46 Cal. 663=36 M.L.J. 429 (P. C.); 94 I. C. 628=1925 R. 304.

RENT, SUIT FOR.—See 15 C. 145 (F. B.). See also 21 M. 236; 6 C. 791; 12 C. 50; 5 M.H.C.R. 419; 5 C. 24; 27 M. 116; 16 M.L.J. 24. A prior suit for account of rents bars a subsequent suit for rent due prior to the date of the first suit. 46 B. 229; 39 M.L.T. 217=103 I. C. 74=A.I.R. 1927 Mad. 791. The non-inclusion of a claim for rent in the previous suit for possession is not a bar to a subsequent suit for rent. 35 All. 512; 101 I. C. 816 (2); 25 L. W. 11=100 I. C. 40=A. I. R. 1927 Mad. 273. A suit to recover arrears of rent is not barred by reason of an earlier suit for ejectment. 63 I. C. 978. The relationship of owner and trespasser and that of mortgagor and mortgagee are different and the dismissal of a suit for ejectment is no bar to a suit to enforce a right to redeem as mortgagor. 63 I. C. 684. Suit for rent—Second suit for possession and future mesne profits—Suit for mesne profits for the period between the two issues not barred. 24 L. W. 290=97 I. C. 389=1926 M. 1015=51 M.L.J. 252 (38 M. 829, F.).

RESTITUTION.—Previous application for restitution of a sum of money recovered in execution does not bar a subsequent application for interest due on the said sum. 40 Mad. 780.

WAGES.—A suit for damages for wrongful dismissal bars a subsequent suit for wages. 6 C. L.R. 91.

WAY, RIGHT OF.—The fact that a right of way was not claimed in a previous title suit does not bar a subsequent suit for declaration of a right of way. 57 I. C. 852.

O. 2, R. 3. MEANING OF TERMS.—The expression 'causes of action' means causes of action which are distinct upon the fact or facts as stated in the plaint itself, or as proved at the hearing. Facts alleged by defendant need not be considered. 7 Bom.L.R. 925; 6 A. 106. See also 5 A. 163 (F.B.). The policy of the rule is to avoid needless expense where it can be done without

causes of action in which they are jointly interested against the same defendant or the same defendants jointly may unite such causes of action in the same suit.

(2) Where causes of action are united, the jurisdiction of the Court as regards the suit shall depend on the amount or value of the aggregate subject-matters at the date of instituting the suit.

Only certain claims to be joined for recovery of immoveable property.

4. [S. 44.] No cause of action shall, unless with the leave of the Court, be joined with a suit for the recovery of immoveable property except—

(a) claims for mesne profits or arrears of rent in respect of the property claimed or any part thereof ;

(b) claims for damages for breach of any contract under which the property or any part thereof is held ; and

(c) claims in which the relief sought is based on the same cause of action :

Provided that nothing in this rule shall be deemed to prevent any party in a suit for foreclosure or redemption from asking to be put into possession of the mortgaged property.

5. [S. 44-b.] No claim by, or against an executor, administrator or heir, as such,

Claims by or against executor, administrator or heir.

shall be joined with claims by or against him personally, unless the last-mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff or

defendant sues or is sued as executor, administrator or heir, or are such as he was entitled to, or liable for, jointly with the deceased person whom he represents.

injustice to any one. 103 I. C. 811 [(1910) 2 K. B. 1021 ; (1921) K.B. 1, Rel. on.] The words "jointly interested" do not mean jointly interested as a matter of affection, but jointly interested as to the subject-matter of the suit which the cause of action has in contemplation. 6 M. 239, 242. See also 103 I. C. 811.

SCOPE OF RULE.—Rr. 3 to 6 allow a plaintiff to unite in the same suit several causes of action against the same defendant and to order separate trials if necessary. 75 I. C. 438=5 Pat. L. T. 49. Under R. 3 a plaintiff cannot join in the same suit several causes of action against several defendants unless they are all jointly interested in each separate cause of action. 52 I. C. 927=12 Bur. L. T. 106. See also 55 Cal. 164. A plaint presented by two or more plaintiffs claiming different reliefs against the defendant is not improperly framed nor is it bad for misjoinder of causes of action. 26 M. L. J. 343.

APPLICATION.—The rule does not apply to suits for rent under the N. W. P. Rent Act. 29 A. 18. A good test to see whether two suits filed separately ought to have been filed together is to see if they could have been filed as one without a misjoinder of defendants. 1 Rang. 62=1924 Rang. 161.

REQUISITES.—Joint interest in the main question raised in the litigation is a condition precedent to the joinder of several causes of action against several defendants. 6 A. 106. Claims against different estates cannot be joined in one suit merely because all such estates are represented by the same person, unless they are based on the same instrument affecting plaintiff's rights against all the estates. 50 I.C. 528=11 Bur. L. T. 222. Though the plaintiffs satisfied two different claims against themselves and the defendant separately, on two different occasions the causes of action, which were different could be joined in one suit for contribution. 51 I. C. 826. A single suit lies against several alienees to whom different portions of an estate are alienated, although defendants set up different titles to the various portions held by them. 29

A. 267. See also (1901) A. W. N. 115 ; 29 C. 871. But see 7 B. 290. In a suit for partition and for setting aside a number of alienations, the best course is to order separate trials in respect of each alienation. 8 M. 75. A suit for both enhancement and arrears of rent at an enhanced rate is maintainable. 5 C. W. N. 88. A suit against several persons to whom assets have been wrongfully distributed in execution is valid. 13 C. 159. A suit on several mortgages executed in favour of plaintiff on various items of family properties of defendants is not bad. 17 M. L. J. 515. For other illustrative cases, see 35 Bom. 297 ; 12 I. C. 684=15 C. L. J. 258.

O. 2, B. 4.—The rule prohibits not the joinder of several causes of action entitling a plaintiff to recover immoveable property, but a joinder with such causes of action, of causes of action of a different character, except as excepted in the rule. 5 M. 161. See also 10 C. 1061 ; 31 C. 262 ; A. I. R. 1925 Pat. 674 ; 17 M. L. J. 135 ; 51 Bom. 800=29 Bom. L. R. 937=A. I. R. 1927 Bom. 470.

The new clause (c) has been inserted in order to avoid the possibility of mistake and to make it clear that there is nothing irregular in seeking to recover in one suit immoveable and moveable property if the cause of action is the same in both. 19 I. C. 981=4 P. R. 1914.

APPEAL.—No appeal lies from an order rejecting an application for leave. 3 A. 191.

O. 2, B. 5. SCOPE OF.—The case contemplated by O. 2, R. 5 is one where the causes of action joined in the same suit are essentially different. 36 I. C. 29. It is contrary to the principle of R. 5 to attach money in the hands of an executor, administrator or heir as such, in execution of a decree against him personally, though the executor is a legatee and the money in his hands is due to him personally as legatee. 38 I. C. 563=9 Bur. L. T. 226.

MEANING OF TERMS.—The word "estate" means not only the "estate" rightly and properly held by executors but also the "estate" in its physical sense. 41 I. C. 615=21 C. W. N. 939.

6. [S. 45.] Where it appears to the Court that any causes of action joined in one suit cannot be conveniently tried or disposed of together, the Court may order separate trials or make such other order as may be expedient.

Power of Court to order separate trials.

7. [Cf. S. 46.] All objections on the ground of misjoinder of causes of action shall be taken at the earliest possible opportunity and, in all cases where issues are settled, at or before such settlement, unless the ground of objection has subsequently arisen, and any such objection not so taken shall be deemed to have been waived.

Objections as to misjoinder.

[Loc. Am.—Lahore] After Rule 7 of Order II insert :—

“8. (1) Where an objection duly taken, has been allowed by the Court, the plaintiff shall be permitted to select the cause of action with which he will proceed and shall, within a time to be fixed by the Court, amend the plaint by striking out the remaining causes of action.

(2) When the plaintiff has selected the cause of action with which he will proceed, the Court shall pass an order giving him time within which to submit amended plaint for the remaining causes of action and for making up the court-fees that may be necessary. Should the plaintiff not comply with the Court's order that Court shall proceed as provided in Rule 18 of Order VI and as required by the provisions of the Court-Fees Act.”

ORDER III.

RECOGNIZED AGENTS AND PLEADERS.

1. [S. 36.] Any appearance, application or act in or to any Court, required or authorized by law to be made or done by a party in such Court, may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by a pleader [appearing, applying or acting as the case may be]¹ on his behalf :

Provided that any such appearance shall, if the Court so directs, be made by the party in person.

The words “arises with reference to” are very general, and cover a case where the plaintiff's personal claim can only be determined after calculating the amount due to him as administrator. 43 M. L. J. 218=1922 Mad. 436. A suit by a Hindu widow against the surviving coparceners of her deceased husband to recover Stridhanam illegally detained by them and to enforce her right to maintenance is not bad for misjoinder. 38 Bom. 120. A suit by the assignee of a Mahomedan widow, for the recovery of part of the assignor's dower and of part of the estate of the assignor's late husband, does not contravene the provisions of the rule. 18 A. 256. On this rule see also 31 B. 105. A claim against an executor as such can be joined with a claim against him personally when both the claims arise in reference to the same estate. 41 I. C. 615=21 C. W. N. 939. In an administration suit there can be an enquiry as to accounts of a partnership in which the deceased was a partner and that there was no misjoinder of causes of action under O. 2, Rr. 4, 5 and 7. 51 Bom. 800=29 Bom. L.R. 937=104 I.C. 764=A.I.R. 1927 Bom. 470.

O. 2, R. 6.—On this rule see 8 M. 75; 8 B. 616. As to the scope of the rule, see 27 M. 80. As to what course the Judge ought to pursue where there has been a misjoinder of causes of action, see 8 W.R. 15; 9 B. L. R. 241. An objection as to misjoinder cannot be taken for the first time in second appeal. 5 Bom. L. R. 185. As to waiver of objection, see 49 Cal. 37. The Court cannot select one claim on which to proceed when the plaintiff insists on pressing all.

2 Beng. L. R. at p. 343. Suit in ejectment of two holdings of different classes—Discretion of Court to order separate trials. 7 L. R. 139 (Rev.).

O. 3, R. 1.—¹ The words “appearing, applying, etc.,” were substituted for the words “duly appointed to act,” by Act XXII of 1926, S. 2 (a). O. 3, R. 1, C. P. C., contemplates appearance not as a man but as a party with the intention of acting as a party in the suit. 1926 Mad. 971=97 I.C. 517=51 M.L.J. 290.

An Advocate can “act” on behalf of his client and perform all the duties of a pleader. 4 Pat. 766; 9 A. 617. One pleader can appoint another to hold his brief. 9 A. 613, but the legality of this practice was doubted in 20 B. 293. Pleadings can perform certain ministerial duties through their clerks. 15 C. 638. See also 101 I.C. 205=A.I.R. 1927 Lah. 428 (accepting notice on behalf of client). Pleader appointed by recognized agent of party is a duly appointed pleader. 44 M. 736=48 I.A. 584=41 M. L. J. 645 (P.C.). See also 26 C.W.N. 376 (P.C.); 25 I.C. 136=7 Hur. L.T. 199.

POWER OF PLEADER.—A pleader duly appointed to act for a party can make any application including an application for a reference to arbitration. 34 I.C. 845=9 S.L.R. 183 (14 Bom. 455, Dis.). A recognised agent as such has no right of audience. 28 I.C. 838=19 C.W.N. 64. There is no law which requires the vakalat to be dated. 26 M. 197 (199). Power not signed by party or his agent—Subsequent signing cures defect. 55 I.C. 990. See also 22 A. 55; 40 A. 147; 36 A. 46. Where a vakalatnama

Recognized agents.

2. [S. 37.] The recognized agents of parties by whom such appearances, applications and acts may be made or done are—

(a) persons holding powers-of-attorney, authorizing them to make and do such appearances, applications and acts on behalf of such parties ;

[Loc. Am—Bombay] O. 3, R. 2, cl. (a) be amended to read as follows :—“ Persons holding general powers-of-attorney from parties not resident within the local limits of the jurisdiction of the Court within which limits the appearance, application or act is made or done authorising them to make and do such appearances, applications and acts on behalf of such parties.”

(b) persons carrying on trade or business for and in the names of parties not resident within the local limits of the jurisdiction of the Court within which limits the appearance, application or act is made or done, in matters connected with such trade or business only, where no other agent is expressly authorized to make and do such appearances, applications and acts.

3. [S. 38.] (1) Processes served on the recognized agent of a party shall be as effectual as if the same had been served on the party in person, unless the Court otherwise directs.

(2) The provisions for the service of process on a party to a suit shall apply to the service of process on his recognized agent.

“4. (1) No pleader shall act for any person in any Court, unless he has been appointed for the purpose by such person by a document in writing signed by such person or by his recognized agent or by some other person duly authorised by or under a power of attorney to make such appointment.

(2) Every such appointment shall be filed in Court and shall be deemed to be in force until determined with the leave of the Court by a writing signed by the client or the pleader, as the case may be, and filed in Court, or until the client or the pleader dies, or until all proceedings in the suit are ended so far as regards the client.

bore the signature of the vakil presenting it, but his name did not appear in the body the power is not valid. 102 I.C. 255. But a petition of appeal presented without a vakalatnamah has not been legally presented at all. 55 I.C. 271 ; 95 I.C. 266. Objection as to the validity of power of attorney cannot be raised for the first time in appeal. 69 I.C. 365. Technical irregularities in vakalatnamah, effect of. See 102 I.C. 476 = A.I.R. 1927 Lah. 522. A person alleged to be a lunatic may appear either by vakil or in person. 7 C. 242. When an appeal is dismissed for default a fresh vakalat is not needed to enable the vakil to have the appeal reheard. 15 A. 55. Omission or failure to obtain leave beforehand for signing and verifying plaint as plaintiff's agent is only an irregularity. A. I. R. 1925 Mad. 660 = 48 M.L.J. 721.

O. 3, R. 2. RECOGNIZED AGENTS.—A political agent appointed as the agent of the estate of a minor Chief is not a recognized agent. 11 B. 53. A gumasta of a firm ceases to be a recognised agent when the business ceases. 5 Beng. L.R. App. 11. But if engaged in collecting the assets of the firm, he is a recognised agent. 9 Bom. H.C. 427.

Clause (b).—The agent contemplated by cl. (b) is one who has an initiative and independent discretion. 4 B. 416. See also 16 A. 241 (F.B.) ; 28 A. 135 ; 14 M.L.J. 223. A power of attorney authorising an agent to do all acts relating to the execution of the decree in favour of the principal is a general power of attorney and the agent under the power can act. 38 M. 134 = 24

M.L.J. 130. See also 33 I.C. 661 = 18 O.C. 372. Where a power of attorney does not confer the power to confess judgment, a pleader appointed by the power of attorney agent has no such power either. 1 Luck. C. 19 = 102 I.C. 470 = A.I.R. 1927 Oudh 222. Under Bombay High Court Rules a person holding general power of attorney can act. 72 I.C. 1003 = 1923 Bom. 41 (1). See also 41 B. 40 = 18 Bom. L.R. 821. A recognized agent cannot prosecute or defend a suit in his own name. 5 Beng. L.R. App. 11 ; 12 B. 68 ; 15 W. R. 245. As to filing suit and signing plaint by recognized agent, see 101 I.C. 698 = A.I.R. 1927 All. 514.

O. 3, R. 3 (1).—See R. 5.

O. 3, R. 4.—The rule was substituted by Act XXII of 1926, S. 2 (b).

SCOPE OF.—Rule only provides in what manner and till what time a pleader should be appointed. 48 M. 676 = 49 M.L.J. 366 ; 92 I.C. 300 = 1925 M. 1201. An Advocate unlike a pleader can be verbally appointed to act on behalf of his client. 4 Pat. 766 = 1926 Pat. 73 = 92 I.C. 179 ; 94 I.C. 841 = 1926 Pat. 246 = 5 Pat. 255. An Advocate acts when he files a memorandum of appeal or cross objections or any other document in a case other than a memorandum of appearance under O. 3, R. 4 (5). 4 Rang. 249 = 98 I.C. 15 = 1926 Rang. 215. An unqualified person cannot practice under cover of special powers of attorney from the parties. 25 I. C. 163 = 7 Bur. L. T. 266. Power of guardian *ad litem* to appoint for minor party. 6 L.W. 272. The next friend of an infant plaintiff can change

[**Madras**] In sub-rules (1) and (2) to R. 4, *substitute* the words "a document subscribed with his signature in his own hand" for "in writing signed".

(3) For the purposes of sub-rule (2) an application for review of judgment, an application under section 144 or section 152 of this Code, any appeal from any decree or order in the suit and any application or act for the purpose of obtaining copies of documents or return of documents produced or filed in the suit or of obtaining refund of monies paid into the Court in connection with the suit shall be deemed to be proceedings in the suit.

(4) The High Court may, by general order, direct that, where the person by whom a pleader is appointed is unable to write his name, his mark upon the document appointing the pleader shall be attested by such person and in such manner as may be specified by the order.

[**Loc. Am.—Madras.**] Add the following as sub-rule (4) to O. 3, R. 4:—“(4) Notwithstanding the termination of all proceedings in the suit so far as regards the client, the appointment of a pleader shall, unless otherwise provided therein or determined by the death of the client or the pleader or by revocation in accordance with the provisions of clause (2) of this rule, be deemed to authorise him to appear or to make any application or to do any act in connection with getting copies of documents and obtaining return of documents produced or filed in the suit or refund of money paid into Court in the suit.” [*In view of the amendment of Rule 4 by Act XXII of 1926 this additional rule become Superfluous Ed.*]

[**Patna**] 4. Notwithstanding anything contained in Order III, rule 4 (3) of the First Schedule of the Code of Civil Procedure, 1908, no advocate shall be entitled to make or do any appearance, application or act for any person unless he presents an appointment in writing, duly signed by such person or his recognised agent or by some other agent duly authorised by power of attorney to act in this behalf; or unless he is instructed by an attorney or pleader duly authorised to act on behalf of such person. [*See now Act XXII of 1926.*]

(5) No pleader who has been engaged for the purpose of pleading only shall plead on behalf of any party, unless he has filed in Court a memorandum of appearance signed by himself and stating:—

- (a) the names of the parties to the suit,
- (b) the name of the party for whom he appears, and
- (c) the name of the person by whom he is authorized to appear :

Provided that nothing in this sub-rule shall apply to any pleader engaged to plead on behalf of any party by any other pleader who has been duly appointed to act in Court on behalf of such party.”¹

[**Madras**] *Insert* as cl. (6) to O. 3, R. 4, C. P. C.:—

(6) No Government or other pleader appearing on behalf of the Secretary of State for India in Council, or on behalf of any public servant sued in his official capacity, shall be required to present any document empowering him to act.”

5. [S. 40.] Any process served on the pleader of any party or left at the office or

Service of process on pleader.

ordinary residence of such pleader, and whether the same is for the personal appearance of the party or not, shall be presumed to be duly communicated and made known to

the party whom the pleader represents, and, unless the Court otherwise directs, shall

his attorney so long as he continues to act in that capacity. 28 C. 264. The acceptance of a power of attorney must be in writing. 84 I. C. 518=1923 Lah. 402. Acceptance of vakalatnamah need not be in writing. 43 Cal. 884=20 C. W. N. 287. *See also* 91 I. C. 30=6 Lah. 461=1926 Lah. 32. But *see contra* 20 C. W. N. 283. The acceptance of vakalat must be unconditional. 14 W.R. 7. The writing need not be dated. 26 M. 197 (199). Where a pleader's name appears in a vakalat, it can be accepted even after filing in Court. 3 Pat. L.T. 447=68 I.C. 659. Where in a vakalatnamah, the pleader's name has been omitted by oversight, there is no due appointment of the pleader. 37 I.C. 103=12 N.L.R. 189; 36 A. 46=23 I. C. 464. But *see* 41 I.C. 685. A mere error can be rectified by permitting the party to put the name. *See also* 71 I.C. 436=1923 Nag. 182; 55 I.C. 415. A fresh vakalat is not necessary to

enable a vakil to appear in an application for a new trial. 12 W.R. 465. Also in an application for leave to appeal to the Privy Council. 8 W.R. 92. As to when the duties of a pleader terminate, *see* 49 Cal. 732=35 C.L.J. 356. *See also* 67 I. C. 554=1922 Oudh 75; 2 Pat. L. J. 259=41 I. C. 328. Return of plaint does not terminate authority. 67 I. C. 296=1922 Nag. 125. On a vakalat given in a suit a vakil can act in a claim case. 5 Bom. H.C. (A.C.) 83. Vakil cannot say after accepting engagement that, unless a large sum is paid to him, he will not continue the conduct of the case. 29 C. 63. A vakalat remains in force until all proceedings in the suit are closed. Application for execution are proceedings in the suit. 20 B. 190. Withdrawal of pleader. 47 M. 819=47 M. L. J. 398 (F.B.).

O. 3, B. 4, Cl. (5). —¹ *See* 5 Bur. L. J. 221.

be as effectual for all purposes as if the same had been given to or served on the party in person.

[*Loc. Am.—Madras*] At the end of rule add—

Explanation—Service on a pleader who does not act for his client shall not raise the presumption under this rule.

[*Oudh*] For "on the pleader of party" read "on a pleader who has been appointed to act for any party".

6. [S. 41.] (1) Besides the recognized agents described in rule 2 any person residing within the jurisdiction of the Court may be appointed an agent to accept service of process.

Agent to accept service.

(2) Such appointment may be special or general and shall be made by an instrument in writing signed by the principal, and such instrument or, if the appointment is general, a certified copy thereof shall be filed in Court.

Appointment to be in writing and to be filed in Court.

ORDER IV.

INSTITUTION OF SUITS.

1. [S. 48.] (1) Every suit shall be instituted by presenting a plaint to the Court or such officer as it appoints in this behalf.

Suit to be commenced by plaint.

(2) Every plaint shall comply with the rules contained in Orders VI and VII, so far as they are applicable.

[*Loc. Am.—Allahabad*] O. IV, R. 1.—I (1) Every suit shall be instituted by presenting to the court or such officer as it appoints in this behalf a plaint, together with a true copy for service with the summons upon each defendant, unless the court for good cause shown allows time for filing such copies.

(2) The court-fee chargeable for such service shall be paid in the case of suits when the plaint is filed and in the case of all other proceedings when the process is applied for.

Sub-rule (2) will be sub-rule (3).

[*Oudh*] I (1) Same as original sub-rule (1) of the Allahabad High Court.

(2) To the above sub-rule (3), add the following words:—"and, except with the permission of the presiding officer, for reasons to be recorded, no plaint shall be admitted unless the necessary process fee has been paid into Court".

2. [S. 58, last para.] The Court shall cause the particulars of every suit to be entered in a book to be kept for the purpose and called the register of civil suits. Such entries shall be numbered in every year according to the order in which the plaints are admitted.

Register of suits.

ORDER V.

ISSUE AND SERVICE OF SUMMONS.

Issue of Summons.

1. [S. 64.] (1) When a suit has been duly instituted a summons may be issued to the defendant to appear and answer the claim on a day to be therein specified:

Summons.

O. 4, R. 1.—Presentation of plaint at residence of Judge after Court hours is valid. 65 I. C. 674=1922 Nag. 167; 20 L. W. 655=82 I. C. 928; 47 M. 312=46 M. L. J. 78. But see 7 N. W. P. H. C. R. 5 (*contra*). The placing a petition on the table when the officer is not present, is not a presentation to him. 3 N. W. P. 341. The presentation of petition to clerk not valid. 14 I. C. 221. But presentation to the Head Ministerial Officer is legal and proper where authorised to receive plaints. 40 I. C. 587=6 L. W. 18. See also 40 M. L. J. 229=13 L. W. 321. Presentation out of office hours. See 23 I. C. 360; 82 I. C. 928=20 L. W. 655. The reception of a plaint on a Sunday or other holidays is not illegal. 11 W. R. 537; 16 W. R. 231. District

Court is not competent to receive the plaint which is to be presented to Sub-Court. 10 Bom. H. C. 495. A Nazir of a Court of Small Causes is not authorised to receive plaints. 18 W. R. 172. Also a karkum left in charge of a Court during the vacation. 6 Bom. H. C. (A. C.) 254.

O. 5, R. 1.—It is the duty of a Judge on receiving a plaint to issue a summons on a defendant even if he is a minor. 14 C. at p. 217; but see 26 C. 267. Appearance by pleader instructed only to apply for an adjournment is not appearance in person or by pleader. 24 M. L. J. 235=18 I. C. 360; 92 I. C. 517=A. I. R. 1926 M. 971=51 M. L. J. 290; 99 I. C. 717=A. I. R. 1927 Rang. 46; 4 Rang. 408. The onus of proof of

Provided that no such summons shall be issued when the defendant has appeared at the presentation of the plaint and admitted the plaintiff's claim.

(2) A defendant to whom a summons has been issued under sub-rule (1) may appear—

- (a) in person, or
- (b) by a pleader duly instructed and able to answer all material questions relating to the suit, or
- (c) by a pleader accompanied by some person able to answer all such questions.

(3) Every such summons shall be signed by the Judge or such officer as he appoints, and shall be sealed with the seal of the Court.

[Oudh] O. V.—(1-A) A party shall file with his application for the issue of a summons to the defendant or opposite party a printed summons form, in duplicate, one part being in the Urdu and the other in the Nagri character, duly filled up, except in respect of the date of appearance and of the summons, in a bold, clear and easily legible handwriting; provided that—

(a) if the party to be served is a European British subject, the party applying for the issue of the summons shall file a special form which shall be filled up in English, and

(b) the presiding officer may, in his discretion, direct that such forms in general or that any particular such form be filled up entirely in the office of the Court.

Copy or statement annexed to summons.

2. [S. 65.] Every summons shall be accompanied by a copy of the plaint or, if so permitted, by a concise statement.

Court may order defendant or plaintiff to appear in person.

3. [S. 66.] (1) Where the Court sees reason to require the personal appearance of the defendant, the summons shall order him to appear in person in Court on the day therein specified.

(2) Where the Court sees reason to require the personal appearance of the plaintiff on the same day, it shall make an order for such appearance.

No party to be ordered to appear in person unless resident within certain limits.

4. [S. 67.] No party shall be ordered to appear in person unless he resides—

- (a) within the local limits of the Court's ordinary original jurisdiction, or
- (b) without such limits but at a place less than fifty or (where there is railway or steamer communication or other established public conveyance for five-sixths of the distance between the place where he resides and the place where the Court is situate) less than two hundred miles distance from the court-house.

[Allahabad] O. V, R. 4-A.—Except as otherwise provided, in every interlocutory proceeding and in every proceeding after decree in the trial court, the court may, either on the application of any party, or of its own motion, dispense with service upon any defendant who has not appeared or upon any defendant who has not filed a written statement. (Added by Allahabad High Court.)

Summons to be either to settle issues or for final disposal.

5. [S. 68.] The Court shall determine, at the time of issuing the summons, whether it shall be for the settlement of issues only, or for the final disposal of the suit; and the summons shall contain a direction accordingly:

Provided that, in every suit heard by a Court of Small Causes, the summons shall be for the final disposal of the suit.

[Loc. Am.—Madras] Delete the first paragraph of rule 5 in Order V and substitute the following in lieu thereof:—

"5. The Court shall determine at the time of issuing the summons, whether it shall be—

(1) for the settlement of issues only; or (2) for the defendant to appear and state whether he contests or does not contest the claim and directing him if he contests to receive directions as to the date on which he has to file his written statement, the date of trial and other matters, and if he does not contest for final disposal of the suit at once; or (3) for the final disposal of the suit; and the summons shall contain a direction accordingly."

6. [S. 69.] The day for the appearance of the defendant shall be fixed with reference to the current business of the Court, the place of residence of the defendant and the time necessary for the service of the summons; and the day shall be so fixed as to allow the defendant sufficient time to enable him to appear and answer on such day.

Fixing day for appearance of defendant.

service is on plaintiff. 52 Cal. 453. The report of a peon that a summons or notice was served on a person is not evidence as to service unless the person is examined and the report is proved.

91 I. C. 711 = 1926 Cal. 539.

O. S. R. 6.—Where the time allowed is manifestly insufficient, the Appellate Court will interfere. 3 M. H. C. 167. See also 3 Bom. H. C. 138.

Summons to order defendant to produce documents relied on by him.

On issue of summons for final disposal, defendant to be directed to produce his witnesses.

7. [S. 70.] The summons to appear and answer shall order the defendant to produce all documents in his possession or power upon which he intends to rely in support of his case.

8. [S. 71.] Where the summons is for the final disposal of the suit, it shall also direct the defendant to produce, on the day fixed for his appearance, all witnesses upon whose evidence he intends to rely in support of his case.

Service of Summons.

9. [S. 72.] (1) Where

Delivery or transmission of summons for service.

Court otherwise directs, be delivered or sent to the proper officer to be served by him or one of his subordinates.

(2) The proper officer may be an officer of a Court other than that in which the suit is instituted, and, where he is such an officer, the summons may be sent to him by post or in such other manner as the Court may direct.

10. [S. 73.] Service of the summons shall be made by delivering or tendering a

Mode of service.

copy thereof signed by the Judge or such officer as he appoints in this behalf, and sealed with the seal of the Court.

[Loc. Am.—Lahore] To Rule 10 of Order V the following proviso should be added:—“Provided that in any case if the plaintiff so wishes, the Court may attempt to serve the summons in the first instance by registered post instead of in the mode of service laid down in this rule and provided always that should the defendant not appear in answer to the summons so issued, the Court shall have service effected in accordance with the provisions of this order.”

Service on several defendants.

11. [S. 74.] Save as otherwise prescribed, where there are more defendants than one, service of the summons shall be made on each defendant.

Service to be on defendant in person when practicable or on his agent.

12. [S. 75.] Wherever it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on such agent shall be sufficient.

13. [S. 76.] (1) In a suit relating to any business or work against a person who

Service on agent by whom defendant carries on business.

does not reside within the local limits of the jurisdiction of the Court from which the summons is issued, service on any manager or agent, who, at the time of service,

O. 5, R. 9.—Residence is not synonymous with ownership for purposes of the service of summons. 38 Cal. 394. In mofussil Courts the “proper officer” is the Nazir. 13 B. 500. A special bailiff cannot be sent to serve a civil process in foreign territory. 2 B. L. R. (A. C.) 59.

O. 5, R. 10.—Service is complete when it is tendered to the witness and his refusal to sign the original makes no difference. 39 Mad. 561=28 M. L. J. 505; 38 I. C. 545=13 N. L. R. 46. See also 46 I. C. 277. Order by Court to deposit process fees and postal charges—Dismissal of suit for failure to comply with order not legal. 9 Lah. L. J. 96=99 I. C. 909=A. I. R. 1927 Lah. 157. *Punjab. proviso*:—Service of summons by registered post—Non-appearance—Procedure. 101 I. C. 615=28 Punjab L. R. 300=A. I. R. 1927 Lah. 376. Need for copy of plaint accompanying summons. (*Ibid.*)

O. 5, R. 11.—When one of the defendants is a minor, summons should be served on his guar-

dian. 26 C. at p. 273. But see 14 C. at p. 217.

O. 5, R. 12.—Defendant at first residing in British India, residing outside British India at the time of suit—Service should be effected by affixing the summons to his last known place of residence in British India and by registered post. 32 I. C. 820. Service of summons on the chela of a person is not valid. 57 I. C. 568=23 O. C. 104. Service on a pardanashin lady, affixing a copy of summons at her residence, if sufficient service. 57 I. C. 594. Pardnashin lady—Service of summons on husband is not proper service. 4 Pat. L. T. 89=72 I. C. 910. Summons addressed to B can be refused by A. But if A poses as B and knows that it is intended for him then it is sufficient notice if the summons is served on A. 3 Rang. 515=93 I. C. 91=1926 Rang. 73.

O. 5, R. 13.—Sub-rule (2) follows the ruling in 7 Bom. H. C. (O. C.) 97. This rule is controlled by R. 3 of O. XXXII. 26 C. 267. This rule and R. 2 of O. III are to be read together. 4 B.

personally carries on such business or work for such person within such limits, shall be deemed good service.

(2) For the purpose of this rule the master of a ship shall be deemed to be the agent of the owner or charterer.

14. [S. 77.] Where in a suit to obtain relief respecting, or compensation for wrong to immovable property, service cannot be made on the defendant in person, and the defendant has no agent empowered to accept the service, it may be made on any agent of the defendant in charge of the property.

Service on agent in charge in suits for immovable property.

Where service may be on male member of defendant's family.

15. [S. 78.] Where in any suit the defendant cannot be found and has no agent empowered to accept service of the summons on his behalf, service may be made on any adult male member of the family of the defendant

who is residing with him.

Explanation.—A servant is not a member of the family within the meaning of this rule.

[Loc. Am.] [Madras.] In R. 15 of O. V delete the words "the defendant cannot be found" and in lieu thereof insert the words "the defendant is absent".

[Oudh.] O. V, R. 15. In Oudh for the words "where in....found", substitute 'Where a summons has been issued to a defendant on the institution of a suit and he is absent from the address stated in the summons'.

16. [S. 79:] Where the serving officer delivers or tenders a copy of the summons to the defendant personally, or to an agent or other person on his behalf, he shall require the signature of the

Person served to sign acknowledgment.

person to whom the copy is so delivered or tendered to an

acknowledgment of service endorsed on the original summons.

17. [S. 80.] Where the defendant or his agent or such other person as aforesaid refuses to sign the acknowledgment, or where the serving officer, after using all due and reasonable diligence, cannot find the defendant, and there is no agent empowered to accept service of the summons on his behalf, nor any

Procedure when defendant refuses to accept service, or cannot be found.

416. Service on agent—When valid. 43 C. L. J. 576=97 I. C. 286=1926 Cal. 1030.

O. 5, R. 16.—Pardanashin lady comes under the expression "cannot be found" under O. 5, R. 15 and 17. 4 Pat. L. T. 89=72 I. C. 910. Service made on brother and no attempt made to effect personal service is not proper service. 9 I. C. 763=9 M. L. T. 358. Service of summons on paternal uncle of defendant when proper. 35 All. 556. "Adult," meaning of see 34 Cal. 787. Service on son when sufficient to bind father. 26 C. W. N. 359=35 C. L. J. 203=68 I. C. 991.

O. 5, R. 16.—Service is not proper when no signature or mark of the defendant is affixed on the original summons on the ground that he could not write. 8 Bom. L. R. 584.

O. 5, R. 17.—The provisions as to service of process in the Code must be strictly observed. 39 I. C. 544. For serving summons upon the defendant, proper enquiries and real and substantial effort should be made as to when and where the defendant is likely to be found. 23 C. L. J. 183=43 C. 447. See also 50 I. C. 566. Affixing a copy of summons on the outer door is sufficient service, if the defendant is absent and it is not known when he would return. 21 M. L. J. 978=12 I. C. 420. Summons returned by the serving officer because the defendant was not in the village, cannot be said to have been duly served. (1914) M. W. N. 79=22 I. C. 498. Fixation of summons on door when a person is temporarily away and is traceable is no service on him. 32

I. C. 826; (24 A. 302). As to how the Court is to act on a return under this rule, see R. 19. See 7 Bom. L. R. 159. See also 43 I. C. 632. As to modes of service of summons, see 99 P. R. 1918=48 I. C. 28.

CANNOT FIND.—The question whether serving officer "cannot find" the defendant must be determined with reference to the circumstances of each case. 21 M. 324. See also 26 C. at p. 102. "Due and reasonable diligence". See 91 I. C. 965=1926 Cal. 327.

ORDINARILY RESIDES.—It is necessary that the defendant should be residing in the house in such a manner as to make it probable that knowledge of the service of the summons will reach him. 5 M. H. C. 101; 21 W. R. 242. See also 41 I. C. 181.

AFFIDAVIT OF SERVICE.—An affidavit in support of service of a summons under this rule should show that proper efforts have been made to find out when and where the defendant is likely to be found. 19 C. 201. See also 20 I. C. 318=11 A. L. J. 540.

AFFIX A COPY.—Where there is no affixture, there is no proper service. 16 B. 117. For illustrative cases, see 21 M. at p. 421; 10 B. at p. 204; 21 B. 223. See also 24 A. 302 and 8 M. L. J. 14; 30 B. 623; 20 C. 358. All available steps to effect personal service should be taken before resort is had to the provisions of O. 5, R. 17. 52 Cal. 179=88 I. C. 508. Affixture on outer door

other person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and shall then return the original to the Court from which it was issued, with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so, and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed.

18. [S. 81.] The serving officer shall, in all cases in which the summons has been served under rule 16, endorse or annex, or cause to be endorsed or annexed, on or to the original summons, a return stating the time when and the manner in which the summons was served, and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of the summons.

19. [S. 82, para. 1.] Where a summons is returned under rule 17, the Court shall, if the return under that rule has not been verified by the affidavit of the serving officer, and may, if it has been so verified, examine the serving officer on oath, or cause him to be so examined by another Court, touching his proceedings, and may make such further inquiry in the matter as it thinks fit; and shall either declare that the summons has been duly served or order such service as it thinks fit.

20. [S. 82, para. 2.] (1) Where the Court is satisfied that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service, or that for any other reason the summons cannot be served in the ordinary way, the court shall order the summons to be served by affixing a copy thereof in some conspicuous place in the Court-house, and also upon some conspicuous part of the house (if any) in which the defendant is known to have last resided or carried on business or personally worked for gain, or in such other manner as the Court thinks fit.

(*Loo. Am.*) [*Oudh.*] O. V. R. 20-A.—(1) Where the defendant resides in British India outside the province of Oudh or within the limits of headquarters town of a district in that province, a summons may be served on him by registered post, and in this case, where an acknowledgment purporting to be signed by the defendant or an endorsement by a postal servant that the defendant refused service has been received, the process shall, unless the contrary is proved, be deemed to have been served.

(2) Where the registered address of the defendant or opposite party, as defined in O. 8, R. 11, is within the limits of a headquarters town or of a municipality of India (including Burma) or Ceylon, a notice, summons or other process may be served on him at that address by registered post and such service shall be deemed to be as effectual as if the notice or process had been personally served. [*Added by Oudh Chief Court.*]

[S. 83.] (2) Service substituted by order of the Court shall be as effectual as if it had been made on the defendant personally.

[S. 84.] (3) Where service is substituted by order of the Court, the Court shall fix such time for the appearance of the defendant as the case may require.

of house whether good service. 22 L. W. 423 = 49 M. L. J. 445 = 1926 Mad. 31.

AGENT.—Is not invariably entitled to refuse summons. 23 N. L. R. 166.

O. 5, R. 18.—The report of the Nazir is not enough. 12 W. R. 365. The Court is not bound by the return. It is not evidence of the service, 7 C. 34; 10 W. R. 3.

O. 5, R. 19.—There must be strict compliance with the rule as to propriety of service in cases where the service is the basis of the plea of constructive *res judicata*. 39 M. L. T. 34 = 103 I. C. 822 = 26 L. W. 481 = A. I. R. 1927 Mad. 813.

O. 5, R. 20.—Substituted service when to be ordered, 69 I. C. 467 = 48 I. C. 304. Affixing of

summons on outer door is not sufficient service, 29 I. C. 26. Copy attached to tree near house if sufficient. 69 I. C. 549 = 1923 Nag. 13. When substituted service is ordered, a sufficient time ought to be given for notice of the fact to reach the defendant, wherever he may be. 2 B. 449. The mode of substituted service must be settled according to the circumstances of each case. 10 B. at p. 205.

PROCEDURE.—Granting of order for substituted service is at the discretion of the trial court. Appellate Court will not interfere with such discretion. 102 I. C. 243 = A. I. R. 1927 Mad. 507 = 52 M. L. J. 472.

- 21. [S. 85, para. 1.]** A summons may be sent by the Court by which it is issued, whether within or without the province, either by one of its officers or by post to any Court (not being the High Court) having jurisdiction in the place where the defendant resides.

Service of summons where defendant resides within jurisdiction of another Court.

(Loc. Am.) [Rangoon.] In order V, the following shall be inserted as Rule 21-A :—“ 21-A. When any summons is sent for service by a Court to any Court situated beyond the limits of Burma, it shall, unless it is written in English, be accompanied by a translation in English or in the language of the locality in which it is to be served.”

- 22. [S. 86.]** Where a summons issued by any Court established beyond the limits of the towns of Calcutta, Madras, Bombay, and Rangoon is to be served within any such limits, it shall be sent to the Court of Small Causes within whose jurisdiction it is to be served.

Service within Presidency-towns and Rangoon, of summons issued by Courts outside.

(Loc. Am.) [Bombay.] The following proviso be added to O. V, R. 22 :—

“ Provided that where any such summons is to be served within the limits of the town of Bombay, it may be addressed to the defendant at the place within such limits where he is residing and may be sent to him by the Court by Post registered for acknowledgment. An acknowledgment purporting to be signed by the defendant or an endorsement by a postal servant that the defendant refused service shall be deemed by the Court issuing the summons to be *prima facie* proof of service. In all other cases the Court shall hold such enquiry as it thinks fit and either declare the summons to have been duly served or order such further service as may in its opinion be necessary.”

- 23. [S. 85, para. 2.]** The Court to which a summons is sent under rule 21 or rule 22 shall, upon receipt thereof, proceed as if it had been issued by such Court and shall then return the summons to the Court of issue, together with the record (if

Duty of Court to which summons is sent.

any) of its proceedings with regard thereto.

(Loc. Am.) [Rangoon.] The following shall be added to O. V, as R. 23-A :—

“ 23. (1) Before re-transmitting a summons received from another Court for service, the Court shall either take down the deposition of peon serving the summons as to the time when and the manner in which the summons was served, or cause the peon to make an affidavit before the bailiff if the bailiff has been empowered to administer oaths, and shall transmit the same, together with the summons, to the Court whence the summons originally issued.

“ (2) In the case of process received from India and Upper Burma if the person on whom the summons is to be served is not personally known to the process-server an affidavit or deposition by the person who pointed out to the process-server the said person or his ordinary residence or place of business shall also be attached to the summons.

“ (3) When a process is forwarded for service by one Court in Lower Burma to another Court in Lower Burma and when the person on whom the process is to be served is not personally known to the process-server, the case in connection with which the process was issued shall not be heard *ex parte* without an affidavit or deposition of some person who pointed out to the process-server the person to be served or his ordinary residence. The onus shall be upon the person at whose instance the summons is issued, either himself or by an agent, to point out to the process-server the person on whom the process is to be served or his ordinary residence or place of business.

“ (4) When the summons has been returned by the process-server under rule 17, a declaration of due service or of failure to serve shall be recorded in Form (Civil) 46, and sent with the summons to the Court by which it was issued.”

- 24. [Ss. 87 and 88.]** Where the defendant is confined in a prison, the summons shall be delivered or sent by post or otherwise to the officer in charge of the prison for service on the defendant.

Service on defendant in prison.

- 25. [S. 89.]** Where the defendant resides out of British India and has no agent in British India empowered to accept service, the summons shall be addressed to the defendant at the place where he is residing and sent to him by post, if there is postal communication between such place and the place

Service where defendant resides out of British India and has no agent.

where the Court is situate.

O. 5, R. 21.—Service outside jurisdiction can only be done by an officer of the Court, with an order from a Court having jurisdiction over the place where he resides. 3 Rang. 239=89 I. C. 870=A. I. R. 1925 Rang. 325.

O. 5, R. 24.—The Court shall take judicial notice of the signature of the jailor on the return 4 B. L. R. O. C. 51.

O. 5, R. 26.—A summons cannot be sent by post to any place to which letters are not regis-

(*Loc. Am.*) [*Madras.*] Substitute the following for Rule 25 in Order V :—“ 25. Where the defendant resides out of British India and has no agent in British India empowered to accept service, the summons may be addressed to the defendant at the place where he is residing and sent to him by post, if there is postal communication between such place and the place where the Court is situate :

“ Provided that if by any arrangement between the Local Government of the province in which the Court issuing the summons is situate and the Government of the foreign territory in which the defendant resides, the summons can be served by an officer of the Government of such territory, the summons may be sent to such officer in such manner as by the said arrangement may have been agreed upon.”

[*Allahabad.*] O. V., R. 25-A. When the defendant resides in British India but outside the limits of the United Provinces of Agra and Oudh, the Court may, in addition to or in substitution for any other mode of service, send the summons by post to the defendant at the place where he is residing or carrying on business. An acknowledgment purporting to be signed by the defendant, or an endorsement by a postal servant that the defendant refused service, may be deemed by the Court issuing the summons to be *prima facie* proof of service. (Added by Allahabad High Court.)

Service in foreign territory
through Political Agent or
Court.

[26. S. 90.] Where—

(a) in the exercise of any foreign jurisdiction vested in His Majesty or in the Governor-General in Council, a Political Agent has been appointed, or a Court has been established or continued, with power to serve a summons issued by a Court under this Code in any foreign territory in which the defendant resides, or

1 [(b) the Governor-General in Council has, by notification in the *Gazette of India*, declared, in respect of any Court situate in any such territory and not established or continued in the exercise of any such jurisdiction as aforesaid, that service by such Court of any summons issued by a Court under this Code shall be deemed to be valid service,]

the summons may be sent to such Political Agent or Court, by post or otherwise, for the purpose of being served upon the defendant ; and, if the Political Agent or Court returns the summons with an endorsement signed by such Political Agent or by the Judge or other officer of the Court that the summons has been served on the defendant in manner hereinbefore directed, such endorsement shall be deemed to be evidence of service.

[*Madras.*] Substitute the following for R. 26, O. V :—

“ 26. Where—

(a) in the exercise of any foreign jurisdiction vested in His Majesty or in the Governor-General in Council, a Political Agent has been appointed, or a Court has been established or continued, with power to serve a summons issued by a Court under this Code in any foreign territory in which the defendant resides, or

(b) the Governor-General in Council has, by notification in the *Gazette of India*, declared in respect of any Court situate in any such territory and not established or continued in the exercise of any such jurisdiction as aforesaid, that service by such Court of any summons issued by a Court under this Code shall be deemed to be valid service, or

(c) by any arrangement between the Local Government of the Province in which the Court issuing the summons is situate and the Government of the foreign territory in which the defendant resides, the summons can be served by an officer of the Government of such territory.

the summons may be sent to such Political Agent or Court, or in such manner as may have been agreed upon to the proper officer of the Government of the foreign territory by post or otherwise, for the purpose of being served upon the defendant ; and, if the summons is returned with an endorsement signed by such Political Agent or by the Judge or other officer of the Court or by the officer of the Government of the foreign territory that the summons has been served on the defendant in manner hereinbefore directed, such endorsement shall be deemed to be evidence of service.”

tered by a post officer. 2 B. L. R. (A. C.) 59. The summons should be sent by post under a registered cover. 15 W. R. 31. A person refusing a registered letter cannot afterwards plead ignorance of its contents. 16 W. R. 223 ; but see 18 B. 606. See also 23 A. 99. See also 35 B. 213 = 13 Bom. L. R. 323 = 11 I. C. 351. Rule 26 (b) substituted for “ The Governor-

General in Council has, by notification in the *Gazette of India*, declared that any summons so issued may be served by any Court situate in any such territory and not established or continued in the exercise of any such jurisdiction as aforesaid ” by S. 2 and Sch. I of Act XVII of 1914.

27. [S. 422.] Where the defendant is a public officer (not belonging to His Majesty's military [naval or air]¹ forces or His Majesty's Indian Marine Service), or is the servant of a railway company or local authority, the Court may, if it appears

Service on civil public officer
or on servant of railway com-
pany or local authority.

to it that the summons may be most conveniently so served, send it for service on the defendant to the head of the office in which he is employed, together with a copy to be retained by the defendant.

[Allahabad.] To O. V, R. 27, add the following as note 1 and note 2 :—

"1. A list of heads of offices to whom summonses shall be sent for service on the servants of Railway Companies working in whole or in part in these provinces is given in appendix (2) of the General Rules (Civil) of 1911.

2. In every case where a Court sees fit to issue a summons direct to any public servant other than a soldier under Order XVI, simultaneously with the issue of the summons, notice shall be sent to the head of the office in which the person concerned is employed, in order that arrangements may be made for the performance of the duties of such person.

Illustration.—If the Court sees fit to issue a summons to a *kanungo* or *patwari* it shall inform the Collector of the district, and if to a Sub-Registrar it shall inform the District Registrar to whom the sub-Registrar is subordinate."

[Madras.] In O. V, R. 27 after the words "send it" insert the words "by registered post prepaid for acknowledgment."

28. [S. 468.] Where the defendant is a soldier [or airman]¹ the Court shall send the summons for service to his commanding officer together with a copy to be retained by the defendant.

Service on soldiers.

[Madras.] In O. V, R. 28 after the words "shall send" insert the words "by registered post prepaid for acknowledgment."

[Allahabad.] **28 (1) Service on Soldiers.** Where the defendant is a soldier, the Court shall send the summons for service to his Commanding Officer together with a copy to be retained by the defendant.

(2) Where the address of such Commanding Officer is not known the court may apply to the officer commanding the station in which the defendant was serving when the cause of action arose to supply the address, in the manner prescribed in sub-rule (4) of this rule.

(3) Where the defendant is an officer of His Majesty's military forces, wherever it is practicable service shall be made on the defendant in person.

(4) Where such defendant resides outside the jurisdiction of the court in which the suit is instituted, or outside British India, the court may apply over the seal and signature of the court to the officer commanding the station in which the defendant was residing when the cause of action arose, for the address of such defendant, and the officer commanding to whom such application is made shall supply the address of the defendant or all such information that it is in his power to give, as may lead to the discovery of his address.

Where personal service is not practicable, the Court shall issue the summons to the defendant at the address so supplied by registered post.

Order 28. (a) Where the defendant is an officer in His Majesty's military, naval or air forces, the Court shall send the summons direct to him for service together with a copy to be retained by him.

(b) (Same as 28 (1) of Allahabad High Court).

29. [S. 468.] (1) Where a summons is delivered or sent to any person of service under rule 24, rule 27 or rule 28, such person shall be bound to serve it, if possible, and to return it under his signature, with the written acknowledgment of the defendant, and such signature shall be deemed to be evi-

Duty of person to whom
summons is delivered or sent
for service.

dence of service.

(2) Where from any cause service is impossible, the summons shall be returned to the Court with a full statement of such cause and of the steps taken to procure service, and such statement shall be deemed to be evidence of non-service.

[Madras.] Insert as R. 29-A, to O. V, R. 29 :—

"**29-A.** Notwithstanding anything contained in the foregoing rules, where the defendant is a public officer (not belonging to His Majesty's military or naval forces or His Majesty's Indian

Rr. 27 and 28.—¹Inserted by Act X of 1927.

O. 5, R. 19.—The commanding officer must serve the summons, 10 M. 319, although the defendant is entitled to the privilege given by

S. 144 of the Army Act, 1882. 11 M. 475. The words "such signature shall be deemed to be evidence of service" give effect to the ruling in 11 B. L. R. Ap. 43.

marine service) sued in his official capacity, service of summons shall be made by sending a copy of the summons to the defendant by registered post prepaid for acknowledgment together with the original summons, which the defendant shall sign and return to the Court which issued the summons."

30. [S. 91.] (1) The Court may, notwithstanding anything hereinbefore contained, substitute for a summons a letter signed by the Judge or such officer as he may appoint in this behalf, where the defendant is, in the opinion of the Court, of a rank entitling him to such mark of consideration.

(2) A letter substituted under sub-rule (1) shall contain all the particulars required to be stated in a summons, and, subject to the provisions of sub-rule (3), shall be treated in all respects as a summons.

[S. 92.] (3) A letter so substituted may be sent to the defendant by post or by a special messenger selected by the Court, or in any other manner which the Court thinks fit; and, where the defendant has an agent empowered to accept service, the letter may be delivered or sent to such agent.

[Allahabad.] To O. V, add the following as Rr. 31 and 32:—

"31. An application for the issue of a summons for a party or a witness shall be made in the form prescribed for the purpose. No other forms shall be received by the Court."

"32. Ordinarily every process, except those that are to be served on Europeans, shall be written in the Court vernacular. But where a process is sent for execution to the Court of a district where a different language is in ordinary use, it shall be written in English and shall be accompanied by a letter in English requesting its execution.

In cases where the return of service is in a language different from that of the district from which it is issued, it shall be accompanied by an English translation."

ORDER VI.

PLEADINGS GENERALLY.

1. "Pleading" shall mean plaint or written statement.

2. [Cf. S. 114.] Every pleading shall contain, and contain only, a statement in a concise form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved, and shall, when necessary, be divided into paragraphs, numbered consecutively. Dates, sums and numbers shall be expressed in figures.

3. The forms in Appendix A when applicable, and where they are not applicable forms of the like character, as nearly as may be, shall be used for all pleadings.

4. In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default, or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid, particulars (with dates and items if necessary) shall be stated in the pleading.

O. 6, R. 1.—Pleadings in Indian Courts must not be construed with the same strictness as in English Courts. 6 A. 406. They must be very liberally construed. 5 C. L. J. 25.

O. 6, R. 2.—As to frame of plaint in collision cases. *see* 25 C. W. N. 519 = 34 C. L. J. 178.

'**ESSENTIALS OF PLAINT**'.—What it should contain. 22 C. L. J. 254 = 20 C. W. N. 310. The object of pleadings is to bring the parties to an issue. 14 M. L. T. 117 = 25 M. L. J. 329. Inconsistent pleas are not prohibited. A. I. R. 1925 Oudh 120 = 27 O. C. 175 = 1 O. W. N. 248. Pleas and facts constituting them should be clearly expressed. 6 P. L. T. 465 = A. I. R. 1925 Pat. 168. Pleadings are confined to facts and a

point of law need not be raised in the pleadings. 92 I. C. 926 = 1926 Nag. 265.

O. 6, R. 3.—Evidence has no place in pleading. 3 Pat. L. R. 36 = A. I. R. 1925 Pat. 410.

O. 6, R. 4.—In an action for damages for injury done, the nature of the injury ought to be set out. 13 W. R. 246; 10 Bom H. C. 182. In a suit for money advanced, defendant pleading illegality of contract must clearly plead and prove illegality. 3 Rang. 275 = A. I. R. 1925 Rang. 275 [23 M. 227, (P. C.), foll.]. A custom should be specifically pleaded and all the essential requisites to its validity and binding effect should be proved, 66 I. C. 640 = 34 C. L. J. 319. A plea of a special nature must be distinctly pleaded and

- 5.** A further and better statement of the nature of the claim or defence, or further and better particulars of any matter stated in any pleading, may in all cases be ordered, upon such terms, as to costs and otherwise, as may be just.
- Further and better statement, or particulars.
- 6.** Any condition precedent, the performance or occurrence of which is intended to be contested, shall be distinctly specified in his pleading by the plaintiff or defendant, as the case may be; and, subject thereto, an averment of the performance or occurrence of all conditions precedent necessary for the case of the plaintiff or defendant shall be implied in his pleading.
- Condition precedent.
- 7.** No pleading shall, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same.
- Departure.
- 8.** Where a contract is alleged in any pleading, a bare denial of the same by the opposite party shall be construed only as a denial in fact of the express contract alleged or of the matters of fact from which the same may be implied, and not as a denial of the legality or sufficiency in law of such contract.
- Denial of contract.
- 9.** Wherever the contents of any document are material, it shall be sufficient in any pleading to state the effect thereof as briefly as possible, without setting out the whole or any part thereof, unless the precise words of the document or any part thereof are material.
- Effect of document to be stated.
- 10.** Wherever it is material to allege malice, fraudulent intention, knowledge or other condition of the mind of any person, it shall be sufficient to allege the same as a fact without setting out the circumstances from which the same is to be inferred.
- Malice, knowledge, etc.

made the subject of a distinct issue. 25 I. C. 729=18 C. W. N. 622. A pleading charging fraud must set forth particulars, and general allegations, however strong the words may be, cannot be noticed. 15 C. 533 (P.C.); 23 C. W. N. 1045=31 C. L. J. 3; 35 I. C. 339=20 C. W. N. 819; 35 I. C. 284=20 C. W. N. 638; 20 I. C. 753; 92 I. C. 322=1926 Lah. 96; 40 C. 898; 2 Pat. L. T. 528=6 P. L. J. 373 (F. B.); 58 I. C. 317; 46 I. C. 342; 30 I. C. 20=8 L. B. R. 185. Points as to fraud or forgery shall be specifically pleaded. 25 A. L. J. 20=38 M. L. J. 3 (P.C.)=31 C. W. N. 538 (P.C.); 97 I. C. 543=1926 P. C. 109. Fraud of one kind alleged—Relief on another ground cannot be given. 34 C. L. J. 529=26 C. W. N. 177. See also 24 C. W. N. 662=30 C. L. J. 475. Charges of fraud and collusion must be proved by those who make them by established facts or inferences legitimately drawn from those facts taken together as a whole. 29 I. C. 482; 45 M. L. J. 363=39 C. L. J. 165=A. I. R. 1923 P. C. 73 (P.C.). Suit for money advanced—Defendant pleading illegality of contract—Defendant must clearly plead and prove illegality. 92 I. C. 270=A. I. R. 1925 Rang. 275. Coercion, undue influence, fraud and misrepresentation are all separate categories in law. General allegations, however strong, are insufficient even to an averment of fraud of which any Court ought to take notice. 39 Bom. 441=42 I. A. 135 (P.C.); (15 I. A. 119, Ref.). Where fraud or coercion is alleged, it must be supported by

particulars. 39 Bom. 149. New case of fraud must not be allowed to be set up on appeal. 26 Bom. L. R. 622. Plea of estoppel should preferably be raised and issue framed. 1926 Mad. 1052=96 I. C. 915 (2). Special damage—Particulars to be given. 91 I. C. 728=1926 Cal. 549.

O. 6, R. 5.—If averments in a plaint are not precise, the defendant can apply for particulars. Failure to do so operates as estoppel in second appeal. 1 Pat. L. T. 34=52 I. C. 964.

O. 6, R. 6.—Scope of contract—Condition precedent—Specific plea necessary. 94 I. C. 304=1926 Lah. 318.

O. 6, R. 7.—A plaintiff must be limited to the case which he puts forward in his plaint. 54 I. C. 43. The Court can ignore subsequent pleadings. 57 I. C. 684. An amendment of plaint should not be allowed where the object is to get round the effect of some admissions made by the plaintiff himself. 80 I. C. 355 (2). An alternative plea not raised in trial court cannot be allowed to be set up on appeal. 8 L. R. 156 (Rev.).

O. 6, R. 8.—Plea of want of consideration can be raised even when execution of the document is denied. 4 Bur. L. T. 24=9 I. C. 469; 5 C. 684; 13 M. 549; 18 A. 125.

O. 6, R. 10.—Allegations of fraud must be taken in the pleadings and must not be allowed to be made at a later stage of the suit. 34 I. C. =(1916) 1 M. W. N. 180; 15 C. 533 (P. C.). Mere want of diligence is not fraud. 61 I. C. 823=2 Pat. L. T. 401=1921 Pat. A. C. C. 181.

11. Wherever it is material to allege notice to any person of any fact, matter or thing, it shall be sufficient to allege such notice as a fact, unless the form or the precise terms of such notice, or the circumstances from which such notice is to be inferred, are material.

12. Whenever any contract or any relation between any persons is to be implied from a series of letters or conversations or otherwise from a number of circumstances, it shall be sufficient to allege such contract or relation as a fact, and to refer generally to such letters, conversations or circumstances without setting them out in detail. And if in such case the person so pleading desires to rely in the alternative upon more contracts or relations than one as to be implied from such circumstances, he may state the same in the alternative.

13. Neither party need in any pleading allege any matter of fact which the law presumes in his favour or as to which the burden of proof lies upon the other side unless the same has first been specifically denied (e.g., consideration for a bill of exchange where the plaintiff sues only on the bill and not for the consideration as a substantive ground of claim).

14. [S. 51.] Every pleading shall be signed by the party and his pleader (if any): Provided that where a party pleading is, by reason of absence or for other good cause, unable to sign the pleading, it may be signed by any person duly authorized by him to sign the same or to sue or defend on his behalf.

15. [Ss. 51 and 52.] (1) Save as otherwise provided by any law for the time being in force, every pleading shall be verified at the foot by the party or by one of the parties pleading or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case.

O. 6, R. 13.—See 99 I. C. 538=A. I. R. 1927 Lah. 83.

O. 6, R. 14.—Strict proof of pleadings having been read out and explained to Purdanashin ladies should be had, before they are accepted as satisfactory proof of the contents. 38 A. 627=31 M. L. J. 607=43 I. A. 215 (P. C.), reversing 13 I. C. 882. This rule has no application to cases falling under O. XXIX. R. 1. 21 C. 60 (P. C.). What is required by this rule is that the plaintiff must be in existence before the signature is put in. 15 A. at p. 60. See also 22 A. 55; 6 M. L. J. 213; 17 C. at p. 582 (P. C.). There is no rule providing that a person named as co-plaintiff is not to be treated as a plaintiff, unless he signs the plaint. 17 C. at p. 582 (P. C.); 80 I. C. 141.

SIGNATURE, OBJECT OF.—The object of the signature to a plaint is to prevent as far as possible disputes as to whether a suit was instituted with the plaintiff's knowledge and authority or not. 87 I. C. 1002=1925 Sind 275. The provisions of O. 6, R. 14 relate to a mere matter of procedure and any mistake or omission therein may be amended at any time subsequent to the institution of the suit. (*Ibid.*) See also 80 I. C. 141; 104 I. C. 747. Plaint valid if signed by person instructed by plaintiff to sign. 1925 Lah. 144 (1); 4 B. 468; 75 I. C. 880. Plaint filed on behalf of person exempted from personal appearance in court—Plaint signed by his servant—Subsequent power of attorney to servant by plaintiff ratifies prior acts of servant. 104 I. C. 747. A plaint is properly signed when it is signed by a person specially authorized to do so by a Company, which is incorporated in a foreign

country. 8 P. R. 1912=10 I. C. 141. As to filing pleading on behalf of corporation, see 31 C. W. N. 1030=105 I. C. 568=A. I. R. 1927 Cal. 780. A prisoner in jail, who is unable to sign a plaint, may authorize some other person under R. 14 to sign it for him, and the plaint so signed will be a valid plaint. 40 A. 147=16 A. L. J. 64. An omission by the plaintiff to sign the plaint is no ground for rejecting it; the plaint ought to be returned for amendment. 80 I. C. 141; 11 I. C. 842=254 P. L. R. 1911.

O. 6, R. 15.—As to importance of verification, see 19 I. C. 993=41 C. 113. When a pleading does not conform to this rule, the defect is a mere irregularity that can be cured by amendment. 31 C. W. N. 397=101 I. C. 573=54 Cal. 380=A. I. R. 1927 Cal. 376. Plaint when amended takes effect from the date of original institution. (*Ibid.*) A verified plaint is not legal evidence of the facts contained in it. 20 C. W. N. 1192=43 C. 1001. The verification should be made by some person acquainted with the facts of the case. 9 A. 188. See also 4 B. 468. A petition by the Administrator-General for Letters of Administration is sufficiently verified by his signature. 20 C. 879. When a plaint contains numerous allegations of fraud, the defendant might require the plaintiff to verify the plaint himself. 9 A. 505. See also 8 C. 855. In case the verification is defective, it can be amended. 20 A. 442. See also 18 A. 396 (F. B.). A plaint which is not verified cannot be treated as waste paper. 22 A. 55. Also a written statement. 11 C. W. N. 871. But see 46 A. 637=22 A. L. J. 690. If the verification is found to be false the suit cannot be dismissed. 24 W. R. 71. Sub-rule (2) follows the ruling in 15 A. 59.

(2) The person verifying shall specify, by reference to the numbered paragraphs of the pleading, what he verifies of his own knowledge and what he verifies upon information received and believed to be true.

(3) The verification shall be signed by the person making it and shall state the date on which and the place at which it was signed.

16. The Court may at any stage of the proceedings order to be struck out or amended any matter in any pleading which may be unnecessary or scandalous or which may tend to prejudice, embarrass or delay the fair trial of the suit.

17. [Cf. S. 53.] The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall

Amendment of pleadings.

O. 6, R. 16.—Scope of the rule, 92 I. C. 926 = A. I. R. 1926 Nag. 265. The jurisdiction given to the Court under R. 16 is one which ought to be exercised with great care and caution. 29 C. W. N. 670 = 88 I. C. 435. Inconsistent rights claimed alternatively may be permitted except when they are destructive of each other. 22 C. L. J. 254 = 20 C. W. N. 310. See also 17 C. W. N. 555 = 16 C. L. J. 404. Pleadings disrespectful to the Court may be struck out. 22 M. L. J. 155, 42 I. C. 620 = 2 Pat. L. W. 226. A Court can at any stage of the proceedings direct that any matter in any pleading which may tend to prejudice, embarrass or delay the fair trial of a suit be amended or struck out. 20 O. C. 192 = 41 I. C. 903; 2 Pat. L. R. 82 = 75 I. C. 433 = 1923 Pat. 357; (A.I.R. 1924 P. 280).

O. 6, R. 17.—Under O. 6, R. 17, the powers of amendment vested in the Court are very wide. 10 M. L. T. 116 = 12 I. C. 119; 3 Lah. 382; 96 I. C. 79; 1925 Mad. 585 (2) = 48 M. L. J. 349; 49 I. C. 441; 87 I. C. 950 = 1925 Oudh 602; 29 I. C. 132; 84 P. R. 1919 = 52 I. C. 464; 58 I. C. 665 = 24 C. W. N. 749; 100 I. C. 469 = A. I. R. 1927 Cal. 477. To allow or not to allow an amendment is in the Court's discretion which must be liberally exercised. 1925 Mad. 794 = 48 M. L. J. 489; 1925 Nag. 9; 25 I. C. 567 = 19 C. L. J. 518; 13 I. C. 128 = 15 C. L. J. 439; 11 I. C. 481 = 14 C. L. J. 188; 9 I. C. 267; 45 I. C. 649; 37 I. C. 914; 34 C. L. J. 529 = 26 C. W. N. 177; 27 Mad. 80. As to conditions which should be satisfied before granting amendment, see 103 I. C. 455 = 23 N. L. R. 81 = A. I. R. 1927 Nag. 310; 103 I. C. 670 = A. I. R. 1927 Mad. 859; 92 I. C. 926. Discretion in allowing amendment should be freely exercised but not where the suit by amendment would relate to a different subject-matter. 32 I. C. 624 = (1916) 1 M. W. N. 171. Amendment to change the date when cause of action arose and not to change the cause of action itself should be allowed. (1925) M. W. N. 781; 30 I. C. 391. See also 48 Cal. 932 (P. C.). All amendments necessary for deciding points in dispute should be allowed—Revision lies against improper refusal. 21 L. W. 639 = 87 I. C. 90 = (1925) M. W. N. 469 = 48 M. L. J. 349; 85 I. C. 344; 22 L. W. 26 = 1925 Mad. 950. The Court ought to give all reasonable indulgence with regard to amending. 32 C. at p. 600. The fact that an issue would have to be tried again is no ground for refusing an amendment. (1906) A. W. N. 220. Amendments of pleadings should be allowed to avoid multiplicity of suits. 86 I. C. 615 = A. I. R. 1925 Cal. 944; 45 A. 220; 19 I. C. 250 = 11 A. L. J. 423; 56 I. C. 115; 64 I. C. 99; 28 Punj. L. R. 15 = A. I. R.

1927 Lah. 103. An amendment for an additional relief on the facts alleged in the plaint ought to be allowed. 28 I. C. 828 = 29 M. L. J. 464. See also 10 I. C. 260 = 9 M. L. T. 429. A court can allow an amendment so as to grant an alternative relief. See 98 I. C. 458 = 38 M. L. T. 33 = A. I. R. 1927 Mac. 212. See also 54 I. A. 55. Amendment should not be refused on the ground that a fresh party shall have to be joined. 10 I. C. 737 = 7 N. L. R. 43. Mere delay is no ground for refusing amendment. 79 I. C. 1033 = 1925 Oudh 291. But amendment sought for at a very late stage would be disallowed. 51 Bom. 749 = 29 Bom. L. R. 1071 = 104 I. C. 685 = A. I. R. 1927 Bom. 521. Amendment of plaint is not allowed if it alters the nature of the suit. 35 C. L. J. 25 = 26 C. W. N. 73; 51 I. C. 435; 35 I. C. 91; 10 I. C. 250; 54 I. A. 55 = 6 Pat. 323 = 31 C. W. N. 469 = 100 I. C. 56 = A. I. R. 1927 P. C. 18 = 52 M. L. J. 402 (P. C.); 10 I. C. 218. Substitution of one plaintiff for another cannot be allowed by amendment. 27 Bom. L. R. 277. It is not enough for a plaintiff to show that the amendment does not alter the character of the suit. 21 B. 571. The test is whether the evidence to be offered after the amendment will be substantially the same as that offered if the plaint stood as originally framed. 3 C. at p. 661. Amendment of plaint so as to make out an inconsistent case is not allowed. 101 I. C. 280. Amendment seeking to introduce a new claim would not be allowed where no cause is shown for introducing new matter which was not included in the original plaint. See 4 O. W. N. 1219. A suit based on adoption cannot be treated as a suit for partition of undivided family property. 21 I. C. 737 = (1913) M. W. N. 828. An alternation in the relief claimed does not alter the character of the suit. 20 C. at p. 808. The addition of a prayer ancillary to the principal one does not alter the character of the suit. 5 C. W. N. 273. See also (1902) A. W. N. 114.

ILLUSTRATIVE CASES, see 26 A. 215; 2 M. 295; 5 Bom. L. R. 329; 13 B. 548. See also 14 B. 395; 15 M. 15; 15 M. 255; 5 Bom. L. R. 643; 5 B. 181; 7 M. H. C. R. 364; 11 C. L. R. 451. But see 15 M. 255; 6 B. 495; 12 C. 414.

REDEMPTION SUIT. 7 B. 146. But not when the action is instituted for purposes absolutely inconsistent with redemption. 5 C. L. J. 653. See also 5 C. 269. A suit for redemption can be converted into one in ejectment. 28 B. at p. 161; 24 A. 456; 5 B. 496; 9 B. 355; 3 B. 222. Suit on mortgage—Amendment so as to save question of amendment. See 53 M. L. J. 647. Suit on promissory note, insufficiently stamped—Amendment can be allowed to sue on original

be made as may be necessary for the purpose of determining the real questions in controversy between the parties.

consideration. A. I. R. 1922 Lah. 394 (1) ; 52 I. C. 758 ; 99 I. C. 625 = A. I. R. 1927 Mad. 378. A written application is not necessary to move the Court for an order allowing an amendment of the pleadings. An oral application is sufficient. 52 I. C. 758. Amendments involving an entire change in the form and character of a suit cannot be allowed in second appeal. 9 I. C. 774 = 4 Bur. L. T. 47 ; 12 I. C. 200 = 4 Bur. L. T. 244 ; 180 P. W. R. 1913 = 20 I. C. 501 = 292 P. L. R. 1913 ; 14 C. W. N. 128 ; 93 I. C. 871 = A. I. R. 1926 Lah. 453 ; 42 I. C. 455. A Court of second appeal if and when can order amendment of a plaint. 59 P. L. R. 1916 = 30 I. C. 387 ; 20 I. C. 501 = 292 P. L. R. 1913 ; 50 I. C. 180. 98 I. C. 39 = 51 M. L. J. 418 ; 52 M. L. J. 253. Amendment can be allowed in second appeal if the error is *bona fide*. 21 M. L. J. 475 = 10 I. C. 218 ; 33 B. 644 ; 3 Lah. 382 ; 2 P. 919 = 5 P. L. T. 315. Principles governing amendment of plaint in appeal. See 54 I. A. 55 = A. I. R. 1927 P. C. 18 = 52 M. L. J. 422 (P. C.). See also 9 Lah. L. J. 152 = 102 I. C. 194 ; (1927) M. W. N. 175 = A. I. R. 1927 Mad. 504 ; 1 Luck. 33 = 91 I. C. 927. A suit filed against a dead person is no suit at all and no question of amendment of the plaint arises. Such a suit cannot be substituting the representatives of the deceased, 31 M. 86 ; 42 I. C. 539 ; 30 I. C. 679 = 2 L. W. 828. An order directing a plaintiff to pay in cash the costs of an amendment of the plaint, after he has been found to be a pauper is improper. 24 Bom. L. R. 924 = 47 B. 104. Inclusion of wrong property owing to mistaken identity—Amendment can be allowed. 51 I. C. 757 = 56 P. W. R. 1919. Declaratory suit, if can be permitted to be changed into one for recovery of possession. 24 M. L. J. 455 = 19 I. C. 672. See also 8 Lah. 531 = A. I. R. 1927 Lah. 499 ; 2 Pat. L. J. 379 = 40 I. C. 174 ; 93 I. C. 871 = 1926 Lah. 453. In a suit for injunction, an addition of subsequent prayer for possession can be allowed by way of amendment. 4 O. W. N. 975 = 105 I. C. 784 = A. I. R. 1927 Oudh 513. Where plaintiff prays for exclusive possession, amendment claiming joint possession may be allowed 104 I. C. 325. Claim for possession as reversioner—Amendment into a claim in plaintiff's own right. 52 M. L. J. 253. Different cause of action not to be introduced by amendment. 52 I. C. 961. A suit in ejectment cannot be converted into one for partition. 37 M. 529 = 23 M. L. J. 189. Suit for possession by a person admittedly a sharer—Amendment of suit into one for partition to be allowed. 23 L. W. 468 = 92 I. C. 306 = 1926 Mad. 909. A suit for rent may be amended into one for damages for use and occupation. 30 I. C. 753 = 8 Bur. L. T. 234. But see contra A. I. R. 1927 Mad. 182 = 99 I. C. 977 = 52 M. L. J. 399. See also A. I. R. 1927 Oudh 505 ; 11 I. C. 863 = 4 Bur. L. T. 197. Suit against a dead man under *bona fide* mistake—Allowing his name to be struck off can be allowed. 105 I. C. 284. Suit to recover purchase-money on the basis of vendor's lien—Amendment into a suit for damages for breach of contract may be allowed. 99 I. C. 770 = 8 Lah. 257 = A. I. R. 1927 Lah. 103. Application for probate can be converted into

one for letters of administration. 9 Lah. L. J. 152 = 102 I. C. 194. Amendment is not generally allowed of lapse of time and limitation is sought to be taken away when a valuable right acquired by reason of amendment. See 46 C. L. J. 51 = 104 I. C. 151 = A. I. R. 1927 Cal. 733 ; 25 L. W. 506 = 101 I. C. 390 = A. I. R. 1927 Mad. 650 ; 23 L. W. 771 = 1926 Mad. 827 = 51 M. L. J. 414 = 96 I. C. 700. But see also 104 I. C. 700 (where it is laid down that there may be special considerations that may necessitate an amendment even in such cases). As to amendment of written statement in an action for libel, see 54 Cal. 73. Where the basis of plaintiff's right to sue has been jeopardised by a decision in another suit after the plaint in the suit was filed, an application for the amendment of the plaint put in promptly ought to be allowed. 23 L. W. 618 = 95 I. C. 267 (1) = 1926 Mad. 754. Suit by a person who had no right to sue—Amendment of plaint to enable proper party to sue should not be allowed. 23 L. W. 377 = 93 I. C. 305 = 1926 Mad. 577. Suit for redemption—Alleged mortgage not proved—Another and different mortgage cannot be substituted. 96 I. C. 304.

LATE STAGE.—An amendment at a very late stage should not be allowed. 45 C. 305 ; 46 C. 168 ; 48 C. 110 (P. C.) ; 48 C. 832 (P. C.) ; 3 Lah. L. J. 437 ; 47 I. C. 906 ; 3 Lah. L. J. 184 = 67 I. C. 132 ; 51 Bom. 749 = 20 Bom. L. R. 1071 = A. I. R. 1927 Bom. 521 ; 99 I. C. 979 ; 25 L. W. 506 = 101 I. C. 390 = A. I. R. 1927 Mad. 650 ; 46 I. C. 929 = 5 Pat. L. J. 164. But it can be allowed provided that no injustice is caused to the other side. 61 I. C. 328 = 1924 P. H. C. C. 297.

SUIT PREMATURE.—When suit is premature amendment cannot cure the defect. 49 All. 599 = 101 I. C. 643 = 25 A. L. J. 385 = A. I. R. 1927 All. 451.

INCONSISTENT PLEA.—An amendment inconsistent with the plaint should not be allowed. 34 I. C. 541 ; 101 I. C. 280. By means of an amendment, the subject-matter of the suit cannot be changed, or one distinct and inconsistent cause of action cannot be substituted for another. 42 M. L. J. 43 = 68 I. C. 703 = 1922 Mad. 49. If an amendment changes the cause of action, and the suit if brought on that date would be barred, the amendment should be refused. 28 I. C. 828 = 29 M. L. J. 464 ; 31 M. L. J. 688 = 38 I. C. 720 ; 46 I. C. 29 = 13 Bur. L. T. 201 ; 4 Bur. L. J. 110 = 90 I. C. 639 = A. I. R. 1925 Rang. 264 ; 87 I. C. 218 ; 13 I. C. 370 = 38 Cal. 797 ; 26 I. C. 42 = 12 A. L. J. 833 ; 41 M. L. J. 525. Amendment of plaint must be allowed when it merely amplifies and does not vary the original cause of action. 1925 Mad. 188 ; 23 L. W. 771 = 1926 Mad. 827. Amendment should not be allowed so as to defeat plea of limitation. 39 M. L. J. 195 = 47 I. A. 255 = 48 Cal. 110 (P. C.) ; 36 A. 370 ; 37 B. 340 ; 50 C. 878 ; 30 I. C. 379 ; 21 I. C. 306 ; 22 C. W. N. 104 ; 11 M. I. A. 468 ; 28 C. W. N. 1009 = 1925 Cal. 67. Amendment may be allowed when a claim has been left out by mistake or inadvertence and not deliberately. 17 I. C. 646 = 17 C. W. N. 311 ; 97 I. C. 796 (2) = 1926 Lah. 460. A plaint cannot be amended

18. [Cf. Ss. 53 and 54.] If a party who has obtained an order for leave to amend does not amend accordingly within the time limited for that purpose by the order, or if no time is thereby limited then within fourteen days from the date of the order, he shall not be permitted to amend after the expiration of such limited time as aforesaid or of such fourteen days, as the case may be, unless the time is extended by the Court.

ORDER VII.

PLAINT.

Particulars to be contained in plaint.

1. [S. 50.] The plaint shall contain the following particulars :—

- (a) the name of the Court in which the suit is brought ;
- (b) the name, description and place of residence of the plaintiff ;
- (c) the name, description and place of residence of the defendant, so far as they can be ascertained ;

when it would expose the defendant to an injury which could not be compensated in costs. 40 Bom. 158. Amendments should be allowed to rectify technical defects. 34 All. 348 ; 47 Bom. 785 = 25 Bom. L. R. 513 ; 40 Cal. 541 ; 30 I. C. 323 ; 82 I. C. 777 ; 1926 All. 672. Events that happen even after the filing of the suit may be taken notice of and an amendment of the plaint for including a prayer for relief on the foot of such events ought to be allowed to avoid multiplicity of proceedings. 1926 M. 6 = 90 I. C. 881 = 49 M. L. J. 479 ; 22 L. W. 120 = 1925 Mad. 1021 = 91 I. C. 503.

REVISION.—An order refusing leave to amend the plaint can be set aside in revision. 40 I. C. 65 = 26 P. R. 1917 ; 78 I. C. 510 = 1925 Nag. 195. See also (1927) M. W. N. 175 = A. I. R. 1927 Mad. 504 ; 41 M. L. J. 525 ; 4 L. W. 654. Amendment ordered on payment of costs—Costs drawn out under protest—Such order cannot be impeached in revision. 26 L. W. 527 = 105 I. C. 620 = A. I. R. 1927 Mad. 1009.

EFFECT OF AMENDMENT.—Amendment takes effect from date of presentation of plaint or application. 98 I. C. 658 = A. I. R. 1927 Nag. 95 ; 93 I. C. 625 = 1926 Mad. 437 = 50 M. L. J. 442.

O. 6, R. 18.—The Court cannot reject a plaint or dismiss the suit under O. 6, R. 18 but must proceed to try the suit on the original plaint. 169 P. L. R. 1913 = 19 I. C. 472. Where a plaint was rejected on the ground that it was not amended within the time fixed by the court a fresh suit on the same cause of action is maintainable. 99 I. C. 538 = A. I. R. 1927 Lah. 83.

O. 7, R. 1. SCOPE OF.—See A. I. R. 1925 Nag. 113. The plaint should contain the facts constituting the cause of action and the time when it arose. 42 Cal. 85 ; 39 I. C. 21 = 13 N. L. R. 16. One plaint is only one suit. Jurisdiction depends on amount or value of the aggregate subject-matters at the date of institution. 40 M. 1 = 32 M. L. J. 221. Description of suit in heading does not determine nature of suit. See A. I. R. 1927 Sind. 78. Defect in signature is not fatal to a suit and the merits are not affected. A. I. R. 1927 All. 514. Adverse possession should be expressly pleaded at least as alternative ground. 88 I. C. 249 = A. I. R. 1925 M. 1005.

NAME.—A suit cannot be instituted against a dead man. 17 M. L. J. 551. If so instituted and

a decree is obtained it is invalid. 9 Bom. L. R. 274. See 16 M. 319.

DESCRIPTION.—This term includes age, father's name, caste, etc. 7 M. L. J. 81. Where the Government has recognised a person as having a right to bear particular titles, a plaint in a suit against such person may contain them. 12 B. L. R. 443 (P. C.). A plaintiff cannot be compelled to insert every name and title to which the defendant may conceive himself entitled. 3 M. H. C. R. 31.

PLACE OF RESIDENCE.—To describe the plaintiff as residing in Chitpore Road in Calcutta is not a sufficient description of his residence. 4 C. L. R. 366 ; 14 W. R. 474. Facts constituting cause of action must be stated. See 18 A. 403 ; 15 M. L. J. 122 ; 13 W. R. 248 ; 10 Bom. H. C. R. 182 ; 11 A. 438 ; 15 C. 533 (P. C.) ; 10 Bom. H. C. R. 414 ; 7 M. H. C. R. 364. See 7 C. 169 ; 9 A. 486 ; 13 W. R. 48 ; 13 C. 9.

INCONSISTENT CLAIMS.—A claim to set aside a deed as a forgery cannot be combined with a claim to set it aside on the ground of absence of consideration, fraud, misrepresentation, etc. 15 I. A. 86. A claim to set aside an adoption on the ground that it never took place cannot be joined with a claim that even if it took place it was a conditional one. 14 M. 172. A stranger to a deed can aver that it is a forgery, and that if not a forgery, it is not supported by consideration. 16 M. L. J. 13 (Recent Cases).

RELIEF CLAIMED.—The Court should not give the plaintiff more relief than he prays for. 6 Bom. H. C. R. 9. An injunction could be granted on a general prayer. 6 C. 485. In a suit for partition no decree for redemption can be given. 10 M. L. J. 242 ; 5 A. 345 ; 27 B. at p. 603 ; 23 B. at p. 160. See Rule 7. Plaint defective—Relief not claimed in proper form—Duty of Courts. 93 I. C. 928 = 1926 Lah. 417.

CLAUSE (1).—The value of a suit for purposes of court-fees is not applicable for determining jurisdiction. Acts of a fiscal nature are not to be resorted to for determining questions of jurisdiction. 6 M. H. C. R. 151. Plaintiff in certain cases is free to fix his own valuation for purposes of jurisdiction. 18 C. 378. The general rule is that in all suits for account the valuation for purposes of Court-fees determines the question of jurisdiction. 22 C. 690 ; 92 I. C. 730 = 1926 M. 591.

- (d) where the plaintiff or the defendant is a minor or a person of unsound mind, a statement to that effect ;
 (e) the facts constituting the cause of action and when it arose ;
 (f) the facts showing that the Court has jurisdiction ;
 (g) the relief which the plaintiff claims ;
 (h) where the plaintiff has allowed a set-off or relinquished a portion of his claim, the amount so allowed or relinquished ; and
 (i) a statement of the value of the subject-matter of the suit for the purposes of jurisdiction and of court-fees, so far as the case admits.

2. [S. 50.] Where the plaintiff seeks the recovery of money, the plaintiff shall state the precise amount claimed :

But where the plaintiff sues for mesne profits, or for an amount which will be found due to him on taking unsettled accounts between him and the defendant, the plaintiff shall state approximately the amount sued for.

[Punjab.] In the second paragraph of R. 2 of O. VII after the words

"and the defendant" insert "or for movables in the possession of the defendant, or for debts the value of which he cannot, after the exercise of reasonable diligence, estimate"; after the words "the amount" insert "or value."

3. Where the subject-matter of the suit is immovable property, the plaintiff shall contain a description of the property sufficient to identify it, and, in case such property can be identified by boundaries or numbers in a record of settlement or survey, the plaintiff shall specify such boundaries or numbers.

Where the subject-matter of the suit is immovable property.

[Calcutta.] After R. 3, O. VII, add the words—

"and when the area is mentioned, such description shall further state the area according to the notation used in the record of settlement or survey, with or without, at the option of the party, the same in terms of the local measures."

4. [S. 50, para. 4.] Where the plaintiff sues in a representative character the plaintiff shall show not only that he has an actual existing interest in the subject-matter, but that he has taken the steps (if any) necessary to enable him to institute a suit concerning it.

When plaintiff sues as representative.

Defendant's interest and liability to be shown.
 the plaintiff's demand.

5. [S. 50, para. 5.] The plaintiff shall show that the defendant is or claims to be interested in the subject-matter, and that he is liable to be called upon to answer

Ground of exemption from limitation law.

6. [S. 50, para. 6.] Where the suit is instituted after the expiration of the period prescribed by the law of limitation, the plaintiff shall show the ground upon which exemption from such law is claimed.

O. 7, R. 2.—A claim for contribution should distinctly set forth the amounts due by each part. 14 W. R. 374. Plaintiff is only entitled to the sum specified in the plaint, even though on the evidence he is found to be entitled to more. 2 M. I. A. 113. See also 30 C. 406. Rules 1 and 4 of Order 7 are mandatory. 82 I. C. 201.

O. 7, R. 4.—Plaint is to state the representative nature of the suit. 1925 Nag. 183=82 I. C. 201. A plaintiff suing in a representative character must set it forth, and show that he is qualified to fill it, 7 B. at p. 470. In the Bombay Presidency Mahomedan executors can sue without first taking out probate. 8 B. 241. In the case of Hindus, see 14 C. 37. When the original plaintiff dies, the suit may be continued by his legal representative, although the latter has not taken out letters of administration. 16 B. 519. The production of a Succession Certificate is not

a condition precedent to the institution of the suit. 16 M. 454; 19 C. 482. See also 17 M. 14.

O. 7, R. 5.—Plaint must show how the various defendants are interested in the subject-matter of the suit and the cause of action against each 1924 Nag. 191.

O. 7, R. 6.—O. 7, Rule 6 should be construed liberally and reasonably. 60 I. C. 772=3 Lah. L. J. 22=2 Lah. 13; 46 I. C. 495=102 P. R. 1918=120 P. L. R. 1918. Rule 6 has no application when the plaintiff is not on its face time barred. 70 P. R. 1914=25 I. C. 463; but is applicable to cases in which the suit as laid in the plaint is *prima facie* barred by limitation. 51 I. C. 956=1 Lah. 21. Ground of exemption from limitation not set up in plaint cannot afterwards be set up and proved. 75 I. C. 1048=1924 Lah. 702. Failure to set up acknowledgment as saving limitation is a bar. 3 Lah. 233=1922 Lah. 39; 52 I.

7. Every complaint shall state specifically the relief which the plaintiff claims either simply or in the alternative, and it shall not be necessary to ask for general or other relief which may always be given as the Court may think just to the same extent as if it had been asked for. And the same rule shall apply to any relief claimed by the defendant in his written statement.

Relief founded on separate grounds. **8.** Where the plaintiff seeks relief in respect of several distinct claims or causes of action founded upon separate and distinct grounds, they shall be stated as far as may be separately and distinctly.

9. [S. 58.] (1) The plaintiff shall endorse on the plaint, or annex thereto, a list of the documents (if any) which he has produced along with it; and, if the plaint is admitted, shall present as many copies on plain paper of the plaint as there are defendants, unless the Court by reason of the length of the plaint or the number of the defendants, or for any other sufficient reason, permits him to present a like number of concise statements of the nature of the claim made, or of the relief claimed in the suit, in which case he shall present such statements.

Concise statements. **(2)** Where the plaintiff sues, or the defendant or any of the defendants is sued, in a representative capacity, such statements shall show in what capacity the plaintiff or defendant sues or is sued.

(3) The plaintiff may, by leave of the Court, amend such statements so as to make them correspond with the plaint.

(4) The chief ministerial officer of the Court shall sign such list and copies or statements if, on examination, he finds them to be correct.

[Allahabad.] **9 (1).** *Procedure on admitting plaint.*—The plaintiff shall endorse on the plaint, or annex thereto, a list of the documents (if any) which he has produced along with it.

(2) The chief ministerial officer of the court shall sign such list and copies if, on examination, he finds them to be correct.

[Madras.] In R. 9 of O. VII after the word 'and' occurring the third line *delete* the comma and the five words following, *viz.* "if the plaint is admitted" and *insert* the expression "alongwith the plaint" after the words "shall, present."

[Oudh.] **9 (1).** *Procedure on admitting plaint.*—The plaintiff shall endorse on the plaint, or annex thereto, a list of the documents (if any) which he has produced along with it; and shall, at the same time, present as many copies on plain paper of the plaint as there are defendants.

(2) Same as Allahabad 9 (2) given above.

[Rangoon.] In O. VII, R. 9 (1), *add* the words 'on the day on which the plaint is admitted' after the word "present."

C. 243=9 L. W. 82. Grounds on which plaintiff relies for extending the period of limitation must be specifically alleged in the plaint. 27 I.C. 344=8 S. L. R. 69. Plea of exemption for limitation—Inconsistent averments may be allowed. 65 I. C. 279=17 N. L. R. 209. Where in the plaint returned for presentation to proper Court the ground of exemption is not stated the endorsement of the Court as to the date of receipt and return is substantial compliance with the provisions of R. 6. 9 I. C. 157=9 M. L. T. 374; 1923 Lah. 591. The plaintiff ought not to be allowed to put forward a new case inconsistent with the plaint, to enable him to avoid limitation. 30 C. at p. 709.

O. 7, R. 7.—In a suit on a negotiable instrument, relief on the strength of the original consideration could be granted if prayed for in the alternative. 46 Cal. 663=29 C. L. J. 340=36 M. L. J. 429 (P. C.); 14 I. C. 399=8 N. L. R. 7. Where specific allegation is not proved, it is not open to the Court to arrive at a finding in his favour contrary to the allegation set up. 54 I. C. 797. A plaintiff is entitled to put his case in the alternative and his suit should not be dismissed

as being for inconsistent relief. 36 A 476; 7 All. 184; 12 A. L. J. 708. The decree in a suit should conform with the rights of the parties as they stand at the date of its institution. 44 Cal. 47=20 C. W. N. 1099. A prayer "for any other relief" may cover any other relief arising out of the same cause of action but not one arising under a different cause of action. 13 I. C. 650=92 P. L. R. 1912. An exaggerated claim is no ground for refusing a person the rights which he is found entitled to. 46 I. C. 679=13 P. R. 1919; 33 M. L. J. 63. In a suit for ejectment, a decree for joint possession may be passed. 38 M. 1036=26 M. L. J. 532; 24 M. L. J. 271=21 I. C. 724. Under O. 7, R. 7, C. P. Code, a prayer for general relief is unnecessary, and a Court may always give general or other relief, as it may think just to the same extent, as if it had been asked for. 76 I. C. 940=5 Pat. L. T. 330. On this section, *see also* 29 Bom. L. R. 147.

O. 7, R. 9.—A suit is instituted on the date when the plaint is filed and not on the date when it is ordered to be registered. 66 I. C. 923=34 C. L. J. 465.

10. [S. 57.] (1) The plaint shall at any stage of the suit be returned to be presented to the Court in which the suit should have been instituted.

Return of plaint.

(2) On returning a plaint the Judge shall endorse thereon the date of its presentation and return, the name of the party presenting it, and a brief statement of the reasons for returning it.

Procedure on returning plaint.

11. [Ss. 53 and 54.] The plaint shall be rejected in the following cases :—

Rejection of plaint.

O. 7, R. 10.—Where a plaint has been returned for presentation to the proper Court and the plaintiff appeals against the order, he is still at liberty to present the plaint to the proper Court subject to the bar of limitation. 27 Bom. L. R. 652=89 I.C. 68. The direction in R. 10 is mandatory. 53 I. C. 308=10 L. W. 525; 8 C. 834. Suit filed in civil court instead of before Collector—Proper procedure. 6 Pat. 358.

APPLICABILITY.—R. 10 applies only where the suit is instituted in a wrong Court and not where the necessary relief under S. 20, C. P. C., was not obtained. 23 Bom. L. R. 1086=46 Bom. 229. O. 7, R. 10 applies to a Small Cause Court. 94 I. C. 550 (1)=1926 Mad. 679=51 M. L. J. 158. Rule applies when the suit as originally framed was wrongly instituted. 54 I.C. 655. It is the duty of a Court to return the plaint for presentation to a proper Court, and not decide the suit on merits if it finds it has no jurisdiction to entertain the suit. 88 I.C. 991=A. I. R. 1925 Oudh 735; 44 All. 686=70 I.C. 98; 10 M. 211; 41 Mad. 701=35 M.L.J. 27; 41 I. C. 203=27 C. L. J. 510; 10 L. W. 525=(1920) M. W. N. 163. There is nothing in the wording of the rule which forbids the return of the plaint after a late stage of the case. 8 B. 313 (F.B.). The plaint cannot be returned after a decree has been passed. 8 B. 380. When the Appellate Court decides that the Lower Court has no jurisdiction to entertain the suit, it should return the plaint to the plaintiff. 1 B. 538; 9 B. 266. But see 11 M. 482; 89 I. C. 511=1925 Oudh 499. Return of plaint cannot be made on the ground that it would be more advantageous to one of the parties to do so. A.I. R. 1927 Cal. 87. As to whether suit is to be deemed to be pending in the court of filing even after return of plaint. See 5 Rang. 101. Where a plaint filed in one Court is returned to be presented to another Court, whether the latter Court has jurisdiction to return the same to be presented to the former Court. See 42 I.C. 483=6 L. W. 239. But see 22 L. W. 582=(1925) M.W.N. 804; 64 I.C. 496=2 Pat. L.T. 739. See also 51 Bom. 236=29 Bom. L. R. 280=A. I. R. 1927 B. 257. An application for leave to sue as a pauper is not a plaint and it only reaches the stage of a plaint when it is granted. 52 I.C. 688. If the cause of action arises within the jurisdiction of the Court the plaint cannot be returned simply because the defendant resides outside the jurisdiction of the Court. 32 C. 146. Court not to decide material issue of question of damages to decide question of jurisdiction. 91 I. C. 737=1926 Mad. 339. Plaint containing different causes of action—jurisdiction of Court to try one cause of action only procedure to be followed. 94 I.C. 783=1926 Bom. 283=28 Bom. L. R. 521. Plaint returned under S. 23, Prov. Small Cause Court Act—Order of return by Civil Court—Appeal if lies. 1926

Cal. 83. Return of plaint cannot be made on the ground that it would be more advantageous to one of the parties to do so. 97 I.C. 979.

PLEADINGS.—Plaintiff cannot rely upon the pleas in the written statement for making out a cause of action. 46 I. C. 60; 6 Bur. L.T. 85=20 I.C. 278.

APPEAL.—An appeal lies against an order passed under this rule. See O. XLIII, R. 1; also 14 M. 462; 27 Bom. L.R. 636=88 I.C. 753. But no appeal lies after the plaint has been taken back and re-filed in the Court as directed. 5 C. L.J. 580.

REVISION.—Order returning a memorandum of appeal to be presented to the proper Court is revisable. 7 Lah. L.J. 285=A.I.R. 1925 Lah. 479.

O. 7, R. 11.—All statements in plaint are to be taken as true, for argument on preliminary issue as to whether plaint discloses a cause of action. 40 Cal. 598=25 M. L.J. 104 (P.C.). The provisions of R. 11 are mandatory and where a plaint is written on paper insufficiently stamped, the Court is bound to give the plaintiff time to make good the deficiency. 38 B. 41; 2 Pat. L.J. 74; 49 Cal. 880=27 C.W.N. 566; 44 Cal. 352=21 C.W. N. 834. R. 11 (d) does not apply when there is no statement in the plaint suggesting the suit to be barred. 27 I.C. 232=18 C.W.N. 1340. Plaint insufficiently stamped—Court bound to grant time for affixing proper court-fee. 27 P. L. R. 1917=39 I.C. 766; 3 P. L. T. 142; 55 I. C. 316=4 Pat. L.J. 703. Return of plaint for payment of deficient court-fee—Payments beyond the time fixed by the court—No application to extend the time—But court has power to excuse delay. (1926) M.W.N. 341=95 I.C. 439=51 M. L.J. 90=1926 Mad. 676. Where plaint is defective, plaintiff is to be given an opportunity to cure the defect. 1 Pat. L. T. 188=55 I. C. 445. See also 105 I. C. 881=A.I.R. 1927 Mad. 1002; 51 Bom. 236=29 Bom. L.R. 280=A. I. R. 1927 Bom. 257. A Court has jurisdiction to entertain a plaint though it is unstamped. 20 I.C. 767=24 M. L. J. 658. It is competent to a Court to reject a plaint after it has been admitted and duly registered. 34 C. 20 (F.B.). A plaint may be rejected at any stage of the suit. 18 M. 338; 12 A. 553. But see 28 I.C. 504=(1915) M. W. N. 228 (contra). The mere unlikelihood of plaintiff's success is no sufficient ground for rejecting a plaint. 1 M.H.C. 240. A suit should not be dismissed on the ground that it cannot be maintained as a mere acknowledgment of debt. 97 I. C. 800=1926 Lah. 472 (1). If plaint cannot be rejected in part, see 29 A. 325. Rule does not apply to the High Court in the exercise of its appellate jurisdiction. 12 A. at p. 151 (F.B.). If a wrong date is given for the cause of action, and the action is not barred, the plaint cannot be rejected. 7 A. 354. An Appellate Court has the same powers of rejecting plaint:

(a) where it does not disclose a cause of action :

(b) where the relief claimed is undervalued, and the plaintiff on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so :

(c) where the relief claimed is properly valued, but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so :

(d) where the suit appears from the statement in the plaint to be barred by any law.

Procedure on rejecting
plaint.

12. [S. 55.] Where a plaint is rejected the Judge shall record an order to that effect with the reason for such order.

Where rejection of plaint
does not preclude presentation
of fresh plaint.

13. [S. 56.] The rejection of the plaint on any of the grounds hereinbefore mentioned shall not of its own force preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action.

Documents relied on in plaint.

14. [S. 59.] (1) Where a plaintiff sues upon a document in his possession, or power, he shall produce it in Court when the plaint is presented, and shall at the same time deliver the document or a copy thereof to be filed with the plaint.

Production of document on
which plaintiff sues.

(2) Where he relies on any other documents (whether in his possession or power or not) as evidence in support of his claim, he shall enter such documents in a list to be added or annexed to the plaint.

List of other documents.

(Loc. Am.) [Oudh.] O. VII, R. 14. (In Oudh for sub-section (2) of R. 14 substitute the following —

(2) Where he relies on any other documents as evidence in support of his claim, he shall enter all of them in a list to be added or annexed to the plaint and shall produce in Court, when the plaint is presented, such of them as are in his possession or power. In regard to the documents not in his possession or power, he shall, if possible, state in whose possession or power they are, and shall cause them to be summoned for production before the Court on a date to be fixed by the Court for the purpose.

Explanation.—A certified copy of a public document is a document "in the power" of a party, but where a document is in the possession of a person other than the plaintiff, it will not be deemed to be "in the power" of the plaintiff.).

under O. 7, R. 11, C.P.Code, as the Court of first instance. 69 I. C. 554 (1)=1924 Nag. 80.

APPEAL AND REVISION.—An order holding that a certain court-fee is payable is revisable. 1925 Mad. 722=48 M. L. J. 514. An order of rejection under O. 7, R. 11 (b) of a plaint is appealable and a revision is therefore incompetent. 80 P.R. 1914=25 I. C. 565. Where a plaint has been rejected by a Court for non-payment of court-fees, the proper remedy of plaintiff is by way of an application for review under O. 47, R. 11. 2 Pat. 504=4 Pat. L.T. 261.

O. 7, R. 13.—A fresh suit can be instituted provided it is not barred. 14 W.R. 289.

O. 7, R. 14.—It is competent for a witness for the purpose of refreshing his memory to refer to horoscope made at the time although the document has not been included in the list of documents under R. 14. 41 All. 68=23 C. W.N. 577=45 I.A. 284 (P.C.). A document given to a witness to refresh his memory does not come within the meaning of this rule. 1 M. H. C. 168. The reception of a document in evidence, which

has not been produced at the proper time, is no ground for appeal. 8 M. 373 (374). See also 13 M.I.A. 77 ; 44 C.L.J. 385=99 I. C. 258=A. I. R. 1927 Cal. 168. The refusal to receive it is a good ground. 4 M. 417 ; 8 B. 377. The sanction of the Court receiving the documents clears the defect of their not having been tendered with the plaint, 13 M.I.A. 77. Documents produced by plaintiff in answer to case set up by defendants—No necessity for filing before first hearing. 4 Pat. L. T. 322. Rejection of documents not produced along with plaint, if proper. 44 I.C. 21 ; 46 I.C. 246=27 C.L.J. 119. Good cause to be shown for non-production with plaint or at first hearing. 101 I.C. 911=1 Luck. C. 56. Document sued on, to be produced with plaint; and if it is produced subsequently it can only be treated as evidence. 1 Lah. 6 ; 21 C.W.N. 553 (P.C.) ; 32 M.L.J. 137=39 I.C. 243 (P.C.). It should not be sprung upon the opposite party a considerable time after. 44 B. 625. A Court may refuse to admit later on unlisted documents. 1926 Lah. 527.

Statement in case of documents not in his possession or power.

[Oudh.] [Deleted by Oudh Chief Court].

15. [S. 60.] Where any such document is not in the possession or power of the plaintiff, he shall, if possible, state in whose possession or power it is.

16. [S. 61.] Where the suit is founded upon a negotiable instrument, and it is proved that the instrument is lost, and an indemnity is given by the plaintiff, to the satisfaction of the Court, against the claims of any other person upon such instrument, the Court may pass such decree as it would have passed if the plaintiff had produced the instrument in Court when the plaint was presented, and had at the same time delivered a copy of the instrument to be filed with the plaint.

17. [S. 62.] (1) Save in so far as is otherwise provided by the Bankers' Books Evidence Act, 1891, where the document on which the plaintiff sues is an entry in a shop-book or other account in his possession or power, the plaintiff shall produce the book or account at the time of filing the plaint, together with a copy of the entry on which he relies.

(2) The Court, or such officer as it appoints in this behalf, shall forthwith mark the document for the purpose of identification; and, after examining and comparing the copy with the original, shall, if it is found correct, certify it to be so and return the book to the plaintiff and cause the copy to be filed.

[Loc. Am.] [Allahabad]. Add the following proviso to O. VII, R. 17, of the Code of Civil Procedure :—

Provided that, if the copy is not written in English or is written in a character other than the ordinary Persian or Nagri character in use, the person producing it or some one on his behalf shall attest it as a true copy, and in that case the Court or its officer need not examine or compare the copy with the original.

[18. S. 63.] (1) A document which ought to be produced in Court by the plaintiff when the plaint is presented, or to be entered in the list to be added or annexed to the plaint, and which is not produced or entered accordingly, shall not, without the leave of the Court, be received in evidence on his behalf at the hearing of the suit.

(2) Nothing in this rule applies to documents produced for cross-examination of the defendant's witnesses, or in answer to any case set up by the defendant or handed to a witness merely to refresh his memory.

[Allahabad.] Add the following rules to O. VII :—

19. Every plaint or original petition shall be accompanied by a proceeding giving an address at which service of notice, summons or other process may be made on the plaintiff or petitioner. Plaintiffs or petitioners subsequently added shall, immediately on being so added, file a proceeding of this nature.

20. An address for service filed under the preceding rule shall be within the local limits of the District Court within which the suit or petition is filed, or of the District Court within which the party ordinarily resides, if within the limits of the United Provinces of Agra and Oudh.

21. Where a plaintiff or petitioner fails to file an address for service, he shall be liable to have his suit dismissed or his petition rejected by the Court *suo motu* or any party may apply for an order to that effect, and the Court may make such order as it thinks just.

22. Where a party is not found at the address given by him for service and no agent or adult male member of his family on whom a notice or process can be served, is present, a copy of the notice or process shall be affixed to the outer door of the house. If on the date fixed such party is not present another date shall be fixed and a copy of the notice, summons or other process shall be sent to the registered address by registered post, and such service shall be deemed to be as effectual as if the notice or process had been personally served.

O. 7, R. 16.—A plaintiff founding his suit on a lost hundi must furnish security against possible claims. 166 P.L.R. 1912 = 16 I. C. 769; 59 I. C. 363. Document not filed in Court when may be allowed to be used. 60 I. C. 372.

O. 7, R. 18.—Failure to produce a document—Effect of. See 1924 Lah. 608. See also 44 C. L. J. 385 = 99 I. C. 258 = A.I.R. 1927 Cal. 168; 44 B. 625. Certified copies of public documents may be received, though not produced with plaint. 67 I. C. 686 = (A. I. R.) 1922 P. 322.

When there could be no possible doubt about the existence of a document at the date of suit, it is not proper to refuse to admit it in evidence on the ground that it had not been produced with the plaint. 8 B. 377. The only penalty which the plaintiff incurs is that laid down in this rule. 22 B. 671.

O. 7, R. 18 (2)—"Defendants' witnesses" in O. 7, R. 18, cl. (2) includes witnesses who have turned hostile to the plaintiff and may be treated as the adversary's witnesses. 54 I. C. 311.

23. Where a party engages a pleader, notices or processes for service on him shall be served in the manner prescribed by O. III, R. 5, unless the Court directs service of the address for service given by the party.

24. A party who desires to change the address for service given by him as aforesaid shall file a verified petition, and the Court may direct the amendment of the record accordingly. Notice of such petition shall be given to such other parties to the suit as the Court may deem it necessary to inform, and may be either served upon the pleaders for such parties or be sent to them by registered post, as the Court thinks fit.

25. Nothing in these rules shall prevent the Court from directing the service of a notice or process in any other manner, if, for any reasons, it thinks fit to do so.

26. Nothing in these rules shall apply to the notice prescribed by O. XXI, R. 22.

[Added by Oudh Chief Court].—19. Every plaint or original petition shall be accompanied by an address at which service of notice, summons or other process may be made on the plaintiff or petitioner. This address shall be called the 'registered address' and service thereat shall be deemed to be sufficient service.

20. Any party subsequently added as plaintiff or petitioner shall, in like manner, file a registered address at the time of applying or consenting to be joined as plaintiff or petitioner.

21. A registered address shall be within the local limits of the district Court within which the suit or petition is filed, if the plaintiff or petitioner resides or carries on business within those limits.

22. If a plaintiff or petitioner fails to file a registered address as required above, he shall be liable, at the discretion of the Court, to have his suit dismissed or his petition rejected.

An order under this rule may be passed by the Court *suo motu* or on the application of any party.

23. Where the registered address of the plaintiff or petitioner is within the limits of a headquarters town or of a municipality of India (including Burma) or Ceylon, a notice, summons or other process may be served on him at that address by registered post and such service shall be deemed to be as effectual as if the notice or process had been personally served.

24. In all cases to which rule 22 does not apply, where a plaintiff or petitioner is not found at his registered address and no agent or adult male member of his family on whom a notice or process can be served is present, a copy of the notice or process shall be affixed to the outer door of the house. If, on the date fixed, such plaintiff or petitioner is not present another date shall be fixed and a copy of the notice, summons or other process shall be sent to his registered address by registered post, and such service shall be deemed to be as effectual as if the notice or process had been personally served.

25. Whenever a plaintiff or petitioner has engaged a pleader to act for him, a notice or process for service on him shall be served in the manner prescribed by O. III, R. 5, unless the Court directs service at his registered address:

Provided that where a notice is served on a pleader under the above rule, he shall be given sufficient time to communicate with his client and to receive instructions.

Explanation :—Where 10 days' time has been allowed under this rule, this shall be deemed sufficient time within the meaning of this proviso in the absence of an application made within such 10 days by the pleader concerned for further time.

26. A plaintiff or petitioner who wishes to change his registered address shall file a verified petition, and the Court shall direct the amendment of the record accordingly. Notice of such petition shall be given to such other parties to the suit or proceedings as the Court may deem it necessary to inform, and may be either served upon the pleader for such parties or be sent them by registered post, as the Court thinks fit.

27. Nothing in Rr. 19 to 26 shall prevent the Court from directing the service of a notice or process in any other manner, if for any reason, it thinks fit.

ORDER VIII.

WRITTEN STATEMENT AND SET-OFF.

1. [S. 110, Cf. S. 112.] The defendant may, and if so required by the Court, shall, at or before the first hearing or within such time as the Court may permit, present a written statement of his defence.

Written statement.

[Oudh.] O. VIII, R. 1. Add the following as sub-R. (2) :—

The defendant shall file with his written statement a list of all the documents on which he relies as evidence in support of his case, shall produce with the written statement such of the

O. 8, R. 1.—A written statement cannot be filed by one who is not a party to the suit. 25 W. R. 17. A plaintiff could not file a written statement by way of rejoinder to that filed by defendant. 5 W. R. 56. A written statement tendered

before, or at the first hearing, need not bear any court-fee. 5 B. 400. The practice of filing written statements on behalf of persons accused of criminal offences is improper. 32 I. C. 137 = 20 C. W. N. 128.

documents as are in his possession or power, and shall cause the others to be summoned on a date to be fixed by the Court for the purpose

Explanation.—A certified copy of a public document is a document “in the power” of a party, but where a document is in the possession of a person other than the defendant, it will not be deemed to be “in the power” of the defendant.

2. The defendant must raise by his pleading all matters which show the suit not to be maintainable, or that the transaction is either void

New facts must be specially pleaded. or voidable in point of law, and all such grounds of defence as, if not raised, would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the plaint, as, for instance, fraud, limitation, release, payment, performance, or facts showing illegality.

3. It shall not be sufficient for a defendant in his written statement to deny

Denial to be specific. generally the grounds alleged by the plaintiff, but the defendant must deal specifically with each allegation of fact of which he does not admit the truth, except damages.

4. Where a defendant denies an allegation of fact in the plaint, he must not do so evasively, but answer the point of substance. Thus, if

Evasive denial. it is alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum or any part thereof, or else set out how much he received. And if an allegation is made with diverse circumstances, it shall not be sufficient to deny it along with those circumstances.

5. Every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the

Specific denial. pleading of the defendant, shall be taken to be admitted except as against a person under disability :

Provided that the Court may in its discretion require any fact so admitted to be proved otherwise than by such admission.

6. [S. 111.] (1) Where in a suit for the recovery of money the defendant claims

Particulars of set off to be given in written statement. to set-off against the plaintiff's demand any ascertained sum of money legally recoverable by him from the plaintiff not exceeding the pecuniary limits of the jurisdiction of the Court, and both parties fill the same character as they fill in the plaintiff's suit,

O. 8, R. 2.—Defence to be specific and clear 76 I. C. 603=1923 Cal. 578. Limitation should be specifically pleaded. 66 I. C. 287=34 C. L. J. 205; 69 I. C. 194. Limitation under special law cannot be allowed to be raised in appeal. 69 I. C. 194; 60 I. C. 280=32 C. L. J. 236; 46 I. C. 787=28 C. L. J. 216. Plea of want of necessity cannot be raised for the first time in appeal. 1 Pat. 612=3 Pat. L. T. 367. A defendant in a suit in ejectment, denying plaintiff's title and tenancy, cannot plead want of notice to quit. 17 M. L. J. 287. Raising of new defence for the first time in appeal not allowed. 95 I. C. 573=28 Bom. L. R. 513.

O. 8, R. 3.—As to what amounts to an admission of the case in plaint, *see* A I. R. 1927 All. 225=95 I. C. 1.

O. 8, R. 5. APPLICATION OF.—R. 5 is limited in its application to cases where there is in fact a pleading before the Court. 20 C. W. N. 1192=43 C. 1001. For scope of R. 5, *see* 47 I. C. 589=35 M. L. J. 372.

CONSTRUCTION.—Strict construction ought not to be placed on the written statements as is placed on pleadings in England. 39 I. C. 460; 45 I. C. 878. In the absence of specific denial, a document relied on by a party must be accepted as admitted between the parties and therefore need not be proved. 41 Bom. 89=18 Bom. L. R. 946. Allegations in plaint not denied in written

statement, effect of. 49 I. C. 733. The words “stated to be not admitted” in R. 5 means specifically stated to be not admitted. 22 L. W. 26=1925 Mad. 950. Omnibus clause that defendant denies all allegations not expressly admitted is not sufficient. (*Ibid.*)

O. 8, R. 6. SCOPE OF.—The rule only provides for set-off in suits for recovery of money but makes no provision for counter-claim. 1922 Cal. 1 (1). O. 8, R. 6 is not exhaustive but Courts can allow an equitable set off if the amount claimed arises out of the same transaction though not an ascertained amount. 92 I. C. 787=1926 Oudh 301. ‘Debt’ in O. 8, R. 6 means a present obligation to pay a liquidated sum of money. 42 M. 873=37 M. L. J. 193. “Ascertained sum” means a conclusive and indisputable amount. 37 I. C. 367. Specified sums are not necessarily ascertained sums of moneys “legally recoverable” within the meaning of the rule. 16 Cal. 71; 95 I. C. 358=1926 Sind 225. A sum to be ascertained on a settlement of account is not an ascertained sum. 49 I. C. 193. Distinction between ‘set-off’ and ‘counter-claim’. 24 Bom. L. R. 998=1923 Bom. 113; 47 Bom. 182=24 Bom. L. R. 328. Before a set-off can be allowed the parties must fill the same character as they fill in the plaintiff's suit. 8 Lah. 105=101 I. C. 762=A. I. R. 1927 Lah. 228. It is not open to a defendant to claim a set-off in

the defendant may, at the first hearing of the suit, but not afterwards unless permitted by the Court, present a written statement containing the particulars of the debt sought to be set off.

(2) The written statement shall have the same effect as a plaint in a cross-suit so as to enable the Court to pronounce a final judgment in respect both of the original claim and of the set-off: but this shall not affect the lien, upon the amount decreed, of any pleader in respect of the costs payable to him under the decree.

(3) The rules relating to a written statement by a defendant apply to a written statement in answer to a claim of set-off.

Illustrations.

(a) *A* bequeaths Rs. 2,000 to *B* and appoints *C* his executor and residuary legatee. *B* dies and *D* takes out administration to *B*'s effects. *C* pays Rs. 1,000 as surety for *D*; then *D* sues for the legacy. *C* cannot set off the debt of Rs. 1,000 against the legacy, for neither *C* nor *D* fills the same character with respect to the legacy as they fill with respect to the payment of the Rs. 1,000.

(b) *A* dies intestate and in debt to *B*. *C* takes out administration to *A*'s effect and *B* buys part of the effects from *C*. In a suit for the purchase-money by *C* against *B*, the latter cannot set off the debt against the price, for *C* fills two different characters, one as the vendor to *B*, in which he sues *B*, and the other as representative to *A*.

(c) *A* sues *B* on a bill of exchange. *B* alleges that *A* has wrongfully neglected to insure *B*'s goods and is liable to him in compensation which he claims to set off. The amount not being ascertained cannot be set off.

(d) *A* sues *B* on a bill of exchange for Rs. 500. *B* holds a judgment against *A* for Rs. 1,000. The two claims being both definite pecuniary demands may be set off.

(e) *A* sues *B* for compensation on account of trespass. *B* holds a promissory note for Rs. 1,000 from *A* and claims to set off that amount against any sum that *A* may recover in the suit. *B* may do so for, as soon as *A* recovers, both sums are definite pecuniary demands.

(f) *A* and *B* sue *C* for Rs. 1,000. *C* cannot set off a debt due to him by *A* alone.

(g) *A* sues *B* and *C* for Rs. 1,000. *B* cannot set off a debt due to him alone by *A*.

(h) *A* owes the partnership firm of *B* and *C* Rs. 1,000. *B* dies, leaving *C* surviving. *A* sues *C* for a debt of Rs. 1,500 due in his separate character. *C* may set off the debt of Rs. 1,000.

7. Where the defendant relies upon several distinct grounds of defence or set-off founded upon separate and distinct facts, they shall be stated, as far as may be, separately and distinctly.

8. Any ground of defence which has arisen after the institution of the suit on the presentation of a written statement claiming a set-off may be raised by the defendant or plaintiff, as the case may be, in his written statement.

respect of unliquidated damages for alleged breaches of contracts. 24 Bom. I. R. 998 = 1923 Bom. 113. Plea of set off as distinct from equitable set off 9 N. L. J. 227. Set off not pleaded in written statement, effect of *See* 28 Punj. L. R. 297 = 102 I. C. 688 = A. I. R. 1927 Lah. 431. The right of set-off exists not only in cases of mutual debts and credits but also of cross-demands arising out of the same transaction. 21 I. C. 716 = 19 C. W. N. 1183; 17 C. W. N. 1060 = 19 C. L. J. 152. R. 6 applies only to a legal set-off and not to any other set-off that a party may equitably claim. 39 I. C. 508 = 62 P. R. 1917. An equitable set-off which is barred by limitation cannot be allowed. 42 M. 873 = 37 M. L. J. 193; 22 M. 139; 28 M. L. J. 294; 39 M. 939 = 30 M. L. J. 59 = 32 I. C. 80. *See also* 44 I. C. 428 = 34 M. L. J. 32; 8 L. 105 = 101 I. C. 762 = 28 Punj. L. R. 427 = A. I. R. 1927 Lah. 228. But *see* 21 I. C. 716 = 19 C. W. N. 1183. A claim to set-off must be adjudicated according to common sense and equity. 82 P. R. 1914 = 25 I. C. 560 = 277 P. L. R. 1914. Time-barred claim by a co-parcener against joint family cannot be set-off. 41 M. L. J.

370 = 62 I. C. 852. In case of legal set-off, defendant is not bound to put forward his counter claim and a separate suit by him will lie. 60 I. C. 226 = 12 L. W. 173. The Court is bound to try a claim, to set off which falls under O. 8, R. 6. 57 I. C. 636 = 12 L. W. 85; 40 M. 688 = 30 M. L. J. 655. A plea of set-off cannot be raised without filing a written statement. 25 I. C. 361 = 16 M. L. T. 122; 28 Punj. L. R. 297 = A. I. R. 1927 Lah. 431. Conditions as to right to set-off. 2 Pat. L. J. 451 = 40 I. C. 350. Failure to plead equitable set off is not bar to suit. It is not obligatory to plead an equitable set-off. 49 M. L. J. 14 = 1925 M. 830. Defendant making a statement that he would make a separate counter claim is not estopped from claiming a set-off in the same suit. 20 L. W. 531 = 1925 Mad. 228. R. 6 does not apply to unascertained sum, but if cross-demands are very closely connected, set-off can be pleaded. 49 M. L. J. 14 = 1925 M. 830. The whole of the sum claimed as set-off should be within jurisdiction. 2 Rang. 349 = 84 I. C. 956. *Court-fees* on claim of set-off. *See* A. I. R. 1927 Nag. 74 = 97 I. C. 916.

9. [S. 112.] No pleading subsequent to the written statement of a defendant other than by way of defence to a set-off shall be presented except by the leave of the Court and upon such

Subsequent pleadings.
terms as the Court thinks fit, but the Court may at any time require a written statement or additional written statement from any of the parties and fix a time for presenting the same.

10. [S. 113.] Where any party from whom a written statement is so required fails to present the same within the time fixed by the Court, the Court may pronounce judgment against him, or make such order in relation to the suit as it thinks fit.

Procedure when party fails to present written statement called for by Court.

[Allahabad.] Add the following rules to O. VIII :—

11. Every party, whether original, added or substituted, who intends to appear and defend any suit or original petition shall, on or before the date fixed in the summons or notice served on him as the date of hearing, file in Court a proceeding stating his address for service, and if he fails to do so he shall be liable to have his defence, if any, struck out and to be placed in the same position as if he had not defended. In this respect the Court may act *suo motu* or on the application of any party for an order to such effect, and the Court may make such order as it thinks just.

12. Rules 20, 22, 23, 24, 25 and 26 of Order VII shall apply, so far as may be, to addresses for service filed under the preceding Rule.

[Note. R. 26 has been deleted by Allahabad High Court.]

[Oudh.] 11. Every defendant in a suit or opposite party in any proceeding shall, on the first day of his appearance in Court, file an address (to be called the 'registered address') for service on him of any subsequent notice, summons or other process; and, if he fails to do so, shall be liable, at the discretion of the Court, to have his defence or reply, if any, struck out, and to be placed in the same position as if he had made no defence or reply.

An order under this rule may be passed by the Court *suo motu* or on the application of any party.

12. Rules 21, 23 and 25 to 27 of Order VII shall apply, so far as may be, to addresses for service filed under the preceding rule, and rule 24 shall, in the same manner, apply but as if the words at the beginning "In all cases to which rule 23 does not apply" were omitted.

13. Nothing in rules 11 and 12 shall apply to the notice prescribed by O. XXI, R. 22.

ORDER IX.

APPEARANCE OF PARTIES AND CONSEQUENCE OF NON-APPEARANCE.

1. [S. 96.] On the day fixed in the summons for the defendant to appear and answer, the parties shall be in attendance at the Court-house in person or by their respective pleaders, and the suit shall then be heard unless the hearing is adjourned to a future day fixed by the Court.

Parties to appear on day fixed in summons for defendant to appear and answer.

Dismissal of suit where summons not served in consequence of plaintiff's failure to pay costs.

2. [S. 97.] Where on the day so fixed it is found that the summons has not been served upon the defendant in consequence of the failure of the plaintiff to pay the court-fee or postal charges (if any) chargeable for such service, the Court may make an order that the suit

be dismissed :

O. 8, R. 9.—Court's permission is necessary for filing pleading in reply to defendant's written statement. 27 Bom. L. R. 890=1925 B. 390.

O. 8, R. 10.—O. 8, R. 10, relates back to R. 1 as well as to R. 9, and the rest are of the nature of an explanation to R. 1. 40 I. C. 223=(1917) M. W. N. 241. But see 1 Bom. 217; 43 Cal. 1001.

APPLICABILITY.—R. 10 applies only to specific requirement by the Court to the filing of a written statement and not to a general direction in the summons that such a written statement may be filed. 2 O.W.N. 391=12 O. L. J. 532=88 I. C. 540=A. I. R. 1925 Oudh 567. Vakil refusing to file is sufficient cause to excuse delay in filing written statement. 41 M. L. J. 213=44 Mad. 978.

O. 8, R. 1.—O. 9 does not apply to execution

proceedings. 35 I. C. 337. See also 17 All. 106; 41 I. C. 586=21 C. W. N. 767. 47 C. L. J. 87; 51 M. L. J. 219=1926 M. 980=97 I. C. 1008; 23 L. W. 227=1926 M. 412=50 M. L. J. 200; 50 Mad. 67=26 L. W. 878; 100 I. C. 518=A. I. R. 1927 Cal. 420; 53 Cal. 679. O. 9 does not apply to the special set of circumstances contemplated by O. 10, R. 4. (1921) M. W. N. 390=63 I. C. 961=14 L. W. 15. The Court has power to order a case to be set down for hearing, if the defendant enters appearance before the time for appearance fixed in the summons. 4 Beng. L. R. App. 75. For the meaning of the words "day fixed," see 2 A. 67. A defendant has a right to appear at the hearing of the case although he has not been served. 15 B. 160.

O. 9, R. 2.—Court ordering summons in the ordinary way and by registered post—Plaintiff

Provided that no such order shall be made although the summons has not been served upon the defendant, if on the day fixed for him to appear and answer he attends in person or by agent when he is allowed to appear by agent.

Where neither party appears, suit to be dismissed.

3. [S. 98.] Where neither party appears when the suit is called on for hearing, the Court may make an order that the suit be dismissed.

4. [S. 99.] Where a suit is dismissed under rule 2 or rule 3, the plaintiff may (subject to the law of limitation) bring a fresh suit; or he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for his not paying the court-fee and postal charges (if any)

Plaintiff may bring fresh suit or Court may restore suit to file.

paying process fee and not postal charges—Dismissal of suit—Illegal. 9 Lah. L. J. 96=90 I. C. 909=A. I. R. 1927 Lah. 157; 99 I. C. 909. The rule has no application to a case where the plaintiff did not furnish the correct address of the defendants or did not go with the process-server to serve the summons. 99 I. C. 898=9 Lah. L. J. 135=A. I. R. 1927 Lah. 170. The Court cannot dismiss the suit before the date fixed for hearing. 2 A. 318. The rule will apply where there are more defendants than one, and the plaintiff fails to pay process-fees for one or some of the defendants only. 5 Bom. H. C. (A. C.) 119. But see R. 11. Reasonable time for compliance with Court's order to be given. 55 I. C. 650. Failure to file affidavits of service of summons on guardian of minor defendants—Dismissal for default is not proper. 55 I. C. 826=1 Pat. L. T. 125. A fresh application can be made where an application for a final decree in a mortgage suit is dismissed for default of appearance of both parties. 43 I. C. 518=16 A. L. J. 1431. The mere fact that a case had been previously dismissed for default is no reason for refusing to restore it after a second dismissal. 43 I. C. 180. On this rule, see also 9 Cal. 163; 20 Bom. 541. No appeal lies from an order dismissing a suit under O. 9, Rr. 2 and 4 for default, as it is not a decree, plaintiff could seek relief under R. 4. 38 All. 357; 9 C. 627. Dismissal of an application for insolvency is not a bar for the making of a fresh application. A. I. R. 1928 Pat. 116 (49 I. C. 229, F.).

O. 9, R. 3.—Rule applies only to a case where a date is fixed for the appearance of the defendant. 40 All. 592=25 A. L. J. 437=101 I. C. 676=A. I. R. 1927 All. 439. As to whether a suit dismissed under this rule can be restored. See 103 I. C. 620. The mere physical presence of a pleader not instructed to proceed with the case is not an appearance. 9 I. C. 842. Notice of application for restoration of a suit dismissed under O. 9, R. 3 in the absence of both the parties, need not be sent to the other side. (10 A. L. J. 399, foll.) 24 O. C. 347=1923 Oudh 55. When the parties state that the case be struck off as settled it amounts to withdrawal and no suit can lie again. 32 I. C. 624=(1916) 1 M. W. N. 171. Application for amendment of issues—Parties absent—Suit cannot be dismissed. 6 Pat. L. J. 331=63 I. C. 746. See also 102 I. C. 416=A. I. R. 1927 Sind 228. Failure to appear must be on the day fixed for hearing, or on the date to which the hearing is adjourned. 2 A. 67 (P.C.); 4 M.H.C. 56. But the suit is not to be dismissed for failure to appear on the day fixed for judgment. 28 Punj.

L. R. 324=100 I. C. 472=9 Lah. L. J. 178. A judge is not bound to wait until the Court is about to close for the day. 7 Mad. 356. When neither party appears, the Court should dismiss the suit, and not strike the case off the file. 10 M. 270. The rule applies to execution applications 20 B. 541. See also 9 C. 163. No appeal lies from an order under this rule. 10 M. 270.

O. 9, R. 4. APPLICATION.—O. 9, R. 4, C. P. Code, expressly applies to suits, and cases under O. 21, Rr. 100 and 101 are not suits within this rule. 52 I. C. 416. But see 2 P. 372 *infra*. An application under O. 21, R. 100 is not an application in execution the proceedings being in the nature of a summary suit. R. 4 can well apply to proceedings under O. 21, R. 100. 4 Pat. L. T. 93=2 Pat. 372. O. 9, R. 4 does not apply to the dismissal of an application under O. 21, R. 90. 53 Cal. 679=1926 Cal. 773=96 I. C. 705.

"SUFFICIENT CAUSE," WHAT IS—A *bona fide* mistake which is not unreasonable amounts to sufficient cause. 96 I. C. 881 (1)=1926 Lah. 634; 3 Bom. H. C. 60. Whether absence of counsel amounts to sufficient cause. See 26 M. 599. Where the non service is due to the process being mislaid in Court, the suit should be restored. 9 Lah. L. J. 19=100 I. C. 595 (1)=28 Punj. L.R. 136. Grounds for restoration of suit dismissed under R. 3. See 103 I. C. 620. As to carelessness of petitioner see 27 Punj. L.R. 264. An application under this rule need not always be accompanied by an affidavit. 3 Bom. L. R. 130. Default to pay process-fees for the attendance of one of several defendants—Suit cannot be dismissed against all. 60 I. C. 377=2 Pat. L. T. 256. Duly authorised agent present—Suit cannot be dismissed for default. 3 Pat. L. T. 447=68 I. C. 659. A Judge when restoring a suit to file under this rule cannot pass an order as to the general costs of the suit. 26 B. 201. An order of dismissal for default can under R. 4 be set aside only by the Court which passed the order. 2 Lah. L. J. 48=56 I. C. 884. The two remedies provided by O. 9, R. 4, are not mutually exclusive. 96 I. C. 187=1926 All. 675.

NOTICE—On an application under O. 9, R. 4 notice to a defendant is unnecessary. (10 A. L. J. 399, foll.) 24 O. C. 347=9 O. L. J. 52=64 I. C. 767=1923 Oudh 55.

APPEAL.—No appeal lies from an order under R. 4 refusing to set aside the dismissal of a suit under R. 3. 43 I. C. 180; 42 I. C. 613=2 Pat. L. W. 172. Fresh application can be made although the applications to sue *in forma pauperis* is once dismissed. 2 Bur. L. J. 217=1924 Rang. 161; 53 C. 679=96 I. C. 705.

required within the time fixed before the issue of the summons, or for his non-appearance, as the case may be, the Court shall make an order setting aside the dismissal and shall appoint a day for proceeding with the suit.

- 15. [Cf. S. 99-A.]** (1) Where, after a summons has been issued to the defendant, or to one of several defendants, and returned unserved, the plaintiff fails, for a period of three months from the date of the return made to the Court by the officer ordinarily certifying to the Court returns made by the serving officers, to apply for the issue of a fresh summons the Court shall make an order that the suit be dismissed as

against such defendant, unless the plaintiff has within the said period satisfied the Court that—

- (a) he has failed after using his best endeavours to discover the residence of the defendant who has not been served, or
 - (b) such defendant is avoiding service of process, or
 - (c) there is any other sufficient cause for extending the time,
- in which case the Court may extend the time for making such application for such period as it thinks fit.

(2) In such case the plaintiff may (subject to the law of limitation) bring a fresh suit.

Procedure when only plaintiff appears.

When summons duly served.

When summons not duly served.

(c) if it is proved

When summons served, but not in due time.

6. [S. 100.] (1) Where the plaintiff appears and the defendant does not appear when the suit is called on for hearing, then—

(a) if it is proved that the summons was duly served, the Court may proceed *ex parte*;

(b) if it is not proved that the summons was duly served, the Court shall direct a second summons to be issued and served on the defendant;

(c) if it is proved that the summons was served on the defendant, but not in sufficient time to enable him to appear and answer on the day fixed in the summons, the Court shall postpone the hearing of the suit to a future day to be fixed by the Court, and shall direct notice of such day to be given to the defendant.

(2) Where it is owing to the plaintiff's default that the summons was not duly served or was not served in sufficient time, the Court shall order the plaintiff to pay the costs occasioned by the postponement.

O. 9, R. 5.—¹ Rule 5 (1) was substituted by Act XXIV of 1920, S. 2. Rule 5 does not give the appellant the right to apply for fresh summons at any time within a year (now 3 months) from the date of return to the Court. 17 I. C. 294. Dismissal for default—Absence of petitioner—Non-service—Effect of, 1926 Cal. 112. The provisions of O. 9, R. 5 giving one year's time (now 3 months' time) for the issue of first summons, would not apply to appeals. 50 Bom. 815 = 100 I. C. 147 = 28 Bom. L. R. 1446 = A. I. R. 1927 Bom. 68, dissenting from. 25 M. L. J. 451; see also 21 I. C. 420. A summons ought not to be ordered after the lapse of one year (now 3 months) unless the plaintiff shows that there has been no laches on his part. 15 B. L. R. (App.) 12. See also 5 C. 126; 3 Bom. L. R. 402.

O. 9, R. 6. SCOPE OF RULE—PROCEDURE.—See 1 Pat. 188 = 69 I. C. 837. R. 6 lays down when the Court may proceed *ex parte* but there appears to be no explanation in the Code what *ex parte* procedure is. 60 I. C. 619 = 1923 Nag. 83. A decree passed on merits in the absence of the plaintiff and his pleader reporting no instructions is an *ex parte* decree (1927) M. W. N. 897.

A decree passed in the presence of the pleader for defendants is not an *ex parte* decree. 6 P. 383 = 103 I. C. 711 = A. I. R. 1927 Pat. 291. The application of the rule is not limited to defendants residing within British India. 23 A. 99. The words "proceed *ex parte*" in R. 6 mean proceed to take and determine evidence. 42 Cal. 1001 = 20 C. W. N. 1192. The appearance referred to in this rule is an appearance in an answer to a summons to appear and answer the claim on a day specified therein. 7 A. 538. "When a suit is called on for hearing" in connection with O. 9, refers to the first day's hearing and in connection with O. 17, R. 2, means "when the suit is first called on for hearing." 26 L. W. 76 = 104 I. C. 371 = A. I. R. 1927 Mad. 799. *Ex parte* proceedings cannot be taken on the basis of a service effected through registered post. 1926 Lah. 579 = 95 I. C. 874. The mere fact of a case, being *ex parte*, does not render bad evidence otherwise reliable. 37 I. C. 27 = 3 O. L. J. 468. A decree cannot be passed *ex parte* merely because the defendant does not appear. The plaintiff must prove *prima facie* that his claim is true. 91 I. C. 119 = 1926 Oudh 192

Procedure where defendant appears on day of adjourned hearing and assigns good cause for previous non-appearance.

7. [S. 101.] Where the Court has adjourned the hearing of the suit *ex parte*, and the defendant, at or before such hearing, appears and assigns good cause for his previous non-appearance, he may, upon such terms as the Court directs as to costs or otherwise, be heard in answer

to the suit as if he had appeared on the day fixed for his appearance.

8. [S. 102.] Where the defendant appears and the plaintiff does not appear when the suit is called on for hearing, the Court shall make an order that the suit be dismissed, unless the defendant admits the claim, or part thereof, in which case the Court shall pass a decree against the defendant upon such admission and, where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder.

9. [S. 103.] (1) Where a suit is wholly or partly dismissed under rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But he may apply for an order to set the dismissal aside, and if he satisfies

Decree against plaintiff by default bars fresh suit.

O. 9, R. 7.—An application to the Court under O. 9, R. 7 can be made through a vakil notwithstanding that the Court had decided to proceed *ex parte* owing to the non-appearance of the defendant in person pursuant to an order of the Court. 55 I. C. 945=11 L. W. 289. In the absence of good and sufficient cause for previous non-appearance the defendant cannot be allowed to appear and defend the suit; and the case should proceed *ex parte* against him. 1 B. 217; 9 B. L. R. App. 15. But see also 26 M. 599. Defendant declared *ex parte*—Appearance on adjourned day—Application to appear is not necessary. 92 I. C. 493=1926 Sind 181; 91 I. C. 545=1925 Mad 1275; 106 I. C. 664=39 M. L. T. 656=(1928) M. W. N. 103 (1). A guardian's laches is a sufficient cause for setting aside an *ex parte* decree or order in the case of minors. (27 M. I. J. 166 and 6 C. L. R. 69, Foll.) 11 L. W. 289. Good cause not shown—Application need not be allowed. 26 O. C. 10=73 J. C. 591. An appeal lies from an order dismissing a suit for default where part of the claim is rejected. 45 M. L. J. 497=4 Lah. 284=50 I. A. 162 (P.C.).

O. 9, R. 8. SCOPE OF.—53 Cal. 844. O. 9, R. 8 and O. 17, R. 2 and 3.—Scope of—Failure to appear—Procedure. 24 Bom. L. R. 775=46 Bom. 1026. Absence of plaintiff—Court cannot hear cases on merits. 20 A. L. J. 123=1923 All. 68; 55 I. C. 966; 37 All. 460=29 I. C. 553. Where the plaintiff is absent but he has been adjudged insolvent, whether formal notice to Official Assignee necessary even though he has actual knowledge of the suit. A. I. R. 1927 Cal. 76=31 C. W. N. 22=53 Cal. 844. Where there are several defendants jointly interested in a particular matter, an admission by some of them is relevant against all the defendants. (4 C. 133; 45 C. 159, Ref.) 69 I. C. 35=1923 Lah. 123.

MEANING OF TERMS.—The word 'claim' in R. 8 being synonymous with the amount sued for, refers to the right claimed irrespective of the amount stated in the relief column. 35 I. C. 65. The words 'admits the claim or part thereof' applicable to the cases where the Court can consider on the examination of the plaint and defendant's written statement that the defendant is ready to pay the admitted claim there

and then or submit to the relief claimed in the plaint. 35 I. C. 65.

COURT'S POWERS TO PASS ORDERS.—The provisions of O. 9, Rr. 8 and 13 are exhaustive in respect of cases where the plaintiff makes default in appearance in a suit. 28 Punj. L. R. 554=103 I. C. 425=A. I. R. 1927 Lah. 622. In dismissing a suit for default, a Court has no jurisdiction to provide that the order shall not prejudice a minor plaintiff. 63 I. C. 736=6 Pat. L. J. 317. A Court has jurisdiction to direct a plaintiff to appear in person and to dismiss his suit if he fails to appear. But it cannot dismiss the suit against the other plaintiffs. 50 I. C. 323=4 Pat. L. J. 152. A person added as additional plaintiff on the objection of the defendant was ordered to appear personally—Order dismissing suit for default of appearance is erroneous. 95 I. C. 865 (1)=1926 Lah. 577. Where a plaintiff and his witnesses were absent and his pleader had instructions only for an adjournment the Court can dismiss the suit only under O. 9, R. 8 and not under O. 17, R. 3. 23 I. C. 614=(1914) M. W. N. 344; 1926 Cal. 246. Where a sole plaintiff dies before trial, the dismissal of the suit for non-appearance is improper. 35 All. 331=40 I. A. 150=25 M. I. J. 148 (P.C.). When all the evidence has been adduced but plaintiff and his pleader do not appear at a subsequent hearing, the suit cannot be dismissed. 7 Bom. L. R. 201. Dismissal for default—If plaintiff dead on the date of hearing order is a nullity. 73 I. C. 230=1924 Oudh 114. The date fixed for the settlement of issues is a date fixed for the hearing of the suit within O. 9, R. 8. 48 I. C. 192=1919 Pat. 32.

APPEAL.—Dismissal under R. 8—Appeal does not lie. (1922) M. W. N. 483=1922 Mad. 416. As to powers of appellate court, see 1926 All. 284=92 I. C. 496.

O. 9, R. 9. SCOPE OF.—See 41 I. C. 905; 29 I. C. 902; 55 I. C. 481=23 O. C. 18. See also 1 Pat. L. J. 547=38 I. C. 53. (16 C. W. N. 643 diss.; 29 C. 598 expl.); 8 L. R. (Rev.) 281.

APPLICABILITY.—R. 9 is applicable to the dismissal of an application for probate which had under S. 83 of the Probate and Administration Act been treated as a suit. 52 I. C. 639. But see 53 Cal. 578. O. 9, R. 9 has no applica-

the Court that there was sufficient cause for his non-appearance when the suit was

tion to proceedings in execution. 17 All. 106; 13 C. L. J. 532; 41 Cal. 1; 38 Mad. 199; 35 I. C. 337 (2); 21 C. W. N. 769; 4 Pat. L. J. 135 = 49 I. C. 617 = 1919 Pat. 75 (F. B.); 47 I. C. 154 = 1918 Pat. 265; 100 I. C. 343 = 45 C. L. J. 60. 50 Bom. 457 = 1926 Bom. 377 = 28 Bom. L. R. 686 = 96 I. C. 411. A fresh application for execution is competent when a previous application is dismissed for default as R. 9 does not apply. 21 C. W. N. 769; 25 L. W. 192 = 99 I. C. 954 = A. I. R. 1927 Mad. 355 = 52 M. L. J. 123. R. 9 does not apply to an application under O. 21, R. 2 (2). 63 I. C. 855. An application for setting aside a sale under S. 47 and O. 21, R. 90 is not an application for execution. 33 I. C. 581 = 20 C. W. N. 1203; 29 I. C. 395 = 19 C. W. N. 758; 59 I. C. 575 = 23 O. C. 349. Where an application for setting aside an execution sale under O. 21, R. 90 is dismissed for default another application lies under R. 9. (*Ibid.*) R. 9 is applicable to an application for final decree for foreclosure dismissed for default. 26 O. C. 194 = 1924 Oudh 30. A second petition to have a person declared an insolvent is not barred under this rule. 39 M. L. T. 118 = (1927) M. W. N. 176 = 101 I. C. 349 (1) = A. I. R. 1927 Mad. 579. Under R. 9 an application lies, when an application, for restoring a suit dismissed for default, is itself dismissed for default. 44 Cal. 950 = 21 C. W. N. 30. *See also* 54 Cal. 405 = 31 C. W. N. 576 = 103 I. C. 69 = A. I. R. 1927 Cal. 534; 27 Punj. L. R. 564 = 99 I. C. 1055 = A. I. R. 1927 Lah. 71 (1); 100 I. C. 313; 3 Rang. 534 = 93 I. C. 94 = 1926 Rang. 74. But *see* 23 L. W. 538 = 1926 Mad. 654 = 94 I. C. 151; 101 I. C. 705 = 7 N. L. R. 32. Contra 51 I. C. 152. R. 9 bars a suit where the cause of action is the same. 39 M. L. J. 412 = 60 I. C. 201. Where the cause of action is different a second suit is maintainable. 5 R. 471 = 6 Bur. L. J. 148 = 104 I. C. 313 = A. I. R. 1927 Rang. 281; 5 R. 785. But when a suit in ejectment is dismissed under O. 9, R. 8 a fresh suit cannot be instituted in a subsequent year 9 L. R. 287 (Rev.) = 4 O. W. N. 1202. Application under R. 9 must be disposed of on evidence and not on the ground that it is *bona fide* or otherwise. 42 I. C. 649 = 22 C. W. N. 671. Fresh suit, when barred. 45 All. 81 = 1923 All. 408. The rules or orders dealing with the case of the new appearance of a suitor do not apply to the situation arising from the death of suitor. 35 All. 331 = 40 I. A. 150 (P. C.). The dismissal for default of a suit for partition does not bar a second suit for partition. 5 Rang. 785; 49 Mad. 939 = 51 M. L. J. 254. An order dismissing an appeal for default, is not a decree and therefore the decree of the Court of first instance is not superseded by it nor does it merge into it. (39 All. 13; 36 All. 350 (P. C.) foll.) 39 All. 393. An order under R. 9 setting aside an order of dismissal for default made on the application of some of the plaintiffs may operate in favour of all of them, as the Court setting aside the order may direct. 55 I. C. 481 = 23 O. C. 18. Subsequent application for assessment of rent where the application failed for default, is not barred under S. 158 of the Bengal Tenancy Act. 2 P. 192 = 4 Pat. L. T. 705. *See also* 8 Pat. L. T. 789 = 103 I. C.

615 = A. I. R. 1927 Pat. 375 Conditional order—Order to restore on payment of costs—Appeal lies. 26 I. C. 895 = 12 A. L. J. 1270. *See also* 49 Cal. 616.

APPLICATION WHEN TO BE MADE.—Application to restore suit dismissed for default must be made within 30 days of the order and the limitation does not cease to run by making an application for review. (2 C. W. N. 318, sel.) 1 Pat. L. J. 547 = 38 I. C. 53.

RESTORATION.—A Court can in its inherent powers restore a suit dismissed for default of appearance, on a ground other than sufficient cause for non-appearance. 34 A. 426; 44 B. 82 = 53 I. C. 252; 20 S. L. R. 266; 5 Bur. L. J. 139 = 99 I. C. 151 = A. I. R. 1927 Rang. 58. *See contra* 28 Punj. L. R. 554 = 103 I. C. 425 = A. I. R. 1927 Lah. 623. Appearing in court on the same day after the case has been disposed of *ex parte*, cannot entitle a party to restoration. 103 I. C. 129 = A. I. R. 1927 Sind 223. *See also* 100 I. C. 313. There is no rule that enables the Court to restore an application made under O. 9, R. 9 which has been dismissed for want of prosecution. Even S. 151 does not apply in such a case. 1923 Bom. 386. Where the plaintiff exonerates certain defendants from liability and the suit is subsequently dismissed for default, it cannot be restored as against the exonerated defendants. 25 O. C. 67 = 1922 Oudh 160. A difference in the mode of relief claimed does not affect the identity of the cause of action. 15 C. 422 (P. C.); 96 I. C. 287 = 1926 Lah. 562. The dismissal of a suit for redemption does not bar a subsequent suit for possession. 10 B. 28. A *bona fide* mistake which is not unreasonable amounts to sufficient cause. 3 Bom. H. C. R. 60. Whether absence of counsel amounts to sufficient cause. *See* 7 A. 542; 100 I. C. 313; 100 I. C. 793; 6 R. 471 = 6 Bur. L. J. 148 = 104 I. C. 313 = A. I. R. 1927 Rang. 281; 9 Lah. L. J. 80 = 101 I. C. 444 = 28 Punj. L. R. 204; 101 I. C. 880 = 4 O. W. N. 508 = A. I. R. 1927 Oudh 211. Minority is not in itself 'sufficient cause' for restoration under O. 9, R. 9 (1), unless the guardian has been guilty of laches or gross neglect. The Court is bound to enquire into the question (26 M. 599; 30 M. 274, foll.; 24 M. L. J. 235, dist.) 25 I. C. 450 = 27 M. L. J. 167. Gross negligence on the part of a next friend in the conduct of a suit, prevents the effect of the bar contained in the rule. 22 C. 8. *See also* 24 B. 547 at p. 552; 19 B. 571. Illness of a brother was held not sufficient cause to set aside a dismissal for default 2 Pat. 784 "Sufficient cause"—Pleader sitting at the next room not hearing call. 102 I. C. 416 = A. I. R. 1927 Sind 228. Appearance of counsel two minutes late. 103 I. C. 313. Late arrival of train, 98 I. C. 868 = A. I. R. 1927 Lah. 40. Counsel engaged but remaining absent—Case should be restored 95 I. C. 260 = 1926 Nag. 409. Illness of plaintiff is a sufficient cause. 95 I. C. 240 (1) = 1926 Lah. 541. An application under O. 9, R. 9 should not be dismissed *limine* 106 I. C. 821. Few minutes delay due to plaintiff's going to call his pleader is sufficient cause. 96 I. C. 821 = 1926 Lah. 650 (2). *See also* 93 I. C. 211 (1) = 23 L. W. 430. 96 I. C. 402 = 8 Lah. I. J. 422.

REVIEW.—Plaintiff is entitled to apply for review of judgment when his suit dismissed for

called on for hearing, the Court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.

(2) No order shall be made under this rule unless notice of the application has been served on the opposite party.

[Lahore] Order IX, Rule 9 (1), the following proviso should be added :—

" Provided that the plaintiff should not be precluded from bringing another suit for redemption of a mortgage, although a former suit may have been dismissed for default."

10. [S. 105.] Where there are more plaintiffs than one, and one or more of them appear, and the others do not appear, the Court may, at the instance of the plaintiff or plaintiffs appearing, permit the suit to proceed in the same way as if all the plaintiffs had appeared, or make such order as it thinks fit.

Procedure in case of non-attendance of one or more of several plaintiffs.

11. [S. 106.] Where there are more defendants than one, and one or more of them appear and the others do not appear, the suit shall proceed, and the Court shall, at the time of pronouncing judgment, make such order as it thinks fit with respect to the defendants who do not appear.

Consequence of non-attendance, without sufficient cause shown, of party ordered to appear in person.

12. [S. 107.] Where a plaintiff or defendant, who has been ordered to appear in person, does not appear in person, or show sufficient cause to the satisfaction of the Court for failing so to appear, he shall be subject to all the provisions of the foregoing rules applicable to plaintiffs and defendants, respectively, who do not appear.

Setting aside Decrees ex parte.

13. [S. 108.] In any case in which a decree is passed *ex parte* against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the summons was not duly served, or that he

Setting aside decree *ex parte* against defendant.

default and he has not applied under O. 9, R. 9 to set aside the order. (26 Cal. 598; 16 C.W.N. 643, foll.) 37 M. L. J. 59=50 I.C. 327; 20 S. L. R. 266.

REVISION.—A revision lies against an order re-admitting a suit dismissed for default. 29 I.C. 1004. Decision on merits instead of dismissal under the rule—Revision. See 4 O. W. N. 644. But an appellate or revisional authority should not lightly interfere with an order of restoration. 17 M. L. J. 225. See also 46 C. L. J. 182.

APPEAL.—Order refusing to set aside the dismissal for default. 100 I. C. 343=45 C. L. J. 60. See also 51 Bom. 67=99 I. C. 384=1927 Bom. 1.

O. 9, R. 12.—The dismissal of a suit under this rule is a highly penal matter, and ought not to be done unless after a distinct order to attend, he has deliberately disobeyed the order. 17 W. R. 141. See also 4 Pat. L. J. 152; 6 L. W. 337. A defendant, a minor represented by a guardian, is a party to the suit whose production in Court can be compelled by a direction to his guardian. (23 M. L. J. 676, dist.) 55 I. C. 945=11 L. W. 289. The Court is not bound to have recourse to all the processes prescribed by law for compelling the attendance of the defendant as a witness. 5 C. 353. See also 8 A. 20. The non-filing of a written statement does not justify the Court in proceeding *ex parte*. 2 M. H. C. R. 311. If a defendant appears and files a written statement, he ought not to be placed *ex parte*. 3 M. 264.

O. 9, R. 13. SCOPE.—Applicability to an order under S. 53, Prov. Insol. Act. 103 I.C. 381=A.I.R. 1927 Mad. 897. O. 9, R. 13 deals only with default in appearance and not in the doing of any act ordered by the Court. 105 I.C. 842=A.I.R. 1928 Nag. 75. Rule applies to every case in which a decree is passed *ex parte* against a defendant either by reason of his non-appearance at the first hearing, or by reason of his non-appearance at an adjourned hearing. 23 C. 738 (F. B.); 20 B. 380. The rule contemplates the case of a Court setting aside its own decree, and not that of another and higher tribunal. 4 C.W.N. 456. R. 13 is an enabling one which prescribes what is to be done in the ordinary course to get an *ex parte* decree set aside. 42 M.L.J. 344=1922 Mad. 10. The word "appearance" implies that the party is present at the trial either in person or through pleader for the purpose of conducting the case. 1922 Pat. 485=1 P. 188. The words "was prevented by any sufficient cause from appearing" must be liberally construed to enable the court to exercise powers *ex debito justitiæ*. 4 O.W.N. 356=101 I. C. 632 (2)=A. I. R. 1927 Oudh 173. See also 32 C. W. N. 10. The word "duly" does not mean personally. 102 I.C. 243=A.I.R. 1927 Mad. 507=52 M. L. J. 477. Mere misdescription of plaintiff in an application under this rule is no reason for refusal to hear the application on merits. 23 N.L.R. 71=102 I.C. 24=A. I. R. 1927 Nag. 251.

was prevented by any sufficient cause from appearing when the suit was called on for

APPLICABILITY TO ORDERS IN EXECUTION UNDER S. 47.—They are decrees as defined in S. 2 and hence *ex parte* orders are *ex parte* decrees. 37 Mad. 462=26 M. L. J. 189; to decrees passed under Sch. 11, para. 21 (2). 62 I. C. 927. O. 9, R. 13 does not apply to delivery proceedings under O. 21, R. 97 to 101 as they are execution proceedings. 23 L. W. 227=92 I. C. 533=50 M. L. J. 200=1926 Mad. 412. An application under O. 9, R. 13 to set aside an order passed in a preceding application of the same nature lies. 76 I. C. 583=1923 Cal. 552. Inherent powers of Court under S. 151 cannot be invoked to set aside an *ex parte* decree long after the limitation prescribed by Art. 164 has passed. 1 Pat. 277=65 I. C. 341; 53 I. C. 847; 78 I. C. 660=1923 Lab. 147 (1). But see also next case. There is no inherent power in a Court apart from O. 9, R. 13 to set aside an *ex parte* decree on an application made for that purpose. The scope of the inherent power of a court pointed out. See 43 Mad. 94=37 M. L. J. 599 (F.B.) (26 Mad. 599, overruled; 24 M. L. J. 235, affirmed.) An order refusing exercise of such powers by court is not appealable. 1 Pat. 277=65 I. C. 341. Where there is transfer of territorial jurisdiction after decree, the new court can entertain application to set aside *ex parte* decree. 42 M. L. J. 344=1922 Mad. 33. Though an appeal is pending against an *ex parte* decree, an application to set it aside should be made to the Court which passed the decree and not to the Court hearing the appeal. (30 Mad. 535, dist.; 27 Mad. 602; 39 All. 13 and 38 Cal. 394, foll.); 44 Mad. 731=41 M. L. J. 90. Proceedings under O. 9, R. 13 may go on *ad infinitum*. (44 Cal. 950, Foll.); 76 I. C. 583=1923 Cal. 552.

DECREE WHEN EX PARTE.—A decree passed owing to defendant's default of appearance in spite of the Court's direction to him to appear on that day, amounts to an *ex parte* decree. 27 I. C. 882=2 L. W. 105. The mere sitting in Court of the pleader of a party having no instructions but to ask for time is not an appearance. 3 Pat. L. J. 481=46 I. C. 488. An application to set aside a final decree in a mortgage suit passed *ex parte* is maintainable under O. 9, R. 13. 48 I. C. 71=35 M. L. J. 375. Where an application to set aside an *ex parte* decree is conigned to the record room in account of non-payment of process fee, it is tantamount to dismissal for default. 102 I. C. 754. Conditional order, when proper where there has been no default on the part of the party asking for re-hearing, e.g., where he has not been duly served it is inequitable for the Court to impose conditions. 57 I. C. 300=5 Pat. L. J. 420. A Court should not as a condition precedent to setting aside an *ex parte* decree require the deposit of a large sum of money. 74 I. C. 86=1924 Oudh 229; or order an unreasonably large compensation. 8 L. R. 176 (Rev.). An order giving time to pay the decree amount does not of itself operate as a stay of execution of the *ex parte* decree itself. 32 I. C. 731=3 L. W. 35. An order setting aside an *ex parte* decree under O. 9, R. 13 is not *ultra vires* if it does not impose any conditions as to costs. 32 I. C. 984. Where an *ex parte* decree is set aside on condition of defendant's furnishing security the Court must adjourn the case in order to take security and must pass final

orders only after the party has tendered or failed to furnish security. 43 I. C. 1=6 L. W. 767. Where an *ex parte* decree is set aside, the defendant is entitled to be restored to his original position under S. 144. 72 I. C. 912=2 Pat. 277. A decree based on a compromise cannot be treated as an *ex parte* decree and consequently O. 9, R. 13 does not apply. 27 I. C. 227=19 C. W. N. 118. *Ex parte* decree against defendant.—Suit dismissed by consent against another.—Court cannot restore suit against that other while setting aside the *ex parte* decree. 104 I. C. 216=A. I. R. 1927 Sind 245. *Ex parte* decree cannot be re-opened except upon ground of fraud which must be alleged in particular form. 58 I. C. 317.

WHO CAN APPLY.—Heirs of a defendant against whom an *ex parte* decree is passed before his death, have a right to apply to set aside the *ex parte* decree. (27 All. 274, doubted.) 1923 All. 30. It is competent to executor of a defendant since deceased, to apply to set aside an *ex parte* decree against him. 38 Mad. 442.

REVIEW.—Application to set aside an *ex parte* decree cannot be altered to one for review, by merely changing the description, to avoid limitation. 57 I. C. 15.

LIMITATION.—TIME WHETHER CAN BE EXTENDED.—Under O. 9, R. 13 as amended by the Madras High Court, though time can be extended, still it should be extended on justifiable grounds. 42 M. L. J. 12=1922 Mad. 33.

PARTIES TO THE ORDER.—A Court has no jurisdiction to set aside an order, setting aside an *ex parte* decree, at the instance of a person not a party to the suit. 61 I. C. 534. A Court has no jurisdiction to set aside an *ex parte* decree at the instance of a person not affected by the decision and who has been expressly exempted from the decree. 61 I. C. 484. There can be no *ex parte* proceedings against a defendant who has entered appearance and filed his defence. 21 A. L. J. 495=45 A. 618. If the minor defendants were not represented there is sufficient cause for their non-appearance and the Court could set aside the *ex parte* decree. 21 A. L. J. 185=1923 All. 213. See *contra* 66 I. C. 460 (Nag.); 49 All. 123 (F. B.). See also 4 O. W. N. 356=101 I. C. 632=A. I. R. 1927 Oudh 173. An application under O. 9, R. 13 if granted will re-open the suit only as against the successful applicant and not against other defendants. 9 I. C. 835=8 A. L. J. 364. Where there is an *ex parte* decree against one of the several defendants-mortgagors, and an application is made to set it aside, the better course would be to set it aside against all the defendants and direct the suit to be re-tried. 33 All. 264=38 I. A. 37=21 M. L. J. 1140 (P. C.).

COURT'S POWERS UNDER THE RULE.—A Court passing an *ex parte* decree is competent to deal with an application to set aside such a decree even if an appeal had been subsequently preferred. (12 C. W. N. 885; 30 Mad. 535; 13 C. W. N. 846; 38 C. 394, foll.); 26 I. C. 412; or even after an appeal therefrom has been dismissed. 26 L. W. 19=103 I. C. 146=A. I. R. 1927 Mad. 722 (2)=53 M. L. J. 110. Court bound to decide whether summons was not duly served. 1926 Mad. 558=94 I. C. 420 (1)=23 L. W. 319. The trial Court cannot set aside an

hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit :

Provided that where the decree is of such a nature that it cannot be set aside

ex parte decree on grounds other than those mentioned in O. 9, R. 13, C. P. C. 24 L. W. 439 = 97 I. C. 936 (1) = (1926) M. W. N. 707. Service on the son of pardanashin lady living in the same house is proper. 94 I. C. 228 = 1926 Cal. 845 (1). A Judge cannot set aside an *ex parte* decree against the judgment-debtor without also setting it aside as against the surety. 40 I. C. 400.

APPEAL.—Erroneous order accepting application to set aside *ex parte* decree—Appealability. 29 Bom. L. R. 925. An appeal lies against an order dismissing for default an application to set aside *ex parte* decree. 36 I. C. 798. Where an application to set aside an *ex parte* decree is dismissed for failure to pay process fee this is in substance a dismissal for default and an appeal lies from the order. (21 C. L. J. 628; 36 I. C. 798; 37 I. C. 835, Rel.) 69 I. C. 713. See also 51 Bom. 67 = 99 I. C. 384 = A. I. R. 1927 Bom. 1 = 28 Bom. L. R. 1245. See also 1926 A. 142 (2) = 48 A. 199; 1926 Oudh 118 = 90 I. C. 745. No appeal lies against an order refusing to set aside an *ex parte* decree made in a reference under the Land Acquisition Act. 94 I. C. 330 = 1926 Cal. 816.

POWERS OF APPELLATE COURT.—An appellate Court can set aside an *ex parte* order passed by the original Court against some of the defendants when an appeal by the other defendants is pending before it. (30 M. 535; 32 Mad. 416, foll.) 29 I. C. 458 = 2 L. W. 529. See also 42 M. L. J. 12 = 1922 M. 33. A pleader duly appearing in a suit is not obliged to file a fresh vakalatnama for the purpose of an application to set aside an *ex parte* decree in the suit. 24 Bom. L. R. 744 = 47 B. 11. Appellate Court cannot go beyond R. 13. 48 A. 175 = 1925 All. 610. Powers of appellate Court. See 1925 Pat. 534. Under R. 13, a defendant is entitled to have the *ex parte* decree set aside as against him if the summons was not duly served even when the defendants knew that the suit has been filed against him. 43 Cal. 447 = 23 C. L. J. 183. Power of appellate Court to go into sufficiency of order for substituted service. 52 M. L. J. 477. A Court can restore a suit only when it is satisfied that defendant was prevented by any sufficient cause from appearing. 64 I. C. 965 = 1 Pat. L. T. 69. Application to set aside *ex parte* decree—Dismissal of—Non-preferring of appeal—Final appeal against decree—Raising the same points—Validity. See 100 I. C. 553 (1).

EVIDENCE.—Where a summons has not been personally served, but served on the gumasta, the plaintiff has to prove that such service was valid since it was not so *prima facie*. (1913) M. W. N. 1028 = 21 I. C. 922. Burden of proof of sufficiency of service—Defective report of the process-server. 23 N. L. R. 166. In the case of a substituted service of summons the Court is not bound by the return of the process-server alone, but can declare the service good from other circumstances of the case. (21 Mad. 324, foll.; 17 C. W. N. 999; 24 All. 302; 29 Mad. 324, dist.; 6 A. L. J. 45 Diss.); 23 I. C. 14 = 26 M. L. J. 368. Under this rule the question to be considered is whether the defendant honestly intended to be

present at the hearing of the suit and did his best to do so. 43 M. L. J. 632 = 46 Mad. 60. See also 5 Rang. 80 = 102 I. C. 379 = A. I. R. 1927 Rang. 150. Appearance before registration of suit in a proceeding for appointing a guardian *ad litem* does not dispense with service of summons. 35 All. 163 = 18 I. C. 711.

REMEDIES.—Difference in procedure in an application under the section and appeal pointed out. 32 C. W. N. 101. The person against whom an *ex parte* decree is passed can apply to have it set aside under O. 9, R. 13, or he can appeal from the decree; but he cannot start a fresh proceeding to set aside the decree. 57 I. C. 551 = 22 Bom. L. R. 798. To impeach an *ex parte* decree on grounds other than fraud, the proper remedy is by an application under O. 9, R. 13 or an application for review or an appeal to a superior Court. A separate suit to set aside the decree will not lie. 1 Lah. 344 = 2 Lah. L. J. 622. A plaintiff whose application to set aside an *ex parte* decree has proved infructuous, can maintain a suit to set aside the decree on the ground of fraud or any other valid reason. (28 Cal. 475; 29 Cal. 395, Rel. on.) 15 C. L. J. 446 = 17 C. W. N. 219. A regular suit lies to set aside an *ex parte* decree obtained by fraud. 55 I. C. 412. A subsequent suit to set aside the decree, apart from fraud is not maintainable. 3 L. W. 522 = 36 I. C. 128. Suit to set aside *ex parte* decree on the ground of false claim and perjured evidence is not maintainable. 97 I. C. 879 = 31 C. W. N. 258 = A. I. R. 1927 Cal. 84. Where an appeal against an order under O. 9, R. 13 is dismissed for non-prosecution, second application under O. 9, R. 13 to restore the first application may be allowed subject to terms. 76 I. C. 583 = 1923 Cal. 552. After an appeal has been filed against a decree of the lower Court, the power to set aside the original decree becomes vested in the appellate Court. 30 M. 535. Where a suit is transferred without notice to defendant, the *ex parte* decree must be set aside. 1923 Lah. 444. When a decree of the lower Court is superseded by a decree of a superior Court, the former cannot alter or amend it, on the application of defendants against whom the *ex parte* decree was passed. 37 All. 208 = 28 I. C. 261 = 13 A. L. J. 283; but see 53 M. L. J. 110.

PROVISO.—The fact that the decree is the result of a compromise is no bar to the application of the proviso. (1927) M. W. N. 294 = 101 I. C. 98 = 38 M. L. T. (H. C.) 315 = A. I. R. 1927 Mad. 550. Where the decree is indivisible in its nature, for example, for the possession of a house, the whole decree must be set aside, subject to the payment of the money due by the person bound by the decree. (*Ibid.*) Reasons for acting under the proviso to be given. 102 I. C. 243 = A. I. R. 1927 Mad. 507 = 52 M. L. J. 477. *Ex parte* decree against several defendants whether can be set aside at the instance of some of them alone. See 92 I. C. 776 = 1926 Mad. 256.

as against such defendant only it may be set aside as against all or any of the other defendants also.

[Madras] Make the following amendments to O. 9, R. 13 :—

Re-number Rule 13 as Rule 13 (1).

Insert the following as proviso to sub-rule (1) of Rule 13 of Order IX :—

“ Provided further that no Court shall set aside a decree passed *ex parte* merely on the ground that there has been an irregularity in the service of summons, if it be satisfied that the defendant had notice of the date of hearing in sufficient time to appear and answer the plaintiff's claim.”

Add the following as Sub-Rule (2) to Rule 13 :—

“(2) The provisions of Sec. 5 of the Indian Limitation Act, 1908, shall apply to applications under sub-rule (1).

[Allahabad] Add the following further provisos and explanation :—

Provided also that no such decree shall be set aside merely on the ground of irregularity in the service of summons, if the court is satisfied that the defendant knew, or but for his wilful conduct would have known of the date of hearing in sufficient time to enable him to appear and answer the plaintiff's claim.

Provided also that no *ex parte* decree shall be set aside under this rule on the ground that the summons was not duly served, if the Court is satisfied that the defendant had information of the date of hearing sufficient to enable him to appear and answer the plaintiff's claim.

Explanation.—Where a summons has been served under O. V, R. 15, on an adult male member having an interest adverse to that of the defendant in the subject-matter of the suit, it shall not be deemed to have been duly served within the meaning of this rule.

[Bangoon] In Order IX, Rule 13 substitute ‘decree or order’ for the word ‘decree’ wherever it occurs in that Rule.

In Rule 13, add the following as second proviso :—

‘ Provided also that no decree or order shall be set aside under this rule merely on the ground that there has been an irregularity in the service of the summons, if the Court is satisfied that the defendant was aware of the date of hearing in sufficient time to enable him to appear and answer the plaintiff's claim.’

No decree to be set aside without notice to opposite party.

14. [S. 109.] No decree shall be set aside on any such application as aforesaid unless notice thereof has been served on the opposite party.

ORDER X.

EXAMINATION OF PARTIES BY THE COURT.

1. [S. 117.] At the first hearing of the suit the Court shall ascertain from each party or his pleader whether he admits or denies such allegations of fact as are made in the plaint or written statement (if any) of the opposite party, and as are not expressly or by necessary implication admitted or denied

by the party against whom they are made. The Court shall record such admissions and denials.

2. [S. 118.] At the first hearing of the suit, or at any subsequent hearing, any party appearing in person or present in Court, or any person able to answer any material questions relating to the suit by whom such party or his pleader is accompanied,

may be examined orally by the Court; and the Court may, if it thinks fit, put in the course of such examination questions suggested by either party.

O. 9, R. 14.—R. 14 is imperative and an *ex parte* decree against the defendant can be set aside only after notice has been served on the plaintiff. 24 M. L. J. 482 = 13 M. L. T. 344 = 19 I.C. 241 = (1913) M. W. N. 340. See also Notes under R. 13. “Opposite party,” meaning of. See 31 C. W. N. 906 = 103 I. C. 860 = A. I. R. 1927 Cal. 692.

O. 10, R. 1.—An admission on a question of fact made by a pleader binds his client. 9 W.R. 485. See also 2 M. I. A. 253. An erroneous consent of a vakil upon a mistaken view of the law cannot bind the client. 16 W. R. 246. A pleader cannot relinquish any portion of his client's case without express authority. 12 W. R. 279. Admissions made by a party under O. 10,

R. 1 are conclusive against him. 49 All. 210 = 97 I.C. 176 = 1926 A. 710 = 25 A. L. J. 48. Under O. 10, R. 1 it is obligatory on the Court to examine them only when there is no clear express or implied denial of any statement of fact in their pleadings. 92 I. C. 1006 = 8 Lah. L. J. 67.

O. 10, R. 2.—The object of the examination is not to take evidence, but to see what are the matters in dispute. 15 I. A. 119. See 5 Bom. L. R. 687 and 1905 A. W. N. 170; 1926 All. 411 = 94 I. C. 1003. A statement made under O. 10, R. 2 for a person who appears with a pleader merely to prosecute a case or to look after it would not necessarily bind the party on whose behalf he appears. 1926 A. 411 = 94 I. C. 1003.

Substance of examination to be written.

3. [S. 119.] The substance of the examination shall be reduced to writing by the Judge, and shall form part of the record.

4. [S. 120.] (1) Where the pleader of any party who appears by a pleader or any such person accompanying a pleader as is referred to in rule (2) refuses or is unable to answer any material question relating to the suit which the Court is of opinion that the party whom he represents ought to answer, and is likely to be able to answer if interrogated in person, the Court may postpone the hearing of the suit to a future day and direct that such party shall appear in person on such day.

(2) If such party fails without lawful excuse to appear in person on the day so appointed, the Court may pronounce judgment against him, or make such order in relation to the suit as it thinks fit.

ORDER XI.

DISCOVERY AND INSPECTION.

1. [S. 121.] In any suit the plaintiff or defendant by leave of the Court may deliver interrogatories in writing for the examination of the opposite parties or any one or more of such parties, and such interrogatories when delivered shall have a note at the foot thereof stating which of such interrogatories each of such persons is required to answer: Provided that no party shall deliver more than one set of interrogatories to the same party without an order for that purpose: Provided also that interrogatories which do not relate

O. 10, R. 4.—The powers granted by this rule are discretionary, and its intention seems to be to enable the Court not only to get obscure points cleared up by getting information, but also to get admission to narrow down the issues. 5 Bom. L. R. 687. O. 10, R. 4 is a self-contained Code for cases where a party is ordered to attend because the Court desires to have his evidence. 63 I. C. 961 = 14 L. W. 15 = 1921 M. 417. The rule does not appear to provide for cases where party appears and refuses to answer. For such cases, see O. 16, R. 20. The parties to suits should not be required to attend the Court under R. 4 unless questions material to the case which are to be answered have first been put to their pleaders and they have been unable or have refused to answer them. 48 I. C. 269 = 21 O. C. 252. Court ordering plaintiff to appear on the challenge of the defendant—Validity of the order. 24 L. W. 757. The question required to be answered must be material. 2 Bom. H. C. R. 340 = 21 W. R. 44. Pleader merely applying for adjournment is not putting an appearance. 99 I. C. 717 = A. I. R. 1927 Rang. 46; 4 Rang. 408.

Cl. (2).—What is lawful excuse will depend upon the circumstances of each case. 18 W. R. 63. Before pronouncing judgment, the Judge should hear what the defaulter has to say, and adjudicate on the sufficiency of the excuse. 24 W. R. 314. An order under O. 10, R. 4 (2) against one of the parties is not appealable under O. 43, R. 1 unless that order amounts to a judgment. 39 All. 450 = 39 I. C. 151.

O. 11, APPLICATION OF THE ORDER.—Order 11 of the Code applies to proceedings in probate. 49 Cal. 300 = 23 C. L. J. 480. Under the Code interrogatories can be administered in the same manner as is done in England for discovering the facts in issue. 24 I. C. 765 = 41 Cal. 6 (7 Cal. 840, Dist.).

O. 11, R. 1. WHAT INTERROGATORIES MAY BE DELIVERED.—Question to extract information as to material facts in issue or for the purpose of obtaining admissions about them may be asked. The mere fact that the questions would be admissible in cross examination does not make them good as interrogatories. 17 I. C. 155 = 17 C. L. J. 66. Interrogatories must not be exhibited unreasonably or vexatiously or be prolix—unnecessary or scandalous, nor be obviously meant for the purpose of fishing information. (*Ibid.*) Thus defendant setting up the plea of wagering should not be allowed to interrogate his opponent generally as to his business transactions. (*Ibid.*) Interrogatories as to the amount of damages are relevant, though they may not be allowed until the question in action has been tried. See 14 C. at p. 706. Interrogatories should be disallowed if aimed at discovering the nature of the opponent's evidence. 69 I. C. 417 = 1923 Lah. 282 (2). Interrogatories on matters of opinion are not admissible. 23 C. 117.

'OPPOSITE PARTY'.—The party on the other side of the record to the applicant is an opposite party, and he may be ordered to give discovery if he is a necessary party to an action, although there may be no issue or matter in question at all between him and the applicant. *Spokes v. Grosvenor & Co.*, (1897) 2 Q.B. 124. See also 17 B. 384. An *ex parte* defendant does not come within the words "opposite party." 61 I. C. 258. The plaintiff is not entitled to administer interrogatories to him; nor is he entitled to do so with defendants who have the same interests as he (the plaintiff) has in the suit. 63 I. C. 258. An objection to the relevancy of interrogatories must be adjudicated upon by the court. 46 I. C. 660 = 16 A. L. J. 762. An *ex parte* order giving leave to interrogate, can be set aside on the application of the opposite party. 5 C. 707.

to any matters in question in the suit shall be deemed irrelevant, notwithstanding that they might be admissible on the oral cross-examination of a witness.

2. On an application for leave to deliver interrogatories, the particular interrogatories proposed to be delivered shall be submitted to the Court. In deciding upon such application, the Court shall take into account any offer, which may be made by the party sought to be interrogated to deliver particulars, or to make admissions, or to produce documents relating to the matters in question, or any of them, and leave shall be given as to such only of the interrogatories submitted as the Court shall consider necessary either for disposing fairly of the suit or for saving costs.

3. [S. 123.] In adjusting the costs of the suit inquiry shall at the instance of any party be made into the propriety of exhibiting such interrogatories, and if it is the opinion of the taxing officer or of the Court, either with or without an application for inquiry, that such interrogatories have been exhibited unreasonably, vexatiously, or at improper length, the costs occasioned by the said interrogatories and the answers thereto shall be paid in any event by the party in fault.

Form of interrogatories.

4. Interrogatories shall be in Form No. 2 in Appendix C, with such variations as circumstances may require.

5. [S. 124.] Where any party to a suit is a corporation or a body of persons, whether incorporated or not, empowered by law to sue or be sued, whether in its own name or in the name of any officer or other person, any opposite party may apply for an order allowing him to deliver interrogatories to any member or officer of such corporation or body, and an order may be made accordingly.

Corporations.

6. [S. 125.] Any objection to answering any interrogatory on the ground that it is scandalous or irrelevant or not exhibited *bona fide* for the purpose of the suit, or that the matters inquired into are not sufficiently material at that stage, or on any other ground, may be taken in the affidavit in answer.

Objections to interrogatories by answer.

7. Any interrogatories may be set aside on the ground that they have been exhibited unreasonably or vexatiously, or struck out on the ground that they are prolix, oppressive, unnecessary or scandalous; and any application for this purpose may be made within seven days after service of the interrogatories.

Setting aside and striking out interrogatories.

8. [S. 126.] Interrogatories shall be answered by affidavit to be filed within ten days, or within such other time as the Court may allow.

Affidavit in answer, filing.

9. An affidavit in answer to interrogatories shall be in Form No. 3 in Appendix C, with such variations as circumstances may require.

Form of affidavit in answer.

10. No exceptions shall be taken to any affidavit in answer, but the sufficiency or otherwise of any such affidavit objected to as insufficient shall be determined by the Court.

No exception to be taken.

11. [S. 127.] Where any person interrogated omits to answer, or answers insufficiently, the party interrogating may apply to the Court for an order requiring him to answer, or to answer further, as the case may be. And an order may be made requiring him to answer or answer further, either by affidavit or by *viva voce* examination, as the Court may direct.

Order to answer or answer further.

O. 11, R. 6. NOT 'BONA FIDE'.—Fishing questions in order to try whether any flaw can be discovered in the defendant's case, cannot be allowed. 17 C. at p. 849. If the defendant is out of the jurisdiction, a reasonable time will be

given. 24 W. R. 587.

O. 11, R. 11.—When a Court grants leave to interrogate, it does not make an order under this rule. 18 C. 420 (F.B.).

12. [S. 127.] Any party may, without filing any affidavit, apply to the Court for an order directing any other party to any suit to make Application for discovery of documents, discovery on oath of the documents which are or have been in his possession or power, relating to any matter in question therein. On the hearing of such application the Court may either refuse or adjourn the same, if satisfied that such discovery is not necessary, or not necessary at that stage of the suit, or make such order, either generally or limited to certain classes of documents, as may, in its discretion, be thought fit: Provided that discovery shall not be ordered when and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs.

13. [S. 129, para. 2.] The affidavit to be made by a party against whom such order as is mentioned in the last preceding rule has been Affidavit of documents, made, shall specify which (if any) of the documents therein mentioned he objects to produce, and it shall be in Form No. 5 in Appendix C, with such variations as circumstances may require.

14. [S. 130.] It shall be lawful for the Court, at any time during the pendency of any suit, to order the production by any party thereto, Production of documents, upon oath, of such of the documents in his possession or power, relating to any matter in question in such suit, as the Court shall think right; and the Court may deal with such documents, when produced, in such manner as shall appear just.

15. [S. 131.] Every party to a suit shall be entitled at any time to give notice Inspection of documents referred to in pleadings or affidavits, to any other party, in whose pleadings or affidavits reference is made to any document, to produce such document for the inspection of the party giving such notice, or of his pleader, and to permit him or them to take copies thereof; and any party not complying with such notice shall not afterwards be at liberty to put any such document in evidence on his behalf in such suit unless he shall satisfy the Court that such document relates only to his own title, he being a defendant to the suit, or that he had some other cause or excuse which the Court shall deem sufficient for not complying with such notice, in which case the Court may allow the same to be put in evidence on such terms as to costs and otherwise as the Court shall think fit.

O. 11, R. 12.—Guardian *ad litem* if a party to the suit—See 22 Cal. 981. But see rule 23 and 19 B. 350. Where there are several plaintiffs all must join in making an affidavit. 15 B. 7. A defendant may obtain discovery against a co-defendant. 17 B. 384. Affidavit, effect of. 5 Pat. L. J. 550=58 I. C. 281. A document directed to be produced under Rr. 12 and 14 does not *ipso facto* become evidence in the case. It must be proved by witnesses and then marked as an exhibit. 4 Lah. L. J. 385. On this section, see also 29 Bom. L. R. 414=A. I. R. 1927 Bom. 367.

O. 11, R. 13.—An affidavit of document filed under R. 13 does not protect the party from an obligation to give inspection of other documents that may be proved to be in his possession. 38 Cal. 428=16 C. W. N. 81.

O. 11, R. 14. ORDER WHEN TO BE PASSED.—The Court has no power to order production of documents which do not relate to any matter in question. 23 C. 125. An order for production of documents under R. 14 must follow an order as to affidavit of documents under O. 11, R. 12. A. I. R. 1925 Pat. 337=76 I. C. 991. No order will be made under R. 14 against a party unless he has directly or indirectly admitted the document to be in his possession or power. 5 Pat.

L. J. 650=58 I. C. 281. The Court can only order the production of documents under R. 14 and not the inspection. An order for inspection has to be made under R. 18, 14 I. C. 51. As to what documents are privileged and what statements, see 29 Bom. L. R. 414=102 I. C. 425=A. I. R. 1927 Bom. 367.

EFFECT OF NON-COMPLIANCE.—The non-compliance with an order under R. 14 for the production of account books does not warrant the striking off the defence of the party which is guilty of the non-compliance of the order. 44 All. 565=20 A. L. J. 422. The grounds on which the discretion is given to a Court for striking off the defence are given in O. 11, R. 21. (*Ibid.*)

REVISION.—An order under this rule cannot be revised under S. 115. 9 M 256.

O. 11, R. 15.—As there is a distinction between documents sued upon and documents relied upon by plaintiffs a defendant under O. 11, R. 15 is not entitled as of right to have inspection of the documents relied upon by plaintiff before he files the written statement. 56 I. C. 457=24 C. W. N. 302. It is a good cause for non-production of a document within R. 15 that the document is not in the possession or power of the person called upon to produce it. 5 Pat. L. J. 550=58 I. C. 281.

16. Notice to any party to produce any documents referred to in his pleading or affidavits shall be in Form No. 7 in Appendix C, with such variations as circumstances may require.

Notice to produce.

17. [S. 132.] The party to whom such notice is given shall, within ten days from the receipt of such notice, deliver to the party giving the same a notice stating a time within three days from delivery thereof at which the documents, or such of them as he does not object to produce, may be inspected at the office of his pleader, or in the case of bankers' books or other books of account or books in constant use for the purposes of any trade or business, at their usual place of custody, and stating which (if any) of the documents he objects to produce and on what ground. Such notice shall be in Form No. 8 in Appendix C, with such variations as circumstances may require.

18. [S. 133.] (1) Where the party served with notice under rule 15 omits to give such notice of a time for inspection, or objects to give inspection, or offers inspection elsewhere than at the office of his pleader, the Court may, on the application of the party desiring it, make an order for inspection in such place and in such manner as it may think fit : Provided that the order shall not be made when and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs.

Order for inspection.

(2) **[S. 134.]** Any application to inspect documents, except such as are referred to in the pleadings, particulars or affidavits of the party against whom the application is made or disclosed in his affidavit of documents, shall be founded upon an affidavit showing of what documents inspection is sought, that the party applying is entitled to inspect them, and that they are in the possession or power of the other party. The Court shall not make such order for inspection of such documents when and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs.

19. (1) Where inspection of any business books is applied for, the Court may, if it thinks fit, instead of ordering inspection of the original books, order a copy of any entries therein to be furnished and verified by the affidavit of some person who has examined the copy with the original entries, and such affidavit shall state whether or not there are in the original book any and what erasures, interlineations or alterations : Provided that, notwithstanding that such copy has been supplied, the Court may order inspection of the book from which the copy was made.

Verified copies.

(2) Where on an application for an order for inspection privilege is claimed for any document, it shall be lawful for the Court to inspect the document for the purpose of deciding as to the validity of the claim of privilege.

(3) The Court may, on the application of any party to a suit at any time, and whether an affidavit of documents shall or shall not have already been ordered or made, make an order requiring any other party to state by affidavit whether any one or more specific documents, to be specified in the application is or are, or has or have at any time been, in his possession or power ; and, if not then in his possession, when he parted with the same and what has become thereof. Such application shall be made on an affidavit stating that in the belief of the deponent the party against whom the application is made has, or has at some time had, in his possession or

O. 11, R. 17.—Where a contract is entered into at one place and has to be performed at another place, and the documents are at the place where the contract has to be performed, the place of performance is the proper place for inspecting the documents. 5 B. 467 ; see also 11 C. 655 ; 12 C. 265 ; 15 B. 7.

O. 11, R. 18.—Strict compliance with provisions of the rule is necessary before an order for inspection of documents is passed. 67 I. C. 73 = 44 All. 565. See also 20 S. L. R. 309. No order

can be made under this rule until the questions raised under R. 17 have been determined. 14 C. 776. Before the Court can make an order under this rule, the preliminary steps mentioned in R. 15 must be taken. 10 C. 59. The applicant must show that the document is relevant to the matter in question. 23 C. 125. A party cannot be compelled to show the whole account book to the opposite party, if his trade secrets are likely to be unnecessarily exposed to the opposite party. 14 I. C. 371.

power the document or documents specified in the application, and that they relate to the matters in question in the suit, or to some of them.

20. [S. 135.] Where the party from whom discovery of any kind or inspection is sought objects to the same, or any part thereof, the

Premature discovery.

Court may, if satisfied that the right to the discovery or inspection sought depends on the determination of any issue or question in dispute in the suit, or that for any other reason it is desirable that any issue or question in dispute in the suit should be determined before deciding upon the right to the discovery or inspection, order that such issue or question be determined first, and reserve the question as to the discovery or inspection.

21. [S. 136.] Where any party fails to comply with any order to answer interrogatories, or for discovery or inspection of documents, he

Non-compliance with order for discovery.

shall, if a plaintiff, be liable to have his suit dismissed for want of prosecution, and, if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not defended, and the party interrogating or seeking discovery or inspection may apply to the Court for an order to that effect, and an order may be made accordingly.

22. Any party may, at the trial of a suit, use in evidence any one or more of the answers or any part of an answer of the opposite party to

Using answers to interrogatories at trial.

interrogatories without putting in the others or the whole of such answer : Provided always that in such case the Court may look at the whole of the answers, and if it shall be of opinion that any others of them are so connected with those put in that the last-mentioned answers ought not to be used without them, it may direct them to be put in.

23. This order shall apply to minor plaintiffs and defendants, and to the next friends and guardians for the suit of persons

Order to apply to minors.

under disability.

ORDER XII.

ADMISSIONS.

1. Any party to a suit may give notice, by his pleading, or otherwise in writing, that he admits the truth of the whole or any part of the

Notice of admission of case.

case of any other party.

2. [S. 128.] Either party may call upon the other party to admit any document, saving all just exceptions ; and in case of refusal or neglect

Notice to admit documents.

to admit, after such notice, the costs of proving any

such document shall be paid by the party so neglecting or refusing, whatever the result

O. 11, R. 20.—The rule applies to mixed questions of law and fact. 27 W. R. 678. The rule is not intended to come into operation until after an application has been made under R. 18. 14 C. 776. *See also* 6 B. 578.

O. 11, R. 21. WHEN AN ORDER UNDER THE RULE MAY BE PASSED.—Order only after the Court has directed discovery under R. 12 or inspection of documents under R. 18. 44 All. 565 = 20 A. L. J. 422 = 67 I. C. 73; 96 I. C. 1003 = 1926 Sind 272. Thus a mere suspicion against plaintiff of suppressing documents relating to matters in issue, without order for discovery or inspection, is not a ground for dismissing the suit. 38 All. 5 = 13 A. L. J. 831. A suit can be dismissed for failure to comply with an order for discovery or inspection of documents only when the documents are referred to in the pleading or affidavits. 28 I. C. 905. An order under O. 11, R. 21, C. P. C., can be passed only when there is a previous order under R. 11 requiring a party to answer interrogatories. 96 I. C. 16 = 24 A. L. J. 589 = 1926 All. 553. Mere non-compliance with orders for discovery or inspection does not justify a trial Court to strike off the defence of the party so ordered.

20 A. L. J. 422 = 44 A. 565. The penalty provided in R. 21 should only be imposed in extreme cases and as a last resort. (58 P. R. 1898; 59 P. R. 1892; 9 C. 923; 38 A. 5; 5 Pat. L. J. 550; 14 C. 768, Ref.); 65 I. C. 661. The defendant should be called upon to show cause before an order striking off defence is passed. It must also be shown that the non-compliance was due to wilful default. 27 Bom. L. R. 694 = 89 I. C. 215. *See also* 1925 Cal. 166; 20 S. L. R. 309.

Where a party fails to comply with an order for discovery, the proper remedy is for the party seeking the discovery to apply to have the proceedings stayed or the suit dismissed. 48 I. C. 711 = 4 Pat. L. J. 394. Where a suit is dismissed for want of prosecution under the rule, the remedy of the aggrieved party is by appeal. The Court cannot set it aside under O. 9, R. 9. 3 Rang. 63 = 1925 Rang. 218. Where a plaintiff's suit has been dismissed under O. 11, R. 21, the court has no power to review its order under S. 151, the order being appealable. 98 I. C. 70 = A. I. R. 1927 Cal. 158.

O. 12, R. 1.—Admissions must be taken as a whole. 41 M. L. J. 525 = 71 I. C. 270.

of the suit may be, unless the Court otherwise directs; and no costs of proving any document shall be allowed unless such notice is given, except where the omission to give the notice is, in the opinion of the Court, a saving of expense.

3. A notice to admit documents shall be in Form No. 9 in Appendix C, with such variations as circumstances may require.

Form of notice.

4. Any party may, by notice in writing, at any time not later than nine days before the day fixed for the hearing, call on any other party to admit, for the purposes of the suit only, any specific fact or facts mentioned in such notice. And in case of refusal or neglect to admit the same within six days after service of such notice, or within such further time as may be allowed by the Court, the costs of proving such fact or facts shall be paid by the party so neglecting or refusing, whatever the result of the suit may be, unless the Court otherwise directs: Provided that any admission made in pursuance of such notice is to be deemed to be made only for the purposes of the particular suit, and not as an admission to be used against the party on any other occasion or in favour of any person other than the party giving the notice: Provided also that the Court may at any time allow any party to amend or withdraw any admission so made on such terms as may be just.

Notice to admit facts.

5. A notice to admit facts shall be in Form No. 10 in Appendix C, and admissions of facts shall be in Form No. 11 in Appendix C, with such variations as circumstances may require.

Form of admissions.

6. Any party may at any stage of a suit, where admissions of fact have been made, either on the pleadings, or otherwise, apply to the Court for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties: and the Court may upon such application make such order, or give such judgment, as the Court may think just.

Judgment on admissions.

I. *Re-number* the existing rule 6 of Order XII as sub-rule 6 (1) and *insert* the following as sub rules (2) and (3):—

“(2) The Court may also of its own motion make such order or give such judgment as it may consider just, having due regard to the admissions made by the parties.

“(3) Whenever an order or judgment is pronounced under the provisions of this rule a decree may be drawn up in accordance with such order or judgment and bearing the same date as the day on which the order or judgment was pronounced.”

[Patna] Substitute the following for rule 6 in Order XII:—

6. Where admissions of fact have been made, either on the pleadings or otherwise, the Court may, at any stage of a suit, on the application of any party, or, of its own motion, without waiting for the determination of any other question between the parties, make such order or give such judgment, as it may think just.

[Bangoon] In Order XII, Rule 6, *substitute* ‘judgment, decree or order’ for the word ‘judgment or order’: and ‘and the Court may, either upon such application or upon its own motion, give such judgment or make such decree or order as the Court may think just’. For ‘and the Court may just’.

Add the following as sub-rule (2):—

‘A decree or order passed under this rule may be executed at any time, notwithstanding that other questions between the parties still remain to be decided in the case.’

7. An affidavit of the pleader or his clerk, of the due signature of any admissions made in pursuance of any notice to admit documents or facts, shall be sufficient evidence of such admissions, if evidence thereof is required.

Affidavit of signature.

8. Notice to produce documents shall be in Form No. 12 in Appendix C, with such variations as circumstances may require. An affidavit of the pleader, or his clerk, of the service of any notice to produce, and of the time when it was served, with a copy

Notice to produce documents.

O. 12, R. 6.—When judgment on admissions to be passed. 27 C. W. N. 783=1924 Cal. 190. Judgment on confessions, object and enforcement of. *See* 92 I. C. 562=1926 Sindh 119=20 S.L.R. 216. Admission must be clear and to the effect

that money is recoverable in the action in which admission is made. 1927 Sindh 25=97 I. C. 623. Admission of portion of claim—Judgment—Procedure. 45 Cal. 138=22 C.W.N. 204.

of the notice to produce, shall in all cases be sufficient evidence of the service of the notice, and of the time when it was served.

9. If a notice to admit or produce specifies documents which are not necessary, the costs occasioned thereby shall be borne by the party giving such notice.

Costs.

ORDER XIII.

PRODUCTION, IMPOUNDING AND RETURN OF DOCUMENTS.

1. [S. 138.] (1) The parties or their pleaders shall produce, at the first hearing of the suit, all the documentary evidence of every description in their possession or power, on which they intend to rely, and which has not already been filed in Court, and all documents which the Court has ordered to be produced.

Documentary evidence to be produced at first hearing.

- (2) [S. 140.] The Court shall receive the documents so produced : provided that they are accompanied by an accurate list thereof prepared in such form as the High Court directs.

[Rangoon] To Order XIII, Rule 1, the following shall be added as sub-rule (3) :—

“(3) The High Court of Judicature at Rangoon directs that such lists shall be prepared in form ^{Judicial} _{General 23} which will be given free of charge to parties wishing to tender documents in evidence.”

[Oudh] Order XIII. *Substituted by Oudh Chief Court.*—I. (1) The parties or their pleaders shall produce or cause to be produced, on the date fixed by the Court, under Order VII, Rule 14, and Order VIII, Rule 1 (2), or on any subsequent date which may be fixed by the Court for the purpose, all the documentary evidence of every description in their possession or power on which they intend to rely, and which has not already been filed in Court, and all documents which the Court has permitted or ordered to be produced.

(2) The parties or their pleaders may also file, with the permission of the Court, either on the date of hearing or any subsequent date to be fixed by the Court for the purpose, a supplementary list of further documents on which they intend to rely, and such documents shall be produced by them within the time fixed by the court.

(3) The Court shall receive the documents so produced provided that (whenever the documents are produced at any stage of the case) they are accompanied by an accurate list thereof prepared in such form as the Chief Court may direct.

Explanation.—A certified copy of a public document is a document “in the power” of a party, but where a document is in the possession of a person other than the plaintiff or defendant it will not be deemed to be “in the power” of the plaintiff or defendant.

2. [S. 139.] No documentary evidence in the possession or power of any party which should have been but has not been produced in accordance with the requirements of rule 1 shall be received at any subsequent stage of the proceedings unless good cause is shown to the satisfaction of the Court for the non-production

Effect of non-production of documents.

O. 13, R. 1 LEGISLATIVE CHANGES.—The words “when called for by the Court” have been omitted to meet the ruling in 8 M. 373, 375.

“FIRST HEARING OF THE SUIT.”—The words “first hearing” do not mean first hearing on the issue. 21 W. R. 42. First hearing means framing of issues and documents can only be produced after that date on good cause being shown under O. 13, R. 2 23 L. W. 69=A. I. R. 1926 M. 347 =93 I. C. 16. First hearing of suit means not the day to which the case is adjourned but the day when the case is actually gone into. It is enough if documents are filed before the latter date. 50 I. C. 296 Documentary evidence which has not been produced at the first hearing of a suit under O. 13, R. 1 may be admitted at a later stage at the discretion of the Court. 45 Cal. 878 =45 I. A. 73=35 M. L. J. 422 (P. C.). See also 42 C. L. J. 280=A. I. R. 1926 Cal. 1; 106 I. C. 272; 23 L. W. 69. Summary rejection of application to produce documents after settlement of issues but at an early stage, not proper. 87 I. C. 351 (2)=1925 Mad. 744. Where certain register-

ed documents were filed and admitted in evidence at a very late stage of the trial and the opposite side did not object to the same, *held*, that the trial Judge had complete discretion to admit the documents and that no objection having been raised to their mode of proof, the question cannot be raised in appeal. 8 P. L. T. 255=98 I. C. 968=A. I. R. 1927 Pat. 117. The mere receipt of a document by a court does not imply that it is evidence, but merely declares that it may be used as evidence in the suit. 21 W. R. 76. The mere endorsement “Exhibit” does not amount to formal admission in evidence. 16 I. C. 834=169 P. L. R. 1912. Absence of endorsement makes the document inadmissible. 96 I. C. 998=8 Lah. L. J. 492 (38 A. 627, P. C.). Duty of counsel to tender documentary evidence and have the endorsement of the Judge. 9 Lah. 4.

O. 13, R. 2.—The rule was enacted to prevent fraud by the late production of suspicious documents, and not to shut out formal evidence beyond suspicion, such as certified copies of public document, like records of Government. 22

thereof ; and the Court receiving any such evidence shall record the reasons for so doing.

Rejection of irrelevant or inadmissible documents.

3. [S. 140.] The Court may at any stage of the suit reject any document which it considers irrelevant or otherwise inadmissible, recording the grounds of such rejection.

4. [S. 141.] (1) Subject to the provisions of the next following sub-rule, there shall be endorsed on every document which has been admitted in evidence in the suit the following particulars, namely :—

- (a) the number and title of the suit,
 - (b) the name of the person producing the document,
 - (c) the date on which it was produced, and
 - (d) a statement of its having been so admitted ;
- and the endorsement shall be signed or initialled by the Judge.

(2) Where a document so admitted is an entry in a book, account or record, and a copy thereof has been substituted for the original under the next following rule, the particulars aforesaid shall be endorsed on the copy and the endorsement thereon shall be signed or initialled by the Judge.

[Oudh] In R. 4 (1) (d) add in the judge's own handwriting " after statement.

[Rangoon] To O. 13, R. 4 the following shall be added as sub-rules (3), (4) and (5) :—

"(3) The Court shall mark the documents which are admitted on behalf of the plaintiff or plaintiffs with capital letters in the order in which they are admitted thus A, B, C, etc., and the documents admitted on behalf of the defendant with figures thus 1, 2, 3, etc.

"(4) When a number of documents of the same nature are admitted, as for example a series of receipts for rent, the whole series shall bear one number or capital letter, a small number or small letter being added to distinguish each paper of the series.

"(5) Every document on admission shall be entered in a list in Form

Judicial	General
25	

 prepared by the Bench Clerk and signed by the Judge.

5. [S. 141-A.] (1) Save in so far as is otherwise provided by the Banker's Books Evidence Act, 1891, where a document admitted in evidence in the suit is an entry in a letter-book or a shop-book or other account in current use, the party on whose behalf the book or account is produced may furnish a copy of the entry.

(2) Where such a document is an entry in a public record produced from a public office or by a public officer, or an entry in a book or account belonging to a person other than a party on whose behalf the book or account is produced, the Court may require a copy of the entry to be furnished—

- (a) where the record, book or account is produced on behalf of a party, then by that party, or
- (b) where the record, book or account is produced in obedience to an order of the Court acting of its own motion, then by either or any party.

B. 173 ; 6 C. L. J. 521. The rule does not apply to documents handed to a witness to refresh his memory. 1 M. H. C. R. 168 ; or to documents filed for comparison of handwriting. 8 M. 373 ; to documents produced for the cross-examination of a witness. (*Ibid.*)

O. 13, R. 3.—The Appellate Court is bound to consider documents admitted by the Lower Court. 8 M. 373 ; 6 C. L. J. 621. See also 12 M. L. J. 351.

O. 13, R. 4.—Provisions of Rule are imperative. A judge should endorse with his own hand a statement, that a document is proved or admitted by the person, against whom it is used. 38 All. 627 = 31 M. L. J. 607 = 43 I. A. 212 (P. C.). Strict compliance with section necessary. 8 Lah. 1 = 28 Panj. L. R. 455 = A. I. R. 1927 Lah. 115 Documents produced behind the back of a party

and endorsed by Court—Party can call for the proof thereof. 9 Lah. L. J. 347 = 104 I. C. 146 = A. I. R. 1927 Lah. 679. As to mofussil practice in the Madras Presidency regarding admission of documents, see 37 Mad. 455 = 22 M. L. J. 217. Document mechanically admitted in the trial Court, but not considered—Appellate Court basing its decision on the document—Not valid. Proper course is to send back the whole case for re-trial *de novo*. 8 Lah. L. J. 537 = 99 I. C. 920 = A. I. R. 1927 Lah. 45.

O. 13, R. 5.—An extract from an entry in an account-book does not require any stamp. 26 B. 522. Proceedings for return of documents are purely ministerial. No question can arise therein, which would make, the taking of evidence on oath compulsory. 71 I. C. 666 = 26 C. W. N. 660. On this rule, see 8 Lah. L. J. 537 cited under R. 4.

(3) Where a copy of an entry is furnished under the foregoing provisions of this rule, the Court shall, after causing the copy to be examined, compared and certified in manner mentioned in rule 17 of Order VII, mark the entry and cause the book, account or record in which it occurs to be returned to the person producing it.

[Bangoon] To O. 13, R. 5, sub-rule (3), the following shall be added :—

(3) "A note of the return should be made in the list in form Judicial.
General 27."

6. [S. 142.] Where a document relied on as evidence by either party is considered by the court to be inadmissible in evidence, there shall be endorsed thereon the particulars mentioned in clauses (a), (b) and (c) of rule 4, sub-rule (1), together with a statement of its having been rejected, and the endorsement shall be signed or initialled by the Judge.

Endorsements on documents rejected as inadmissible in evidence.

Recording of admitted and return of rejected documents.

7. [142-A.] (1) Every document which has been admitted in evidence, or a copy thereof where a copy has been substituted for the original under rule 5, shall form part of the record of the suit.

(2) Documents not admitted in evidence shall not form part of the record and shall be returned to the persons respectively producing them.

[Madras] Add the following proviso to O. XIII, R. 7 (2) :—

'Provided that no document shall be returned which by force of the decree has become wholly void or useless.'

[Bangoon] Add the following to sub-rule (2) to O. 13, R. 7.—"who shall give a receipt for them in col. 6 of the list in Form Judicial.
General 25."

8. [S. 143.] Notwithstanding anything contained in rule 5 or rule 7 of this Order or in rule 17 of Order VII, the Court may, if it sees sufficient cause, direct any document or book produced before it in any suit to be impounded and kept in the custody of an officer of the Court, for such period and subject to such conditions as the Court thinks fit.

Court may order any document to be impounded.

9. [S. 144.] (1) Any person, whether a party to the suit or not, desirous of receiving back any document produced by him in the suit and placed on the record shall, unless the document is impounded under rule 8, be entitled to receive back the same,—

Return of admitted documents.

(a) where the suit is one in which an appeal is not allowed, when the suit has been disposed of, and

(b) where the suit is one in which an appeal is allowed, when the Court is satisfied that the time for preferring an appeal has elapsed and that no appeal has been preferred or, if an appeal has been preferred, when the appeal has been disposed of ;

Provided that a document may be returned at any time earlier than that prescribed by this rule if the person applying therefor delivers to the proper officer a certified copy to be substituted for the original and undertakes to produce the original if required to do so :

Provided also that no document shall be returned which, by force of the decree, has become wholly void or useless.

(2) On the return of a document admitted in evidence, a receipt shall be given by the person receiving it.

[Bombay] Between the first and second proviso to sub-rule (1) of rule 9 of Order XIII, the following proviso shall be inserted, namely :—

Provided also that a copy of the decree and of the judgment filed with the memorandum of appeal under Order XLI, rule 1, may be returned after the appeal has been disposed of by the court.

O. 13, R. 6.—See 12 M. L. J. 351.

O. 13, R. 7.—A document which is not admitted in evidence cannot be treated as forming part of the record, although it is found amongst the papers on the record. 14 A. 356.

[Madras] O. 13, R. 9.—Add the following as sub-rule (3) :

(3) Every application under the first proviso to sub-rule (1) above shall be made by a verified petition setting forth facts justifying the immediate return of the original and the Court may make such order as it thinks fit for costs of any or all the parties to the application, including any costs "incidental to the preparation of the certified copy to be substituted for the original" and may further direct that any party against whom any order for costs is made shall have such costs, if paid, "included as costs in the cause."

[Patna] Add the following as sub-rule (A) in rule 9, Order XIII :—

(9-A) Where a document is produced by a person who is not a party in the proceeding, the Court may require the party on whose behalf the document is produced, to substitute a certified copy for the original as herein before provided.

10. [S. 137.] (1) The Court may of its own motion, and may in its discretion

Court may send for papers from its own records or from other Courts.

upon the application of any of the parties to a suit, send for, either from its own records or from any other Court, the record of any other suit or proceeding, and inspect the same.

(2) Every application made under this rule shall (unless the Court otherwise directs) be supported by an affidavit showing how the record is material to the suit in which the application is made, and that the applicant cannot without unreasonable delay or expense obtain a duly authenticated copy of the record or of such portion thereof as the applicant requires, or that the production of the original is necessary for the purposes of justice.

(3) Nothing contained in this rule shall be deemed to enable the Court to use in evidence any document which under the law of evidence would be inadmissible in the suit.

[Bangoon] In Order XIII, Rule 10, sub-rule (3) shall be re-numbered as (5) and the following shall be inserted as sub-rules (3) and (4) :—

"(3) If the Court thinks fit to send for the record, it shall do so by sending a formal proceeding to the Court whose record is required. No summons to produce any record shall be issued to any Record keeper, Chief Clerk, or Official of any Court.

"(4) Whenever a Judge sends for the record of another suit or case or other official papers and uses any part of such record or papers as evidence in a trial before him, he shall direct that an authenticated copy of the part so used shall be put up with the trial record, and shall further direct at the expense of which party such copy shall be made."

In Order XIII, the following shall be inserted as Rule 10-A and 10-B.

"10-A. Exhibits, with their accompanying lists, shall not be filed with the record until after the termination of the trial."

"10-B. If any exhibit included in the index of contents of the trial record is withdrawn after judgment, the fact should be noted in the column of remarks of the index, and it should be stated whether a copy has been substituted or not."

11. [S. 145.] The provisions herein contained as to

Provisions as to documents applied to material objects.

documents shall, so far as may be, apply to all other material objects producible as evidence.

[Allahabad] Insert the following as rules 12 and 13 to Order XIII :—

"12. Every document not written in the Court vernacular or in English, which is produced (a) with a plaint or (b) at the first hearing or (c) at any other time tendered in evidence in any suit, appeal, or proceeding, shall be accompanied by a correct translation of the document into the Court vernacular. If any such document is written in the Court vernacular but in characters other than the ordinary Persian or Nagri characters in use, it shall be accompanied by a correct transliteration of its contents into the Persian or Nagri character.

13. When a document included in the list, prescribed by Rule 1, has been admitted in evidence, the Court shall, in addition to making the endorsement prescribed in Rule 4 (1), mark such document with serial figures in the case of documents admitted as evidence for a plaintiff and with serial letters in the case of documents admitted as evidence for a defendant, and shall initial every such serial number or letter. When there are two or more parties defendants the documents of the first party defendant may be marked A-1, B-1, C-1, etc., AA-1, BB-1, etc., and those of the second A-2, B 2, C-2, etc., AA-2 BB-2, etc. When a number of documents of the same nature is admitted,

O. 13, R. 10.—A judge is not bound to send for the records of another suit. 7 W. R. 109; 18 W. R. 13; and should not refuse an application under this rule merely because in his opinion the

document cannot be produced before the trial. 7 C. 560. The party applying may be required to file copies of the documents on record. 2 Bom. H. C. 341.

as for example a series of receipts for rent, the whole series shall bear one figure or capital letter or letters and a small figure or small letter shall be added to distinguish each paper of the series.

ORDER XIV.

SETTLEMENT OF ISSUES AND DETERMINATION OF SUIT ON ISSUES OF LAW OR ON ISSUES AGREED UPON.

Framing of issues.

1. [S. 146.] (1) Issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other.

(2) Material propositions are those propositions of law or fact which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defence.

(3) Each material proposition affirmed by one party and denied by the other shall form the subject of a distinct issue.

(4) Issues are of two kinds : (a) issues of fact, (b) issues of law.

(5) At the first hearing of the suit the Court shall, after reading the plaint and the written statements, if any, and after such examination of the parties as may appear necessary, ascertain upon what material propositions of fact or of law the parties are at variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend.

(6) Nothing in this rule requires the Court to frame and record issues where the defendant at the first hearing of the suit makes no defence.

2. [S. 146, para. 6.] Where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on the issues of law only, it

Issues of law and of fact.

O. 14, R. 1. OBJECT OF FRAMING OF ISSUES.—"We make it the occasion for insisting on the importance of defining with precision at the outset, the points on which a decision must turn. This no doubt requires thought and care, but the time is well spent; while vague and general issues for the most part mean that the case is approached without a clear idea of its essentials." 28 B. 424. *See also* 22 C. 324 (P. C.); 11 C. 111, 118 (P. C.). The duty of framing issues rests under the Code on the Court, and it would be unsafe to presume from the failure of the court to raise the necessary issues, an intention of the defendant to admit the facts which the plaintiff was bound to prove. 26 B. 360. *See also* 47 I. C. 589 = 35 M. L. J. 372; 51 I. C. 1007. It is the duty of court primarily to frame issues but the parties are entitled to be heard. 1925 Mad. 169; 60 I. C. 751. Court cannot raise points not raised by parties. 1923 All. 167; 21 M. L. J. 1008 = 12 I. C. 137. The issues should raise matters fairly in controversy between the parties, even though the pleadings may be defectively drawn. 8 M. H. C. 114. No issues arise where there is no averment or denial. 68 I. C. 106 = 2 Lah. L. J. 188. Every Court trying civil cases has inherent power to take cognizance of questions which cut at the root of the subject-matter of controversy between the parties. 35 Mad. 607 = 39 I. A. 218 = 23 M. L. J. 321 (P. C.). This rule implies that issues may be settled whether there is a written statement or not, though it is not obligatory on the Court to frame issues when the defendant makes no defence. 11 C. W. N. 870. *See also* 29 B. 234. The Court is not bound to frame issues when the defendant does not appear. 15 W. R. 145. A court is not justified in framing an issue on a question about which there is no dispute in the pleadings. 51 I.

C. 981 = 1919 Pat. 393. But *see* 87 I. C. 575 = 1925 Cal. 1157 (an issue may be framed by reference to other matters besides pleadings); 5 R. 527 = 105 I. C. 361 = A. I. R. 1927 Rang. 319 (suit on pro note—Defendant admitting signature but pleading fraud on the part of the plaintiff—Burden of proof on plaintiff). As to the raising of issues between co-defendants, *see* 15 M. 264. For other illustrative cases, *see* 2 M. H. C. 470; 13 M. I. A. 573; 29 M. 72. *See also* 29 A. 184 (P. C.); 16 W. R. 235; 17 W. R. 359; 6 C. 815; 8 C. 975. Inconsistent issues should not be raised. 15 C. 684 (P. C.). *See also* 13 M. 549. A judge is not bound to raise an issue on a point of law which he considers to be perfectly clear. 2 Bom. H. C. 272. The Court should not decide a suit in a way which is not the case of either party and on a matter on which no issue is raised. 15 I. C. 185 = (1912) M. W. N. 177. A specific finding must be given to every issue though two or more issues may be discussed jointly. 20 I. C. 792 = 25 M. L. J. 329. Evidence inadmissible on issues not raised. 53 I. C. 975.

O. 14, R. 2. APPLICATION OF THE RULE.—The provisions of this rule, as to trying issues of law before those of fact only come into operation at the first hearing of the suit. 4 B. 578. O. 14, R. 2 does not apply to cases in which issues of fact have not been settled but applies to cases, where the Court has not postponed the settlement of issues of fact. 28 I. C. 813 = 19 C. W. N. 1193. R. 2 applies when on settlement of issues the Court thinks there are issues of law upon which the case or some part thereof may be disposed of, then those issues of fact may be postponed. 15 L. W. 667 = 68 I. C. 167. As to limitation on the power, *see* 89 I. C. 814 = A. I. R. 1925 P. 674. A Court acts illegally, if it treats issues raising mixed questions of law and

shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined.

Materials from which issues may be framed.

3. [S. 147.] The Court may frame the issues from all or any of the following materials :—

(a) allegations made on oath by the parties, or by any persons present on their behalf, or made by the pleaders of such parties ;

(b) allegations made in the pleadings or in answers to interrogatories delivered in the suit ;

(c) the contents of documents produced by either party.

4. [S. 148.] Where the Court is of opinion that the issues cannot be correctly framed

Court may examine witnesses or documents before framing issues.

without the examination of some person not before the Court or without the inspection of some document not produced in the suit, it may adjourn the framing of the issues to a future day, and may (subject to any law for

the time being in force) compel the attendance of any person or the production of any document by the person in whose possession or power it is by summons or other process.

5. [S. 149.] (1) The Court may at any time before passing a decree amend the

Power to amend, and strike out, issues.

issues or frame additional issues on such terms as it thinks fit, and all such amendments or additional issues as may be necessary for determining the matters in controversy

between the parties shall be so made or framed.

(2) The Court may, also, at any time before passing a decree, strike out any issues that appear to it to be wrongly framed or introduced.

6. [S. 150.] Where the parties to a suit are agreed as to the question of fact or

Questions of fact or law may by agreement be stated in form of issues.

of law to be decided between them, they may state the same in the form of an issue, and enter into an agreement in writing that, upon the finding of the Court in the affirmative or the negative of such issue,—

(a) a sum of money specified in the agreement or to be ascertained by the Court, or in such manner as the Court may direct, shall be paid by one of the parties to the other of them, or that one of them be declared entitled to some right or subject to some liability specified in the agreement ;

(b) some property specified in the agreement and in dispute in the suit shall be delivered by one of the parties to the other of them, or as that other may direct ; or

(c) one or more of the parties shall do or abstain from doing some particular act specified in the agreement and relating to the matter in dispute.

Court, if satisfied that agreement was executed in good faith, may pronounce judgment.

7. [S. 151.] Where the Court is satisfied, after

making such inquiry as it deems proper,—

fact, as involving only questions of law and decides without taking evidence. 26 I. C. 954 = 20 C. L. J. 426. On this section, *see also* 5 Rang. 527.

O. 14, B. 3.—*See* 3 B. 210, 213 ; 11 C. 407 at p. 410 ; 12 W. R. 512 ; 27 A. 266.

O. 14, B. 4.—Document produced at the instance of other party—Evidence. A. I. R. 1926 Nag. 60.

O. 14, B. 5.—An issue cannot be amended or a fresh issue framed so as to convert a suit of one character into one of another and inconsistent character. 13 B. 664 ; 6 A. 456. *See also* 38 I. C. 191 = 2 Pat. L. J. 69. A charge of unchastity disentitling a Hindu-widow to maintenance, must be specifically raised in the pleadings or issues. After plaintiff's case is closed, the Court will not

frame an issue to that effect. 27 B. 485 (P. C.). A Judge is not bound to make any amendment in the issues of a case, except for the purpose of more effectually putting in issue and trying the real question or questions in controversy, or disclosed by the pleadings on either side. 5 C. 64. The application of this rule is not confined to the date of first hearing. 68 I. C. 167 = 1922 Mad. 321.

O. 14, B. 6.—The principles laid down in this rule and in R. 7 apply when the question of fact is stated in the form of an issue and is referred to the finding, not of the Court, but of a Commissioner. 29 C. 306.

O. 14, B. 7.—The word "shall" has been substituted for the word "may" to give effect to the ruling in 16 B. 202 at p. 216.

- (a) that the agreement was duly executed by the parties,
 (b) that they have a substantial interest in the decision of such question as aforesaid, and
 (c) that the same is fit to be tried and decided, it shall proceed to record and try the issue and state its finding or decision thereon in the same manner as if the issue had been framed by the Court ;
 and shall, upon the finding or decision on such issue, pronounce judgment according to the terms of the agreement ; and, upon the judgment so pronounced, a decree shall follow.

ORDER XV.

DISPOSAL OF THE SUIT AT THE FIRST HEARING.

1. [S. 152.] Where at the first hearing of a suit it appears that the parties are not at issue on any question of law or of fact, the Court may at once pronounce judgment.
 Parties not at issue.
2. [S. 153.] Where there are more defendants than one, and any one of the defendants is not at issue with the plaintiff on any question of law or of fact, the Court may at once pronounce judgment for or against such defendant and the suit shall proceed only against the other defendants.
 One of several defendants not at issue.

II. *Re-number* rule 2 of Order XV as sub-rule 2 (1) and *insert* the following as sub-rule (2) :—
 “(2) Whenever a judgment is pronounced under the provisions of this rule a decree may be drawn up in accordance with such judgment bearing the same date as the day on which the judgment was pronounced.”

3. [S. 154.] (1) Where the parties are at issue on some question of law or of fact, and issues have been framed by the Court as hereinbefore provided, if the Court is satisfied that no further argument or evidence than the parties can at once adduce is required upon such of the issues as may be sufficient for the decision of the suit, and that no injustice will result from proceeding with the suit forthwith, the Court may proceed to determine such issues, and, if the finding thereon is sufficient for the decision, may pronounce judgment accordingly, whether the summons has been issued for the settlement of issues only or for the final disposal of the suit :

Provided that, where the summons has been issued for the settlement of issues only, the parties or their pleaders are present and none of them objects.

(2) Where the finding is not sufficient for the decision, the Court shall postpone the further hearing of the suit, and shall fix a day for the production of such further evidence, or for such further arguments as the case requires.

4. [S. 155.] Where the summons has been issued for the final disposal of the suit and either party fails without sufficient cause to produce the evidence on which he relies, the court may at once pronounce judgment, or may, if it thinks fit, after framing and recording issues, adjourn the suit for the production of such evidence as may be necessary for its decision upon such issues.
 Failure to produce evidence.

ORDER XVI.

SUMMONING AND ATTENDANCE OF WITNESSES.

1. [S. 159.] At any time after the suit is instituted, the parties may obtain, on application to the Court or to such officer as it appoints in this behalf, summonses to persons whose attendance is required either to give evidence or to produce documents.
 Summons to attend to give evidence or produce documents.

O. 15, B. 2.—The working of this rule will lead to anomalies. *See* 25 A. 42. In an action commenced against several joint-debtors judgment recovered against one of them who admits the claim does not bar the further prosecution of the suit against the others. 25 B. 378.

O. 15, B. 3.—APPLICATION OF THE RULE.—O. 15, R. 3 (1) applies after issues have been framed and allows the Court to determine issues of law, if satisfied that no further argument or

evidence than the parties can at once adduce, is required upon such of the issues as may be sufficient for the decision of the suit. 68 I. C. 167 = 1922 Mad. 321. *See also* 16 Mad. 198.

O. 15, B. 4.—The Judge cannot dispose of the case at the first hearing when the summons is issued for settlement of issues only. 25 I. C. 9 = (1914) M. W. N. 501.

O. 16, B. 1.—Under O. 16, R. 1, C. P. Code, a Court has no discretion in the matter of an

[Loc. Am.] [Allahabad.] *The following proviso is added by Allahabad High Court.*—Provided that no party who had begun to call his witnesses shall be entitled to obtain process to enforce the attendance of any witness against whom process has not previously issued, or to call any witness not named in a list, which must be filed in court before the hearing of evidence on his behalf has commenced, without an order of the Judge made in writing and stating the reasons therefor.

[Oudh.] *Substituted by Oudh Chief Court 1.*—(1) The Court may, in any suit or class of suits, require any party to file by a date to be fixed by the Court, a list of witnesses whom he proposes to produce; and may, if necessary, direct that such list be kept in a sealed envelope for such time as the Court considers desirable.

Where such a list has been called for from any party, the latter shall not, except for special reasons, be permitted to summon or produce as witness, any person whose name has not been entered in the list.

(2) Subject to the provisions of sub-rule (1) the parties may, after the suit is instituted, obtain on application to the Court or to such officer as it appoints in this behalf, summonses to persons whose attendance is required either to give evidence or to produce documents.

[Loc. Am.] [Bombay.] *The following shall be added as rule 1-A to Order XVI:—*

1-A (1) The Court may, on the application of any party for a summons for the attendance of any person, permit that service, of such summons shall be affected by such party.

(2) When the Court has directed service of the summons by the party applying for the same and such service is not effected, the Court may, if it is satisfied that reasonable diligence has been used by such party to effect such service, permit service to be effected by an officer of the court.

2. (1) The party applying for a summons shall, before the summons is granted,

and within a period to be fixed, pay into Court such a sum of money as appears to the Court to be sufficient to defray the travelling and other expenses of the person summoned in passing to and from the Court in which he is required to attend, and for one day's attendance.

[Bombay.] *Insert as proviso to sub-rule (1) of rule 2 of Order XVI:—*

Provided that where Government or a public officer being a party to a suit or proceeding as such public officer supported by Government in the litigation, applies for a summons to any public officer to whom the Civil Service Regulations apply, to give evidence of facts which have come to his knowledge, or of matters with which he has had to deal, as a public officer, or to produce any documents from public records, the Government or the aforesaid officer shall not be required to pay any sum of money on account of the travelling and other expenses of such witness.

[Calcutta.] *Add the following proviso to Rule 2 (1) in Order XVI:—*

Provided that when a Government officer is summoned on behalf of Government the Court shall not require his travelling and other expenses to be paid under this rule.

[Lower Burma.] *To Order XVI, Rule 2 (1), the following shall be added:—*

Provided that in cases to which Government is a party: (a) no payment into Court will be required for the travelling and other expenses of a Government servant who may be required to be summoned at the instance of Government to give evidence in his official capacity;

(b) the amount to be paid into Court for the travelling and other expenses of a Government servant whose salary exceeds Rs. 10 and who may be required to be summoned at the instance of a party other than the Government to give evidence in his official capacity in a Court situate at a

application for summonses on witnesses if such application be made before the day of hearing, 68 I. C. 272; *See also* 27 Bom. L. R. 471=1925 Bom. 368; 15 B. 86; 16 A. 218; 7 C. 560 at p. 565. Even where the application is too late the Court has no power to refuse to summon witnesses; it may refuse to adjourn the case. 87 I. C. 355. 1925 Lah. 67. *See also* 101 I. C. 541=A. I. R. 1927 Lah. 281=9 Lah. L. J. 154; *see also* 96 I. C. 448=A. I. R. 1926 Pat. 545; A. I. R. 1926 Cal. 364. The legitimate privilege of taking out summonses to witnesses is subject to the control of the tribunal which is called upon to enforce their attendance though such control will be sparingly exercised, and only in exceptional cases. When a person's attendance is required from ulterior motives, a commission may be issued. 28 M. 28. A Judge's discretion in not compelling the attendance of witnesses must be exercised on reasonable grounds distinctly stated in the judgment. 7 W. R. 147. Detailed reasons, for refusal need not be given. 6 W. R. 65. Direction to witnesses to appear—adjournment of

hearing by Court if can be made. 15 I. C. 367=22 M. L. J. 409. The fact that a party has undertaken to bring his witnesses is no ground for refusing to summon them. 6 B. 472. Where witnesses summoned are absent, further opportunity should be allowed. 4 Pat. L. T. 545=1924 Pat. 36. And the case cannot be decided on the ground that the witnesses if produced, would not have supported the case of the party producing them. 86 I. C. 1012=1925 Lah. 572. The witness can produce documents not referred to in the summonses. 88 I. C. 498=1925 Cal. 1149.

O. 16, R. 2.—After the list of witnesses has been filed and the batta paid, the Court's officers and not the applicant are responsible for their service. 15 W. R. 88. Dismissal of suit is proper where plaintiff fails to pay process fees. 7 Lah. L. J. 232=89 I. C. 955. No action will lie for the expenses of a witness. 5 W. R. S. C. Ref. 6. A witness is entitled to be paid his expenses although he has not applied for them before giving his evidence. 4 B. 619.

distance of more than five miles from his headquarters shall be equivalent to the travelling and halting allowances admissible under the Civil Service Regulations.

In Order XVI, Rule 2, the following shall be substituted for Sub-rule (3) :—

"(3) Subject to the provisions of sub-rule (2), travelling and other expenses of witnesses, in Courts subordinate to the Chief Court other than the Court of Small Causes of Rangoon shall be payable on the following scale :—(a) Ordinary labouring class of Natives.—The actual railway or steamboat fare to and from the Court by the lowest class, so far as these can be ascertained, or, where the journey cannot be performed by rail or steamboat, actual travelling expenses up to a limit of Rupees 2 a day by boat and of 4 annas a mile by road and an allowance for each day's absence from home, including one day in attendance at the Court, or six annas to those who are residents of places other than the place where the Court is held, and of four annas to those who are residents of the place where the Court is held, (b) Petty village officers.—Double the above rate of daily allowance, same rates as above for railway or steamboat fare or actual travelling expenses by boat or road up to the limit of Rs. 2 a day by boat and of four annas a mile by road. (c) Persons of higher ranks of life, such as clerks, trades-people, ywathugyis and Circle Thugyies.—Second Class railway or steamboat fare to and from the Court or, where the journey cannot be performed by rail or steamboat actual travelling expenses up to a limit of Rs. 4 a day by boat and of six annas a mile by road, and an allowance not to exceed except in special cases Rs. 3 for each day's absence from home to Europeans or Eurasians and Re. 1 to Natives. NOTE.—A non-official who does not pay income-tax, even though he may describe himself as a clerk or a tradesman, is not entitled to be treated as falling under class (d). Persons of superior rank.—The actual sum likely to be spent in travelling to and from the Court, with an allowance, according to circumstances, not to exceed, except in very special cases, Rs. 5 for each day's absence from home to Europeans or Eurasians and Rs. 2 to Native Gentlemen. (e) Witnesses following any profession, such as Medicine or Law—A special allowance according to circumstances. NOTE.—When the Journey has to be performed partly by rail or steamboat and partly by road or boat the fare shall be paid in respect of the former and the mileage or boat allowance in respect of the latter part of the journey. Railway servants summoned by a Civil Court as witnesses, and travelling by rail to attend the Court, should be paid the railway fare to which they are entitled under the rules for the payment of witnesses without regard to the fact that they may have travelled under a pass and not on actual payment of the fare."

[Loc. Am.] [Punjab.] Add the following as an Exception to Rule 2 (i) :—

Exception—When applying for a summons for any of its own officers, government will be exempt from the operation of clause (i).

[Patna.] Add the following proviso to O. XVI, R. 2 (1):—

Provided that the Secretary of State shall not be required to pay any expenses into Court under this rule when he is the party applying for the summons, and the person to be summoned is an officer serving under Government, who is summoned to give evidence of facts which have come to his knowledge, or of matters with which he has had to deal in his public capacity.

(2) In determining the amount payable under this rule, the Court may, in the case of any person summoned to give evidence as an expert, allow reasonable remuneration for the time occupied both in giving evidence and in performing any work of an expert character necessary for the case.

Experts.

Scale of expenses.

[Allahabad.] To Order XVI, Rule 2, add :—

(4) This rule shall not apply, in cases to which Government is a party, in the case of witnesses who are Government servants whose salary exceeds Rs. 10 per mensem and who are summoned to give evidence in their public capacity at a Court situated more than five miles from their headquarters.

3. [S. 161.] The sum so paid into Court shall be tendered to the persons summoned, at the time of serving the summons, if it can be served personally.

Tender of expenses to witness.

[Bombay.] Insert as proviso to Rule 3 of Order XVI:—

Provided that where the witness is a public officer to whom the Civil Service Regulations apply and is summoned to give evidence of facts which have come to his notice, or of facts with which he has had to deal in his official capacity, or to produce a document from public records, the sum payable by the party obtaining the summons on account of his travelling and other expenses shall not be tendered to him.

O. 16, R. 3.—A witness who attends on subpoena is entitled to demand his batta at any time, from the party summoning him although he gives evidence as witness for a party other

than the party summoning him. 28 B. 647. If he does not attend, he can be sued for the recovery of the sum tendered. 17 M. L. J. 143.

[Calcutta.] Add the following proviso to Rule 3 in order XVI:—

Provided that money shall not be tendered under this rule to Government officers whose pay exceeds Rs. 10 per mensem, or whose headquarters are situate more than 5 miles from the Court, when they are summoned to appear as witnesses in their official capacity in cases to which Government is a party.

[Punjab.] For Rule 3, substitute:—

3. (1) The sum so paid into Court shall, except in the case of a Government servant, be tendered to the person summoned, at the time of serving the summons, if it can be served personally.

(2) When the person summoned is a Government servant, the sum so paid into Court shall be credited to Government.

Exception (1).—In cases in which Government servants have to give evidence at a Court situate not more than five miles from their headquarters, actual travelling expenses incurred by them may, when the Court considers it necessary, be paid to them.

Exception (2).—A Government servant, whose salary does not exceed Rs. 10 per mensem, may receive his expenses from the Court.

[Patna.] Add the following as proviso to Rule 3 of Order XVI:—

Provided that when the person summoned is an officer of Government who has been summoned to give evidence in a case to which Government is a party, of facts which have come to his knowledge, or of matters which he has had to deal, in his official capacity, then,

(i) if the officer's salary does not exceed Rs. 10 a month, the Court shall at the time of the service of the summons make payment to him of his expenses as determined by Rule 2 and recover the amount from the treasury;

(ii) if the officer's salary exceeds Rs. 10 a month and the Court is situated not more than 5 miles from his headquarters, the Court may, at its discretion, on his appearance, pay him the actual travelling expenses incurred;

(iii) if the officer's salary exceeds Rs. 10 a month and the Court is situated more than 5 miles from his headquarters, no payment shall be made to him by the Court. In such cases any expenses paid into Court under Rule 2 shall be credited to Government.

[Rangoon.] To Rule 3 of Order XVI add the following:—

This rule does not apply, where the person summoned is a government servant summoned to give evidence in his official capacity in a case to which the Government is a party.

4. [S. 162.] (1) Where it appears to the Court or to such officer as it appoints

Procedure where insufficient sum paid in.

in this behalf that the sum paid into Court is not sufficient to cover such expenses or reasonable remuneration, the Court may direct such further sum to be paid to the person summoned as appears to be necessary on that account, and, in case of default in payment, may order such sum to be levied by attachment and sale of the moveable property of the party obtaining the summons; or the Court may discharge the person summoned, without requiring him to give evidence; or may both order such levy and discharge such person as aforesaid.

(2) Where it is necessary to detain the person summoned for a longer period

Expenses of witnesses detained more than one day.

than one day, the Court may, from time to time, order the party at those instance he was summoned to pay into Court such sum as is sufficient to defray the expenses of his detention for such further period, and, in default of such deposit being made, may order such sum to be levied by attachment and sale of the moveable property of such party; or the Court may discharge the person summoned without requiring him to give evidence; or may both order such levy and discharge such person as aforesaid.

[Punjab.] 4. After the words "summoned," where it occurs in Rule 4 (1) insert:—
or, when such person is a Government servant, to be paid into Court.

[Madras.] Insert the following as Rule 4-A in Order XVI:—

4-A (1) Notwithstanding anything contained in the foregoing rules, in any suit by or against the Secretary of State for India in Council no payment in accordance with Rule 2 or Rule 4 shall be required when an application on behalf of Government is made for summons to a Government servant whose salary exceeds Rs. 10 per mensem and whose attendance is required in a Court situate more than five miles from his headquarters, and the expenses incurred by Government in respect of the attendance of the witness shall not be taken into consideration in determining costs incidental to the suit.

(2) When any other party to such a suit applies for a summons to such an officer, he shall deposit in Court along with his application a sum of money for the travelling and other expenses of

the officer according to the scale prescribed in the Civil Service Regulations and shall also pay any further sum that may be required under Rule 4 according to the same scale and the money so deposited or paid shall be credited to Government.

(3) In all cases where a Government servant appears in accordance with this rule, the Court shall grant him a certificate of attendance.

5. [S. 163.] Every summons for the attendance of a person to give evidence

Time, place and purpose of attendance to be specified in summons.

or to produce a document shall specify the time and place at which he is required to attend, and also whether his attendance is required for the purpose of giving evidence

or to produce a document, or for both purposes; and any particular document, which the person summoned is called on to produce, shall be described in the summons with reasonable accuracy.

6. [S. 164.] Any person may be summoned to produce a document, without

Summons to produce document.

being summoned to give evidence; and any person summoned merely to produce a document shall be deemed to have complied with the summons if he causes

such document to be produced instead of attending personally to produce the same.

Power to require persons present in Court to give evidence or produce document.

7. [S. 165.] Any person present in Court may be required by the Court to give evidence or to produce any document then and there in his possession or power.

8. [S. 166.] Every summons under this Order shall be served as nearly as

Summons how served.

may be in the same manner as a summons to a defendant, and the rules in Order V as to proof of service shall apply in the case of all summonses served under this rule.

[Allahabad.] In Allahabad after "this order," add "may by leave of the court be served by the party or his agent, applying for the same, by personal service, and failing such service 'before shall be served.'"

[Oudh.] In Oudh add the following provisoes:—

Provided that any party may, with the sanction of the Court himself or by his agent effect service on his own witness, as if he were an officer of the Court; but in this case no diet money paid to a witness by a party or by his agent shall be included in the costs of the suit unless the witness verifies such payment before an officer of the Court.

Provided also that the special procedure for the service of summons upon defendant under Order V, Rule 21 (I), shall not apply to service of summons under this order.

9. [S. 167.] Service shall in all cases be made a sufficient time before the

Time for service of summons.

time specified in the summons for the attendance of the person summoned, to allow him a reasonable time for preparation and for travelling to the place at which his attendance is required.

[Rangoon.] To O. XVI, R. 9 the following shall be added:—

"Where the person summoned is a public officer or servant of the Railway Company sufficient time shall also be allowed in order to give the witness an opportunity of communicating with his departmental superior, so as to arrange for the discharge of his duties during the temporary absence from his post."

10. [S. 168.] (1) Where a person to whom a summons has been issued either

Procedure where witness fails to comply with summons.

to attend to give evidence or to produce a document fails to attend or to produce the document in compliance with such summons, the Court shall, if the certificate of the

serving officer has not been verified by affidavit, and may, if it has been so verified, examine the serving-officer on oath, or cause him to be so examined by another Court, touching the service or non-service of the summons.

(2) Where the Court sees reason to believe that such evidence or production is material, and that such person has, without lawful excuse, failed to attend or to

O. 16, R. 5.—A summons should state the place of attendance. 7 M. H. C. Ap. XIV & XLIII. A summons should clearly specify the title of the Court and the place, day and time of the day when attendance is required, 5 A. 7.

O. 16, R. 8.—The rule is one in favour of the witness, and for enforcing diligence on the party. 9 B. 308 (310).

O. 16, R. 10.—Where an application is made at a very late stage of the case, to enforce the provisions of this rule, the Court is justified in not adjourning the case. 15 W. R. 176. Non-appearance of witness—Court should not insist on party taking out warrant if the party offers to produce the witness himself. 101 I. C. 257 (2)=1927 Lah. 424 (1).

produce the document in compliance with such summons or has intentionally avoided service, it may issue a proclamation requiring him to attend to give evidence or to produce the document at a time and place to be named therein ; and a copy of such proclamation shall be affixed on the outer door or other conspicuous part of the house in which he ordinarily resides.

(3) In lieu of or at the time of issuing such proclamation, or at any time afterwards, the Court may, in its discretion, issue a warrant, either with or without bail, for the arrest of such person, and may make an order for the attachment of his property to such amount as it thinks fit, not exceeding the amount of the costs of attachment and of any fine which may be imposed under Rule 12 :

Provided that no Court of Small Causes shall make an order for the attachment of immoveable property.

If witness appears, attachment may be withdrawn.

11. [S. 169.] Where, at any time after the attachment of his property, such person appears and satisfies the Court,—

(a) that he did not, without lawful excuse, fail to comply with the summons or intentionally avoid service, and,

(b) where he has failed to attend at the time and place named in a proclamation issued under the last preceding rule, that he had no notice of such proclamation in time to attend,

the Court shall direct that the property be released from attachment, and shall make such order as to the costs of the attachment as it thinks fit.

12. [S. 170.] The Court may, where such person does not appear, or appears but fails so to satisfy the Court, impose upon him such fine not exceeding five hundred rupees as it thinks fit, having regard to his condition in life and all the circumstances of the case, and may order his property, or any part thereof, to be attached and sold or if already attached under rule 10, to be sold for the purpose of satisfying all costs of such attachment, together with the amount of the said fine, if any :

Provided that, if the person whose attendance is required pays into Court the costs and fine aforesaid, the Court shall order the property to be released from attachment.

13. The provisions with regard to the attachment and sale of property in the execution of a decree shall, so far as they are applicable, be deemed to apply to any attachment and sale under this order as if the person whose property is so attached were a judgment-debtor.

14. [S. 171.] Subject to the provisions of this Code as to attendance and appearance and to any law for the time being in force, where the Court at any time thinks it necessary to examine any person other than a party to the suit, and not called as a witness by a party to the suit, the Court may, of its own motion, cause such person to be summoned as a witness to give evidence, or to produce any document in his possession, on a day to be appointed, and may examine him as a witness or require him to produce such document.

O. 16, R. 12.—No order under O. 16, R. 12, can possibly be made until the procedure laid down in R. 10 had been followed, where that rule applies. 33 I. C. 968 = 20 C. W. N. 511 ; 57 I. C. 302. But see 48 M. 941 = 49 M. L. J. 438 where it has been held that there need not be any issue of proclamation or attachment of property before the fine is imposed. If an order for attachment of property is made, and the person concerned fails to attend in obedience to a warrant, the court may impose upon him a fine under O. 16, R. 12. 55

I. C. 425 = 31 C. L. J. 363. Both arrest and attachment cannot be ordered. 51 I. C. 967 = 29 M. L. T. 95. The Court is not bound to compel attendance of a witness in absence of an application by a party to that effect. 57 I. C. 311. Where the witness appears, but is unable to produce the document, it is illegal to impose a fine upon him. 61 I. C. 967 = 29 M. L. T. 95.

O. 16, R. 14.—A witness called by the Court is liable to be cross-examined by any of the parties, 11 W. R. 468.

15. [S. 172.] Subject as last aforesaid, whoever is summoned to appear and give evidence in a suit shall attend at the time and place named in the summons for that purpose, and whoever is summoned to produce a document shall either attend to produce it, or cause it to be produced, at such time and place.

Duty of persons summoned to give evidence or produce document.

16. [S. 173.] (1) A person so summoned and attending shall, unless the Court otherwise directs, attend at each hearing until the suit has been disposed of.

When they may depart.

(2) On the application of either party and the payment through the Court of all necessary expenses (if any), the Court may require any person so summoned and attending to furnish security to attend at the next or any other hearing or until the suit is disposed of and, in default of his furnishing such security, may order him to be detained in the civil prison.

17. [S. 174, para. 1 and S. 175.] The provisions of rules 10 to 13 shall, so far as they are applicable, be deemed to apply to any person who having attended in compliance with a summons

Application of rules 10 to 13.

departs, without lawful excuse, in contravention of rule 16.

18. [S. 174, last para.] Where any person arrested under a warrant is brought before the Court in custody and cannot, owing to the absence of the parties or any of them, give the evidence or produce the document which he has been summoned to give or produce, the Court may require him to give reasonable bail or other security for his appearance at such time and place as it thinks fit, and, on such bail or security being given, may release him, and, in default of his giving such bail or security, may order him to be detained in the civil prison.

Procedure where witness apprehended cannot give evidence or produce document.

No witness to be ordered to attend in person unless residence within certain limits.

19. [S. 176.] No one shall be ordered to attend in person to give evidence unless he resides—

(a) within the local limits of the Court's ordinary original jurisdiction, or

(b) without such limits but at a place less than fifty or (where there is railway or steamer communication or other established public conveyance for five-sixths of the distance between the place where he resides and the place where the Court is situate) less than two hundred miles distance from the Court-house.

20. [S. 177.] Where any party to a suit present in Court refuses, without lawful excuse, when required by the Court, to give evidence or to produce any documents then and there in his possession or power, the Court may pronounce judgment against him or make such order in relation to the suit as it thinks fit.

Consequence of refusal of party to give evidence when called on by Court.

Rules as to witnesses to apply to parties summoned.

21. [S. 178.] Where any party to a suit is required to give evidence or to produce a document, the provisions as to witnesses shall apply to him so far as they are

applicable.

[Allahabad.] Add the following to O. XVI as R. 22 :—

"22. (1) Save as provided in this rule and in rule 2, the Court shall allow travelling and other expenses on the following scale:—(a) In the case of witnesses of the class of cultivators,

O. 16, R. 16.—The rule has been amended so as to meet the ruling in 5 M. H. C. 132. These rules have no application to a case where a party to a suit desires to give evidence of his own motion in his own favour. 35 C. L. J. 78=68 I. C. 9.

O. 16, R. 19 and 21.—Scope of. 35 C. L. J. 78=68 I. C. 9.

O. 16, R. 20.—What is or what is not a lawful excuse, must depend on the circumstances of each case—18 W. R. 63. The stringent provi-

sions of this rule ought to be applied only in the case of contumacious litigants. 15 W. R. 253. The requirement of the law under R. 20 is fulfilled, if the document is produced, and where a document is produced but refused to be exhibited, the Court cannot dismiss the suit. 46 I. C. 879=28 C. L. J. 24. A decision against a party for failure to give evidence does not operate as res-judicata. 2 C. 222. An appeal will lie from a decree passed under this rule. See also O. XLIII, R. 1.

labourers, and menials, six annas a day; (b) in the case of witnesses of a better class, such as zamindars, traders, pleaders, and persons of corresponding rank, from eight annas to two rupees a day, as the Court may direct; and (c) in the case of witnesses of superior rank, including officers of Government in receipt of salary of not less than Rs. 200 a month, from three to five rupees a day. (2) If a witness demand any sum in excess of what has been paid to him, such sum shall be allowed if he satisfies the Court that he has actually and necessarily incurred the additional expense. Illustration.—A post office employee summoned to give evidence is entitled to demand from the party, on whose behalf or at whose instance he is summoned the travelling and other expenses allowed to witnesses of the class or rank to which he belongs, and in addition the sum for which he is liable as payment to the substitute officiating during his absence from duty. The sum so payable in respect of the substitute will be certified by the official superior of the witness on a slip, which the witness will present to the Court from which the summons was issued. (3) If a witness be detained for a longer period than one day the expenses of his detention shall be allowed at such rate, not usually exceeding that payable under clause (c) of this rule as may seem to the Court to be reasonable and proper:

Provided that the Court may, for reasons stated in writing, allow expenses on a higher scale than that hereinbefore prescribed."

[Allahabad.] Add the following to Order XVI as Rule 23:—

23. In cases to which Government is a party, Government servants, not being police constables, whose salary exceeds Rs. 10 per mensem, and who are summoned to give evidence in their official capacity at a Court situated more than five miles from their headquarters, shall be given a certificate of attendance by the Court in lieu of travelling and other expenses.

ORDER XVII.

ADJOURNMENTS.

1. [S. 156.] (1) The Court may, if sufficient cause is shown, at any stage of the suit grant time to the parties or to any of them, and may from time to time adjourn the hearing of the suit.

(2) In every such case the Court shall fix a day for the further hearing of the suit, and may make such order as it thinks fit with respect to the costs occasioned by the adjournment:

Costs of adjournment.

Provided that, when the hearing of evidence has once begun, the hearing of the suit shall be continued from day to day until all the witnesses in attendance have been examined, unless the Court finds the adjournment of the hearing beyond the following day to be necessary for reasons to be recorded.

[Punjab.] To rule 1 add the following as sub-rule (3):—

(3) Where sufficient cause is not shown for the grant of an adjournment under sub-rule (1) the Court shall proceed with the suit forthwith.

[Allahabad.] The following proviso is added by the Allahabad High Court. Provided further that no such adjournment shall be granted for the purpose of calling a witness not previously summoned or named, nor shall any adjournment be utilised by any party for such purpose, unless the Judge has made an order in writing under the proviso to order XVI, Rule 1.

2. [S. 157.] Where, on any day to which the hearing of the suit is adjourned the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Order IX or make such other order as it thinks fit.

O. 17, R. 1. APPLICATION OF THE RULE.
—This rule does not apply to an adjournment not made at the instance of the parties, 2 C. W. N. 490. Application for adjournments should not be belated. 83 I. C. 257=1925 Nag. 236 (2). Non-compliance with a provision of law does not give a party an absolute right to insist on an adjournment. 5 Pat. L. J. 390. Adjournment is in the discretion of court, 24 I. C. 206; 37 I. C. 266=1 Pat. L. J. 173; 27 I. C. 942. Case transferred without notice to defendant should be given an adjournment if he pleads unpreparedness to go on. 1925 Pat. 534. O. 17, R. 1 draws a distinction between the hearing of a suit and the hearing of evidence. 46 I. C. 246=27 C. L. J. 119. When the defence set up is of such a nature as to take plaintiff by surprise,

time should be granted. 7 W. R. 84. Trial Court alone has power to grant adjournment. 26 I. C. 261=16 M. L. T. 504. Signature of parties or their pleaders to be taken when adjournments are granted. 4 P. 440=1925 Pat. 807. The Court can grant an adjournment on the understanding that plaintiff should bear the whole costs of the hearing. 7 C. 177. If costs are not paid, the suit is liable to be dismissed. 90 P. W. R. 1916=35 I. C. 534. Where such a condition is imposed on the deft. and he fails so to pay, the court can strike off the defence and proceed *ex parte*. 47 A. 538=23 A. L. J. 212. But payment on the same day should not be insisted on. 1925 Cal. 570.

O. 17, R. 2. APPLICATION OF RULE.—This rule does not apply to a case where no day has

[Alahabad] B. 2.—Where on any such day the evidence, or a substantial portion of the evidence, of any party has been recorded and such party fails to appear, the court may in its discretion proceed with the case as if such party were present, and may dispose of it on the merits.

Explanation.—No party shall be deemed to have failed to appear if he is either present or is represented in court by an agent or pleader, though engaged only for the purpose of making an application.

[Oudh] (2) Where before any such day, the evidence of a substantial portion of the evidence of any party has been recorded, and such party fails to appear on such day the Court may, in its discretion, proceed with the case as if such party were present and may dispose of it on the merits.

Explanation.—No party shall be deemed to have failed to appear if he is either present in person, or is represented in Court by his agent or pleader, though engaged only for the purpose of making an application.

3. [S. 158.] Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the Court may, notwithstanding such default, proceed to decide the suit forthwith.

Court may proceed notwithstanding either party fails to produce evidence, etc.

been fixed for the hearing of the suit. 18 W. R. 325. O. 17, R. 2 applies to the case where the hearing of a suit has been adjourned and on adjourned date, the parties or any of them fail to appear. 45 A. 618 = 21 A. L. J. 495; 1 P. 188 = 69 I. C. 837; 102 I. C. 273 (2) = A. I. R. 1927 All. 507. The Court cannot hear case on the merits. 20 A. L. J. 123 = 1922 All. 68; 27 Bom. L. R. 477 = 87 I. C. 710 = 1925 Bom. 328; 24 Bom. L. R. 775 = 46 B. 1026; 22 A. L. J. 1041 = 47 A. 181; 85 I. C. 528 = 1925 Oudh 360 (1). The words 'or make such other order as it thinks fit' do not include a decision on the merits. 89 I. C. 418 = 1925 Oudh 433. Where defendant is absent on the adjourned hearing and judgment is pronounced on the same day, the order should be presumed to be under R. 2 in absence of mention otherwise in the judgment and an application to have the decree set aside as being *ex parte* one would lie. 47 A. 140 = 85 I. C. 470. No appeal will lie from an order under this rule. 10 A. 355. See also 10 M. 270. Where, however, the Court purports to decide the case on the merits, the remedy of the aggrieved party is by appeal. 84 I. C. 521 (1) = 1925 All. 252. See 96 I. C. 564 = 1926 All. 720; 4 R. 408 = A. I. R. 1927 Rang. 46. An order dismissing the suit, when both the pleader and the client who was present retired from the case is one under O. 17, R. 2 though the decree was wrongly drawn up and it is not appealable. 32 I. C. 766 (Cal.); 4 Rang. 408 = 1927 Rang. 46. Dismissal is not proper where the pleader is present but is unprepared to argue. The Court is bound to proceed and decide on the merits. 83 I. C. 257 = 1925 Nag. 236 (2). *Revision* lies against such dismissal on the ground of material irregularity. (*Ibid.*) Instructions only to ask for adjournment—Dismissal is one under R. 2. 1 Pat. L. R. 281 = 74 I. C. 693; 4 Rang. 408. Pleader reporting no instructions after refusal of adjournment—Party present in Court—Order passed if *ex parte*. See A. I. R. 1926 Mad. 971 = 1926 M. W. N. 616; 27 L. W. 347 = (1928) M. W. N. 162; see 1926 Lah. 27. Order dismissing suit after preliminary decree is without jurisdiction. 4 Pat. 61 (P. C.). See also 6 P. L. T. 152 = 86 I. C. 785. Where there is a default and there is not enough material on record to enable the Court to pronounce judgment, the Court should proceed

under O. 17, R. 2. 41 Cal. 956 = 18 C. W. N. 775. A party had summoned witnesses who did not appear in spite of the summons. *Held*, that this did not amount to default in appearance of the party within O. 17, R. 2. 33 All. 690. Rules 2 and 3 are independent and mutually exclusive. 41 Mad. 286 = 34 M. L. J. 24 = 43 I. C. 566. (F. B.). Under R. 3 Court must have material to decide the case on the merits. 1925 Oudh 278 = 78 I. C. 240. Where a Court wrongly holds that no application under O. 9, R. 13 lies to set aside an order under the Rule, it amounts to refusal to exercise jurisdiction and revision is competent. 47 A. 140 = 85 I. C. 470. Withdrawal of suit by plaintiff—Right of defendants whose interests were similar to plaintiffs to have the suit restored to file. 98 I. C. 501 = 25 L. W. 57 = 1927 Mad. 227.

O. 17, R. 3. APPLICATION OF THE RULE.—This rule applies to those cases where time has been given to adduce evidence, and the parties appear, but fail to produce the necessary evidence. 95 I. C. 798 (1). See also 10 M. 270. Where the parties do not appear, R. 2 applies. 10 M. 270; 20 B. 736; 6 M. H. C. R. 262 and 1 M. 287. But see 25 A. 194. O. 17, R. 3 only applies where the hearing of the suit had commenced and an application for an adjournment is then made by one of the parties. 1928 Pat. 167 = 7 Pat. 236. Where there is no institution of the suit and the plaint has been returned for amendment, the rule does not apply. 86 I. C. 491 = 1925 Mad. 1045. Where there are materials on record on which the Court can decide the case it should proceed under R. 3 and not under R. 2. 61 I. C. 897 = 6 Pat. L. J. 313; 6 P. L. J. 313 = 61 I. C. 897; see also 1925 Oudh 278 = 78 I. C. 240. R. 3 applies only where on the application of one of the parties the Judge directs a particular act to be done on the adjourned hearing and the party is unable to perform that act. 27 I. C. 882 = 2 L. W. 105. Case adjourned by consent of parties—Party not ready on adjourned date—Dismissal of suit under R. 3 is not valid and an appeal lies. 5 Rang. 838 = 1927 Rang. 148 = 101 I. C. 618. Rule 3 applies only to cases where the parties are present and have not satisfied the court as to the existence of any adequate reason for their not having done

[Allahabad] The following is substituted for O. 17, R. 3 by the Allahabad High Court. Where any party to a suit, to whom time has been granted, fails, without reasonable excuse, to produce his evidence, or to cause the attendance of his witnesses, or to comply with any previous order, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the court may, whether such party is present or not, proceed to decide the suit on the merits.

(Substituted by Oudh Chief Court) [Oudh] (3) Where any party to a suit to whom time has been granted fails without reasonable excuse, to produce his evidence, or to cause the attendance of his witnesses, or to comply with any previous order or to perform any other act necessary to the further progress of the suit for which time has been allowed, the Court may, notwithstanding such default, and whether such party is present or not proceed to decide the suit on the merits.

ORDER XVIII.

HEARING OF THE SUIT AND EXAMINATION OF WITNESSES.

1. [S. 179 Expln.] The plaintiff has the right to begin unless the defendant admits the facts alleged by the plaintiff and contends that either in point of law or on some additional facts alleged by the defendant, the plaintiff is not entitled to any part of the relief which he seeks, in which case the defendant has the right to begin.

2. [S. 179.] (1) On the day fixed for the hearing of the suit or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove.

what they were directed to do. 41 Mad. 286 = 34 M. L. J. 24 (F. B.). The words "notwithstanding such default" in R. 3 clearly imply that the Court is to proceed with the disposal of the suit in spite of the default upon such materials as are before it. 51 M. L. J. 684.

SCOPE AND OPERATION OF THE RULE.—R. 3 merely authorises the Court to proceed to decide the suit forthwith and it does not authorise its dismissal summarily. 71 I. C. 862 = 1924 Lah. 404. R. 3 is an enabling and not a mandatory rule. 52 I. C. 292 = 150 P. R. 1919. Where there is no default by party, Court cannot proceed under this rule. 69 I. C. 665 = 1924 Lah. 272. Party's failure to request the Court to pass orders under O. 16, R. 10 (2) and (3) for getting the attendance of material witnesses, does not enable the Court to proceed under R. 3. 33 All. 690 = 8 A. L. J. 839 = 10 I. C. 903. A dismissal of suit for failure to amend plaint and pay costs of adjournment cannot fall under O. 17, R. 3. C. P. C. 96 I. C. 312 = 1926 Lah. 571. Plaintiff present on date of hearing but not present on date fixed for return of summons—R. 3 is not applicable—Dismissal of suit is illegal. 102 I. C. 289 = 1927 Lah. 484. Absence of defendant on date of hearing—Court should proceed under O. 17, R. 3. 9 O. L. J. 543 = 72 I. C. 394. Default in appearance is not covered by this rule. 1 P. 188 = 69 I. C. 837. Date fixed for final disposal of suit and for appointment of guardian. No steps taken by plaintiff for latter—Suit cannot be dismissed. 63 I. C. 570 = 2 Pat. L. T. 572 = 6 P. L. J. 650. Party not aware that he was to pay adjournment costs—Further hearing not conditional upon payment of costs—Time should be allowed. 1926 Cal. 1221 = 97 I. C. 172 (2). Plaintiff ordered to appear as a witness—Failure to appear—Dismissal of suit is improper. 100 I. C. 788 (1) = 1927 Lah. 388 (1). Production of stay order is not an act within the rule. 105 I. C. 30.

APPEAL.—Only an appeal and no revision lies against an order under O. 17, R. 3. 34 All. 123 = 8 A. L. J. 1265. This is so even if the Court wrongly acts under R. 3 instead of under R. 2. 84 I. C. 521 (1) = 1925 All. 252. A mistake in judgment stating the disposal was under R. 2 does not affect the right of appeal. 86 I. C. 356 = 1925 Oudh 495. A decision passed "forthwith" under O. 17, R. 3 is one on the merits as gathered from available facts. 31 I. C. 307 = 2 L. W. 1067. Decree passed on merits—Party cannot appeal against order setting it aside but must appeal against the decree. 103 I. C. 192 = A. I. R. 1927 Lah. 562 (1).

O. 18, B. 1.—The right to begin in a Small Cause Court—Preference is generally given to plaintiff. 13 B. L. R. 142. Restitution of conjugal rights, suit for—Marriage admitted but coercion and non-consent pleaded—Defendant should begin. 7 Bur. L. T. 129 = 23 I. C. 242. Applicant for mesne profits of property taken in execution of a decree reversed on appeal, must begin. 47 M. 800 = A. I. R. 1925 M. 145 = 48 M. L. J. 89. Where a defendant pleads minority he must prove his plea. 8 W. R. 371. Right of objector under Income-tax Act to begin. See 48 C. 161.

O. 18, B. 2.—"The day fixed for the hearing of the suit," see 82 I. C. 73 = 1925 All. 98. New pleadings cannot be introduced without leave of the Court. 103 I. C. 501 = A. I. R. 1927 Lah. 615 (1). Every party is entitled to have all the witnesses whom he desires to call, and is ready at the trial to produce, heard by the Court. 17 W. R. 172 = 6 C. 608 = 9 B. 146 = 2 M. I. A. 424. But see 6 B. L. R. Ap. 10. The omission of Counsel to argue a question of law, or his abandonment of it, is not sufficient to disentitle the Court to go into the question. The case is different when a question of fact is concerned. 11 C. W. N. 340 (342). Plaintiff accepting onus—Court not bound to hear defendant's case if plaintiff fails. 25 M. L. J. 281 = 21 I. C. 96.

(2) [S. 180, paras. 1 and 2.] The other party shall then state his case and produce his evidence (if any) and may then address the Court generally on the whole case.

[Madras] *Explanation.*—Nothing in this rule shall affect the jurisdiction of the Court, for reasons to be recorded in writing, to direct any party to examine any witness at any stage.

[Rangoon] *Add the following as a proviso to sub-rule (2) of Rule 2 :—*

“Provided that the Court may, in its discretion, call upon the other party to proceed under this sub-rule before the evidence of the party having the right to begin is complete if it considers that the other party will not be prejudiced by so proceeding and that unnecessary inconvenience and delay will thereby be avoided.

(3) The party beginning may then reply generally on the whole case.

3. [S. 180, last para.]

Evidence where several issues.

Where there are several issues, the burden of proving some of which lies on the other party, the party beginning may, at his option, either produce his evidence on those issues or reserve it by way of answer to the evidence produced by the other party; and, in the latter case, the party beginning may produce evidence on those issues after the other party has produced all his evidence, and the other party may then reply specially on the evidence so produced by the party beginning; but the party beginning will then be entitled to reply generally on the whole case.

Witnesses to be examined in open Court.

4. [S. 181.]

The evidence of the witnesses in attendance shall be taken orally in open Court in the presence and under the personal direction and superintendence of the Judge.

5. [S. 182.]

How evidence shall be taken in appealable cases.

In cases in which an appeal is allowed the evidence of each witness shall be taken down in writing, in the language of the Court, by or in the presence and under the personal direction and superintendence of the Judge, not ordinarily in the form of question and answer, but in that of a narrative, and, when completed, shall be read over in the presence of the Judge and of the witness, and the Judge shall, if necessary, correct the same, and shall sign it.

[Rangoon] 5. In cases in which an appeal is allowed, the evidence of each witness shall be taken down in writing in the language of the Court or in English by or in the presence and under the direction and supervision of the judge, not ordinarily in the form of question and answer, but in that of a narrative, and when completed shall be read over or translated to the witness by such person as the judge may direct, provided that the judge may, if he thinks fit, require the evidence to be read over in his own presence.

O. 18, R. 3.—Suit for declaration and recovery of possession—Plea of *benami* in defence—Plaintiff has right to adduce evidence of rebuttal after the close of evidence of *benami* by the defendant. 93 I.C. 273=7 Pat. L. T. 445.

O. 18, R. 4.—Courts should in all cases exercise the powers entrusted by law in the examination of witnesses, if they see that they are not properly examined. 10 W. R. 280. A pardanashin lady should be admitted into Court in her palanquin, and her evidence taken after her being properly identified. 1 B. L. R. 5. Omission to administer an oath to a witness, or any irregularity in the form in which it is administered does not invalidate the proceedings. 24 W. R. 31. See S. 13 of the Oaths Act X of 1873.

O. 18, R. 5. SCOPE AND OBJECT OF.—Failure to comply with the provisions of this rule and R. 6 is an informality which renders the deposition inadmissible in evidence on a charge of giving false evidence based on such deposition. 6 C. 762. O. 18, Rr. 5 to 12 have no application to Small Cause Courts and the depositions need not be read over to the witnesses and they would be admissible in evidence in a prosecution for perjury. 89 I. C. 390 (2)=1925 Nag.

412. The object of O. 18, R. 5 is to ensure accuracy; non-compliance with it does not affect the admissibility but the weight to be attached to the evidence. (18 Mad. 308; 42 Cal. 240, Diss.); 27 C. L. J. 377=22 C. W. N. 646. See also 51 C. 236; 45 C. 825. Reading out the deposition to a witness in a room adjoining the Court-hall and at a distance of 30 feet from the Judge's seat is a sufficient compliance with O. 18, R. 5. (1918) M. W. N. 239=7 L. W. 435. Reading over of the deposition by the witness himself is a sufficient compliance with the rule. 46 Cal. 895=23 C. W. N. 661. S. 91, Evidence Act, bars the admission of secondary evidence in proving a witness's statement, where it was not read over to him according to requirements of R. 5. 1 Lah. 361=58 I. C. 830. Witnesses in civil cases are not legally bound to sign or thumb mark their depositions. Courts cannot order them to do so, nor could they be compelled to sign under S. 151. 8 P. R. 1912 (Cr.)=16 I. C. 521. When parties agree that evidence is to be taken in a particular way, and that evidence in one suit shall be treated as evidence in another suit, it is not a matter which affects the jurisdiction of the Court. 30 B. 109.

Such a person shall, after reading over the deposition to the witness, append a certificate at the foot of the deposition form as follows :—

Read over
Interpreted by me in Burmese or (as the case may be) and acknowledged correct.
(signature)
Interpreter or Clerk.

The Judge shall, if necessary, correct the deposition and shall sign it

6. [S. 183.] Where the evidence is taken down in a language different from that in which it is given, and the witness does not understand the language in which it is taken down, the evidence as taken down in writing shall be interpreted to him in the language in which it is given.

[Rangoon] "6-A. Where there are no interpreters paid by Government and it is found necessary to employ an interpreter in a civil case, he shall be paid such fee, ordinarily not exceeding Rs. 2 per diem, as the Court may fix. The fee shall be advanced by the party at whose instance the interpreter is required, and shall be treated as costs in the case. All payments of interpreters' fees shall be made through the Court and duly entered in Bailiff's Register II."

7. [S. 185-A, para. 3.] Evidence taken down under section 138 shall be in the form prescribed by rule 5 and shall be read over and signed and, as occasion may require, interpreted and corrected as if it were evidence taken down under that rule.

8. [S. 184.] Where the evidence is not taken down in writing by the Judge, he shall be bound, as the examination of each witness proceeds, to make a memorandum of the substance of what each witness deposes, and such memorandum shall be written and signed by the Judge and shall form part of the record.

9. [S. 185.] Where English is not the language of the Court, but all the parties to the suit who appear in person, and the pleaders of such as appear by pleaders, do not object to have such evidence as is given in English taken down in English, the Judge may so take it down.

10. [S. 186.] The Court may, of its own motion or on the application of any party or his pleader, take down any particular question and answer, or any objection to any question, if there appears to be any special reason for so doing.

11. [S. 187.] Where any question put to a witness is objected to by a party or his pleader, and the Court allows the same to be put, the Judge shall take down the question, the answer, the objection and the name of the person making it, together with the decision of the Court thereon.

12. [S. 188.] The Court may record such remarks as it thinks material respecting the demeanour of any witness while under examination.

13. [S. 189.] In cases in which an appeal is not allowed, it shall not be necessary to take down the evidence of the witnesses in writing at length; but the Judge, as the examination of each witness proceeds, shall make a memorandum of the substance of what he deposes, and such memorandum shall be written and signed by the Judge and shall form part of the record.

14. [S. 190.] (1) Where the Judge is unable to make a memorandum as required by this Order, he shall cause the reason of such inability to be recorded, and shall cause the memorandum to be made in writing from his dictation in open Court.

O. 18, R. 8.—Where there is a conflict between the Judge's memoranda and the recorded deposition, the Court must be guided by the latter. 9 B. L. R. 274.

O. 18, R. 11.—When evidence is admitted without objection in the lower Court the Appel-

late Court must consider it. 11 B. 220. The objection cannot be taken in special appeal. 24 W. R. 296.

O. 18, R. 13.—Abstract of evidence incomplete—Judgment based on it is illegal. 2 L. W. 803=30 I. C. 634.

(2) Every memorandum so made shall form part of the record.

15. [S. 191.] (1) Where a Judge is prevented by death, transfer, or other cause

Power to deal with evidence taken before another Judge. from concluding the trial of a suit, his successor may deal with any evidence or memorandum taken down or made under the foregoing rules as if such evidence or memorandum had been taken down or made by him or under his direction under the said rules and may proceed with the suit from the stage at which his predecessor left it.

(2) The provisions of sub-rule (1) shall, so far as they are applicable, be deemed to apply to evidence taken in a suit transferred under section 24.

16. [S. 192.] (1) Where a witness is about to leave the jurisdiction of the Court,

Power to examine witness immediately. or other sufficient cause is shown to the satisfaction of the Court why his evidence should be taken immediately, the Court may, upon the application of any party or of the witness, at any time after the institution of the suit, take the evidence of such witness in manner hereinbefore provided.

(2) Where such evidence is not taken forthwith and in the presence of the parties, such notice as the Court thinks sufficient, of the day fixed for the examination, shall be given to the parties.

(3) The evidence so taken shall be read over to the witness, and, if he admits it to be correct, shall be signed by him, and the Judge shall, if necessary, correct the same, and shall sign it, and it may then be read at any hearing of the suit.

17. [S. 193.] The Court may at any stage of a suit recall any witness who has

Court may recall and examine witness. been examined and may (subject to the law of evidence for the time being in force) put such questions to him as the Court thinks fit.

18. The Court may at any stage of a suit inspect any property or thing concerning which any question may arise.

[Allahabad] **19.** (1) The Judge shall record in his own hand in English all orders passed on applications, other than orders of a purely routine character.

(2) The Judge shall record in his own hand in English all admissions and denials of documents, and the English proceedings shall show how all documents tendered in evidence have been dealt with from the date of presentation down to the final order admitting them in evidence or rejecting them.

(3) The Judge shall record the issues in his own hand in English, and the issues shall be signed by the Judge and shall form part of the English proceedings.

ORDER XIX.

AFFIDAVITS.

1. [S. 194.] Any Court may at any time for sufficient reason order that any parti-

Power to order any point to be proved by affidavit. cular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing, on such conditions as the Court thinks reasonable :

O. 18, R. 15.—Applies only when the previous Judge has not concluded the trial of the case. 21 M. L. J. 808=9 I. C. 254. It is not necessary for the succeeding Judge to rehear the case after arguments had been heard by the predecessor. 17 I. C. 278=(1912) M. W. N. 999.

O. 18, R. 16.—The evidence must be taken by the Court unless the parties consent to the evidence being taken on commission. 5 B. L. R. 252.

O. 18, R. 18.—Local inspection—Result of investigation to be recorded. 65 I. C. 601. No decision should be based solely on local inspection of the Judge. 73 I. C. 616=1923 Lah. 546; 39 Mad. 501=28 M. L. J. 598. It should be used to test the accuracy of other evidence. It

need not be recorded. 1925 Cal. 170. R. 18 authorises every Court to inspect any property or thing without the sanction of its superior Court. 26 M. L. J. 9=23 I. C. 297.

O. 19, R. 1.—An affidavit is ordinarily not evidence unless the person seeking to use it complies with the requirements of O. 19. 63 I. C. 258. A Court is authorised under O. 19. C. P. C., to receive an affidavit from the identifier as evidence of the fact of the service of summons. 106 I. C. 703=6 Pat. 760. The District Judge can act upon affidavits in support of an application to declare certain persons law touts. 13 M. L. J. 272. There is nothing in R. 1 to exclude from its operation a foreign company incorporated

Provided that where it appears to the Court that either party *bona fide* desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorizing the evidence of such witness to be given by affidavit.

Power to order attendance of deponent for cross-examination.

2. [S. 195.] (1) Upon any application evidence may be given by affidavit, but the Court may, at the instance of either party, order the attendance for cross-examination of the deponent.

(2) Such attendance shall be in Court, unless the deponent is exempted from personal appearance in Court, or the Court otherwise directs.

3. [S. 196.] (1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications, on which statements of his belief may be admitted: provided that the grounds thereof are stated.

Matters to which affidavits shall be confined.

(2) The costs of every affidavit which shall unnecessarily set forth matters of hearsay or argumentative matter, or copies of or extracts from documents, shall (unless the Court otherwise directs) be paid by the party filing the same.

[Allahabad] Add the following rules 4 to 15 to O. XIX:—

4. Affidavits shall be entitled in the court of _____ at (naming such court). If the affidavit be in support of, or in opposition to, an application respecting any case in the Court, it shall also be entitled in such case. If there be no such case it shall be entitled *In the matter of the petition of*.

5. Affidavits shall be divided into paragraphs, and every paragraph shall be numbered consecutively and, as nearly as may be, shall be confined to a distinct portion of the subject.

6. Every person making any affidavit shall be described therein in such manner as shall serve to identify him clearly; and where necessary for this purpose, it shall contain the full name, the name of his father, of his caste or religious persuasion, his rank or degree in life, his profession, calling, occupation or trade, and the true place of his residence.

7. Unless it be otherwise provided, an affidavit may be made by any person having cognizance of the facts deposed to. Two or more persons may join in an affidavit; each shall depose separately to those facts which are within his knowledge and such facts shall be stated in separate paragraphs.

8. When the declarant in any affidavit speaks to any fact within his own knowledge, he must do so directly and positively, using the words "I affirm" or "I make oath and say".

9. Except in interlocutory proceedings, affidavits shall strictly be confined to such facts as the declarant is able of his own knowledge to prove. In interlocutory proceedings, when the particular fact is not within the declarant's own knowledge, but is stated from information obtained from others, the declarant shall use the expression "I am informed" and, if such be the case, "and verily believe it to be true," and shall state the name and address of, and sufficiently describe for the purposes of identification, the person or persons from whom he received such information. When the application or the opposition thereto rests on facts disclosed in documents or copies of documents produced from any Court of Justice or other source, the declarant shall state what is the source from which they were produced, and his information and belief as to the truth of the facts disclosed in such documents.

10. When any place is referred to in an affidavit, it shall be correctly described. When in an affidavit any person is referred to, such person, the correct name and address of such person, and such further description as may be sufficient for the purpose of the identification of such person, shall be given in the affidavit.

11. Every person making an affidavit for use in a Civil Court, shall, if not personally known to the person before whom the affidavit is made, be identified to that person by some one known to him, and the person before whom the affidavit is made shall state at the foot of the affidavit the name, address and description of him by whom the identification was made as well as the time and place of such identification.

12. No verification of a petition and no affidavit purporting to have been made by a *pardanashin* woman who has not appeared unveiled before the person before whom the verification or affidavit was made, shall be used unless she has been identified in manner already specified and

in a foreign country. 8 P. R. 1912=10 I. C. 141.

O. 19, R. 3.—Contents and essentials of a valid affidavit. See 36 All. 18=22 I. C. 740. Affidavits should clearly specify what statements are made on knowledge and what on belief. A. I. R. 1924 P. 312=73 I. C. 721. An affidavit stating certain facts upon information and belief

without stating the source thereof is insufficient evidence upon which to grant an injunction. 46 I. C. 335=22 C. W. N. 700; 1 L. W. 394=23 I. C. 377; 1926 Pat. 54. An affidavit as to the points argued in a case and sworn by a person, who cannot understand the language in which the argument was made has no value. 41 I. C. 1.

unless such petition or affidavit be accompanied by an affidavit of identification of such woman made at the time by the person who identified her.

13. The person before whom any affidavit is about to be made shall, before the same is made, ask the person proposing to make such affidavit if he has read the affidavit and understands the contents thereof, and if the person proposing to make such affidavit state that he has not read the affidavit or appears not to understand the contents thereof, or appears to be illiterate, the person before whom the affidavit is about to be made shall read and explain, or cause some other competent person to read and explain in his presence, the affidavit to the person proposing to make the same, and when the person before whom the affidavit is about to be made is thus satisfied that the person proposing to make such affidavit understands the contents thereof, the affidavit may be made.

14. The person before whom an affidavit is made, shall certify at the foot of the affidavit the fact of the making of the affidavit before him and the time and place when and where it was made, and shall for the purpose of identification mark and initial any exhibits referred to in the affidavit.

15. If it be found necessary to correct any clerical error in any affidavit, such correction may be made in the presence of the person before whom the affidavit is about to be made, and before, but not after, the affidavit is made. Every correction so made shall be initialled by the person before whom the affidavit is made, and shall be made in such manner as not to render it impossible or difficult to read the original word or words, figure or figures, in respect of which the correction may have been made.

[Rangoon] To O. XIX the following shall be added as rules 4 to 12 :—

4. The officer administering the oath to the declarant of an affidavit should first make the declarant take the oath or affirmation. Then he should make the declarant repeat the whole of the statement written in the affidavit as coming from him. Then the declarant should sign the affidavit, and lastly the officer administering the oath should sign and date it.

5. Every affidavit to be used in a Court of Justice should be entitled 'In the Court of at " naming the Court. If there is a case in Court, the affidavit in support of or in opposition to an application respecting it, must also be entitled "In the case of."

If there is no case in Court, the affidavit should be entitled "*In the matter of the petition of.*"

6. Every affidavit containing any statement of facts shall be divided into paragraphs, and every paragraph shall be numbered consecutively and, as nearly as may be, shall be confined to a distinct portion of the subject.

7. Every person, other than a plaintiff or defendant in a suit in which the application is made, making an affidavit shall be described in such a manner as will serve to identify him clearly, that is to say, by the statement of his full name, the name of his father, his profession or trade, and the place of his residence.

8. When the declarant in any affidavit speaks to any fact within his own knowledge, he must do so directly and positively, using the words 'I affirm' (or make oath) 'and say.'

9. When the particular fact is not within the declarant's own knowledge, but is stated from information obtained from others, the declarant must use the expression 'I am informed' (and, if such be the case, should add) 'and verily believe it to be true' or he may state the source from which he received such information. When the statement rests on facts disclosed in documents or copies of documents procured from any Court of Justice or other source, the deponent shall state what is the source from which they were procured and his information or belief as to the truth of the facts disclosed in such documents.

10. Every person making an affidavit, if not personally known to the Commissioner, shall be identified to the Commissioner by some person known to him, and the Commissioner shall specify at the foot of the petition, or of the affidavit (as the case may be), the name and description of him, by whom the identification is made, as well as the time and place of the identification and of the making of the affidavit.

11. If any person making an affidavit is ignorant of the language in which it is written, or appears to the Commissioner to be illiterate or not fully to understand the contents of the affidavit, the Commissioner shall cause the affidavit to be read and explained to him in a language which he understands. If it is necessary to employ an interpreter for this purpose, the interpreter shall be sworn to interpret truly. When an affidavit is read and explained as herein provided, the Commissioner shall certify in writing at the foot of the affidavit that it has been so read and explained and that the declarant seemed perfectly to understand the same at the time of making the affidavit. When an interpreter is employed the Commissioner shall state in his certificate the name of the interpreter, and the fact that he was sworn to interpret truly.

12. In administering oaths and affirmations to declarants the Commissioner shall be guided by the provisions of the Indian Oaths Act, 1873.

ORDER XX.

JUDGMENT AND DECREE.

1. [S. 198.] The Court, after the case has been heard, shall pronounce judgment in open Court, either at once or on some future day, of which due notice shall be given to the parties or their pleaders.

O. 20, R. 1.—A judgment signed, dated and delivered in the absence of the parties or their pleaders and without previous notice to them is not validly pronounced. 47 A. 332 = 23 A. L. J.

[Madras] Re-number rule 1 as sub-rule (1) and add the following as sub-rule (2) :—

“(2) The judgment may be pronounced by dictation to a shorthand writer in open Court, where the presiding Judge has been specially empowered in that behalf by the High Court.”

Power to pronounce judgment written by Judge's predecessor.

2. [S. 199.] A Judge may pronounce a judgment written but not pronounced by his predecessor.

3. [S. 202.] The judgment shall be dated and signed by the Judge in open court at the time of pronouncing it and, when once signed, shall not afterwards be altered or added to, save as provided by section 152 or on review.

[Madras] For R. 3, substitute the following rule :—

The judgment shall bear the date on which it is pronounced and shall be signed by the Judge and, when once signed, shall not afterwards be altered or added to, save as provided by section 152 or on review, provided also that, where the presiding Judge is specially empowered by the High Court to pronounce his judgment by dictation to a shorthand writer in open Court, the transcript of the judgment so pronounced shall, after such revision as may be deemed necessary, be signed by the Judge.

Judgments of Small Cause Courts.

4. [S. 203.] (1) Judgments of a Court of Small Causes need not contain more than the points for determination and the decision thereon.

145 ; 100 I.C. 909 = 28 Punj. L. R. 132. Pronouncing a judgment within the meaning of O. 20, C. P.C., does not require a reading out of the whole judgment by the court. 94 I. C. 121 (1). But the decree which has followed such a judgment cannot be violated so long as it stands. (*Ibid.*) A Judge may, at the close of the hearing, state at once orally the judgment which he intends to record and deliver. 5 M. H. C. R. at p. 8. The omission in a judgment to make special mention of oral evidence is not in itself sufficient to show that, as a matter of fact, the judge did not consider the evidence. 59 I. C. 963. It is not legal for a judge trying a Civil Suit to ask two members of the bar to act as assessors presumably to appraise the value of the evidence and to base his judgment on that opinion. 21 I. C. 427. Contravention of Rules 1 to 3—Judgment pronounced by another judge—Effect. 46 Cal. 979 = 29 C. L. J. 438. Posting of result of appeal on notice-board is not a pronouncement in open Court. 41 M. L. J. 385 = 65 I. C. 42. Omission to give notice of the date on which judgment is to be pronounced is a serious irregularity if not an illegality. 12 M. L. T. 332 = (1912) M. W. N. 999 ; 38 I. C. 575 ; 7 All. 857. When either party dies before judgment is pronounced, see O. XXII, R. 6. See also 12 M. L. J. 435.

O. 20, R. 2.—R. 2 does not apply to the original side of the High Court. 51 Bom. 267 = 29 Bom. L. R. 126. Judgment—Pronouncement of, can be made by successor. 42 All. 362 = 61 I. C. 932 ; 50 I. C. 641 ; 46 I. C. 618 = 29 C. L. J. 568. See also 49 I. C. 724 ; 14 I. C. 371 ; 5 Pat. L. J. 147 = 58 I. C. 437. A Judge may write a judgment after he ceases to be a Judge in the district. It may be pronounced by his successor. 35 All. 368. In the absence of an order of transfer of the case by a competent authority a judge who is transferred has no power to deal with it. 80 P. R. 1919 = 49 I. C. 724 ; 80 P. R. 1916 = 35 I. C. 938. See also 5 Pat. L. J. 147 = 58 I. C. 437.

O. 20, R. 3.—Order 20, rule 3 is a distinct prohibition against any alteration of a signed judgment except as provided by S. 152 or on review. 254 P. L. R. 1913 = 20 I. C. 3. See also 31 A. 153. Judgment dictated to shorthand writer—Transcript cannot be amended. 18 L. W. 105 = 1923 Mad. 663. As to the power of a Court to rectify an order which it finds is wrong or has been made in an improper form, see 16 B. 404. Where a Court gives a judgment but refuses to pass a decree till the successful party complies with a certain condition, the judgment is only a provisional judgment which does not become operative until the decree is passed. 34 I. C. 867 = 9 S. L. R. 193.

O. 20, R. 4.—Judges, whatever reasons they may give in judgments must make specific and precise statements of their findings. 37 I. C. 304. Personal inspection by Judge alone is not sufficient material for judgment. 67 I. C. 302 = 1923 Cal. 311. Courts invested with Small Cause powers is governed by sub-rule (1). 31 B. 314 = 4 Bom. L. R. 327. Judgment of Small Cause Court not containing the points for determination and the decision thereon is liable to be set aside. 6 M. L. J. 50 ; 1925 Oudh 283. The Court of Small Causes need not give reasons for its decision nor even a concise statement of the case. 88 I. C. 376 = 1925 Oudh 648. Need not state more than the points for decision and the decision thereon *seriatim*. 67 I. C. 851 (Cal.) ; 42 M. L. J. 583 = 1922 Mad. 360 ; 4 Lah. L. J. 55 = 1922 Lah. 122 (1) ; 48 I. C. 752 ; 40 I. C. 890. See also 12 I. C. 740 = 7 N. L. R. 146 ; 59 I. C. 906 = 12 L. W. 285 ; but see 15 L. W. 642 ; 109 P. L. R. 1913 = 18 I. C. 216 ; 1 Rang. 274 = 2 Bur. L. J. 108 ; 97 I. C. 538 ; 95 I. C. 584. A Small Cause Judge can reduce his remarks to intelligible minimum containing points of determination. 1921 Pat. 298 = 64 I. C. 226. Judgment should contain reasons for decision. 1 Rang. 274 = 2 Bur. L. J. 108 ; 15 Bom. 11. The words “need not” in O. 20, R. 4 were not meant to be read as

(2) Judgments of other Courts shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision.

Judgments of other Courts.

5. [S. 204.] In suits in which issues have been framed, the Court shall state its finding or decision, with the reasons therefor, upon each separate issue, unless the finding upon any one or more of the issues is sufficient for the decision of the suit.

Court to state its decision on each issue.

6. [S. 206.] (1) The decree shall agree with the judgment; it shall contain the number of the suit, the names and descriptions of the parties, and particulars of the claim, and shall specify clearly the relief granted or other determination of the suit.

Contents of decree.

(2) The decree shall also state the amount of costs incurred in the suit, and by whom or out of what property and in what proportions such costs are to be paid.

[Madras] In O. XX, R. 6, after sub-rule (2) the following be inserted as sub rule (2-A):—
(2-A) In all cases in which an element of champerty or maintenance is proved, the Court may provide in the final decree for costs on a special scale approximating to the actual expenses reasonably incurred by the defendant."

(3) **[S. 221.]** The Court may direct that the costs payable to one party by the other shall be set off against any sum which is admitted or found to be due from the former to the latter.

7. [S. 205.] The decree shall bear date the day on which the judgment was pronounced, and, when the Judge has satisfied himself that the decree has been drawn up in accordance with the judgment, he shall sign the decree.

Date of decree.

"shall not." (*Ibid.*) There must be a distinct finding one way or the other, on all the material issues in the case. 8 W. R. 481. A judgment jumbling up all points together and containing a statement that all issues are found in plaintiff's favour does not comply with the rule. 1925 Mad. 1229 = 49 M. L. J. 354.

O. 20, R. 4 (2).—Conjecture is not a sound basis for judicial decision. 21 I. C. 413 = 18 C. L. J. 220. The court's judgment based on a question neither raised in written statement nor included in any issue is bad. 15 I. C. 159. Judgments—Contents of—Following prior judgment. 15 I. C. 434 = (1912) M. W. N. 900. Where the trial judge did not give a reasoned finding on the main issue in the case but simply stated his conclusion, it was held to be a violation of the provisions of O. 20, R. 4, C. P. C. 102 I. C. 280 = A. I. R. 1927 Lah. 418. In trying a question of fact a judge should not act on his knowledge or public rumour. 11 M. I. A. 213.

O. 20, R. 5.—Although a suit is decided upon a preliminary point, the Court can record findings on all the issues. 9 C. W. N. 66; *but see* 11 C. 544 and 17 M. L. J. 626 (P. C.). Courts deciding a suit have no right to impose a condition as to the mode of execution of the decree. 45 I. C. 250. The High Court set aside the judgment of the first court for uncertainty in the judgment as it could not know what the judgment meant. 25 I. C. 576 = 19 C. L. J. 545. In appealable cases the Lower Court should as far as possible pronounce its opinion on all the issues raised. 24 I. C. 87 = 1 L. W. 416 [5 W. R. 53 (P. C.), Foll.].

O. 20, R. 6.—The Court will not be deterred from making a decree by the difficulties to be expected in carrying it out. 1 M. H. C. R. 415. The decree should not be vague, but explicit in its terms. 7 W. R. 232. A decree ought to be drawn by the court deciding a case, showing all

the costs incurred by both the parties. 10 I. C. 858 = 38 Cal. 125. In the case of an original suit the decree must be quite distinct from the judgment. 54 I. C. 913 = 1 Lah. 223. When a plaintiff sues by a recognised agent and obtains a decree, the decree should stand in the name of the agent, as agent and on behalf of the plaintiff. 11 W. R. 503. Decree in a suit for contribution should specify the particular sum payable by each defendant. 24 W. R. 252. *See also* 3 M. H. C. R. 187. Decrees declaring a right to maintenance should contain an order directing future maintenance. 9 Bom. 108. *See also* 7 C. 394. Findings upon issues other than those upon which the suit is determined should not be inserted in the decree. 26 A. 234.

O. 20, R. 6 (2).—The sub-rule does not authorize the Court to order payment of costs by a person who is not a party to the suit. Costs cannot be decreed against the guardian of a defendant except in the case referred to in O. 32, R. 2. 3 M. 263. A set-off cannot be allowed for costs not actually awarded. 16 W. R. 308. Costs awarded on the disposal of a preliminary point may be set off against costs awarded at the final disposal of the suit. 9 C. 797.

O. 20, R. 7.—Where a person has the judgment of the Court that he shall have a decree, he then obtains his decree. The decree, when drawn up afterwards, relates back to that time. 65 I. C. 650 = 34 C. L. J. 494 (17 Cal. 347, Ref.). *See also* 13 Cal. 104. A decree must follow the judgment and failure to prepare a decree cannot deprive the parties of their right to appeal. 52 I. C. 479 = 66 P. R. 1919. Date of decree is date of delivery of judgment. 1 P. 771 = 75 I. C. 879; 66 I. C. 7 = 1922 Nag. 113; 21 I. C. 545 = 25 M. L. J. 560; 25 I. C. 67; 32 I. C. 744; 42 B. 309. Difference in date between judgment and

8. Where a Judge has vacated office after pronouncing judgment but without signing the decree, a decree drawn up in accordance with such judgment may be signed by his successor or, if the Court has ceased to exist, by the Judge of any Court to which such Court was subordinate.

Procedure where Judge has vacated office before signing decree.

9. [S. 207.] Where the subject-matter of the suit is immoveable property, the decree shall contain a description of such property sufficient to identify the same, and where such property can be identified by boundaries or by numbers in a record of settlement or survey, the decree shall specify such boundaries or numbers.

Decree for recovery of immoveable property.

10 [S. 208.] Where the suit is for moveable property, and the decree is for the delivery of such property, the decree shall also state the amount of money to be paid as an alternative if delivery cannot be had.

Decree for delivery of moveable property.

11. [S. 210.] (1) Where and in so far as a decree is for the payment of money, the Court may for any sufficient reason at the time of passing the decree order that payment of the amount decreed shall be postponed or shall be made by instalments, with or without interest, notwithstanding anything contained in the contract under which the money is payable.

Decree may direct payment by instalments.

(2) After the passing of any such decree the Court may, on the application of the judgment-debtor and with the consent of the decree-holder, order that payment of the amount decreed shall be postponed or shall be made by instalments on such terms as to the payment of interest, the attachment of the property of the judgment-debtor, or the taking of security from him, or otherwise, as it thinks fit.

Order, after decree, for payment by instalments.

[Bangoon] O. XX, R. 11, sub-rule 2. For the words "and with the consent of the decree holder" substitute the words "and after notice to the decree-holder".

decree—The decree should bear the date of judgment. 101 I. C. 319=6 Bur. L. J. 23.

O. 20, R. 8.—The Judge deciding a case on the conclusion of all the evidence is not bound by the previous decision on certain issues of a Judge who has tried a part of the case. 47 I. C. 555=11 Bur. L. T. 97.

O. 20, R. 9.—A decree which does not specify the lands decreed, but directs them to be determined in execution, is bad in law. 4 C. 69. Such a decree cannot be executed. 45 W. R. 39. Evidence cannot be given in the execution department to amend any uncertainty in the decree. 12 W. R. 99. But evidence could be taken to ascertain the boundaries, and the subject on which the decree operates. 16 W. R. 171; 22 W. R. 330. If the boundaries given are no longer in existence, evidence may be taken to ascertain the former position of the lands. 16 W. R. 191.

O. 20, R. 10.—In the case of a decree which follows O. 20, R. 10, C. P. C., execution cannot be taken out by the decree-holder so far as the money portion of it is concerned without adopting the procedure prescribed by O. 21, R. 31, C. P. C. 31 C. W. N. 850=103 I. C. 740=A. I. R. 1927 Cal. 652=55 Cal. 26 (13 M. L. J. 444, Fol.).

O. 20, R. 11.—The word "postponed" has been added to meet the ruling in 2 A. 649. See 7 M. at p 154 and 2 A. at p. 132. A decree for the enforcement of a mortgage or charge is not a decree for the payment of money. 7 B. 332. An order under this rule can only be made by the Court which passed the decree 12 A. 571. See

also 7 B. 332. The Court is not bound to direct that the instalments shall carry the stipulated rate of interest. 3 B. 202. Supplemental decree for balance of mortgage amount—Power of Court to order instalment payment. 11 I. C. 736; 15 C. W. N. 1083. The fact that the estate of the defendants has been brought under the management of the Court of Wards is not a reason for allowing instalments. 5 Lah. L. J. 571=1923 Lah. 266. The Court which passed the decree is the Court which can postpone the execution of decree under O. 22, R. 11. 32 M. L. J. 13=40 M. 233 (F. B.). An order postponing execution of a decree or ordering payment by instalments is virtually an order amending the decree. 34 I. C. 393. Rule refers to order passed by the Court which passed the decree and not executing Court. 2 Pat. L. T. 80=58 I. C. 893. The trial Court has the power under O. 20, R. 11, C. P. C., to postpone the payment of the amount decreed but it must be exercised judicially. 7 Lah. 393=97 I. C. 769=1926 Lah. 604. The burden of proving that the defendant is entitled to the indulgence of a decree in instalments rests upon him. 71 I. C. 303.

LIMITATION.—When an order under this rule is made on an application filed after the expiry of the period of limitation, the order is invalid. 14 C. 348 (350). But an order under this rule is not a nullity because it postpones the period of limitation. 7 M. 152 (154). See also 12 B. 65.

O. 20, R. 11 (2).—An order in the terms "Let the petition be filed" passed on a petition presented by a judgment-debtor after he is arrested,

12. [Ss. 211 & 212.] (1) Where a suit is for the recovery of possession of immoveable property and for rent or mesne profits, the Court may pass a decree—

- (a) for the possession of the property ;
- (b) for the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits ;
- (c) directing an inquiry as to rent or mesne profits from the institution of the suit until—

asking for 15 days' time, the decree-holder consenting, does not amount to an order directing payment to be postponed. 16 C. 16. *See also* 14 C. 348; 11 C. 143. *See also* 4 Bom. H. C. A. C. 77 and 5 B. 604. Order under O. 20, R. 11 (2) directing judgment-debtor to execute mortgage—Subsequent insolvency does not affect decree-holder's rights. 2 Rang. 673=4 Bur. L. J. 32. Execution of decree—Postponement of, on furnishing security—Validity of order. *See* 52 M. L. J. 182=1927 Mad. 416=100 I. C. 841.

O. 20, R. 12.—Difference between the old section (S. 211) and this rule. *See* 26 I. C. 622=2 L. W. 8. As to the effect of the rule, *see* 37 M. 186. Mesne profits must be determinable in the suit itself and not by way of execution. 16 C. W. N. 109. *See also* 37 I. C. 997; 32 I. C. 862; 2 Pat. L. J. 394=41 I. C. 231. An application for assessment of mesne profits is an application in the suit. 25 A. 385; 90 I. C. 811=A. I. R. 1926 Cal. 175; so where such an application is dismissed for default a fresh application is not maintainable. 16 C. L. J. 3. *See also* 29 I. C. 997. The remedy of the aggrieved party is under O. 9, R. 4. 1921 Pat. 25=62 I. C. 737.

SCOPE OF RULE.—The rule has been held not to apply to a suit for partition, but to suits for possession of immoveable property in which plaintiff has a specific share. 14 C. 493 (P. C.). Mesne profits may be allowed however, when one member has been entirely excluded from enjoyment. 19 B. 532. *See also* 16 C. 397 (P. C.); 14 W. R. 397. Mere excess of enjoyment is not ouster. 23 I. C. 122. A suit for mesne profits does not fall within this rule. 9 Bom. H. C. R. 7. *See also* 1 N. W. H. C. R. 22; 9 M. L. J. 163; 9 C. L. R. 1; 21 A. at p. 432 (F. B.); 5 C. 563; 24 B. 345; 19 A. 296; 30 C. at p. 664 (F. B.). Mesne profits may be awarded during the whole period a suit is pending, however long that period may be. 8 Bom. H. C. R. (A. C.) 205. In absence of mention of period in the decree, plaintiff is entitled to mesne profits up to the date of delivery of possession. 13 C. W. N. 430. *See also* 8 C. 178 (P. C.); 16 I. C. 866; 12 W. R. 75; 17 W. R. 209. Amount larger than what is claimed may be awarded as mesne profits. 8 C. 295; 9 C. 474. But *see* 6 C. 474; 5 W. R. 127 (P. C.), *contra*. Where the appellate Court finds that a person is entitled to possession, the proper cause is not to remand the whole suit, but to pass a preliminary decree so far as possession is concerned and direct an enquiry as to mesne profits. 45 M. 449=42 M. L. J. 372. Where possession is decreed to a plaintiff, he is entitled to a further decree for mesne profits from the date of the suit up to the date of taking possession. 42 All. 497=18 A. L. J. 613.

"DELIVERY OF POSSESSION".—Mere filing of a petition stating that the plaintiff might take possession, of which no notice went to the plaintiff would not amount to delivery of possession. (1911) 2 M. W. N. 258. 'Relinquishment of possession'—Notice of relinquishment if given at a time when it is too late to cultivate, is of no avail. 2 L. W. 1129.

"THREE YEARS FROM DECREE".—Mesne profits for more than three years from the date of the decree should not be awarded, even though possession was not delivered during that period. 24 B. 345; 24 B. 149; 35 C. 1017; 27 C. 951 (P. C.). Claim for mesne profits up to date of suit—Decree silent as to period for which mesne profit is to be given—Court whether can award such profits till date of delivery of possession. 53 Cal. 992=31 C. W. N. 112=99 I. C. 428=A. I. R. 1927 Cal. 182. The period should be calculated from the date of the ultimate decree. 34 C. L. J. 415. In cases of appeals, it is the appellate decree. 30 C. 660. *See also* 23 A. 152; 70 I. C. 6=34 C. L. J. 415; 3 Pat. L. J. 116=43 I. C. 855.

O. 20, R. 12 (1).—The word "may" in R. 12 (1) of O. 20 indicates that Court's power is discretionary though in R. 12 (1) (a) "may" means "shall." 41 Mad. 188=33 M. L. J. 699 (F. B.). Preliminary decree—What amounts to—Objection to jurisdiction—Where to be taken. 36 I. C. 431=9 Bur. L. T. 119.

Mesne profits.—Liability for period between date of judgment-debtor's relinquishment of possession with private notice to decree-holder and date of formal delivery through Court. 66 I. C. 49=25 C. W. N. 369.

MODE OF ASSESSMENT AND CALCULATION OF MESNE PROFITS.—*See* notice under S. 2, cl. (12). *See also* 15 I. C. 1; 3 C. W. N. 748; 18 C. 99 (P. C.); 4 Cal. 882; 9 A. L. J. 774=16 I. C. 126; 2 A. 651. The character of the possession held by the decree-holder before ouster to be taken into consideration in cases where the intention as to the mode of occupation if there were no trespass has got to be gathered. 29 C. 622=6 C. W. N. 409. *See also* 35 C. 1000=12 C. W. N. 650; 30 I. C. 536. Basis of assessment of mesne profits—Some lands held at produce rent—Presumption. 53 Cal. 992=31 C. W. N. 112=99 I. C. 428=A. I. R. 1927 Cal. 182. Thus a landlord who dispossesses a ryot is liable, not merely for the profits which he makes by letting the land but to make good the loss which the ryot sustains. 15 W. R. 428; 11 W. R. 481; 12 W. R. 104. Cultivation expenses ought to be deducted. 24 M. L. J. 30=18 I. C. 615. As to other deductions which the trespasser is entitled to, *see* 23 A. 252; 24 A. 376; 1 A. 518 (F. B.) (Collection expenses)

- (i) the delivery of possession to the decree-holder,
- (ii) the relinquishment of possession by the judgment-debtor with notice to the decree-holder through the Court, or
- (iii) the expiration of three years from the date of the decree, whichever event first occurs.

(2) Where an inquiry is directed under clause (b) or clause (c), a final decree in respect of the rent or mesne profits shall be passed in accordance with the result of such inquiry.

[Madras] Add the following to O. XX, R. 12 :—

(3) Where an Appellate Court directs such an inquiry, it may direct the Court of first instance to make the inquiry; and in every case the Court of first instance shall, on the application of the decree-holder inquire and pass the final decree.

13. [S. 213.] (1) Where a suit is for an account of any property and for its due administration under the decree of the Court, the Court shall, before passing the final decree, pass a preliminary decree ordering such accounts and inquiries to be taken and made, and giving such other directions as it thinks fit.

27 C. 951 (P. C.); 17 B. 35. See also 3 W. R. 30; 16 W. R. 171; (1911) 2 M. W. N. 308 = 12 I. C. 385. No deduction for expenses incurred in obtaining decrees for rent. 20 A. 208.

INTEREST ON MESNE PROFITS.—See notes under S. 2, cl. (12). See also 35 C. 329 (Mesne profits shall carry interest unless expressly refused). See also 27 C. 951 = 4 C. W. N. 631 (P. C.); 6 A. L. J. 327 = 2 I. C. 464; 15 M. 203. But see 22 A. 262 and 8 C. 332 (P. C.) in which it was held that where interest is not given by a decree, it is not obtainable in execution. On this point, see also 10 C. 785 (P. C.); 4 Pat. 57 = 84 I. C. 272.

PROCEDURE.—The enquiry as to mesne profits is a part of the proceedings in the suit consequent on the preliminary decree and is terminated by a final decree after the mesne profits are ascertained. 41 I. C. 231 = 2 Pat. L. J. 394. Suit for possession by heir—Enquiry into mesne profits from date of suit should be directed. 66 J. C. 494 = 2 Lah. 383. Where a Court by an order determines the principle for ascertaining mesne profits, such an order is one made in a pending suit and is therefore not appealable. 13 I. C. 186. (19 Cal. 132; 5 I. C. 272, Rel. on). A decree for mesne profits does not become operative till the amount has been ascertained by the Court and the Court-fee paid thereon under S. 11 of the Court Fees Act, 27 I. C. 300. The cases mentioned in O. 20 of the C. P. Code are not exhaustive of the orders which may form the basis of final decrees. 27 C. W. N. 989 = 38 C. L. J. 255. In the absence of a period for the calculation of mesne profits in a decree awarding mesne profits, the decree should be construed as awarding mesne profits for three years. 24 I. C. 484 = 1 L. W. 443. When a decree is passed both for possession and mesne profits, decree for possession only must be executed first. 2 L. W. 688 = 30 I. C. 246.

JURISDICTION—Jurisdiction is not taken away by the mesne profits ascertained by the Court exceeding the pecuniary jurisdiction of the Court. 21 C. 550; 40 C. 56; 15 I. C. 252; 2 Pat. L. T. 143 = 6 Pat. L. J. 54. See also 2 Pat. L. T. 648 = 68 I. C. 903; 32 I. C. 788. Suit for mesne profits is cognizable by Small Cause Courts. 23 C. 884 (F. B.); 22 M. 196; 24 M. 118. But see 25 B. 85; 14 C. W. N. 1001. After an order has

been finally made determining the amount of mesne profits due, a formal decree should be drawn up to give effect to the order which terminates the suit. 32 C. 175. See also 15 B. 416. Where a preliminary decree in a partition suit has omitted to direct an enquiry into mesne profits the final decree cannot award mesne profits or direct an enquiry as to mesne profits. 42 M. 296 = (1919) M. W. N. 284. Decree directing delivery of possession and awarding mesne profits without directing enquiry is final and not preliminary. 22 L. W. 347 = 90 I. C. 789. Mesne profits—Limitation. 16 C. L. J. 135 = 17 I. C. 121; 41 Mad. 188 = 33 M. L. J. 699 (F. B.); 77 I. C. 497 = 1923 Bom. 268.

LIMITATION—Limitation for execution runs from the date of the final decree, that is, from the ascertainment of mesne profits. 4 C. 629; 8 M. 137; 14 C. 50; 19 C. 132 (F. B.); 25 C. 203; 14 A. 531; 25 A. 385; 32 C. 175; 25 A. 623. Under Art. 109 of the Limitation Act mesne profits can be recovered only for a period preceding three years next before the institution of suit. 10 C. 785 (P. C.); 8 C. L. J. 181 = 35 C. 996 = 13 C. W. N. 15; see also 5 M. 236. But see 33 C. 23 (P. C.). The period of three years has no reference to the time when the rents fall due. 24 C. 413; 32 C. 118.

COURT FEES.—As to the Court fees leviable on mesne profits ascertained subsequent to the decree, see under S. 11 of the Court Fees Act. See also 55 I. C. 24 = 1 Pat. L. T. 235. Fees are payable on the difference between the amount paid on the mesne profits claimed in the plaint and the amount ascertained to be due subsequent to the filing of the suit. 10 L. B. R. 276 = 62 I. C. 175 = 13 Bur. L. T. 165. Application for ascertainment of further mesne profits—Court fee if and when payable. 93 I. C. 939 = 5 Pat. 361 = A. I. R. 1926 Pat. 218 (F. B.).

O. 20, R. 13.—The rules to be observed as to the respective rights of secured and unsecured creditors, etc., are to be found in the Provincial Insolvency Act. See also 15 C. at p. 208. Priority of Crown debts, see 45 Cal. 653 = 22 C. W. N. 793. Rule does not apply where Administrator-General has obtained letters of administration of estate of deceased insolvent. 38 Mad. 500. See also 5 Bur. L. T. 5 = 14 I. C. 508. A suit for mesne

(2) In the administration by the Court of the property of any deceased person, if such property proves to be insufficient for the payment in full of his debts and liabilities, the same rules shall be observed as to the respective rights of secured and unsecured creditors and as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively, as may be in force for the time being, within the local limits of the Court in which the administration suit is pending with respect to the estates of persons adjudged or declared insolvent; and all persons who in any such case would be entitled to be paid out of such property, may come in under the preliminary decree, and make such claims against the same as they may respectively be entitled to by virtue of this Code.

14. [S. 214.] (1) Where the Court decrees a claim to pre-emption in respect of a particular sale of property and the purchase-money has not been paid into Court, the decree shall—

Decree in pre-emption suit.

(a) specify a day on or before which the purchase-money shall be so paid, and

(b) direct that on payment into Court of such purchase-money, together with the costs (if any) decreed against the plaintiff, on or before the day referred to in clause (a), the defendant shall deliver possession of the property to the plaintiff, whose title thereto shall be deemed to have accrued from the date of such payment, but that, if the purchase-money and the costs (if any) are not so paid, the suit shall be dismissed with costs.

(2) Where the Court has adjudicated upon rival claims to pre-emption, the decree shall direct—

(a) if and in so far as the claims decreed are equal in degree, that the claim of each pre-emptor complying with the provisions of sub-rule (1) shall take effect in respect of a proportionate share of the property, including any proportionate share in respect of which the claim of any pre-emptor failing to comply with the said provisions would, but for such default, have taken effect; and

(b) if and in so far as the claims decreed are different in degree, that the claim of the inferior pre-emptor shall not take effect unless and until the superior pre-emptor has failed to comply with the said provisions.

15. [S. 215.] Where a suit is for the dissolution of a partnership, or the taking of partnership accounts, the Court before passing a final decree, may pass a preliminary decree declaring the proportionate shares of the parties, fixing the day on which

Decree in suit for dissolution of partnership.

profits is not a suit for an account. 22 M. 118. Administration suit in Rangoon High Court—Change in form of preliminary decree—Practice—Rangoon High Court. A. I. R. 1925 P.C. 261 = 50 M. L. J. 644 (P. C.).

O. 20, R. 14. APPLICABILITY.—The rule does not apply where the vendee is not entitled to possession. 45 A. 482 = 21 A. L. J. 417. Sub-rule (2) is new and is based upon the rulings in 6 A. 455; 11 A. 164. The words "whose title thereto shall be deemed to have accrued from the date of such payment" give effect to the observations in 24 M. at p. 463. Pre-emption decree—Form of—Date of payment to be fixed. 24 A. L. J. 63 = 1926 All. 158.

"SPECIFY A DAY".—When the day specified happens to be a Sunday, payment may be made on the following day. 3 A. 850. See also 7 A. 107. The day on which judgment was passed, ought to be excluded in computing the period specified. 3 A. 830. See also 14 A. 529. When the Appellate Court dismisses an appeal, it can extend the time fixed by the Lower Court. 2 A. 744. See also 11 A. 346. But see 18 A. 223. A Court cannot extend the time after the period mentioned in the decree has elapsed. 13 A. 400. See S. 148. But see 45 A. 456 = 74 I. C. 745.

COSTS.—The section makes no provision for cases where costs are awarded in favour of pre-emptor. In such cases he can pay the sum after deducting costs. 6 A. at p. 353.

CASES.—Where a pre-emptor joins with himself a stranger in suing to enforce his right he thereby forfeits it. 5 A. 197. For further cases, see 15 C. 224; 15 C. 184; 4 A. 420; 16 A. 126; 44 Cal. 675 = 32 M. L. J. 459 = 44 I. A. 80 (P. C.). The transferee of a pre-emption decree cannot execute it but the pre-emptor can execute it for the benefit of the transferee. 7 A. 109; 7 A. 107. Pre-emption decree—Failure to deposit whole amount by mistake—Effect of. 1923 Lah. 250; 18 I. C. 600 = 141 P. L. R. 1913. Decree silent as to standing crops—Plaintiff entitled to them on paying money into Court. 76 I. C. 193 = 1923 Nag. 327.

O. 20, R. 15.—The preliminary decree ought to declare the several rights and liabilities which have been adjudicated upon, and embody an order which is contemplated by this Rule and R. 16. 18 M. at p. 87. For the purpose of working out a partnership decree each party should produce all documents and accounts in his possession. See 18 C. W. N. 1025 = 27 M. L. J. 192 (P. C.). On this rule see also 25 I. C. 146 = 17 O. C.

the partnership shall stand dissolved or be deemed to have been dissolved, and directing such accounts to be taken, and other acts to be done, as it thinks fit.

16. [S. 215-A.] In a suit for an account of pecuniary transactions between a principal and an agent, and in any other suit not herein-before

Decree in suit for account between principal and agent.

provided for where it is necessary, in order to ascertain the amount of money due to or from any party, that an account should be taken, the Court shall, before passing its final decree, pass a preliminary decree directing such accounts to be taken as it thinks fit.

17. The Court may either by the decree directing an account to be taken or by any subsequent order give special directions with regard to

Special directions as to accounts.

the mode in which the account is to be taken or vouched and in particular may direct that in taking the account

the books of account in which the accounts in question have been kept shall be taken as *prima facie* evidence of the truth of the matters therein contained with liberty to the parties interested to take such objection thereto as they may be advised.

Decree in suit for partition of property or separate possession of a share therein.

18. Where the Court passes a decree for the partition of property or for the separate possession of a share therein, then,—

(1) if and in so far as the decree relates to an estate assessed to the payment of revenue to the Government, the decree shall declare the rights of the several parties interested in the property, but shall direct such partition or separation to be made by the Collector, or any gazetted subordinate of the Collector deputed by him in this behalf, in accordance with such declaration and with the provisions of section 54 ;

(2) if and in so far as such decree relates to any other immoveable property or to moveable property, the Court may, if the partition or separation cannot be conveniently made without further inquiry, pass a preliminary decree declaring the rights of the several parties interested in the property and giving such further directions as may be required.

19. [S. 216.] (1) Where the defendant has been allowed a set-off against the claim of the plaintiff, the decree shall state what amount

Decree when set-off is allowed.

is due to the plaintiff and what amount is due to the defendant, and shall be for the recovery of any sum which

appears to be due to either party.

(2) Any decree passed in a suit in which a set-off is claimed shall be

Appeal from decree relating to set-off.

subject to the same provisions in respect of appeal to which it would have been subject if no set-off had been claimed.

(3) The provisions of this rule shall apply whether the set-off is admissible under Rule 6 of Order VIII or otherwise.

193 ; 45 I. C. 727 ; 41 P. L. R. 1918 ; 40 All. 446 = 16 A. L. J. 305.

O. 20, R. 16.—Where a decree requires an agent to render accounts, he can only discharge himself by accounting for all the moneys that have come into his hands, and it is always open to the decree-holder to show that this has not been done. 15 W. R. 260. The Court should order an account to be taken of the defendant's dealings with the plaintiff's money. 14 C. 147 ; 12 B. 675. See 24 W. R. 70. See also 7 C. 654 ; 62 I. C. 537 ; 49 I. C. 441 ; 28 I. C. 452 ; 36 I. C. 210. On the fact of agency being established, it is the duty of the Court to direct an account to be taken of the defendant's dealings as agent. 27 A. 374. Objection to particular item—When to be taken—Object—Purpose of preliminary decree. 95 I. C. 171 = A. I. R. 1926 Nag. 393.

O. 20, R. 18.—Difference between old and new

Code, see 43 M. L. J. 406 = 46 Mad. 47. Under certain circumstances, in partition suits, final decree in the first instance would be proper. 17 I. C. 390 = 246 P. L. R. 1912. Preliminary decree in partition suit effects severance of status. 28 I. C. 543 = 2 L. W. 325. Preliminary decree for partition of moveables (as) jewels, must determine whether they exist, their value, if they are partible property, and in whose possession they are. 50 I. C. 876. Preliminary decree omitting to direct enquiry into mesne profits—Final decree cannot award the same. 42 Mad. 296. Partition suit—Preliminary decree not granting interest—Whether Court can award interest in the final decree. 94 I. C. 686 (2) = 1925 Bom. 406.

O. 20, R. 19.—As to applicability of the rule, see 25 W. R. 275. See also 39 I. C. 508 = 62 P. R. 1917

Certified copies of judgment and decree to be furnished.

20. [S. 217.] Certified copies of the judgment and decree shall be furnished to the parties on application to the Court and at their expense.

[Allahabad] Add the following to O. XX as R. 21 :—

21. (1) Every decree and order as defined in section 2, other than a decree or order of a Court of a Small Causes or of a Court in the exercise of the jurisdiction of a Court of Small Causes, shall be drawn up in the Court vernacular. As soon as such decree or order has been drawn up, and before it is signed, the Munsarim shall cause a notice to be posted on the notice-board stating that the decree or order has been drawn up, and that any party or the pleader of any party may, within six working days from the date of such notice, peruse the draft decree or order and may sign it, or may file with the Munsarim an objection to it on the ground that there is in the judgment a verbal error or some accidental defect not affecting a material part of the case, or that such decree or order is at variance with the judgment or contains some clerical or arithmetical error. Such objection shall state clearly what is the error, defect or variance alleged, and shall be signed and dated by the person making it.

(2) If any such objection be filed on or before the date specified in the notice, the Munsarim shall enter the case in the earliest weekly list practicable, and shall, on the date fixed, put up the objection together with the record before the Judge who pronounced the judgment, or if such Judge has ceased to be the Judge of the Court, before the Judge then presiding.

(3) If no objection has been filed on or before the date specified in the notice, or if an objection has been filed and disallowed, the Munsarim shall date the decree as of the day on which the judgment was pronounced and shall lay it before the Judge for signature in accordance with the provisions of rules 7 and 8.

(4) If an objection has been duly filed and has been allowed, the correction or alteration directed by the Judge shall be made. Every such correction or alteration in the judgment shall be made by the Judge in his own handwriting. A decree amended in accordance with the correction or alteration directed by the Judge shall be drawn up, and the Munsarim shall date the decree as of the day on which the judgment was pronounced and shall lay it before the Judge for signature in accordance with the provisions of Rules 7 and 8.

(5) When the Judge signs the decree he shall make an autograph note stating the date on which the decree was signed.

[Burma] To O. XX the following shall be added as Rules 21, 22 and 23 :—

21. As soon as the decree of a Court of first instance in a suit relating to land in a district in which there is a Land Records Establishment has become final, or if the decree has been appealed against, when the decree in appeal has become final, and the interest of any party to the suit in any land included in the survey has been affected thereby, the Court of first instance shall certify the nature and extent of such change of interest in each plot of land in suit to the Superintendent of Land Records of the district in which the land is situate. A copy of the certificate in every such case should also be sent to the Sub-Registrar within whose sub-district the land or any part thereof is situate.

22. The certificates shall be in the prescribed Form (Civil) 96, and shall be signed by the presiding officer of the Court.

23. [* * * * *].¹

ORDER XXI.

EXECUTION OF DECREES AND ORDERS.

Payment under decree.

Modes of paying money under decree.

1. [S. 257.] (1) All money payable under a decree shall be paid as follows, namely :—

¹Omitted by Chief Court Notification, dated 16th June, 1916.

O. 21.—Applicability to sales in insolvency. See 48 All. 209=24 A. L. J. 26=A. I. R. 1926 All. 124; 102 I. C. 543=A. I. R. 1927 Nag. 262.

O. 21, R. 1. EXECUTION OF DECREES AND ORDERS.—Procedure in execution is not to be conducted in a slipshod and slovenly fashion, as if it were a very unimportant branch of the work. It ought to be conducted with as much gravity, care, and decorum as the procedure in suits if not with more care and attention. 12 All. 179 (183). O. 21 has no application to sales under administrative order. 60 I. C. 718=40 P. L. R. 1922. Nor to sales by Receivers though with approval of Court. 96 I. C. 116=L. R. 6 A. 610. "Decree

holder" in the singular includes also the plural. 25 M. at p 440 (F. B.). As to procedure to be adopted in execution where a party to a suit was directed to pay the costs of the day, see 12 M. 120. A payment out of Court only to one of several joint decree-holders cannot bind the others unless he was also constituted by them an agent for this purpose. See 26 A. 318. As to whether deposit under O. 21, R. 89 to prevent confirmation of sale is payment under O. 21, R. 1. See 1925 Nag. 17. As to whether a decree is satisfied where money is paid into Court by the judgment-debtor with a request to pay it to plaintiff on his giving security, see 29 M. at p 210. See also 11 B. 724; 20 A. L. J. 353=1922 All. 190. As to the effect of payment by third parties, see 34 I. C. 350=(1916) 1

- (a) into the Court whose duty it is to execute the decree ; or
- (b) out of Court to the decree-holder ; or
- (c) otherwise as the Court which made the decree directs.

(2) Where any payment is made under clause (a) of sub-rule (1), notice of such payment shall be given to the decree-holder.

2. [S. 258] (1) Where any money payable under a decree of any kind is paid

Payment out of Court to
decree-holder.

out of Court, or the decree is otherwise adjusted in whole or in part to the satisfaction of the decree-holder, the decree-holder shall certify such payment or adjustment to

M. W. N. 195. Payment into Court must be notified to the decree-holder and served on him like summons. 81 I. C. 1001=1925 Nag. 52 ; 20 A. L. J. 353=66 I. C. 744. Interest ceases when the decree-holder receives notice. (35 Mad. 44, dist.) ; 42 Mad. 576=50 I. C. 410 Judgment-debtor must pay process-fee when Court orders notice. If not, Court must inform decree-holder of the payment into Court when executing decree: 67 I. C. 242. Payment to attaching creditor is not payment to a decree-holder. 80 I. C. 947=1925 All. 123 (2) If the last date fixed for payment was a holiday the money can be deposited on the opening date. 87 I. C. 620=1925 All. 687 ; 1925 Mad. 743=48 M. L. J. 596. A decree for *mesne profits* is a decree for money. 4 Pat. L. J. 336=48 I. C. 183. Rule does not apply to mortgage decree not being money decree. 45 M. L. J. 687=18 L. W. 686. Deposit without notice of the assignment of the decree or of petition put in by assignee of execution—The deposit serves as discharge. 76 I. C. 55=2 Pat. 754.

O. 21, R. 2. SCOPE OF RULE.—Distinction between adjustment and agreement to adjust pointed out. 38 Mad. 897=105 I. C. 248=A. I. R. 1927 Mad. 911=53 M. L. J. 533. See also 102 I. C. 753=A. I. R. 1927 Lah. 544. The rule applies to awards under the Ind. Arb. Act. 97 I. C. 321. The Court cannot recognize a payment or adjustment which has not been certified, for any purpose whatsoever. An uncertified payment or adjustment cannot now operate to prolong the period of limitation for applying for execution. See 19 M. 162, 21 C. 542 (549) ; 21 B. 122 ; 17 A. 42 ; 26 A. 36. See also 35 I. C. 234=38 All. 289 ; 13 I. C. 424 ; 16 C. W. N. 396 ; 51 I. C. 567=13 S. L. R. 71 ; 29 Mad. 312 ; 13 I. C. 944=15 C. L. J. 88. An oral adjustment is covered by this rule. A. I. R. 1926 Cal. 643. The rule is general and does not limit the payment to the decree-holder only. 45 A. 304=21 A. L. J. 97 ; (1914) M. W. N. 346=23 I. C. 530. When one party performs his part of a consent decree he has to apply for the execution for performance by the other party. 53 I. C. 882=30 C. L. J. 118. When an execution petition is dismissed by consent of the decree holder, he cannot raise the question of mistake and his remedy is by way of review. The order of a Court, if not appealed against, becomes final. 35 I. C. 369=10 Bur. L. T. 30. The rule provides for the adjustment of any decree and not merely money decrees. 46 B. 226=23 Bom. L. R. 981. Applies also to complex decrees. 40 I. C. 820=(1917) M. W. N. 327. Also to mortgage decrees. 1925 Mad. 467=48 M. L. J. 121 ; 5 Pat. L. J. 672=57 I. C. 473. See also 40 I. C. 845=21 C. W. N. 920. Rule applies also to partition decrees which provide

for payment of money as for other relief. (25 M. L. J. 586, not foll.) 43 Mad. 476=56 I. C. 289. A final decree in a mortgage suit is capable of adjustment. 54 I. C. 137=37 M. L. J. 356 ; 68 I. C. 443=A. I. R. 1923 Nag. 20. A compromise which has been entered into after a decree does not come within the meaning of this rule. 5 Bom. H. C. (A. C. J.) 78. Court can inquire whether a decree for possession of lands has been satisfied. 25 M. L. J. 586=21 I. C. 439. Rule recognises discharge by operation of law. 23 I. C. 848. This rule does not debar a Criminal Court from recognizing an uncertified payment when the decree-holder is charged with fraudulently executing satisfied decree. 9 M. 101, 4 M. 325. This rule has reference only to proceedings in execution as between parties to the decree. 10 M. L. J. 213. This rule does not limit the operation of S. 47. A separate suit does not lie to declare that a decree has been satisfied. 8 C. W. N. 395. This rule covers a much larger ground than what is covered by S. 47. It deals with all adjustments arrived at between the decree-holder and the judgment-debtor. 25 C. 718 (724). The executing Court can investigate the adjustment of a decree out of Court. 50 I. C. 443=135 P. R. 1919. (36 Mad. 357 ; 24 C. L. J. 462, Rel. ; 34 Bom. 575 ; 40 Bom. 333 Dis.) Agreement to give time to the judgment-debtor is valid. 24 I. C. 391. As regards an agreement prior to decree to execute the decree for a lesser sum. See 4 Rang. 118=96 I. C. 773=A. I. R. 1926 Rang. 140 ; 49 Mad. 513=50 M. L. J. 364. Where only some of the conditions provided in a compromise are performed, the decree-holder is entitled to proceed with execution of the rest. 16 I. C. 972=16 C. L. J. 101. Scope and object of Cl. (3). 93 I. C. 53=A. I. R. 1926 Oudh 482 ; 105 I. C. 163=26 L. W. 349=A. I. R. 1927 Mad. 876. The embargo under R. 2 (3) is limited to 'Court executing the decree' only. 1923 Rang. 44 (1).

MEANING OF TERMS.—Receipts by a mortgagee in possession, after decree, will not be "money payable under the decree" and need not be certified. 28 M. 473, (478) (F. B.). See also 30 M. 255 at p. 265 ; 38 I. C. 675=39 Mad. 1026. As regards decree-holder, see 25 M. 431 (440) (F. B.). See also 28 A. 252 ; 26 A. 318, 29 M. 183 ; 26 A. 334 ; and 9 C. 831. "To show cause"—For the meaning of these words, see 11 C. 166. The words "of any kind" have been added after the word "decree" in the first paragraph to give effect to the ruling in 6 C. 786. See also 49 Mad. 716=50 M. L. J. 547. 8 C. W. N. 1028 and 22 M. 182 are not now good law.

"COURT".—An application for recording adjustment may be made to the Collector to whom a decree has been transferred for execution. 16 A. 228. Also to a Court to which a decree is sent

the Court whose duty it is to execute the decree, and the Court shall record the same accordingly.

for execution. 5 C. 448. The certificate of payment or adjustment should be filed in the Court which passed the decree or to Court to which it was sent for execution. 25 M. L. J. 586; 5 Cal. 448. Filing in the wrong Court and obtaining an order "recorded" from that Court cannot be treated as valid. 25 M. L. J. 586=21 I. C. 639. Court proceeding against surety is not strictly Court executing decree. 20 S. L. R. 362=96 I. C. 234=A. I. R. 1926 Sind 105.

WHAT ARE ADJUSTMENTS.—The adjustment referred to under O. 21, R. 2, C. P. C., is such an adjustment as completely or partly extinguishes the decree under execution and cannot mean an adjustment to give effect to the terms of which would be to create a new decree at variance with the decree under execution and which will again have to be executed. 32 C. W. N. 434. Services rendered by the judgment-debtor to decree-holder amounts to an adjustment. 12 I. C. 169=11 M. L. T. 380. An agreement whereby the rights under it should supersede the decree is an adjustment of it. 35 Mad. 75=21 M. L. J. 709. Rule 2 (1) covers an agreement extinguishing the right of execution. 12 I. C. 364=7 N. L. R. 136. An award on arbitration is binding upon the parties as an adjustment. A. I. R. 1927 Sind 66; 42 I. C. 467=3 Pat. L. W. 146. Agreement not to execute one decree if another is satisfied is a sufficient adjustment and satisfaction can be recorded for the former. 1925 Rang. 349=4 Bur. L. J. 179. But see 32 C. W. N. 434. A compromise at the time of execution must be treated as if incorporated in the decree itself. 57 I. C. 591. An incomplete inchoate contract cannot bar execution. Judgment-debtor cannot claim completion of such contract. 43 I. C. 537. An oral agreement not performed by either party cannot bar execution. 103 I. C. 86=A. I. R. 1927 Lah. 537. Part payments towards money decrees can be certified by decree holder in execution application. 26 C. W. N. 534=35 C. L. J. 566. It is sufficient if the payment or adjustment is either certified or recorded. 30 I. C. 45=21 C. L. J. 362.

WHO CAN CERTIFY.—The holder of a decree that is attached may certify satisfaction of the decree after the attachment. 2 M. L. J. 288; 1 Luck. 428. See also 16 B. 522. The law casts on the decree-holder the duty of certifying payment 30 M. 545. See also 1 Bur. L. J. 207=1923 Rang. 88. Vakil's duty to report to Court payment of decree amount to him as early as possible. 105 I. C. 86=A. I. R. 1927 Mad. 947=53 M. L. J. 901. A manager of a joint family can certify satisfaction of a decree so as to bind the other members. 35 All. 380=19 I. C. 645. So also one partner on behalf of a firm. A. I. R. 1926 Sind 167. Any one of joint decree-holders can report satisfaction so far as his own share goes and cannot bind others. 89 I. C. 195=1925 Pat. 822. See also A. I. R. 1925 Pat. 822. A decree-holder and his judgment-debtor can adjust their rights and liabilities and some of the judgment-debtors may be released. See 40 I. C. 1 (25 M. L. J. 586 and (1915) M. W. N. 225, Dist.) If an adjustment is

not certified it is entirely the fault of the judgment-debtor. 1 Bur. L. J. 226=1923 Rang. 103. (See also same case as to fraud of decree-holder). A judgment-debtor is not bound to wait and see whether decree-holder applies or not. He can apply as soon as the payment or adjustment is made. 12 M. L. J. 94. Judgment-debtor can prove that he is discharged, even where an adjustment of a decree is not certified. 18 L. W. 453=1924 Mad. 189. Assignee or transferee of the decree cannot continue any proceedings nor can he institute any fresh proceeding for the execution of the decree. He must make an application under O. 21, R. 16 to the Court which passed the decree and the Court must order that execution may proceed at his instance. It is then open to the judgment-debtor to plead that the claim has already been satisfied. 47 Bom. 643=1923 Bom. 404. An uncertified adjustment between the assignee and the judgment-debtor before the former applies under O. 21, R. 16 can be validly pleaded as bar to execution. 31 C. W. N. 921=104 I. C. 4=A. I. R. 1927 Cal. 694. Where a decree-holder attaches another decree without notice to the judgment-debtor and the latter pays money to his decree-holder, satisfaction should be entered in his decree notwithstanding the attachment. 61 I. C. 815=13 L. W. 34. A surety can apply. 49 Mad. 325=50 M. L. J. 584; A. I. R. 1926 Sind 105. Adjustment by surety with decree-holder may be proved. A. I. R. 1928 Lah. 61. An auction-purchaser of property in execution of money decree has a right to apply for entering up satisfaction of a decree affecting that property. 50 I. C. 931=9 L. W. 596.

DUTY OF COURT.—If a Court is seized of an application to enter up satisfaction of a decree it must make an inquiry whether the decree has been satisfied. The application should not be allowed to be withdrawn. 51 I. C. 411=35 M. L. J. 252. Opportunity must be given to prove adjustment. 102 I. C. 753=A. I. R. 1927 Lah. 544. The Court will not inquire into the truth of the decree-holder's statement. Certificates of satisfaction are not conclusive in any way and the judgment-debtor can show that no such payment was made and raise the plea of limitation. 47 I. C. 177=21 O. C. 161. See also 12 I. C. 580. In recording an adjustment out of Court, the Court must enquire into the factum of adjustment and if there is anything still due to the decree-holder. 41 All. 443=50 I. C. 65; 45 Bom. 91=59 I. C. 399. No appeal lies for dismissal of an application for default. 63 I. C. 855. No particular form is prescribed for certifying payment to the Court. No particular words are essential. The rule should be construed as not to defeat justice. 54 I. C. 257=55 P. L. R. 1919; 35 I. C. 70=31 M. L. J. 207; 30 I. C. 357=29 M. L. J. 219. The adjustment need not be in writing and the judgment-debtor need not have carried out all the terms for satisfying the decree. 102 I. C. 753=A. I. R. 1927 Lah. 544. Enquiries in a suit or in execution proceedings should be confined to matters which could be taken advantage of by parties to the proceedings in the suit or execution itself. 28 I. C. 376=(1915) M. W. N. 225. The inquiry under sub-rule (2) can take place only

(2) The judgment-debtor also may inform the Court of such payment or adjustment, and apply to the Court to issue a notice to the decree-holder to show

between persons standing in the relation of judgment-debtor and judgment-creditor. 19 M. 230 (232). The representative of a deceased judgment-debtor can apply. See S. 146. Court has no power to enquire into a compromise—Power of executing Court. See 17 I. C. 752=24 M. L. J. 88. S. 92 of the Evidence Act does not bar oral evidence to prove an agreement adjusting decree. 60 I. C. 316=16 N. L. R. 204. But see 50 Mad. 897=105 I. C. 248=1927 Mad. 911=53 M. L. J. 533. An executing Court cannot enquire into a prior agreement between the parties that no decree should be obtained in the suit. 8 L. W. 205=(1918) M. W. N. 547. See also 29 I. C. 838=11 N.L.R. 110; 9 Lah. L.J. 7. But see 40 Mad. 233. As to the power of executing Court to enquire into adjustment of decree, see 5 R. 833. Notice of deposit in Court must be served on the decree-holder. 1925 Nag. 52. Once an admission of payment is made, it cannot be allowed to be retracted, and no proof of such payment is necessary from the judgment-debtor. 54 I. C. 257=55 P. L. R. 1919. When a decree is admitted to be satisfied by the decree-holder, it is not executable. 18 N. L. R. 134=1922 Nag. 248. Admission of payment in an execution application can be treated as an application to certify such payment. 83 I. C. 360 (2). But see also 1922 Cal. 200, *infra*. Mere statements in the execution application that payments towards the decree have been made out of Court cannot be treated as an application for certification. 64 I. C. 32=1922 Cal. 200. But see 4 Pat. L. J. 159=50 I. C. 364. A Court can certify part payments towards a money decree in an application for execution. 26 C. W. N. 534=35 C. L. J. 566. Rule requires that a decree-holder should certify payment. The application need not be distinct from an application for execution of decree. 23 I. C. 753=12 A.L.J. 387; 35 C.L.J. 71=26 C. W.N. 529. See also 54 Cal. 143. When such application is acted upon no formal order of Court is necessary. 43 Cal. 207=20 C. W. N. 272; 54 I. C. 257=55 P. L. R. 1919. No record by Court is necessary before adjustment is recognised 98 I. C. 698=A. I. R. 1927 Mad. 155. Withdrawal of appeal by judgment-debtor and stay of execution in the lower Court is sufficient compliance with the requirements of the rule. 16 C.W.N. 923=13 I.C. 63; 49 I.C. 141=(1918) M.W.N. 507; 52 I.C. 764. A casual reference in a plaint or civil proceeding is not sufficient. 52 I. C. 901=13 S. L. R. 130. Confirmation should not be ordered when decree is admitted to be satisfied. 66 I. C. 331=1922 Nag. 248. Full satisfaction can be recorded if a smaller sum is paid under a composition scheme to which the decree-holder is also a party. 22 L. W. 853=49 M. L. J. 730. See also 91 I. C. 1051=A. I. R. 1926 Mad. 184. The dismissal of an application for recording satisfaction does not operate as *res judicata*. 89 I. C. 195=1925 Pat. 822. Where a transferee of a decree is only a benamidar for one of the judgment-debtors, the others can plead that he has no title to execute the decree. 40 Mad. 296=32 I. C. 952. Also see 35 Mad. 659=28 M.L.J. 170.

Where a compromise is made and is inconsistent with the subsequent decree of the Court, the clauses of the compromise cannot operate. 1 Lah. 445=57 I. C. 153. Whether payment to one of many decree-holders can be recorded in full satisfaction, when paid to manager of joint Hindu family without leave of Court, see 1925 Mad. 230 (2)=47 M. L. J. 498. A decree can be executed when satisfaction has been wrongly entered up. 7 M. 167. A fresh decree is unnecessary when parties adjust claim. 20 N. L. R. 122=1925 Nag. 49.

AS TO UNCERTIFIED PAYMENTS AND ADJUSTMENTS.—Execution of decree is barred by sub-rule (3) of R. 2 if satisfaction of decree is not certified under sub-rule (1) or (2) of O. 21, R. 2. A.I.R. 1928 Oudh 195; 49 B. 548, F.; 32 C. W. N. 434. A suit lies to enforce a mortgage executed in consideration of a sum paid in cash, and a debt due under a decree, although satisfaction of the decree has not been certified. 12 M. 61. As to recovery of amount paid and not certified, see 10 C. 354; 21 M. 409; 3 A. 538; 30 M. 545; 5 M. 397 (F. B.); 8 M. 277 (F. B.); 23 B. 394 (396); 95 I. C. 410=A. I. R. 1923 Bom. 253. Judgment-debtor entitled to recover it. 11 I. C. 1. A decree-holder can be sued in damages for not certifying an adjustment and for repayment of money again realised in execution. 15 Mad. 302; 30 Mad. 545; 21 Bom. 463; 20 All. 254; 20 Mad. 369; 12 C.L.J. 312; 36 M. L. J. 376; 42 Mad. 338. The filing of the execution petition itself gives cause of action and successive applications constitute fresh breaches. Rule governed by Art. 115, Lim. Act. 48 I.C. 810=36 M. L. J. 175. Separate suit does not lie on uncertified adjustment for setting aside sale under the satisfied decree. 50 I. C. 956=15 N. L. R. 158. Where an adjustment is not certified when Court can take cognizance of it, see 77 J. C. 337=1924 Oudh 208. It is not competent to a Court executing a decree to enquire into the fact of a payment of adjustment which has not been certified as required by O. 21, R. 2 even if fraud be imputed to decree-holder. 32 C. W. N. 434. See also (1926) M. W. N. 622=24 L. W. 404=97 I. C. 608 (1)=A. I. R. 1926 Mad. 945 (1). Whether suit maintainable to restrain decree-holder from execution when payment not recorded. 1925 Lah. 54. A suit to set aside sale held under a decree adjusted, but not certified does not lie. 50 I.C. 956=15 N.L.R. 158. See also 14 Cal. 376; 21 Mad. 356; 17 M. L. J. 527. A suit for declaration that a decree has been adjusted and is not capable of execution is maintainable. Art. 97, 115 or 120, Lim. Act. is applicable. 21 I. C. 557=330 P. L. R. 1913; 1925 Lah. 54. Interest ceases to run from the date when tender was made. 38 I. C. 295=5 L. W. 718. Failure of an adjustment on the basis of an oral agreement cannot be pleaded as a bar to execution of the decree by the judgment-debtor. He has his remedy by a suit for specific performance of it. 44 A. 238=20 A. L. J. 65. If the judgment-debtor admits making payments though uncertified it is not necessary to prove them. 52 I. C. 362. Uncertified payments cannot be recognised

cause, on a day to be fixed by the Court, why such payment or adjustment should not be recorded as certified; and if, after service of such notice, the decree-holder fails to

for any purpose. 30 All. 204; 32 I. C. 590=14 A. L. J. 132; 13 I. C. 21. *See also* 25 Bom. L. R. 247=1923 Bom. 253 (1). An adjustment of a decree out of Court by an agreement to accept a smaller sum in full satisfaction of the decree, cannot, unless certified, be pleaded as a bar to execution of decree for balance. 17 M. L. J. 527. A surety for the judgment is bound so long as the judgment-debtor is bound. 60 I. C. 885=1923 Cal. 313 (1). Executing Court will not recognise adjustment of uncertified payment. 55 I. C. 669; 48 I. C. 765; 50 I. C. 331; 33 I. C. 71. Payment out of Court if not certified can be ignored only in execution of the decree but not otherwise. 58 I. C. 123. Decree-holder can execute the decree as if no payment has been made out of Court, if it is not brought to the notice of Court in time. 6 P. L. J. 337=63 I. C. 535. An attaching Court cannot recognise an uncertified adjustment and cannot refuse to proceed with the execution. 65 I. C. 830=1922 Mad. 66. An uncertified adjustment of a preliminary decree in a mortgage suit cannot be pleaded in bar to execution of a final decree. 54 I. C. 137=37 M. L. J. 356; 68 I. C. 443=1923 Nag. 20. An agreement to give time for the satisfaction of the judgment-debt is void, if uncertified and has no proper consideration. No suit for damages for breach. (1918) M. W. N. 292=45 I. C. 16. Arrangement pending appeal that original decree should be inexecutable in part cannot be pleaded as a bar in execution of the appellate decree. 44 M. L. J. 599=1923 Mad. 619. Case where Court can take cognizance of an alleged adjustment though it has not been certified. 77 I. C. 337=1924 Oudh 208; 47 M. L. J. 498; 32 C. W. N. 434. *See also* 40 Bom. 333=33 I. C. 232 (case where decree-holder fraudulently denies execution). 1925 Mad. 230 (2)=47 M. L. J. 498; 53 I. C. 443=135 P. R. 1919; 27 Bom. L. R. 403=49 Bom. 548 (F. B.). The Court has no discretion to refuse execution by transferee on the ground of uncertified adjustment. 54 I. C. 922=10 L. W. 179. Adjustment of a decree out of Court and uncertified cannot be recognised. 40 I. C. 889=5 L. W. 644. Rule prohibits proof of uncertified payment. 26 I. C. 944=2 L. W. 109; 18 L. W. 453=1924 Mad. 189. Where the decree-holder has exempted the judgment-debtor from liability though uncertified, his sons cannot execute the decree after his death. 14 I. C. 574=16 C. W. N. 951. An executing Court has no power to recognise payment out of Court and uncertified. 22 I. C. 963=1 U.B.R. 197. A written statement of judgment-debtor alleging uncertified adjustment should be entered as an application by the Court and disposed of. 11 I. C. 780=4 Bur. L. T. 162. But *see* 18 I. C. 944=15 C. L. J. 88. After a decree has been satisfied and certified, subsequent sale is void and can be set aside. 9 I. C. 452=4 Bur. L. T. 12

LIMITATION.—A decree-holder may apply to have a payment certified, at any time. 21 B. 122. *See also* 17 I. C. 617=12 M. L. J. 592; 47 All. 873=1925 All. 802; 4 Pat. L. J. 159=50 I. C. 364; 54 Cal. 143; 1 Luck. 428=29 O. C. 358=3 O. W. N. 829=98 I. C. 353=A. I. R. 1927 Oudh 7. But a judgment-debtor must apply

within 90 days. *See* 27 I. C. 11=20 C. L. J. 131; 24 M. L. J. 541=36 Mad. 357; 6 P. L. J. 337=63 I. C. 535; 86 I. C. 1051=A. I. R. 1925 Cal. 1012; 26 C. W. N. 529=35 C. L. J. 71. Decree-holder cannot certify after 3 years. 50 I. C. 242=23 C. W. N. 320. An uncertified adjustment will not save the period of limitation for execution. 13 I. C. 424=16 C. W. N. 396; 29 I. C. 274=13 A. L. J. 666; 24 I. C. 215=12 A. L. J. 825; 35 All. 178=18 I. C. 731; 25 A. L. J. 933. Failure to certify satisfaction of a decree out of Court is fraud upon the Court. 45 I. C. 222=5 O. L. J. 92. In case of uncertified payment Court will not go into the question of fraud on the part of the decree-holder. 16 C. W. N. 923=16 C. L. J. 174; on the part of the judgment-debtor. 63 I. C. 238=15 S. L. R. 77. Part payments and the certification must take place before the application for execution is barred by limitation. 26 C. W. N. 534=35 C. L. J. 566. Interest paid by judgment-debtor operates to save limitation. 43 Cal. 207=20 C. W. N. 272. *See also* 21 I. C. 926=19 C. L. J. 126. No time or manner is prescribed for the decree-holder to certify payment. An application within 3 years can be accepted as a certificate. 39 Mad. 923. An uncertified payment of a portion of the decree amount made before the expiry of the period saves the decree from the bar of limitation. 33 M. L. J. 219=41 Mad. 251. Court is bound to recognise payments previously made and S. 20 of Lim. Act comes in to save limitation. 29 M. L. J. 669=31 I. C. 318. Rule does not refer to payments in kind which need not therefore be certified to Court. 21 I. C. 177=25 M. L. J. 442. Court has no power to order repayment of over payment but judgment-debtor has got his remedy in law to claim refund. 11 I. C. 200. A Court other than a Court executing a decree can recognise an uncertified payment or adjustment of decree and direct a refund of the amount in a suit brought for the purpose. 39 I. C. 15.

FRAUD.—Omission to certify the adjustment of the decree does not amount to fraud. 5 P. L. J. 70=55 I. C. 890. Decree-holder's failure to report satisfaction is fraud upon the Court, and subsequent purchase of the judgment-debtor's property in execution is vitiated by fraud and is a nullity. 45 I. C. 222=5 O. L. J. 92. Court would not allow execution of a decree where decree-holder is fraudulently denying satisfaction of decree made out of Court. 40 Bom. 338=33 I. C. 232. The sons of a decree-holder cannot execute a decree after father's death if he had during his lifetime exempted the judgment-debtor from all liability, though he has not certified the adjustment of the Court. 14 I. C. 574=16 C. W. N. 951. In case of fraud the judgment-debtor must inform the Court and protect himself, but he can't evade Art. 174, Lim. Act. He has his remedy by a proper suit. 13 I. C. 424=16 C. W. N. 396. Adjustment made by fraudulent arrangement between decree-holder and judgment-debtor should be certified. 13 I. C. 326=15 C. L. J. 451. In case of fraud the defrauded party will have his right of action. 46 Bom. 226=1922 Bom. 380. O. 9, R. 9 (Restoration) does not apply to an application under this rule. 63 I. C. 855. An appeal

show cause why the payment or adjustment should not be recorded as certified, the Court shall record the same accordingly.

[Madras] After "Judgment-debtor" insert "or his legal representative or his surety for the decree debt".

(3) A payment or adjustment, which has not been certified or recorded as aforesaid, shall not be recognized by any Court executing the decree.

Courts executing Decrees.

3. Where immoveable property forms one estate or tenure situate within the local limits of the jurisdiction of two or more Courts, any one of such Courts may attach and sell the entire estate or tenure.

Lands situate in more than one jurisdiction.

4. [S. 223, para. 5.]

Transfer to Court of Small Causes.

Where a decree has been passed in a suit of which the value as set forth in the plaint did not exceed two thousand rupees and which, as regards its subject-matter, is not excepted by the law for the time being in force from the cognizance of either a Presidency or a Provincial Court of Small Causes, and the Court which passed it wishes it to be executed in Calcutta, Madras, Bombay or Rangoon, such Court may send to the Court of Small Causes in Calcutta, Madras, Bombay or Rangoon, as the case may be, the copies and certificates mentioned in rule 6; and such Court of Small Causes shall thereupon execute the decree as if it had been passed by itself.

5. [S. 223, last para.]

Where the Court to which a decree is to be sent for execution is situate within the same district as the Court which passed such decree, such Court shall send the same directly to the former Court. But, where the Court to which the decree is to be sent for execution is situate in a different district, the Court which passed it shall send it to the District Court of the district in which the decree is to be executed.

Procedure where Court desires that its own decree shall be executed by another Court.

6. [S. 224.] The Court sending a decree for execution shall send—

(a) a copy of the decree;

(b) a certificate setting forth that satisfaction of the decree has not been obtained by execution within the jurisdiction of the Court by which it was passed, or, where the decree has been executed in part, the extent to which satisfaction has been obtained and what part of the decree remains unsatisfied; and

lies against an order dismissing an application under this rule. 14 M. 99; 18 M. 26; 16 A. 129; 3 P. L. T. 487=1 P. 644.

O. 21, R. 3.—This rule is new, and follows the ruling in 12 C. 307. See also 12 C. L.R. 404 and 23 W. R. 154. Court having no jurisdiction over immoveable property cannot validly sell it in execution of a decree, except under this rule. If Court sells property entirely outside its jurisdiction, the sale is a nullity. 27 C.W.N. 542=1923 Cal. 619.

O. 21, R. 4.—R. 4 applies equally to decrees of foreign Courts. 40 I.C. 670=33 M.L. J. 539.

O. 21, R. 5.—When a decree passed by a Munsiff in one District is sent direct for execution to the Court of a Munsiff in another District, the Court to which the decree is sent has no jurisdiction to execute it without an express order of the District Judge under R. 88. 22 C. 764. But see 15 M. 345. The Court ought to send it back to the Judge that sent for adopting the correct procedure and not dismiss the execution application. 28 I. C. 682. It is open to the parties to question at any stage the jurisdiction of the Court to execute it. 49 I. C. 374=4 Pat. L. J. 49.

O. 21, R. 6.—The words "copy of any order for the execution of the decree" in cl. (c) mean a copy of any subsisting order. 13 Bom. 371. The judgment of a Native State is a foreign judgment. The British Indian Court has power to see whether a foreign Court had jurisdiction. R. 7 applies only to British Courts. 40 Bom. 551=36 I. C. 363. No formal order necessary as to transfer when the transferring Court and the Court to which a decree is transferred are presided over by the same Judge. 105 I. C. 654=5 R. 613. Notice to execute can be issued only by the Court to which the decree is transferred. 63 I. C. 116=26 C. W. N. 292. Where a decree has been transferred to another Court for execution, the decree-holder need not make a second application to the latter Court to execute it. Where notice is issued under O. 21, R. 22, the application must have been in form and substance one for execution and not only for transfer. 2 Pat. 909=74 I. C. 753. Certificate wrong—Court to which the decree is transferred need not get the certificate amended, but can execute decree. 93 I. C. 257=A.I.R. 1927 P. 807. On this section, see also 31 C.W.N. 1052.

(c) a copy of any order for the execution of the decree, or, if no such order has been made, a certificate to that effect.

7. [S. 225.] The Court to which a decree is so sent shall cause such copies and certificates to be filed, without any further proof of the decree or order for execution, or of the copies thereof, unless the Court, for any special reasons to be recorded under the hand of the Judge, requires such proof.

Court receiving copies of decree, etc., to file the same without proof.

8. [S. 226.] Where such copies are so filed, the decree or order may, if the Court to which it is sent is the District Court, be executed by such Court or be transferred for execution to any subordinate Court of competent jurisdiction.

Execution of decree or order by Court to which it is sent.

Execution by High Court of decree transferred by other Court.

original civil jurisdiction.

9. [S. 227.] Where the Court to which the decree is sent for execution is a High Court, the decree shall be executed by such Court in the same manner as if it had been passed by such Court in the exercise of its ordinary

Application for Execution.

10. [S. 230, para. 1.] Where the holder of a decree desires to execute it, he shall apply to the Court which passed the decree or to the officer (if any) appointed in this behalf, or if the decree has been sent under the provisions hereinbefore contained to another Court then to such Court or to the proper officer thereof.

Application for execution.

[Bangoon] 10-A. If no application is made by the decree-holder within six months of the date of the receipt of the papers, the Court shall return them to the Court which passed the decree with a certificate stating the circumstances as prescribed by section 41.

11. [S. 256.] (1) Where a decree is for the payment of money the Court may, on the oral application of the decree-holder at the time of the passing of the decree, order immediate execution thereof

Oral application.

O. 21, R. 7.—An executing Court cannot question the jurisdiction of the Court passing the decree. 38 Bom. 194; 46 I. C. 419=22 P.R. 1919. See also 10 Bur. L. T. 159=36 I. C. 10. Rule does not apply to a foreign decree transmitted to a British Court. (1913) M.W.N. 605=20 I.C. 704 (on appeal 26 I. C. 287=27 M.L.J. 535).

O. 21, R. 8.—The order forwarding a decree for execution need not be signed by the District Judge himself. 23 C. 481. See 22 C. 764. A Court having no jurisdiction over a decree transmitted to it cannot execute the same. The rule in execution is, a Court can only act through its officers within its territorial jurisdiction. 33 M.L.J. 750=43 I. C. 79. The law of limitation prevailing at the time of application must be applied. 1 M. 52. When there are different laws of limitation in force in two Courts the law applicable is the law of the Court to which the decree is sent for execution. B.L.R. Sup. Vol. 970; But see 17 C. at p. 497. When the decree of a court of a foreign State is being executed in British India the law of limitation applicable is the law which would have been applicable in case the decree had been passed in British India. 14 C. 570.

O. 21, R. 9.—The "manner" of execution refers to the procedure under which the execution is to be had, and has no reference to limitation. 24 C. 473 (491).

O. 21, R. 10.—There is nothing in the Code to prevent separate and successive applications for execution in respect of each item decreed. 18 C. 515. Rule governs only applications made to con-

tinue the suit but not made after the termination of the suit. 48 I.C. 840=41 Mad. 510. The person appearing on the face of the decree as the decree-holder is entitled to execute it unless it be shown by some other person under R. 16, that he has taken the decree-holder's place. 18 C. 639. See also 2 M. 216. A person claiming under the decree-holder can also apply. See S. 146. Every decree-holder must apply for execution, and no exception is made in cases arising under O. 38, R. 11. 12 B. 400. Until the court has received a decree it has no jurisdiction to entertain an application for execution. 27 L.W. 423.

O. 21, R. 11.—Applications for execution of a decree are proceedings in the suit. 20 B. 198. Where an erroneous order of the Court has prevented the decree-holder from proceeding with the execution of his decree the Court may treat a subsequent application to amend the previous one, as a fresh application itself. 53 I.C. 111. A defective application for the execution of a decree, unless it is cured, is liable to be dismissed. 11 I. C. 696 (1). Execution application without giving necessary particulars is mere scrap of paper. 7 P. L. T. 350=A. I. R. 1926 Pat. 533. The rule makes no mention of a temporary alienation of land. 58 I.C. 603=2 Lah. L. J. 398. The rule does not apply to applications for an order absolute under S. 89 of the Transfer of Property Act, O. 34, R. 5. 21 C. 818. A mortgage decree cannot be executed against some of the owners of the equity of redemption. 47 I. C. 907. This rule does not bar the maintenance of concurrent

by the arrest of the judgment-debtor, prior to the preparation of a warrant if he is within the precincts of the Court.

(2) [S. 235.] Save as otherwise provided by sub-rule (1), every application for the execution of a decree shall be in writing, signed and

Written application, verified by the applicant or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case, and shall contain in a tabular form the following particulars, namely :—

- (a) the number of the suit ;
- (b) the names of the parties ;
- (c) the date of the decree ;
- (d) whether any appeal has been preferred from the decree ;
- (e) whether any, and (if any) what, payment or other adjustment of the matter in controversy has been made between the parties subsequently to the decree ;
- (f) whether any, and (if any) what, previous applications have been made for the execution of the decree, the dates of such applications and their results ;
- (g) the amount with interest (if any) due upon the decree, or other relief granted thereby, together with particulars of any cross-decree, whether passed before or after the date of the decree sought to be executed ;
- (h) the amount of the costs (if any) awarded ;
- (i) the name of the person against whom execution of the decree is sought ; and
- (j) the mode in which the assistance of the Court is required, whether—

execution. Court may allow amendment and R. 17 does not bar it. (27 C.L.J. 398, Ref.; 17 Cal. 631, Dist.); 4 Pat. 328=71 I. C. 741. All decree-holders desirous of enforcing their decrees, must apply for execution. There is no exception in cases arising under O. 38, R. 11, 12 B. 400. Non-compliance with immaterial provisions will not vitiate an execution application. 65 I. C. 14=1922 Sind 29; 96 I. C. 554=A. I. R. 1926 Cal. 1146. Application headed as one under R. 11 but not in proper form—Court acting thereon and granting relief—Application is one in execution and order is legal. A. I. R. 1928 Mad. 129 (2). A person appearing on the face of the decree as the decree-holder is entitled to apply for execution, unless it be shown by some other person that he has taken the decree-holder's place. 18 C. 639. An application for execution made by A as guardian of B, who was a major at the time of execution, cannot be considered as an application of B under this rule. 28 M. 396. The Code in its provisions relating to execution does not seem to provide for the execution of a conditional decree which is to become absolute upon the failure of defendant to do a certain thing. 10 C. W. N. 306.

VERIFIED.—An application verified by the general attorney for the decree-holder, is properly verified even if the principal is residing within the jurisdiction of the Court. 26 A. 154. Where there are a number of decree-holders some not acquainted with the facts of the case, all that the law requires is that the application should be verified by some person acquainted with the case. 2 Pat. 809=4 Pat. L. T. 513. Decree-holder's disappearance—Nothing known as to his death—Pleader can apply. 7 Pat. L. T. 220=A. I. R. 1925 Pat. 692.

Clause (b).—When a decree is binding upon a minor, execution might be sought against him through his guardian. 16 C. 40; 18 W. R. 56.

Clause (e).—Decree-holder was bound to state in his application any adjustment between the parties after decree, whether such adjustment

had or had not been certified to the Court. 10 B. 288.

Clause (f).—An application which does not contain the particulars mentioned in this clause is only formally defective, and substantially complies with the requirements of the rule. 16 M. 142=65 I. C. 120. An executing court must either allow a defective application to be amended or reject it. 2 Lah. L. J. 104=55 I. C. 16. A *bona fide* mistake can be amended. 26 M. L. J. 83=21 I. C. 782. A defective application is in accordance with law. 40 Mad. 949=32 M. L. J. 621. See also 96 I. C. 554=A. I. R. 1926 Cal. 1146.

Clause (g).—A purchaser under a sale in execution is not bound to inquire whether judgment-debtor had a cross-judgment for a higher amount. 14 C. at p. 25 (P. C.). Omission to state date of prior application is not a material defect but omission to mention the existence of cross-decrees however may be a material defect. 71 I. C. 1054=1924 Cal. 398.

Clause (j). **SCOPE OF.**—Any method suggested by the decree-holder for the satisfaction of his decree which method is not actually prohibited by law falls within the purview of R. 11 (2) J. (v). 1928 Lah. 7. As regards proper form of decree, see 19 B. 34. The method of executing is one of procedure and not a substantive right. 9 I. C. 800. A judgment-debtor should be arrested only when he shows bad faith or negligence in satisfying decree. 11 I. C. 848=246 P. L. R. 1911. A decree declaring a party entitled to a constantly recurring right to receive certain payments in kind, valued at a certain annual sum cannot be executed, as the applicant would not be able to state definitely, as required by the Code, to what extent relief was desired. 4 M. at p. 220. See also 27 I. C. 804=13 A. L. J. 136. In an application for execution of a decree to remove a building, the assistance of the Court should be asked for in the manner provided by R. 32. 8 C. 174; 18 C. at p. 465; 17 C. 532. "Otherwise as the nature of the relief may

- (i) by the delivery of any property specifically decreed ;
 - (ii) by the attachment and sale, or by the sale without attachment, of any property ;
 - (iii) by the arrest and detention in prison of any person ;
 - (iv) by the appointment of a receiver ;
 - (v) otherwise, as the nature of the relief granted may require.
- (3) The Court to which an application is made under sub-rule (2) may require the applicant to produce a certified copy of the decree.

12. [S. 236.] Where an application is made for the attachment of any moveable property belonging to a judgment-debtor but not in his possession, the decree-holder shall annex to the application an inventory of the property to be attached, containing a reasonably accurate description of the same.

Application for attachment of moveable property not in judgment-debtor's possession.

13. [S. 237, para. 1.] Where an application is made for the attachment of any immoveable property belonging to a judgment-debtor, it shall contain at the foot—

Application for attachment of immoveable property to contain certain particulars.

(a) a description of such property sufficient to identify the same and, in case such property can be identified by boundaries or numbers in a record of settlement or survey, a specification of such boundaries or numbers ; and

(b) a specification of the judgment-debtor's share or interest in such property to the best of the belief of the applicant, and so far as he has been able to ascertain the same.

[Rangoon] The following shall be substituted for O. XXI, R. 13 :—

"13. When application is made for execution of a decree relating to immoveable property, included within the cadastral or Town Survey and the decree does not contain a plan of the property, or for execution of decree by the attachment and sale of such property, the application must be accompanied by a certified extract from the latest kwin or town map, with the boundary of the land in question marked with a distinctive colour. The particulars specified in the annexed instructions, which have been issued regarding the filling up of forms of process concerning immoveable property must also be furnished so far as they are not given in the plan. In the case of other immoveable property a plan is not required, but such of the particulars in the annexed instructions as can be given must be supplied :—(1) If the property to be sold is agricultural land which has been cadastrally surveyed and of which survey maps exist, the area, kwin number, latest holding number (if different kinds of holding, e.g., rice land and garden holdings, are numbered in different series, the kind of holding must be stated), field numbers (if the property does not coincide with one complete holding, year of kwin map from which the holding number is taken), and revenue last assessed upon the land, must be given ; (2) in the case of other agricultural land, the area and village tract within which it falls, distance and direction from nearest town or village and boundaries should be specified ; (3) in the case of land in large towns the area, block or quarter, name or number, the lot number (if there are separate series of lots, the series should be stated, and where the land forms part only of a lot particulars regarding that part), the holding number in the latest town survey map, if any, and year of the map,

require " includes several methods. Sale without attachment is one method of execution ; attachment of a decree or debt is another. An application for execution by one method cannot be converted into another method. 91 I. C. 240. Ejectment for money decree is a method under Oudh Rent Act, S. 61. 19 I. C. 38=15 O. C. 381.

O. 21, R. 12.—Execution of decrees falling under S. 52 must be accompanied by an inventory. 28 Bom. L. R. 1322=98 I. C. 941=A. I. R. 1927 Bom. 52. The rule does not contemplate any enquiry before the Court whether the property belongs to the judgment-debtor or not. 12 W. R. 329. A reasonable and accurate description of what is sold is required. A wrong date of the sale does not invalidate the title acquired at such sale. (30 Cal. 699, Dist.) 9 I. C. 729=9 M. L. T. 319. The execution creditor is liable for damages for wrongful seizure of property belonging to a stranger. 3 Bom. 74.

O. 21, R. 13.—The intention of the rule is that the description in the notice of attachment should be sufficient to identify the property. 12 W. R. 488 ; 14 A. 190 ; see 17 C. 631 (F. B.) under R. 17. The Court can call for an amendment to furnish necessary particulars. 65 P. L. R. 1016=34 I. C. 955. List of properties filed not with application but at a time when execution is barred—Order of dismissal—Effect. A.I.R. 1926 Mad. 260. An application for execution which refers to a list filed with a previous application is valid. 12 C. 161. But see 18 C. at p. 465 and 17 C. 631. Where the decree is not clear regarding proclamation of property, the decree-holder in his execution application can give an amplified description of the property giving the value of the property. 35 I. C. 368. In case a decree-holder fails to specify an incumbrance which he holds, he is estopped from suing on it. 15 M. 412. See also 38 M. L. T. (H. C.) 49=100 I. C. 493=52 M. L. J. 222.

the rent or revenue last assessed on the land, must be given; (4) in the case of buildings situated in a large town when the land on which such buildings stand is not affected, the name or number of the street, or, if the street has neither name nor number, the quarter or block, name or number, the number of the building in the street or, if it has no number, the lot number must be given; (5) in the case of immoveable property situated in a small town or village, such of the particulars in paragraphs 3 and 4 above as can be given should be given; (6) the purpose to which land or buildings are put the material and age of buildings, all incumbrances and Municipal taxes should be stated; (7) (a) the judgment-debtor's share or interest in the property should be specified; (b) the cost of the certified extract shall be reckoned in the costs of the application."

14. [S. 238.] Where an application is made for the attachment of any land which is registered in the office of the Collector, the Court may

Power to require certified extract from Collector's register in certain cases.

require the applicant to produce a certified extract from the register of such office, specifying the persons registered as proprietors of, or as possessing any transferable in-

terest in, the land or its revenue, or as liable to pay revenue for the land, and the shares of the registered proprietors.

15. [S. 231.] (1) Where a decree has been passed jointly in favour of more persons than one, any one or more of such persons may,

Application for execution by joint decree-holder.

unless the decree imposes any condition to the contrary, apply for the execution of the whole decree for the benefit

O. 21, R. 14.—An application by the decree-holder for a certificate that the extract from the revenue register is necessary, to enable him to obtain such a copy from the Collector's Office, is a step-in-aid of execution. 5 M. 141. Application for attachment is unnecessary in a decree passed for sale of mortgaged property. 47 I. C. 639.

O. 21, R. 15. JOINT DECREES.—When once a joint decree is given, it ever after remains a joint decree, any act or conduct of the decree-holder notwithstanding. 8 W. R. 132. *See also* 17 W. R. 497. It is not competent to one of several joint decree-holders to grant full discharge of the decree out of Court or to certify to the Court complete satisfaction of the decree without the concurrence of all the decree-holders. 45 A. 401 = 74 I. C. 687 = 1923 All. 494; 20 I. C. 457 = 16 O. C. 146. A decree obtained by a father becomes a joint decree on the son subsequently obtaining a decree against the father declaring his right to a share of the debt due under the decree obtained by the father. 14 M. 252; *see* 5 A. 27; 10 A. 570. *See also* the observations in 12 M. L. J. 181 = 25 M. 431. Validity of execution application by one of several surviving coparceners. *See* 29 Bom. L. R. 75. A manager of a joint Hindu family can give full discharge and the other members have no right beyond their share. 27 I. C. 603 = 60 P. L. R. 1915; *see also* 21 I. C. 177 = 25 M. L. J. 442. The rule is not applicable to the case of jointdecree-holders, the execution of whose decree is conditional on their joint performance of a particular act. 6 A. 69. One of joint decree-holders is entitled to apply for an order absolute without joining the other party, subject to such orders as the court might see fit to pass to safeguard the other party's rights. 11 I. C. 700 = 34 All. 72. And the judgment-debtor is entitled to look for a valid discharge to him who executes the decree. 7 Pat. L. T. 708 = 103 I. C. 75 = A. I. R. 1927 Pat. 329. The judgment-debtor has no right to object to any one of several joint decree-holders executing the whole decree. 8 N. L. J. 91 = 54 I. C. 924. Such an objection cannot be raised in appellate Court when it has not been raised in the executing Court. 24 L. W. 711 = 97 I. C. 375

= A. I. R. 1926 Mad. 1198. The judge has a discretion to allow one of the several decree-holders to execute the decree. 36 Mad. 357 = 24 M. L. J. 541. The rule does not contemplate a case where a decree is passed in favour of two Hindu widows, and one of them alone applies for execution of the entire decree. 26 A. 318; 15 M. 343; 25 M. 431 (F.B.) and 7 C. 831. Suit in the name of a firm—Names of partners not disclosed—Payment of decree amount to a partner of the firm after dissolution operates as a valid discharge. 105 I. C. 892 = A. I. R. 1928 Sindh 37. A court to which a decree is transferred for execution has no jurisdiction to entertain an application for bringing on record the legal representatives of a deceased decree-holder which must be made to the court passing decree. So the execution of a decree so transferred need not necessarily be stayed. 55 I. C. 156. A decree for costs in favour of 13 defendants cannot be executed by two defendants in respect of their proportionate share of the sum awarded. 18 M. 464. As to decree for costs in different courts, *see* 58 I. C. 212 = 1 Pat. L. T. 426. On the death of one decree-holder the surviving decree-holders can execute on behalf of the legal representatives also. The court can inquire into the heirship in the course of execution when any person raises that question. 43 I. C. 1008. It is not obligatory on the Court to issue notice to the other joint decree-holders. 33 C. 306; 25 M. at p. 447 (F.B.). *See also* 96 I. C. 692 = 30 C. W. N. 562 = A. I. R. 1926 Cal. 811; 7 Pat. L. T. 27 = A. I. R. 1925 Pat. 591. Any one of the decree-holders may, unless the decree imposes a condition to the contrary, apply for execution of the whole decree. 29 I. C. 181. A jointdecree cannot be executed by one of several joint decree-holders in respect of his own share. 4 Pat. L. J. 575 = 53 I. C. 803; 2 Luck. 259; 97 I. C. 896 = A. I. R. 1926 Oudh 605.

LIMITATION.—Where one only of several joint decree-holders is a minor, S. 7, Limitation Act, saves an application for execution by the minor decree-holder from being barred. 28 C. 465. *See also* 25 M. 431 (F.B.). Application though defective saves limitation. 1 P. 609 = 69 I. C.

of them all, or, where any of them has died, for the benefit of the survivors and the legal representatives of the deceased.

(2) Where the Court sees sufficient cause for allowing the decree to be executed on an application made under this rule, it shall make such order as it deems necessary for protecting the interests of the persons who have not joined in the application.

16. [S. 232.] Where a decree or, if a decree has been passed jointly in favour of two or more persons, the interest of any decree-holder in the decree is transferred by assignment in writing or by operation of law, the transferee may apply for execution of

Application for execution by transferee of decree.

668. An application for partial execution is a step-in-aid of execution. 15 B. 242. The court can allow execution of cross-claims under the same decree providing safeguards for the rights of other parties. 44 I. C. 445. Similarity between the rights of each of the parties does not make partition decree, a joint decree in favour of co-sharers. 43 M. L. J. 379 = 70 I. C. 296 = 1922 Mad. 456. No appeal is provided against an order under O. 21, R. 15 or 16. (23 Bom. 620, referred to) 70 I. C. 329 = 1924 Mad. 518. Where in execution of a decree for sale in favour of joint decree-holders, one of them purchases the property with previous leave of the court to execute the decree on behalf of all, the other joint decree-holders have in equity a right to recover from him their share. 11 I. C. 517 = 33 All. 563. The decree can be executed by the decree-holder or the transferee as per S. 49 and O. 21, R. 16. Although portions of a decree can be legally transferred, the decree must be executed as a whole. 39 I. C. 654 = 15 P. R. 1917. See also 2 Luck. 259. An assignee of a portion of the decree amount must apply for execution on behalf of all. Where a certificate is issued on behalf of all the decree holders there is in fact a discharge of the decree and the other decree-holders cannot execute the decree. 49 I. C. 141 = (1918) M. W. N. 507. Where in a joint and several decree against B and C, they were individually awarded costs as against A. A is entitled to execute his decree against only one of the judgment-debtors without deducting the costs of both, but after deducting the costs due to that judgment-debtor alone. 34 I. C. 388 = 3 L. W. 267.

O. 21, B. 16. SCOPE AND APPLICATION OF RULE.—This rule supersedes. 9 Bom. 179 and 20 Cal. 388 at p. 395, 396 and gives effect to 19 Mad. 306; 17 Cal. 341; 17 M. L. J. 391. The rule does not mean that each time the assignee comes to execute the decree he should come in under this rule. 31 C. W. N. 921 = 104 I. C. 4 = A. I. R. 1927 Cal. 694. There can be no assignment of rights pending suit under this rule even though a decree is passed subsequently A. I. R. 1926 Bom. 406. The rule also applies to assignees of awards filed in court. 27 C. W. N. 666 = 1924 Cal. 117 and to assignees of part of a decree. 44 Mad. 919 = 41 M. L. J. 816 = 14 L. W. 287 (F. B.); 24 W. R. 11; 26 Mad. 101; 17 M. L. J. 475; 17 M. L. J. 503; 48 A. 432 = 24 A. L. J. 430 = A. I. R. 1926 All. 346. The transferee of a portion of an indivisible decree cannot execute it even partially. 35 All. 204 = 19 I. C. 304 = 11 A. L. J. 249. But unless the whole interest is exhausted there is not a transfer within the meaning of this rule. 66 I. C. 679 = 1922 All. 101; also 39 I. C. 654 = 15 P. R. 1917. A decree-holder succeeding as heir

to part of the property attached of a deceased judgment-debtor can proceed against the property for the whole debt. 103 I. C. 911 = A. I. R. 1927 Mad. 937. The rule lays down how a decree has to be transferred in case the transferee desires to have it executed, and recognizes only two modes of transfer, *vis.*, (1) transfer by assignment in writing, and (2) transfer by operation of law. An assignee under an oral assignment has, as such, no *locus standi* at all to apply for execution. 15 B. 307. Oral assignment is not valid. 43 Cal. 990 = 43 I. A. 108 = 31 M. L. J. 248 (P. C.); also 16 I. C. 807. An assignment of a decree by partition is not valid. 9 I. C. 349 = 13 Bom. L. R. 22. So an execution application based on an oral assignment cannot be a step-in-aid of execution. (1911) 2 M. W. N. 559 = 13 I. C. 78 = 10 M. L. T. 532. A release by the benami assignee to the real assignee does not amount to an assignment and the real assignee cannot then execute the decree. 8 Pat. L. T. 163 = 101 I. C. 616 = A. I. R. 1927 Pat. 170. Decree-holder of decree-holder does not become transferee by operation of law. 5 Pat. 511 = 7 Pat. L. T. 793 = 96 I. C. 446 = A. I. R. 1926 Pat. 320. The transfer of a decree made by an instrument in writing takes effect from the date of the instrument and not from the date of its recognition by the Court. 106 I. C. 54. The assignment of personal decree does not require registration. 106 I. C. 485 = A. I. R. 1928 Mad. 142. Assignee of a part of decree can apply for its execution. A. I. R. 1928 Lah. 70. Transfer of decree by a decree-holder after insolvency—Official Receiver can object to execution. A. I. R. 1928 Mad. 360 (2).

APPLICATION.—The transferee should apply for execution of the decree, and cannot apply merely for recognizing him as transferee. 14 M. L. J. 393; 14 M. L. T. 513 = 21 I. C. 609; 105 I. C. 611 = 4 O. W. N. 1025. An application by an assignee, for notice to issue under this rule, is an application for execution. 29 C. 235. The assignee of the decree, and not merely of the transferee of the property forming the subject-matter of the suit, can apply. 66 I. C. 878 = 1922 All. 98; 3 Pat. L. T. 625 = 69 I. C. 959 = A. I. R. 1922 P. 563; 4 A. L. J. 759. See also 2 Lah. L. J. 1 = 11 P. W. R. 1920 = 55 I. C. 983 = 28 P. L. R. 1920. If a person obtains a decree for possession of certain property, and sells portions of it to others the vendees could not apply to execute the decree. 4 A. L. J. 759; 98 I. C. 856 = A. I. R. 1927 Mad. 240. As to whether the transferee of a pre-emption decree can apply under this rule, see O. 20, R. 14. A transferee of a decree for costs can apply. 7 A. 457. When a decree has been assigned by one assignee to another the second assignee can apply under this

the decree to the Court which passed it ; and the decree may be executed in the same

rule even though the first assignee has not applied. 9 A. 46. A creditor who attaches a decree is in much the same position as the transferee of a decree under this rule. 15 Cal. at p. 376. Assignment during pendency of execution proceedings dates back to the date of execution application. 9 I. C. 549=13 Bom. L. R. 22. The provisions of this rule are mandatory ; non-compliance renders all proceedings void. 3 Lah. L. J. 434=2 Lah. 230=63 I. C. 884; also 56 I. C. 461; 5 Pat. L. J. 390=57 I. C. 250; 54 Cal. 624. The transferee is entitled to the benefit of an attachment obtained by his transferor and can apply to execute for further sums becoming due under the decree, in addition to the sum originally sought to be executed for. 13 M. L. T. 145=18 I. C. 691. Where properties were sold 'with all arrears of rent', the purchaser should be treated as the assignee of the rent decrees as well. 57 I. C. 874=25 C. W. N. 863. The assignee of a decree *pendente lite* is entitled to execute the appellate decree. 35 M. L. J. 294=44 I. C. 849. If there is an assignment pending proceedings in execution taken by the decree-holder, there is nothing in the Code debaring the Court from recognizing the transferee as the person to go on with the execution. 26 C. at p. 253; see also 16 A. 133; 12 M. L. J. 348. The assignee of a preliminary mortgage-decree for sale cannot ask for execution, and for the passing of the final decree under this rule. He must first get a final decree. 32 I. C. 981. Regarding assignment of preliminary decree in partition suit, see 24 L. W. 392=97 I. C. 754=A. I. R. 1926 Mad. 1129. It is not necessary that the transfer should be effected before the death of the judgment-debtor. If effected after his death the transferee can take out execution against his legal representatives. 11 Bom. 727. If the assignor is dead the assignee will be required to produce a succession certificate. 15 M. 419. But it may be produced at any time during the pendency of the proceedings. 19 C. 482. When a minor succeeds to an estate which, up to the date it fell into his hands, had been in possession of the executrix there is a succession or transfer by operation of law. 16 C. at p. 349; 11 B. 368. See 4 C. W. N. 785 and 21 M. at p. 356. The assignee of a decree which has been attached can still execute it, but subject to the rights of the attaching creditor. 17 I. C. 323=13 M. L. T. 227. Till a transferee is brought on record he has no right to execute the decree. He cannot question attachment of the decretal amount deposited to the credit of his assignor if before that his assignment had not been recognised. 4 Rang. 426=99 I. C. 309=A. I. R. 1927 Rang. 55. The assignee can enter up satisfaction without an execution application. 17 I. C. 617=12 M. L. T. 592. The assignee can execute the decree and his rights can be determined, even though he himself has not filed the execution application. 4 Lah. L. J. 250=1922 Lah. 396. Assignment of rights prior to decree, is not an assignment of the decree. 30 I. C. 831. Equities between decree-holder and judgment-debtor will be taken into consideration against a transferee. Plea of partial failure of consideration for assignment, if can be raised by the assignor as well as by the judgment-debtor. 64 Pat. 120=1925 Pat.

449. The judgment-debtor cannot question an assignment for inadequacy of consideration for assignment. 20 I. C. 685=18 C. W. N. 450. But he has got a right of appeal against an order recognising the transfer of a decree. 26 I. C. 944=2 L. W. 109. In the absence of an allegation of fraud, want of consideration is immaterial, if the transferor and transferee are agreed. 26 I. C. 685=18 C. W. N. 450, or unless the assignment is a sham transaction. 49 I. C. 141=(1918) M. W. N. 507. When a transferee applies under this rule the judgment-debtors cannot contend that the decree was obtained by fraud. 15 B. 307. But can contend that the transfer was fraudulent. 23 I. C. 951=1 L. W. 206. See also 28 C. W. N. 963=1925 Cal. 23.

TO WHAT COURT APPLICATION MADE.—The application can be made only to the Court which passed the decree. 25 A. 443; 27 C. 448. But an order by a Court to which the decree is sent for execution is not void. 17 M. L. J. 300. The legal representatives of the decree-holder can be brought on record even in the Court to which a decree is transferred for execution. 71 I. C. 409=1923 Nag. 105. The Court must enquire into the validity of an assignment if questioned. 23 I. C. 951=1 L. W. 206. See also 24 I. C. 766=1 L. W. 206; 28 C. W. N. 963=84 I. C. 68=39 C. L. J. 590=1925 Cal. 23. But should not enquire into the bad faith of the transferee, while recognising the transfer. 33 I. C. 71 (Doubting 19 M. 230). The decree-holder can always execute the decree if the transferee is not on record and has not applied for execution. 29 M. L. J. 658=31 I. C. 542; 34 I. C. 791=3 L. W. 521. The judgment-debtor cannot object on the ground that the decree has been assigned. 18 I. C. 97=16 O. C. 70. An auction-purchaser, purchasing certain decrees of his judgment-debtor, is a transferee of those decrees. 22 M. L. J. 161=13 I. C. 324.

NOTICE.—Where notice of assignment and warrant of attachment were issued, but the judgment-debtor objected, it was held that the attachment ought not to be allowed before hearing the objections. 12 I. C. 547=36 Bom. 58. The judgment-debtor cannot be said, to have acquiesced in an order of attachment, when no notice of assignment is served on him. (*Ibid.*) 39 I. C. 952=118 P. L. R. 1917. Omission to object to a notice of assignment amounts to ratification. 83 I. C. 142=1925 A. 206 (2); 8 Pat. L. T. 163=101 I. C. 616=A. I. R. 1927 Pat. 170. Substituted service of notice is good service. 28 I. C. 219=1 L. W. 351. The notice is not about the assignment but of the execution proceedings. 62 I. C. 30=6 P. L. J. 358. Therefore he can appeal against the order of recognition. 33 I. C. 71. When want of notice is not pleaded in prior execution proceedings, the judgment-debtor cannot do so in his application to set aside sale. 57 I. C. 707=5 Pat. L. J. 639. Sale held in execution of a decree by assignee without notice to assignor is nullity. 54 Cal. 624=105 I. C. 193=A. I. R. 1927 Cal. 781. If a decree was transferred by assignment, after the death of the judgment-debtor notice of the transfer may be served on his legal representatives. (*Ibid.*) See also 30 M. 541. The proper stage to object to a transfer is when the notice is served,

manner and subject to the same conditions as if the application were made by such decree-holder :

Provided that, where the decree, or such interest as aforesaid, has been transferred by assignment, notice of such application shall be given to the transferor and the judgment-debtor, and the decree shall not be executed until the Court has heard their objections (if any) to its execution :

Provided also that, where a decree for the payment of money against two or more persons has been transferred to one of them, it shall not be executed against the others.

17. [S. 245.] (1) On receiving an application for the execution of a decree as provided by rule 11, sub-rule (2), the Court shall ascertain whether such of the requirements of rules 11 to 14 as may be applicable to the case have been complied with ; and, if they have not been complied with, the Court may reject

Procedure on receiving application for execution of decree.

and not when the transferee tries to execute the order. 87 I. C. 436=1925 All. 662.

PROVISO.—The proviso refers to a decree for money personally due by two or more persons. It does not apply to a case in which nothing is due from the assignee of the decree, personally. 11 C. at p. 396. See also 5 All. 27. "Decree for money against several persons" is not restricted to personal decrees for money. 19 N. L. R. 151=1924 Nag. 41. But a mortgage decree for sale is not a money decree. 12 I. C. 70=16 C. W. N. 132; 49 Mad. 508=93 I. C. 58=A. I. R. 1926 Mad. 623=51 M. L. J. 139. If the assignee is a joint judgment-debtor, he cannot execute it. 28 I. C. 906. See also 44 I. C. 269=27 C. L. J. 110. But can sue for contribution. 20 I. C. 569=18 C. W. N. 113. But a transfer to the pleader for the judgment-debtor does not satisfy the decree, though assigned to him in trust for his clients. It called upon he is bound to assign the decree to them, but upon equitable terms only. 22 C. W. N. 491=44 I. C. 13. Transfer brought about by death is not excluded from the operation of the proviso. 98 I. C. 26 (2)=A. I. R. 1926 Mad. 1141=51 M. L. J. 443.

A BENAMI ASSIGNEE can execute. 37 All. 414=29 I. C. 593; 20 I. C. 685=18 C. W. N. 450. See also 43 I. C. 801=7 L. W. 201; 62 I. C. 299=13 B. L. T. 173; 21 Mad. 388. But where the transferee of a decree is found to be a benamidar for the judgment-debtor, the Court is bound to refuse execution. 32 I. C. 952=40 Mad. 296; also 35 M. 659=12 I. C. 657. Whether transferee is benamidar for judgment-debtor must be decided by court. A. I. R. 1926 Lah. 666. This is so even though the assignee is benamidar for one of the judgment-debtors. (4 C. W. N. 534, foll.); 43 M. L. J. 761=1922 M. 510. Also 35 I. C. 624=4 L. W. 534. An arrangement between decree-holder and some of the judgment-debtors that they must pay the entire decree amount to him and that he must execute the decree against the other judgment-debtors and realise the amount due and pay it to this, is not prohibited by this rule. 99 I. C. 902=A. I. R. 1927 Mad. 322=52 M. L. J. 59. The real transferee owner of a decree cannot apply for execution on the ground that the transferee was his benamidar and his agent. Only the benamidar is entitled to execute. 48 Mad. 553=48 M. L. J. 419; 8 Lah. 35=100 I. C. 545 (1)=A. I. R. 1927 Lah. 110. The rejection of an application for substitution in the place of the decree-holder does not operate as *res judicata* to

a subsequent application under this rule. 1925 Oudh 417=12 O. L. J. 538. No suit will lie to establish a right to execute a decree, when an order dismissing an application under this rule has been allowed to become final. 28 A. 613. But see 20 A. 539; 16 M. L. J. 27; 1 A. L. J. 61. See also 7 A. 457. In such a case the assignee can sue the assignor for the recovery of the money paid. 16 M. 325; 20 A. 539. An appeal lies against an order refusing an application by the assignee. 1 A. L. J. 61=25 A. 443; 25 M. 383. See also 12 C. 610; 16 A. 483 and 27 C. 670. No appeal lies against an order dismissing an application to be brought in as the legal representative of a deceased judgment-creditor. 16 M. L. J. 27.

O. 21, R. 17.—Under S. 245 of the Old Code the Court was bound to reject an application not amended as per orders. Under the present rule time for amendment may be extended, or applicant can show that no amendment is necessary. 17 N. L. R. 179=63 I. C. 971. Also 23 Cal. 217. For the case-law under the old Act, see 16 M. 142; 17 C. 631 (F. B.); and 26 Mad. at p. 103. "As nearly as may be." For the meaning of these words, see 16 B. at p. 114. As to defects which could or could not be cured by an amendment, see 49 I. C. 982=32 P. W. R. 1919. Also 118 P. R. 1912=18 I. C. 516; 39 M. L. T. 371. The Court has power either to return for amendment or to reject, an application not complying with rules 11 to 14 of this order. 1 Pat. 149=69 I. C. 200. Decree-holder is not bound to proceed against properties of judgment-debtors first. A. I. R. 1926 Lah. 110. An application to file a fresh list of properties against which execution is also prayed for, is not an amendment of the execution petition. 2 Pat. 787=74 I. C. 144. Where a vakil is duly authorized to present an application for execution, the fact that the vakalat was not dated, does not make the application one not in accordance with law. 26 M. 197 (198). Defects of form not affecting the merits, should be allowed to be remedied. See 17 C. at p. 636. When an amendment is not made within the time allowed, the application does not stand rejected unless an order is made to that effect. 8 C. 479. A rejected application under this rule is not a step in aid of execution. 37 I. C. 916=21 C. W. N. 835; also 8 N. L. J. 91; 28 C. W. N. 988=84 I. C. 747=1925 Cal. 102. When permission is granted with no time fixed, to file list of immoveable property, if the list is filed after the period

the application, or may allow the defect to be remedied then and there or within a time to be fixed by it.

(2) Where an application is amended under the provisions of sub-rule (1), it shall be deemed to have been an application in accordance with law and presented on the date when it was first presented.

(3) Every amendment made under this rule shall be signed or initialled by the Judge.

(4) When the application is admitted, the Court shall enter in the proper register a note of the application and the date on which it was made, and shall, subject to the provisions hereinafter contained, order execution of the decree according to the nature of the application :

Provided that, in the case of a decree for the payment of money, the value of the property attached shall, as nearly as may be, correspond with the amount due under the decree.

[Madras] Add R. 17 (5) :—“(5) Registers in accordance with Forms Nos. 19, 20 and 21 in Appendix H are prescribed for use in all Civil Courts having jurisdiction over the classes of cases specified therein.”

[Oudh] In Oudh for “and, if . . . fixed by it” substitute “and if they have not been complied with the Court may allow the defect to be remedied then and there or may fix a time within which it should be remedied; and, in case the decree-holder fails to remedy the defect within such time, the Court may reject the application.”

18. [S. 246.] (1) Where applications are made to a Court for the execution of cross-decrees in separate suits for the payment of two

Execution in case of cross-decree.

sums of money passed between the same parties and capable of execution at the same time by such Court, then—

of limitation, the execution application is barred. 22 I. C. 337=18 C. L. J. 538. A filing of a fresh list of properties sought to be attached and sold, should be treated as a continuation of the original application. 22 C. W. N. 540=44 I. C. 553. If the application is within 12 years but amendment is after 12 years, the application is not barred. 45 M.L.J. 651=1924 Mad. 367; the amendment will be deemed to have effect from the date of first presentation. 35 I. C. 876=31 M.L.J. 561.

O. 21, R. 18. CROSS-DECREEES AND CROSS-CLAIMS.—The rule deals only with cross-decrees and has no application to cross-claims under the same decree. 5 A. 272. To these R. 19 applies, and this rule and R. 19 apply only when a step in execution and a counter-claim have come into existence. 9 A. at p. 67. Before cross-decrees can be set off the one against the other it is necessary that they should be in the same Court for execution. 16 W.R. 303. See also 24 A. 481; 21 I. C. 32=11 A.L.J. 763. The decrees must also be under execution at the same time. 7 W.R. 535. A statute barred debt cannot be set off against the claim of plaintiff. 40 I.C. 816=21 C. W. N. 1147. When the decrees themselves lead to the construction of a set-off, execution applications under both the decrees are not necessary. 52 I.C. 746=1919 Pat. 372. The parties should not fill distinct characters in the two cases. 38 All. 660=36 I.C. 948. In order to admit of a set-off, the parties must be the same, and the sum due under each decree must be definite. 5 W. R. 12. A decree directing plaintiff to recover the decree amount by sale of properties, but not directing payment by defendant, is a decree for money, and the provisions of this rule apply to it. 29 M. 318; 16 W.R. 308; 5 W.R. 52; 14 I.C. 18 (P.C.). See also 15 C. 557; 26 M. 428. The decree-holder in

a pre-emption suit can deduct his costs from the deposit made by him. 4 Lah. L. J. 354=2 Lah. 294. A judgment-debtor is entitled to set off a decree obtained by him against the decree-holder, although the latter is alleged to be a mere benamidar in respect of the decree obtained by him. 3 M.L.J. 220. When a pauper plaintiff obtains a decree for a portion of his claim, and the defendant is allowed proportionate costs the right to set off does not arise until the claim of Government is satisfied. 9 A. 64; 10 A. 188. As regards rights of assignee of decree to set off, see 16 C. at p. 621; 7 M.L.J. 227; 26 M. 428. Where there are essentially cross-decrees, the decree for the smaller sum becomes absorbed in the one for the larger sum and no order of attachment can have any operation, or affect the legality of the set off. 2 A. 866. See also 46 Cal. 168=45 I.C. 241; also 22 I. C. 73=1 L.W. 3. The purchaser of a decree held by A against whom B holds a cross-decree, takes it subject to a set-off on account of B's decree. 10 W. R. 32 (F.B.). See also 12 I.C. 205=4 Bur. L. T. 254. Set-off allowed against an attaching decree-holder, for sums against the original decree-holder. 28 C. W. N. 988=1925 Cal. 102. A judgment-debtor may set-off against the amount of the decree against him, the amount of a decree which he has obtained against the decree-holder and other persons. 9 C. 479. See also 14 A. 339; 2 All. 91. A decree in favour of all the partners of a firm in their individual capacity and a decree by the defendant against the firm can be set off. 29 Bom. L.R. 396=104 I. C. 319=A. I. R. 1927 Bom. 255. It is doubtful whether a mortgage decree is a joint and several decree, for the application of the rule of set-off. 39 I. C. 560=15 A. L. J. 327. An appeal lies against an order passed under this rule. 16 C. 619.

(a) if the two sums are equal, satisfaction shall be entered upon both decrees; and

(b) if the two sums are unequal, execution may be taken out only by the holder of the decree for the larger sum and for so much only as remains after deducting the smaller sum, and satisfaction for the smaller sum shall be entered on the decree for the larger sum as well as satisfaction on the decree for the smaller sum.

(2) This rule shall be deemed to apply where either party is an assignee of one of the decrees and as well in respect of judgment-debts due by the original assignor as in respect of judgment-debts due by the assignee himself.

(3) This rule shall not be deemed to apply unless—

(a) the decree-holder in one of the suits in which the decrees have been made is the judgment-debtor in the other and each party fills the same character in both suits; and

(b) the sums due under the decrees are definite.

(4) The holder of a decree passed against several persons jointly and severally may treat it as a cross-decree in relation to a decree passed against him singly in favour of one or more of such persons.

Illustrations.

(a) *A* holds a decree against *B* for Rs. 1,000. *B* holds a decree against *A* for the payment of Rs. 1,000 in case *A* fails to deliver certain goods at a future day. *B* cannot treat his decree as a cross-decree under this rule.

(b) *A* and *B*, co-plaintiffs, obtain a decree for Rs. 1,000 against *C*, and *C* obtains a decree for Rs. 1,000 against *B*. *C* cannot treat his decree as a cross-decree under this rule.

(c) *A* obtains a decree against *B* for Rs. 1,000. *C*, who is a trustee for *B*, obtains a decree on behalf of *B* against *A* for Rs. 1,000. *B* cannot treat *C*'s decree as a cross-decree under this rule.

(d) *A*, *B*, *C*, *D* and *E* are jointly and severally liable for Rs. 1,000 under a decree obtained by *F*. *A* obtains a decree for Rs. 100 against *F* singly and applies for execution to the Court in which the joint-decree is being executed. *F* may treat his joint decree as a cross-decree under this rule.

19. [S. 247.] Where application is made to a Court for the execution of a decree under which two parties are entitled to recover sums of money from each other, then—

(a) if the two sums are equal, satisfaction for both shall be entered upon the decree; and

(b) if the two sums are unequal, execution may be taken out only by the party entitled to the larger sum and for so much only as remains after deducting the smaller sum, and satisfaction for the smaller sum, shall be entered upon the decree.

20. The provisions contained in rules 18 and 19 shall apply to decrees for sale in enforcement of a mortgage or charge.

21. [S. 230, para. 2.] The Court may, in its discretion, refuse execution at the same time against the person and property of the judgment-debtor.

Simultaneous execution.

22. [S. 248.] (1) Where an application for execution is made—

Notice to show cause against execution in certain cases.

O. 21, R. 19.—This rule applies only when a step in execution and a cross-claim have come into existence. 9 A. at p. 67. Rule not limited to cross-claims of precisely same nature. Even costs may be set off. 24 I. C. 376. In order to render this rule applicable, the parties entitled under the decree must hold the same character and possess identical rights for enforcing execution. 5 A. 272. If execution is taken out for the smaller sum this fact does not render subsequent proceedings void. 14 C. 18 (P. C.). Execution against person and property should be encouraged. Refusal to grant both the reliefs should be an exception and not a rule. 6 Lah. 543=93 I. C. 54=A. I. R. 1926 Lah. 110.

O. 21, R. 22.—The case of a transferee of a

decree is not covered by the provisions of this rule. 28 O. C. 330=2 O. W. N. 73=1925 Oudh 448. Provisions if mandatory. A. I. R. 1928 Cal. 60=55 Cal. 96. A notice under this rule presupposes the presentation of an application for execution and the pendency of such application in a Court. 27 A. 557.

NOTICE.—Provisions are mandatory; and proceedings without notice are void. 105 I. C. 65=46 C. L. J. 579; 95 I. C. 711=A. I. R. 1926 Cal. 539. Object of. See A. I. R. 1926 Cal. 86. When an application is made simply to transfer decree for execution to another Court, no notice appears to be necessary. 22 C. at p. 924. Reasons must be recorded if notice is dispensed with under Cl. (2). 40 I. C. 670=33 M. L. J. 539. The notice

(a) more than one year after the date of the decree, or

(b) against the legal representative of a party to the decree, the Court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause, on a date to be fixed, why the decree should not be executed against him :

Provided that no such notice shall be necessary in consequence of more than one year having elapsed between the date of the decree and the application for execution if the application is made within one year from the date of the last order against the party against whom execution is applied for, made on any previous application for execution, or in consequence of the application being made against the legal representative of the judgment-debtor, if upon a previous application for execution against the same person the Court has ordered execution to issue against him.

must issue from the executing Court. To decide whether a decree is capable of execution is a judicial act and cannot be delegated. 43 Cal. 903 = 20 C. W. N. 889 (F. B.). Irregular service has a different effect from that of non-service. 6 P. L. J. 319 = 61 I. C. 823. An objection to the sufficiency of notice should be taken at the earliest opportunity. 21 W. R. 148. Objection may be raised even in the appellate Court for the first time. 9 I. C. 584 = 13 C. L. J. 162. The judgment-debtor will not be bound, where the service of notice has not been in accordance with law and where he has not been aware of the execution proceedings. 32 I. C. 744. Non-service of notice will vitiate the sale. 28 I. C. 898 = 19 C. W. N. 152; 15 I. C. 506 = 40 Cal. 45. One notice is sufficient. Once a notice is served, no fresh notice need be served for every execution application made more than one year after the last order. 2 Pat. 916 = 4 Pat. L. T. 721. Also 74 I. C. 202; 1919 Pat. 386. Notice must issue in every subsequent execution application more than one year old unless the proviso make it unnecessary. 6 Pat. L. T. 290 = 5 Pat. 1 = 87 I. C. 531 (F. B.). Under certain circumstances, notice issued is sufficient even though some of the judgment-debtors are minors, and no guardians are appointed for them. 64 I. C. 25 = 35 C. L. J. 9. A notice served on an intermeddler, though sufficient for the time, will not bar the true legal representative from raising objections subsequently. 63 I. C. 248 = 45 Bom. 1186. A mere issue of notice is not sufficient under this section. It must be served. 64 I. C. 476 = 25 C. W. N. 972. Service of notice by affixing it on the wall of the house in which defendant resides is sufficient. 5 M. H. C. R. 100. The issuing of a notice under this rule gives a fresh starting point for limitation. 15 A. 84. Even if the application under which the notice was issued was defective or irregular. 34 I. C. 280 = 19 O. C. 17. The application for issue of notice is a step-in-aid of execution. 35 C. L. J. 82 = 1922 Cal. 44; 1925 Cal. 668. The date of issuing a notice is the date on which the Court orders that it should issue, and not the date on which the notice is drawn up and signed. 28 B. 416. But see 30 M. 30 (*C. T. Bapu v. N. T. Kanaran*). An order for execution made after the issue of notice has the effect of reviving a decree, within the meaning of Art. 180, Limitation Act. 26 A. at p. 364; 30 C. 979. An order in execution against a dead person is invalid and also all subsequent proceedings are a nullity. 11 I. C. 869 = 247 P. L. R. 1911. But see 4 Pat. L. J. 645 = 52 I. C. 125. If the judgment-debtor

dies after an order for attachment and sale, and if the legal representatives are not brought on record, the sale is valid. 45 M. L. J. 413 = 47 Mad. 63. As to the effect of non-compliance with the provisions of this rule, see 28 A. 193; 21 B. 424 (F. B.). See also 21 C. 19; 10 C. W. N. 306. Sale is void when no notice is issued. 46 I. C. 221 = 27 C. L. J. 528; 41 I. C. 853 = 22 C. W. N. 390; 42 Cal. 72 = 41 I. A. 251 (P. C.); 44 Cal. 954 = 21 C. W. N. 776 = 38 I. C. 493 = 24 C. L. J. 523; 42 Cal. 72 = 27 M. L. J. 150 = 24 I. C. 304 = 41 I. A. 251 (P. C.), 64 I. C. 476 = 25 C. W. N. 862; 48 I. C. 39 = 5 O. L. J. 551. Any order passed in the absence of any notice, is not binding on the judgment-debtor. 34 I. C. 144. But see *contra* 11 I. C. 893 = 20 C. L. J. 337 (where it is said it is only voidable and not void. If the judgment-debtor had been given an opportunity to show cause why the decree should not be executed, absence of notice is not very material. 55 I. C. 816 = 5 L. L. J. 67. Non-service of notice on a defendant after attaining majority is a serious irregularity and will vitiate subsequent proceedings, until met by a valid defence. 63 I. C. 903 = 14 L. W. 638. Sale without notice to the legal representative of a deceased judgment-debtor, is not valid as against other judgment-debtors. 45 I. C. 699; but see also 86 I. C. 745 = 1925 Cal. 1257. Notice to wrong person as legal representative. Effect on real representative. 99 I. C. 211 = 13 O. L. J. 813; 3 O. W. N. 771 = A. I. R. 1926 Oudh 613. No notice need be served on a judgment-debtor who has no interest in the property against which execution is sought. 88 I. C. 1039. Sale held while attachment subsists but without notice is not without jurisdiction, but is merely irregular and liable to be set aside. 43 Mad. 57 = 37 M. L. J. 216. An attachment without notice is not invalid but is a mere irregularity. 26 O. C. 288 = 1924 Oudh 120. When a notice is issued to a person as guardian, it must be presumed that he was appointed guardian by implication, by the Court. 5 C. L. J. 434. Appeal lies from an order setting aside a sale without notice to the auction-purchaser. 3 Lah. L. J. 463; 91 I. C. 711 = A. I. R. 1926 Cal 539. If no reasons were recorded for dispensing with notice it being only discretionary, the appellate Court may consider the executing Court's use of its discretion on the merits. 42 M. L. J. 422 = 45 M. 875. Notice must go when a revivor of a decree is sought on the analogy of this rule. 33 M. L. J. 533 = 40 Mad. 1127.

(2) Nothing in the foregoing sub-rule shall be deemed to preclude the Court from issuing any process in execution of a decree without issuing the notice thereby prescribed, if, for reasons to be recorded, it considers that the issue of such notice would cause unreasonable delay or would defeat the ends of justice.

[Bombay] In R. 22 of O. 21 the words "two years" shall be substituted for the words "one year" wherever they occur.

[Allahabad and Oudh] (1) In O. 21, substitute the words "three years" for "one year" both in R. 22 (1) (a) and in the second line of the proviso to R. 22.

(2) O. 21, R. 22.—The following proviso is added in Allahabad and Oudh :—'Provided that no order for the execution of a decree shall be invalid by reason of the omission to issue a notice under this rule, unless the judgment-debtor has sustained substantial injury by reason of such omission.'

23. [S. 249.] (1) Where the person to whom notice is issued under the last pre-

ceding rule does not appear or does not show cause to the satisfaction of the Court why the decree should not be executed, the Court shall order the decree to be executed.

(2) Where such person offers any objection to the execution of the decree, the Court shall consider such objection and make such order as it thinks fit.

Process for Execution.

24. [S. 250.] (1) When the preliminary measures (if any) required by the foregoing rules have been taken, the Court shall, unless it sees cause to the contrary, issue its process for the execution of the decree.

Procedure after issue of notice.

(2) [S. 251.] Every such process shall bear date the day on which it is issued, and shall be signed by the Judge or such officer as the Court may appoint in this behalf, and shall be sealed with the seal of the Court and delivered to the proper officer to be executed.

(3) In every such process a day shall be specified on or before which it shall be executed.

[Allahabad and Oudh] Add at the end of Sub-Clause (3) of R. 24 of O. 21,—'and a day shall be specified on or before which it shall be returned to Court.'

25. [S. 343, includes latter part of S. 251.] (1) The officer entrusted with the

execution of the process shall endorse thereon the day on, and the manner in, which it was executed, and, if the latest day specified in the process for the return thereof has been exceeded, the reason of the delay, or, if it was not executed, the reason why it was not executed, and shall return the process with such endorsement to the Court.

(2) Where the endorsement is to the effect that such officer is unable to execute the process, the Court shall examine him touching his alleged inability, and may, if it thinks fit, summon and examine witnesses as to such inability, and shall record the result.

[Allahabad and Oudh] O. 21, R. 25 (2).—Substitute the following for paragraph (2) :—

"(2) Where the endorsement is to the effect that such officer is unable to execute the process the Court may examine him personally or upon affidavit touching his alleged inability, and may, if it thinks fit, summon and examine witnesses as to such inability and shall record the result."

O. 21, R. 23.—See 22 C. 558 and 28 M. 466 (F. B.).

O. 21, R. 24.—The words "unless it sees cause to the contrary" do not confer any discretionary power on the Court. 10 C. 817. Seal of the Court is imperatively necessary. Without it the warrant is illegal and resistance to it will be no offence. 3 Pat. L. J. 636=49 I. C. 171; 7 Pat. L. T. 30=5 Pat. 216=93 I. C. 146=27 Cr. L. J. 418=A. I. R. 1926 Pat. 237. As to the effect to

be given to a warrant which is not signed by the Judge, see 7 A. 507; 22 C. at p. 604. A warrant not specifying period within which to be executed is not a good one. It should be executed only by the person authorised to execute it. It is not an offence to resist a bad warrant. 1 Pat. L. J. 550=36 I. C. 871. The warrant cannot be executed after the period specified therein has expired. 10 C. 18. The period fixed may be enlarged. See S. 148.

[Madras] (1) Amend O. 21, R. 25 (2), as follows :—

Insert the words "or cause him to be examined by any other Court" after the words "examine him."

(2) Add the following proviso to R. 25 (2) :—"Provided that an examination of the officer entrusted with the execution of a process by the Nazir or the Deputy Nazir under the general or special orders of the Court shall be deemed to be sufficient compliance with the requirements of this clause."

Stay of Execution.

26. [S. 239.] (1) The Court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time, to enable the judgment-debtor to apply to the Court by which the decree

When Court may stay execution.

was passed, or to any Court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay execution, or for any other order relating to the decree or execution which might have been made by such Court of first instance or appellate Court if execution had been issued thereby, or if application for execution had been made thereto.

(2) Where the property or person of the judgment-debtor has been seized under an execution, the Court which issued the execution may order the restitution of such property or the discharge of such person pending the result of the application.

(3) **[S. 240.]** Before making an order to stay execution or for the restitution of property or the discharge of the judgment-debtor, the Court may require such security from, or impose such conditions upon, judgment-debtor.

Power to require security from, or impose conditions upon, judgment-debtor.

[Allahabad and Oudh] In Allahabad and Oudh for "may" in sub-rule (3) read "shall" unless good cause to the contrary is shown.

27. [S. 241.] No order of restitution or discharge under rule 26 shall prevent the property or person of a judgment-debtor from being retaken in execution of the decree sent for execution.

Liability of judgment-debtor discharged.

Order of Court which passed decree or of appellate Court to be binding upon Court applied to.

28. [S. 242.] Any order of the Court by which the decree was passed, or of such Court of appeal as aforesaid, in relation to the execution of such decree, shall be binding upon the Court to which decree was sent for execution.

29. [S. 243.] Where a suit is pending in any Court against the holder of a decree of such Court, on the part of the person against whom the decree was passed, the Court may, on such terms as to security or otherwise, as it thinks fit, stay execution of the decree until the pending suit has been

Stay of execution pending suit between decree-holder and judgment-debtor.

decided.

O. 21, R. 26.—The Court which passes the decree retains control of the execution proceedings, and it can transfer the decree to two courts at the same time for execution. 5 R. 397=104 I. C. 133=A. I. R. 1927 Rang. 258 (2). The judgment-debtor is not obliged to furnish security; he may if he wants stay. 7 Lah. L. J. 343=26 Punj. L. R. 634=1925 L. 552. Execution can be stayed only by the Court to which the decree is sent for execution, and that too only temporarily. 7 A. 330. Such Court may refer the objector to the Court which passed the decree. 9 C. 916; 4 M. 324; 5 C. 736; 7 B. 481. For enforcement of liability of surety, see S. 145. Power to demand security, see 91 I. C. 772=A. I. R. 1925 Lah. 552. The order requiring security must specify a day on or before which it is to be given. 12 M. L. J. 34. Duty of executing Court where the decree sought to be executed has been modified in appeal. 4 Rang. 562. An appeal lies against an order

requiring security. 12 C. 624.

O. 21, R. 28.—Liability of a surety for satisfaction of a decree does not cease on a decree in a suit by the judgment-debtor to set aside the decree but he will be liable if the suit be dismissed in appeal unless there is a limitation as to his liability in the surety bond. 3 Rang. 496=105 I. C. 602=A. I. R. 1927 Rang. 321. Conditional order for stay has effect from date of order, even though the condition is fulfilled only later. 25 L. W. 108=99 I. C. 632=A. I. R. 1927 Mad. 391. The word 'decided' means finally decided. 32 C. W. N. 181. The words "until the pending suit has been decided" mean after all rights of appeal have been exhausted and not merely until a decree has been passed by the Court. 32 C. W. N. 181. As to the meaning of the word 'suit', see 32 C. W. N. 181. The Court has no power to stay execution if no suit was pending against the decree-holder on the part of the

[Allahabad] O. 21, R. 29.—Add “or any person whose interests are affected by the decree, or by any order made in execution thereof” after words “was passed” and before the words “The Court may” in O. 21, R. 29.

[Lahore] Add—“29-A. When a suit under R. 63 of this order is pending, the Court in which such suit is filed may, if it considers that execution of the former decree should be stayed, intimate the fact to the executing Court, which shall thereupon stay execution until the suit is decided.”

Mode of Execution.

30. [S. 254.] Every decree for the payment of money, including a decree for the payment of money as the alternative to some other relief, may be executed by the detention in the civil prison of the judgment-debtor, or by the attachment and sale of his property, or by both.

31. [S. 259.] (1) Where the decree is for any specific moveable, or for any share in a specific moveable, it may be executed by the seizure, if practicable, of the moveable or share, and by the delivery thereof to the party to whom it has been adjudged, or to such person as he appoints to receive delivery on his behalf, or by the detention in the civil prison of the judgment-debtor, or by the attachment of his property, or by both.

(2) Where any attachment under sub-rule (1) has remained in force for six months, if the judgment-debtor has not obeyed the decree and the decree-holder has applied to have the attached property sold, such property may be sold, and out of the proceeds the Court may award to the decree-holder, in cases where any amount has been fixed by the decree to be paid as an alternative to delivery of moveable property, such amount, and, in other cases, such compensation as it thinks fit, and shall pay the balance (if any) to the judgment-debtor on his application.

(3) Where the judgment-debtor has obeyed the decree and paid all costs of executing the same which he is bound to pay, or where, at the end of six months from the date of the attachment, no application to have the property sold has been made, or, if made, has been refused, the attachment shall cease.

[Allahabad] O. 21, R. 31.—In sub-rules (2) and (3), wherever the words ‘six months’ occur, substitute ‘three months or such extended time as the Court may, for good cause, direct’.

[Oudh] In sub-rules (2) and (3), wherever the words ‘six months’ occur, substitute ‘three months or such further time as the Court may, in any special case, for good cause shown, direct’.

32. [S. 260.] (1) Where the party against whom a decree for the specific performance of a contract, or for restitution of conjugal rights, or for an injunction, has been passed, has had an opportunity of obeying the decree and has wilfully failed to obey it, the decree may be enforced [in the case of a decree for restitution of conjugal rights by the attachment

judgment-debtor. 75 I. C. 419=1923 Lah. 514. Execution cannot be stayed on the ground that a stranger to the decree impeaches it on the ground of fraud. 8 Bom. 532. The holder of a mortgage decree has nothing to do with disputes between the representatives of his mortgagor. Suits respecting such disputes form no ground for stay. 7 C. 773. As to stay of execution of a decree on an award, see 35 B. 196. An appeal lies from an order refusing stay 20 M. 366; 10 A. 389. But see 9 C. 214. Also from an order staying execution. 13 C. 111.

O. 21, B. 30.—Decree-holder not bound to proceed against properties first. A. I. R. 1926 Lah. 110. A regularly perfected attachment is an essential preliminary to sales in execution of simple money decrees. Where there has been no such attachment any sale that may have taken place is not simply voidable but *de facto* void. 5 A. 86 (F.B.). The words “attachment and sale” must be taken together and not distributively. 8 W. R. 415. Attachment is necessary only when

no specific immoveable property is affected by the decree. 2 Pat. 768=73 I. C. 598. In the case of mortgage-decrees no attachment is necessary. 4 B. 515. See R. 21. An order directing the refund of money paid as compensation under the Land Acquisition Act may be enforced under this rule. 32 C. 921.

O. 21, B. 31.—Execution of money portion of decree in terms of O. 20, R. 10. 31 C. W. N. 850. In a decree for moveable property the money value is inserted under O. 20, R. 10 as an alternative if delivery cannot be had. The judgment-debtor is given no option either to surrender the property or pay the money. Money can be recovered only after delivery cannot be had. 13 M. L. J. 444; 39 Mad. 1=29 M. L. J. 342 (F. B.). Strict proof of facts bringing the case under S. 11 of the Specific Relief Act is necessary, to have the benefit of the stringent provisions of this rule.

O. 21, B. 32.—Relief claimed must be consequential upon an infringement of a legal right.

of his property or, in the case of a decree for the specific performance of a contract or for an injunction¹ by his detention in the civil prison, or by the attachment of his property, or by both.

(2) Where the party against whom a decree for specific performance or for an injunction has been passed is a corporation, the decree may be enforced by the attachment of the property of the corporation or, with the leave of the Court, by the detention, in the civil prison of the directors or other principal officers thereof, or by both attachment and detention.

(3) Where any attachment under sub-rule (1) or sub-rule (2) has remained in force for one year, if the judgment-debtor has not obeyed the decree and the decree-holder has applied to have the attached property sold, such property may be sold; and out of the proceeds the Court may award to the decree-holder such compensation as it thinks fit, and shall pay the balance (if any) to the judgment-debtor on his application.

(4) Where the judgment-debtor has obeyed the decree and paid all costs of executing the same which he is bound to pay, or where, at the end of one year from the date of attachment, no application to have the property sold has been made, or if made has been refused, the attachment shall cease.

(5) Where a decree for the specific performance of a contract or for an injunction has not been obeyed, the Court may, in lieu of or in addition to all or any of the processes aforesaid, direct that the act required to be done may be done so far as practicable by the decree-holder or some other person appointed by the Court, at the cost of the judgment-debtor, and upon the act being done the expenses incurred may be ascertained in such manner as the Court may direct and may be recovered as if they were included in the decree.

Illustration.

A, a person of little substance, erects a building which renders uninhabitable a family mansion belonging to *B*. *A*, in spite of his detention in prison and the attachment of his property, declines to obey a decree obtained against him by *B* and directing him to remove the building. The Court is of opinion that no sum realizable by the sale of *A*'s property would adequately compensate *B* for the depreciation in the value of his mansion. *B* may apply to the Court to remove the building and may recover the costs of such removal from *A* in the execution proceedings.

[Allahabad and Oudh] O. 21, R. 32.—In sub-clause (3) of O. 21, R. 32 read "three months" for "one year" and at the end of sub-clause (3) add the following:—"The court may for good cause extend the time": in Oudh add "and the Court may also, for good cause shown, extend the time for the attachment remaining in force for a period not exceeding one year".

[Oudh] In Oudh substitute "three months, or such further time as may have been fixed by the Court under the previous sub-rule" for "one year" in sub-rule (4) of R. 32, O. 21.

44 I. C. 737 = 3 P. L. J. 106. Sub-rule (5) is new. It has been added to remedy a defect disclosed in practice. See 8 Cal. 174 and 18 W. R. 282. In executing a decree for injunction the Court is not justified in ordering Police to interfere or in appointing a Commissioner to see that the decree-holder is not interfered with. 40 All. 648 = 48 I. C. 26. When a decree directs a wall to be demolished, a second wall built in its place, cannot be demolished by executing the same decree. Another suit must be filed. 59 I. C. 594 = 20 P. W. R. 1921. The Court can enforce obedience by punishment but cannot order a security bond. 3 L. W. 261 = 32 I. C. 698. The rule applies to a compromise decree as well, and on a breach of the decree execution must be taken, and no separate suit for damages will lie. 45 I. C. 689 = 7 L. W. 563. Where a Court dismisses a petition for execution on the ground that the petitioning decree-holders had not then afforded to the judgment-debtor an opportunity of obeying the decree a subsequent application made after such opportunity had been afforded is not barred.

21 C. 784 (P. C.); 7 Bom. H. C. (O. C. J.) 122. A decree for the restitution of conjugal rights between Mahomedans or Hindus, may be enforced under this rule. 1 B. 164; 9 Bom. H. C. R. 290; 11 M. I. A. 551. See also 14 B. L. R. 298; 1 A. 501; 11 M. 327. An effective decree for restitution of conjugal rights, where the wife is a minor can be made by ordering her parents to hand her over and in default Court can proceed against their person and property. 23 I. C. 828. If a person who has been directed to refrain from preventing his daughter returning to her husband's house, permits her to reside at his house, such conduct does not amount to interference. 1 A. 501. Art. 182, Limitation Act, does not apply to an application under this rule. 28 A. 300. The decree-holder is not bound to take action on every petty infringement. 29 M. 314. A valid subsisting attachment is a condition precedent to a sale under this section.

Rule 32 (1).—¹ The words "in the case of for an injunction" were inserted after the word "enforced" by Act XXIX of 1923, S. 2.

33. (1) Notwithstanding anything in rule 32, the Court, either at the time of passing a decree [against a husband]¹ for the restitution of conjugal rights or at any time afterwards, may order that the decree [shall be executed in the manner provided in this rule.]¹

Discretion of Court in executing decrees for restitution of conjugal rights.

(2) Where the Court has made an order under sub-rule (1) [* * * * *]² it may order that, in the event of the decree not being obeyed within such period as may be fixed in this behalf, the judgment-debtor shall make to the decree-holder such periodical payments as may be just, and, if it thinks fit, require that the judgment-debtor shall, to its satisfaction, secure to the decree-holder such periodical payments.

(3) The Court may from time to time vary or modify any order made under sub-rule (2) for the periodical payment of money, either by altering the times of payment or by increasing or diminishing the amount, or may temporarily suspend the same as to the whole or any part of the money so ordered to be paid, and again revive the same, either wholly or in part as it may think just.

(4) Any money ordered to be paid under this rule may be recovered as though it were payable under a decree for the payment of money.

34. [S. 261.] (1) Where a decree is for the execution of a document or for the endorsement of a negotiable instrument and the judgment-debtor neglects or refuses to obey the decree, the decree-holder may prepare a draft of the document or endorsement in accordance with the terms of the decree and deliver the same to the Court.

Decree for execution of document, or endorsement of negotiable instrument.

(2) The Court shall thereupon cause the draft to be served on the judgment-debtor together with a notice requiring his objections (if any) to be made within such time as the Court fixes in this behalf.

(3) Where the judgment-debtor objects to the draft, his objections shall be stated in writing within such time, and the Court shall make such order approving or altering the draft, as it thinks fit.

(4) The decree-holder shall deliver to the Court a copy of the draft with such alterations (if any) as the Court may have directed upon the proper stamp-paper if a stamp is required by the law for the time being in force; and the Judge or such officer as may be appointed in this behalf shall execute the document so delivered.

O. 21, R. 33 (1).—¹ The words "against a husband" were inserted after "passing a decree" and the words "shall be executed in the manner provided in this rule" were substituted for the words "shall not be executed by detention in prison" by Act XXIX of 1923, S. 3 (a).

For form of decree for restitution of conjugal rights, see 54 I. C. 887. When at the time of suit the husband is out of caste, the Court can pass a decree conditioned on plaintiff's obtaining restoration to caste. 8 A. 78. Ordinarily a decree for restitution of conjugal rights against a wife should direct that it should not be executed by detention of the wife in prison. 44 Bom. 972 = 59 I. C. 361; 73 I. C. 716 = 1924 Lah. 244; also 10 I. C. 177. But if she persists in leading an immoral life, she must be detained in jail. 75 I. C. 24 = 1923 Lah. 595 (2). A Hindu wife is justified in leaving her husband's protection if he habitually treats her with cruelty. 19 C. 84. As to what amounts to cruelty, see the judgment of Mookerjee, J., in 34 C. 971. In an action for specific performance of a contract to sell certain property with cultivating rights Court can compel defendant under cl. (5) to prosecute the application before the Rev. Div. Officer thus enabling the performance of the contract. A. I. R. 1926 Nag. 465.

O. 21, R. 33 (2).—² The words "and the decree-

holder is the wife" were omitted by Act XXIX of 1923, S. 3 (b).

O. 21, R. 34.—As to the procedure to be adopted in the case of failure on the part of a defendant to execute a document as directed in the decree, see 10 C. W. N. 345. A decree directing transfer of shares and registration in favour of plaintiff, can be executed on defendant's failure to obey the directions. 41 I. C. 77. A defendant can execute the decree in his favour. 24 Bom. L. R. 496 = 46 B. 990. As to the period of limitation within which an application should be made, see 10 B. 91. A compromise decree providing for the execution of document can be enforced under this rule and no suit is necessary. 61 I. C. 535 = 25 C. W. N. 68. Execution of compromise decree providing for execution of patta. 95 I. C. 179 = A. I. R. 1926 Cal. 975. The Registrar of the High Court has authority, when so directed by an order of Court, to execute a conveyance on behalf of a party refusing to do so, so as to pass his estate, but has no authority to bind him by entering into any covenants on his behalf. 16 C. 330. Action taken by Court in execution of decree for specific performance of a contract of lease, is a proceeding in the suit and *lis pendens* does not cease. 48 I. C. 188 = 14 N. L. R. 176.

(5) [S. 262.] The execution of a document or the endorsement of a negotiable instrument under this rule may be in the following form, namely :—

“ C. D., Judge of the Court of
(or as the case may be), for A. B., in a suit by E. F. against A. B.”,
and shall have the same effect as the execution of the document or the endorsement of the negotiable instrument by the party ordered to execute or endorse the same.

(6) The Court, or such officer as it may appoint in this behalf, shall cause the document to be registered if its registration is required by the law for the time being in force or the decree-holder desires to have it registered, and may make such order as it thinks fit as to the payment of the expenses of the registration.

35. [S. 263.] (1) Where a decree is for the delivery of any immoveable property, possession thereof shall be delivered to the party to whom it has been adjudged, or to such person as he may appoint to receive delivery on his behalf, and, if necessary, by removing any person bound by the decree who refuses to vacate the property.

(2) Where a decree is for the joint possession of immoveable property, such possession shall be delivered by affixing a copy of the warrant in some conspicuous place on the property and proclaiming by beat of drum, or other customary mode, at some convenient place, the substance of the decree.

(3) Where possession of any building or enclosure is to be delivered and the person in possession, being bound by the decree, does not afford free access, the Court, through its officers, may, after giving reasonable warning and facility to any woman not appearing in public according to the customs of the country to withdraw, remove or open any lock or bolt or break open any door or do any other act necessary for putting the decree-holder in possession.

36. [S. 264.] Where a decree is for the delivery of any immoveable property in the occupancy of a tenant or other person entitled to occupy the same and not bound by the decree to relinquish such occupancy, the Court shall order delivery to be made by affixing a copy of the warrant in some conspicuous place on the property.

O. 21, R. 35. SCOPE OF RULE.—Under R. 35 (1) formal delivery is actual delivery. It is symbolic when under R. 35 (2), 36 or 96. When possession under a decree for possession has not been obtained subsequent suit for possession is barred. 3 Lah. L. J. 138=59 I. C. 770. A decree-holder entitled to possession of land is entitled to the land and the standing crops thereon. 26 M. 438. Also to any erections made thereon after suit. 18 W. R. 527. When the possession of a village is decreed, the decree-holder is entitled to possession of the account books and other papers relating to the village. 11 B. 485. A decree may be executed partly under this rule and partly under R. 36. 7 W. R. 376; 9 W. R. 454; see also 17 W. R. 80; 5 B. 554 and 10 C. 993. Delivery of possession to an agent without a power of attorney is valid. 13 N. L. R. 87=40 I. C. 689. A reasonable degree of force can be used to remove persons bound by decree to vacate. 42 Cal. 313=28 I. C. 1000. Possession actually given is not the less effective by reason of an irregularity in taking it. 5 B. 387. An application for actual possession can again be put in after it has once been dismissed after delivery of formal possession. 45 I. C. 7. A decree for possession once satisfied by the plaintiffs being put in actual possession, cannot afterwards be re-executed on plaintiffs being dispossessed. 6 W. R. Mis. 108. See also 32 I. C. 44=29 M. L. J. 504. When a stranger obstructs delivery the remedy is criminal proceedings or a suit for damages. 43 M. L. J. 179=1923 Mad. 25. Symbolic delivery by mistake where actual delivery ought to be given is as good as actual delivery, so far

as regards persons bound by the decree. 71 I. C. 999=3 Pat. L. T. 628. See also 97 I. C. 705 (2). Symbolic delivery will interrupt judgment-debtor's adverse possession. 24 I. C. 850=10 N. L. R. 60; also 43 I. C. 268=34 M. L. J. 97 (P. C.); 96 I. C. 481=A. I. R. 1926 Cal. 1172; A. I. R. 1926 Lah. 35. Actual possession must be given if the judgment-debtor is in possession. Mere formal delivery will not prevent limitation running in favour of the judgment-debtor. 71 I. C. 885=1924 Lah. 301; 1925 Mad. 1140=49 M. L. J. 303. The sub-rule (2) merely lays down the manner of executing a decree for joint possession. 11 I. C. 87. See also 20 Bom. 351. The prescribed procedure for symbolic delivery must be followed. When no actual or symbolic delivery has been obtained, no subsequent suit lies for fresh possession. 20 P. R. 1917=39 I. C. 753. Failure to affix warrant of delivery vitiates symbolic delivery. 1923 Lah. 693=74 I. C. 1=5 Lah. L. J. 507; 55 I. C. 19=2 Lah. L. J. 202. Joint possession of one co-sharer as against another in actual enjoyment can only be symbolical. 19 A. L. J. 783=63 I. C. 806. It is neither real possession nor equivalent to it. 36 Bom. 373=14 I. C. 447. Publicity of delivery is what sub-rule (2) requires. 68 I. C. 182=2 Lah. L. J. 563. A decree for joint possession is valid unless unreasonable. 34 All. 150=13 I. C. 79. A usufructuary mortgagee of father's share cannot have joint possession with the son. 25 I. C. 401=16 M. L. T. 229.

O. 21, R. 36.—Rule applies only to person holding exclusive possession of property and not bound by the decree. 97 I. C. 170=

ous place on the property, and proclaiming to the occupant by beat of drum or other customary mode, at some convenient place, the substance of the decree in regard to the property.

Arrest and detention in the civil prison.

37. [S. 215-B.] (1) Notwithstanding anything in these rules, where an application is for the execution of a decree for the payment of money by the arrest and detention in the civil prison of a judgment-debtor was is liable to be arrested in pursuance of the application, the Court may, instead of issuing a warrant for his arrest, issue a notice calling upon him to

Discretionary power to permit judgment-debtor to show cause against detention in prison.

appear before the Court on a day to be specified in the notice and show cause why he should not be committed to the civil prison.

(2) Where appearance is not made in obedience to the notice, the Court shall, if the decree-holder so requires, issue a warrant for the arrest of the judgment-debtor.

38. [S. 337.] Every warrant for the arrest of a judgment-debtor shall direct the officer entrusted with its execution to bring him before the Court with all convenient speed, unless the amount which he has been ordered to pay, together with the interest thereon and the costs (if any) to which he is liable, be

Warrant for arrest to direct judgment-debtor to be brought up.

sooner paid.

[Lower Burma] In Order 21, the following shall be inserted as Rule 38-A :—

" 38-A. The actual cost of conveyance of a civil prisoner shall be borne by the Court ordering his arrest or requiring his attendance at Court, as the case may be, and shall not be charged to the judgment-creditor.

39. [S. 339.] (1) No judgment-debtor shall be arrested in execution of a decree unless and until the decree-holder pays into Court such

Subsistence-allowance.

sum as the Judge thinks sufficient for the subsistence of the judgment-debtor from the time of his arrest until he can be brought before the Court.

(2) Where a judgment-debtor is committed to the civil prison in execution of a decree, the Court shall fix for his subsistence such monthly allowance as he may be entitled to according to the scales fixed under section 57 or, where no such scales have been fixed, as it considers sufficient with reference to the class to which he belongs.

A. I. R. 1926 Lah. 668. There is nothing in this rule to prevent the applicant from obtaining possession without the aid of the Court. 22 W. R. 406; 15 W. R. 99; 18 C. 520; 13 M. L. J. 375. No delivery is effected when the provisions of this rule are not complied with. 41 I. C. 752=52 P. W. R. 1917. Symbolic possession in cases not contemplated under the Code is not effective. 46 Bom. 932=24 Bom. L. R. 499. Where there is obstruction to actual possession by one entitled to a right of residence, only symbolic delivery under this rule can be given. 20 I. C. 571. The present rule applies when the property is in the possession of a mortgagee. 52 I. C. 269=22 O. C. 278. Symbolical possession under the rule will give the purchaser a fresh starting point for limitation. 105 I. C. 781=4 O. W. N. 1005. After formal possession is given under this rule the plaintiff is entitled to bring a fresh suit to eject the defendant. 11 C. 93. If there is a decree for partition and the lands are in possession of tenants, delivery can be given under this rule. 26 M. 76. No possession need again be claimed when a usufructuary mortgagee in possession gets a decree for pre-emption. 23 I. C. 876=12 A. L. J. 521. When the decree-holder asked for possession with the crops on the land, but possession of land only was given, he should again

ask for whole possession and not for crops only. 97 I. C. 567=A. I. R. 1927 Mad. 71.

O. 21, R. 37.—An application for a warrant of arrest may be presumed when the warrant is issued in the presence of the decree-holder's pleader. 19 I. C. 394=15 Bom. L. R. 205. Arrest may be applied for only when means, other than by sale of land fail. 73 P. L. R. 1915=29 I. C. 152. But see 7 Lah. L. J. 165=1925 Lah. 379. Grounds for belief of ill-health are sufficient to exercise discretion to issue notice in the first instance. 9 I. C. 746=14 O. C. 36. A warrant of arrest fixing date of return should be issued when applied for, even though the judgment-debtor resides outside the jurisdiction of the Court. Such warrant should be executed by Court having jurisdiction. 44 I. C. 296=3 Pat. L. J. 95. When notice has been served on individual members of a firm, even though the firm is insolvent, they may be proceeded against personally. 1925 Lah. 379=7 Lah. L. J. 165.

O. 21, R. 38.—When a warrant directs a Nazir to arrest the judgment-debtor, the Nazir may authorize a deputy to execute the warrant, by endorsing his name on it. 6 A. 385. As for the liability of the Nazir for negligence in having allowed the debtor to escape, see 4 B. 65.

[Lower Burma] In Order 21, Rule 39, the following shall be inserted as sub-rule (2-A) :—

“(2-A) When a civil prisoner is kept in confinement at the instance of more than one decree-holder he shall only receive the same allowance for his subsistence as if he were detained in confinement upon the application of one decree-holder. Each decree-holder shall, however, pay the full allowance for subsistence, and when the debtor is released, the balance shall be divided rateably among the decree-holders and paid to them.”

(3) The monthly allowance fixed by the Court shall be supplied by the party on whose application the judgment-debtor has been arrested by monthly payments in advance before the first day of each month.

(4) The first payment shall be made to the proper officer of the Court for such portion of the current month as remains unexpired before the judgment-debtor is committed to the civil prison, and the subsequent payments (if any) shall be made to the officer in charge of the civil prison.

(5) [S. 340.] Sums disbursed by the decree-holder for the subsistence of the judgment-debtor in the civil prison shall be deemed to be costs in the suit :

Provided that the judgment-debtor shall not be detained in the civil prison or arrested on account of any sum so disbursed.

[Madras] O. 21, R. 39. *Delete* the present sub-rules (4) and (5) of Rule 39 of Order 21 and substitute the following :—

(4) Such sum (if any) as the Judge thinks sufficient for the subsistence and cost of conveyance of the judgment-debtor for his journey from the Court-house to the civil prison and from the civil prison, on his release, to his usual place of residence together with the first of the payments in advance under sub-rule (3) for such portion of the current month as remains unexpired, shall be paid to the proper officer of the Court before the judgment-debtor is committed to the civil prison, and the subsequent payments (if any) shall be paid to the officer in charge of the civil prison.

(5) Sums disbursed under this rule by the decree-holder for the subsistence and cost of conveyance (if any) of the judgment-debtor shall be deemed to be costs in the suit.

[Allahabad and Oudh] In sub-rule (5) *delete* the words “in the civil prison” occurring in two places.

40. [S. 337-A.] (1) Where a judgment-debtor appears before the Court in obedience to a notice issued under rule 37, or is brought

Proceedings on appearance of judgment-debtor in obedience to notice or after arrest.

before the Court after being arrested in execution of a decree for the payment of money, and it appears to the Court that the judgment-debtor is unable from poverty or

other sufficient cause to pay the amount of the decree or, if that amount is payable by instalments, the amount of any instalment thereof, the Court may, upon such terms (if any) as it thinks fit, make an order disallowing the application for his arrest and detention, or directing his release, as the case may be.

(2) Before making an order under sub-rule (1), the Court may take into consideration any allegation of the decree-holder touching any of the following matters, namely :—

(a) the decree being for a sum for which the judgment-debtor was bound in any fiduciary capacity to account ;

(b) the transfer, concealment or removal by the judgment-debtor of any part of his property after the date of the institution of the suit in which the decree was passed, or the commission by him after that date of any other act of bad faith in relation to his property, with the subject or effect of obstructing or delaying the decree-holder in the execution of the decree ;

(c) any undue preference given by the judgment-debtor to any of his other creditors ;

O. 21, R. 40.—“Other sufficient cause” must be based on evidence. 54 I. C. 782. Security under Cl. (3) must be substantial and not illusory. (*Ibid.*) The words “Some part thereof” in Sub-S. (2) (d) refer to payment of money generally and are not limited to instalment decrees only. 7 Bur. L. T. 242 = 23 I. C. 833. Grounds for refusal of the arrest of the judgment-debtor. 94 I. C. 279 (1) = 27 Punj L. R. 229. If the debtor can pay a substantial part of the decretal

amount, or instalment, and does not do so, poverty is no plea for release. (*Ibid.*) When all the properties moveable and immoveable have been sold in execution by other creditors, it would be improper to order his imprisonment. 4 Lah. L. J. 266 = 1922 Lah. 259. The lunacy of a judgment-debtor is a good cause for disallowing an application for his arrest. 22 B. 961. See 22 B. 731 under S. 55.

APPEAL.—See 21 M. 29.

(d) refusal or neglect on the part of the judgment-debtor to pay the amount of the decree or some part thereof when he has, or since the date of the decree has had, the means of paying it ;

(e) the likelihood of the judgment-debtor absconding or leaving the jurisdiction of the Court with the object or effect of obstructing or delaying the decree-holder in the execution of the decree.

(3) While any of the matters mentioned in sub-rule (2) are being considered, the Court may, in its discretion, order the judgment-debtor to be detained in the civil prison, or leave him in the custody or an officer of the Court, or release him on his furnishing security, to the satisfaction of the Court, for his appearance when required by the Court.

(4) A judgment-debtor released under this rule may be re-arrested.

(5) Where the Court does not make an order under sub-rule (1), it shall cause the judgment-debtor to be arrested if he has not already been arrested and, subject to the other provisions of this Code, commit him to the civil prison.

[Madras] Add the following as a proviso to sub rule (5) of the Rule 40 of Order 21 :—

“ Provided that, in order to give the judgment-debtor an opportunity of satisfying the decree, the Court before making the order of committal may leave the judgment-debtor in the custody of an officer of the Court for a specified period not exceeding ten days, or release him on his furnishing security to the satisfaction of the Court for his appearance at the expiration of the specified period if the decree be not sooner satisfied.

[Loc. Am. Madras] In sert the following as sub-rule (5-A) in R. 40, O. 21, in the First Schedule to the Code of Civil Procedure, 1908 :—

“(5-A) During the temporary absence of the Judge who issued the warrant under R. 37 or 38, the warrant of committal may be signed by any other Judge of the same Court or by any Judicial Officer superior in rank who has jurisdiction over the same locality, or where the arrest is made on a warrant issued by the District Judge the warrant of committal may be signed by any Subordinate Judge or District Munsif empowered in writing by the District Judge in this behalf.”

[Madras] Add the following as sub-rule (6) to Rule 40 of Order 21 :—

“(6) No judgment-debtor shall be committed to the civil prison or brought before the Court from the prison to which he has been committed pending the consideration of any of the matters mentioned in sub-rule (2) unless and until the decree-holder pays into Court such sum as the judge may think sufficient to meet the travelling and subsistence expenses of the judgment-debtor and the escort for the journey to and from the prison. Sub-rule (5) of Rule 39 shall apply to such payments.”

Attachment of Property.

41. [Cf. S. 267.] Where a decree is for the payment of money the decree-holder may apply to the Court for an order that—

- (a) the judgment-debtor, or
- (b) in the case of a corporation, any officer thereof, or
- (c) any other person,

be orally examined as to whether any or what debts are owing to the judgment-debtor and whether the judgment-debtor has any and what other property or means of satisfying the decree ; and the Court may make an order for the attendance and examination of such judgment-debtor, or officer or other person, and for the production of any books or documents.

42. [S. 255.] Where a decree directs an inquiry as to rent or mesne profits or any other matter, the property of the judgment-debtor may, before the amount due from him has been ascertained, be attached, as in the case of an ordinary decree for the payment of money.

Attachment in case of decree for rent or mesne profits or other matter, amount of which to be subsequently determined.

O. 21, R. 41.—This rule applies to all the properties of the judgment-debtor out of which the decree can be satisfied either by delivery in obedience to the decree or by sale. 17 B. 514. The Court cannot prescribe to the decree-holder what property he is to attach. 3 W. R. Mis. 16. The judgment-debtor can be examined at any stage of the execution proceedings. An order for such

examination may be made *ex parte*. On proper cause being shown, such order may be set aside. It is not necessary that all usual methods of execution should be exhausted before applying this rule. 34 I. C. 287 = 43 Cal. 285.

O. 21, R. 42.—The rule does not apply to a suit for partnership accounts. 93 I. C. 306 = A. I. R. 1926 Sind 178. This rule covers also an enquiry

43. [S. 269, paras. 1 & 2.] Where the property to be attached is moveable property, other than agricultural produce, in the possession of the judgment-debtor, the attachment shall be made by actual seizure, and the attaching officer shall keep the property in his own custody or in the custody of one of his subordinates, and shall be responsible for the

due custody thereof :

Provided that, when the property seized is subject to speedy and natural decay, or when the expense of keeping it in custody is likely to exceed its value, the attaching officer may sell it at once.

[Madras] For O. 21, R. 43, substitute the following rules, *viz.*—

43. (1) Where the property to be attached is moveable property, other than agricultural produce, in the possession of the judgment-debtor, the attachment shall be made by actual seizure, and the attaching officer shall keep the property in his own custody or in the custody of one of his subordinates, and shall be responsible for the due custody thereof :

Provided that, when the property seized is subject to speedy and natural decay or when the expense of keeping it in custody is likely to exceed its value, the attaching officer may sell it at once, and

provided also that, when the property attached consists of livestock, agricultural implements or other articles which cannot conveniently be removed and the attaching officer does not act under the first proviso to this rule, he may at the instance of the judgment-debtor or of the decree-holder or of any person claiming to be interested in such property leave it in the village or place where it has been attached—

(a) in the charge of the person at whose instance the property is retained in such village or place, if such person enters into a bond in the Form No. 15-A of Appendix E to this Schedule with one or more sufficient sureties for its production when called for, or

(b) in the charge of an officer of the Court, if a suitable place for its safe custody be provided and the remuneration of the officer for a period of 15 days at such rate as may from time to time be fixed by the High Court be paid in advance.

(2) Whenever an attachment made under the provisions of this rule ceases for any of the reasons specified in Rule 55 or Rule 57 or Rule 60 of this order, the Court may order the restitution of the attached property to the person in whose possession it was before attachment.

43-A. (1) Whenever attached property is kept in the village or place where it is attached, the attaching officer shall forthwith report the fact to the Court and shall with his report forward a list of the property seized.

(2) If attached property is not sold under the first proviso to rule 43 or retained in the village or place where it is attached under the second proviso to that rule, it shall be brought to the Court-house and delivered to the proper officer of the Court.

43-B. (1) Whenever attached property kept in the village or place where it is attached is livestock, the person at whose instance it is so retained shall provide for its maintenance, and, if he fails to do so and if it is in charge of an officer of the Court, it shall be removed to the Court-house.

Nothing in this rule shall prevent the judgment debtor, or any person claiming to be interested in such stock from making such arrangements for feeding the same as may not be inconsistent with its safe custody.

(2) The Court may direct that any sums which have been expended by the attaching officer or are payable to him, if not duly deposited or paid, be recovered from the proceeds of property, if sold, or be paid by the person declared entitled to delivery before he receives the same. The Court may

into accounts in a scheme suit under S. 92, C. P. Code. 41 I. C. 89. On this section, *see also* 19 Cal. 139.

O. 21, R. 43.—A person who attaches under a warrant must have the warrant with him. Else the taking of the property is not lawful. 27 A. 258. A warrant of attachment affixed to the out-door of a warehouse in which goods belonging to the judgment-debtor were stored constitutes a good attachment although the door is not broken open and the goods taken physical possession of. 27 M. 346. *See also* 11 B. at p. 454 ; 30 M. 207. The rule does not affect the liability of a surety for attached moveables if he fails to produce them. 62 I. C. 719 = 19 A. L. J. 247. A safardar of attached property must produce them when called upon, even though the execution application is dismissed for default and the attachment ends. 51 I. C. 653 = 60 P. R. 1919.

The proper execution procedure against a surety for attached property is to sue on the security bond first having it assigned in the decree-holder's name. 39 M. L. J. 472 = 60 I. C. 134. *See also* 47 I. C. 956 = 16 N. L. R. 178. Attachment of moveables—Bond executed by attaching creditor on taking possession of goods—Subsequent sale—Order for production of goods—Non-compliance—Forfeiture of bond is illegal. (1927) M. W. N. 919. Mere application for attachment of 'moveable property' is not sufficient to attach a debt due from third parties. 9 I. C. 240. A right to sue for breach of contract cannot be attached. 1925 Sind 98. The attaching officer entrusting the attached property to a third person without the permission of the Court, must, if the property be lost, make good the loss himself. 24 A. L. J. 561 = 95 I. C. 828 = 48 A. 510 = A. I. R. 1926 All. 406.

also order that any sums deposited under these rules be recovered as costs of the attachment from any party to the proceedings

[*Note*.—An additional Form, being Form No. 15-A, has been inserted in App. E.]

44. Where the property to be attached is agricultural produce, the attachment shall be made by affixing a copy of the warrant of attachment,—

(a) where such produce is a growing crop, on the land on which such crop has grown, or

(b) where such produce has been cut or gathered, on the threshing-floor or place for treading out grain or the like or fodder-stack on or in which it is deposited,

and another copy on the outer door or on some other conspicuous part of the house in which the judgment-debtor ordinarily resides or, with the leave of the Court, on the outer door or on some other conspicuous part of the house in which he carries on business or personally works for gain or in which he is known to have last resided or carried on business or personally worked for gain; and the produce shall thereupon be deemed to have passed into the possession of the Court.

[*Bombay*.] After R. 44 of O. 21, the following shall be inserted, as rule 44-A, namely:—

44-A. Where the property to be attached is agricultural produce, a copy of the warrant or order of attachment shall be sent by post to the office of the Collector of the District in which the land is situate.

45. (1) Where agricultural produce is attached, the Court shall make such arrangements for the custody thereof as it may deem sufficient and, for the purpose of enabling the Court to make such arrangements, every application for the attachment of a growing crop shall specify the time at which it is likely to be fit to be cut or gathered.

(2) Subject to such conditions as may be imposed by the Court in this behalf either in the order of attachment or in any subsequent order, the judgment-debtor may tend, cut, gather and store the produce and do any other act necessary for maturing or preserving it; and if the judgment-debtor fails to do all or any of such acts, the decree-holder may, with the permission of the Court and subject to the like conditions, do all or any of them either by himself or by any person appointed by him in this behalf, and the costs incurred by the decree-holder shall be recoverable from the judgment-debtor as if they were included in, or formed part of, the decree.

(3) Agricultural produce attached as a growing crop shall not be deemed to have ceased to be under attachment or to require re-attachment merely because it has been severed from the soil.

(4) Where an order for the attachment of a growing crop has been made at a considerable time before the crop is likely to be fit to be cut or gathered, the Court may suspend the execution of the order for such time as it thinks fit, and may, in its discretion, make a further order prohibiting the removal of the crop pending the execution of the order of attachment.

(5) A growing crop which from its nature does not admit of being stored shall not be attached under this rule at any time less than twenty days before the time at which it is likely to be fit to be cut or gathered.

[*Bombay*.] The following words shall be added to sub-rule (1) of Rule 45 of Order 21 after substituting a semi-colon for the full stop:—and the applicant shall deposit in Court at the time of application such sum as the Court shall deem sufficient to defray the cost of watching and tending the crop till such time.

[*Rangoon*.] After R. 45 of O. 21, insert the following rules as Rules 45-A and 45 B:—

45-A. (1) Before issuing a warrant for the attachment of moveable property which it will be necessary to place in charge of one or more peons, permanent or temporary, the Court shall satisfy itself that the attaching decree-holder has produced a receipt in Form 15-A, Appendix E, from the Bailiff that he has paid in cash as process fees under Rules 17 (1) (c) (ii) (2) of the Process-Fees Rules not less than Rs. 10, for each person whom the Bailiff considers should be employed.

(2) In sending the warrant for execution to the Bailiff the Court Clerk shall certify at the foot of the warrant that the receipt granted by the Bailiff for the necessary fees has been filed in the record, the Bailiff shall then endorse on the warrant the name of the process-server to whom it is issued for execution. If a temporary peon is employed for the custody of the attached property, the process-server shall state in his report of the attachment the name of the temporary peon employed and the date from which his duties commenced.

(3) At the time of granting the receipt in Form 15-A, for payments made by the decree-holder as required by sub-rule (1), the Bailiff shall state in the lower portion of the Form the date on which the fees paid will be exhausted, warning the decree-holder that the property will not be kept under attachment after that date, unless further fees are paid before that date.

If the further fees required are not paid, the attachment shall cease as soon as the period for which fees have already been paid expires. In such a case the amount paid prior to the cessation of the attachment shall not be allowed to the attaching decree-holder as costs.

(4) The payment of fees under sub-rule (1) shall be made in cash to the Bailiff and the amount shall be at once entered in Bailiff's Register in No. II. The Court Clerk shall on receipt of the Bailiff's acknowledgment (Form 15-A) file it in the record and make an entry to that effect in the diary.

(5) Temporary peons employed for the custody of the attached property shall be remunerated at the rate provided for in Rule 15 of the Rules regarding process-serving establishments provided that the total remuneration disbursed shall in no case exceed the amount of the process-fees actually paid under the foregoing sub-rules. Permanent peons shall be presumed to be remunerated at the same rate as temporary peons but if the services of the former are utilized, the fees paid shall be credited direct into the Treasury to "Process-servers' Fees" (XVI-A, Law and Justice—"Courts of Law"—"Court-fees realized in cash").

(6) The remuneration of temporary peons employed to take charge of attached property shall be paid direct by the Bailiff to them on the order of the Judge.

Before passing such order, the Judge must verify the name of the payee from the report of the attachment and must satisfy himself that the amount proposed to be paid does not exceed the amount of the fees deposited with the Bailiff, or, if any payments have already been made in the case of the unexpended balance of such deposits, and that all amounts previously drawn have been disbursed to the proper persons.

(7) When the order has been signed by the Judge, the money shall be disbursed by the Bailiff at once to the peon or peons concerned, whose acknowledgment of receipt shall be taken in Bailiff's Register II. If, however, the amount has been transferred to Bailiff's Register I, the Bailiff shall draw the amount necessary for payment from the Treasury as if it were a re-payment of deposit and shall then disburse the amount due to the peon or peons concerned, whose acknowledgment of receipt shall be taken in Bailiff's Register I.

(8) When the attachment is brought to a close or has not been effected, if the Judge finds, at the time of calculating the amount paid in and properly chargeable for peons, that the total amount of the fees actually paid under sub-rules 1 and 3 exceeds the total amount that is chargeable for peons including the amount of the last payment he shall direct that the excess be refunded to the payer.

(9) The Judge shall in all cases in which a refund is to be made, issue to the Bailiff an order, a copy of which shall be placed on the record, to make such refund. If a sufficient portion of the amount paid by the decree-holder to pay such refund is in the hands of the Bailiff that officer shall make the refund in the ordinary way prescribed in his Register II for repayments. If the amount has been credited into the Treasury, he shall prepare a bill for the amount to be refunded in the prescribed treasury form and shall lay it before the Judge for signature with the record of the case in the same way as a bill for the remuneration of temporary peons. Before signing the refund order, the Judge must satisfy himself that the amount is available for refund by examining Bailiff's Register I and the record. The bill when signed by the Judge will be given to the payee, with instructions to present it for payment at the Treasury or sub-Treasury.

45-B. (1) In addition to the fees payable before a warrant issues for the attachment of moveable property under Rule 45-A, the Bailiff shall require the attaching decree-holder to deposit a sum of money sufficient to cover the cost of attachment other than the pay of peons employed to take charge of it, for such period as the Bailiff may think fit.

Explanation.—The costs in question might be, for example, (a) rent of building in which to store attached furniture, (b) costs of conveying the attached property from the place of attachment to Court or to a secure place of custody, (c) cost of feeding and tending live-stock, (d) cost of proceeding to the place of attachment to sell perishable property.

(2) If the Attaching decree-holder fails to comply with the Bailiff's requisition, the warrant shall not be issued.

(3) Sums thus deposited shall be entered in the Bailiff's Registers I and II and any re-payments thereof shall be made according to existing orders. A receipt for such sums shall be granted by the Bailiff in Form 15-A, Appendix E.

(4) In the receipt given for the sums deposited, the Bailiff shall state the period for which such sums will last, and if the attaching decree-holder does not deposit a further sum before the expiry of such period the attachment shall cease when the sum deposited is exhausted.

(5) The officer actually attaching the property shall, unless the Court otherwise directs, give the debtor, or, in his absence, any adult member of his family who may be present, the option of having the attached property kept on his premises or elsewhere, on condition that a suitable place for its safe custody is duly provided. The option so given may be subsequently withdrawn by order of the Court. Where the attached property consists of cattle these may be employed, so far as is consistent with Rule 43, in agricultural operations.

(6) If no such suitable place be provided, or if the Court directs that the property shall be removed, the officer shall remove the property to the Court, unless the property attached is a growing crop, when Rule 45 applies. Whenever live-stock is placed at the place where it has been attached, the judgment-debtor shall be at liberty to undertake the due feeding and tending of it under the supervision of the attaching officer.

(7) Whenever property is attached, the officer shall forthwith report to the Court, and shall with his report forward an accurate list of the property seized.

(8) If the debtor shall give his consent in writing to the sale of property without awaiting the expiry of the term prescribed in Rule 68, the officer shall receive the written consent and forward it without delay to the Court for its orders.

(9) When the property is removed to the Court it shall be kept by the Bailiff, on his own sole responsibility, in such place as may be approved by the Court. If the property cannot, from its nature or bulk, be conveniently kept on the Court premises, or in the personal custody of the Bailiff, he may, subject to the approval of the Court, make such arrangement for its safe custody under his own supervision as may be most convenient and economical.

(10) If there be a Government pound in or near the place where the Court is held, the Bailiff shall be at liberty to place in it such attached live-stock as can be properly there kept, in which case the pound-keeper will be responsible for the property to the Bailiff and shall receive the same rates for accommodation and maintenance thereof as are paid in respect of impounded cattle of the same description.

(11) Whenever property is attached, and any person other than the judgment-debtor shall claim the same, or any part of it, the officer shall nevertheless unless the decree-holder desires to withdraw the attachment of the property so claimed, remain in possession and shall direct the claimant to prefer his claim to the Court.

(12) If the decree-holder shall withdraw an attachment or if it shall cease under sub-rule (2) or (4), the Bailiff's officer shall inform the debtor or, in his absence, an adult member of his family that the property is at his disposal.

(13) If any portion of the deposit made under sub-rule (1) or (4) remains unexpended it shall be refunded to the decree-holder in the manner prescribed for such refunds in sub-rule 9 of Rule 45-A. Any difference between the cost of attachment of moveable property (other than the costs referred to in Rule 45 A) and the sums deposited by the attaching decree-holder shall, unless the difference is due to the default of the Bailiff, be recovered from the sale-proceeds of the attached property, if any, and if there are no sale-proceeds, from the attaching decree-holder on the application of the Bailiff. If there is still a deficiency, the amount shall be paid by Government.

Attachment of debt, share and other property not in possession of judgment-debtor.

46. [S. 268.] (1) In the case of

O. 21, R. 46. SCOPE.—A prohibitory order to a person outside the Court's jurisdiction is illegal. 39 Cal. 104=16 C. W. N. 402. *See also* 177 P. L. R. 1915=30 I. C. 487; 107 I. C. 663 (1). Annuity until it falls due is not a debt, nor money expected to reach a public officer until actual receipt. 14 C. L. J. 127=16 C. W. N. 14. Whether an attaching creditor who has attached a debt but not the decree on the debt, can execute the decree. *See* 92 I. C. 1021=A. I. R. 1926 Mad. 371=50 M. L. J. 79. A mortgage debt is moveable property within the meaning of this rule. 26 B. 305; 39 Mad. 389=28 M. L. J. 338. *Also* 26 I. C. 508=27 M. L. J. 239; 16 I. C. 816; 22 M. L. J. 105=37 Mad. 51; 50 I. C. 157=21 O. C. 400; 49 All. 917=1924 All. 796. But *see* 125 P. L. R. 1913=18 I. C. 318. *See also* (1912) M. W. N. 879=16 I. C. 438. There is no debt in a purely usufructuary mortgage. The proper procedure is to attach his interest in the immoveable property. 35 Bom. 288=10 I. C. 812. An order for attachment under this rule is not an injunction or order staying a suit within the meaning of S. 15, Lim. Act. 13 A. 76. *See also* 14 A. 162. In attaching a debt, it is not the business of the Court to determine whether debts are really due or not. 28 A. 262; 4 Rang. 100=97 I. C. 247 (2)=A. I. R. 1926 Rang. 175. And the appointment of a Receiver is not irregular. 27 I. C. 812. The absence of attachment does not render a sale invalid. 36 I. C. 292. When shares in company are purchased, the proceedings come to an end. Nothing more is to be done by the Court. 42 M. L. J. 449=45 M. 537. Service of notice on the authorised Attorney of the managing director sufficient. 5 R. 685. No notice to the judgment-debtor is necessary in attaching his

money in the hands of the decree-holder himself, if it is not secured by a negotiable instrument. 17 I. C. 420=15 O. C. 289.

WHAT CAN BE ATTACHED.—Payments to be made to a railway contractor for work done as well as the salary and the allowance of a servant of a railway company cannot be attached under O. 21, R. 46, C. P. C. 107 I. C. 663 (1). Attachment of agricultural produce in the hands of a third person comes under this rule. 64 I. C. 1007=15 S. L. R. 128. An attachment of money in the hands of a Receiver made without the previous permission or sanction of the Court is improper and irregular. 21 C. 85. Attachment of debt due when a prior order appointing a receiver has been made is invalid. 102 I. C. 413=29 Bom. L. R. 409. Money deposited by a third person as due to the judgment-debtor can be attached under this rule. 43 All. 272=60 I. C. 881. As regards the attachment of money or other valuable securities deposited as security for the due performance of one's duty, *see* 9 M. 203 (206). If the attachment is made after a cheque is delivered to the payee, the payment of the cheque cannot be stopped. 3 B. 49, and the attachment is of no avail. 12 I. C. 869=4 Bur. L. T. 148. Undivided share in ancestral joint family business cannot be attached when the decree is personal. 50 I. C. 157=21 O. C. 400. After attachment of share in a company, company cannot by resolution appropriate share towards debts due to it. 39 M. L. T. 196=105 I. C. 246=26 L. W. 209. A deposit with an association which is repayable as per rules only when membership ceases can be attached but the judgment-debtor cannot be compelled to resign. 29 Bom. L. R. 416=102 I. C. 418 (1)=A. I. R. 1927 Bom. 365

(a) a debt not secured by a negotiable instrument,

(b) a share in the capital of a corporation,

(c) other moveable property not in the possession of the judgment-debtor, except property deposited in, or in the custody of, any Court, the attachment shall be made by a written order prohibiting,—

(i) in the case of the debt, the creditor from recovering the debt and the debtor from making payment thereof until the further order of the Court ;

(ii) in the case of the share, the person in whose name the share may be standing from transferring the same or receiving any dividend thereon ;

(iii) in the case of the other moveable property except as aforesaid, the person in possession of the same from giving it over to the judgment-debtor.

(2) A copy of such order shall be affixed on some conspicuous part of the Court-house, and another copy shall be sent, in the case of the debt, to the debtor, in the case of the share, to the proper officer of the corporation, and, in the case of the other moveable property (except as aforesaid), to the person in possession of the same.

(3) A debtor prohibited under clause (i) of sub-rule (1) may pay the amount of his debt into Court, and such payment shall discharge him as effectually as payment to the party entitled to receive the same.

[Lower Burma.] In Order 21, the following rule shall be inserted as Rule 46-A :—

46-A. When a debt alleged to be due by a third party to a judgment-debtor has been attached under rule 46 and has not been paid into Court under sub-rule (3) of that Rule, the Court may, on the application of the decree-holder, issue a notice to such third party in Form Civil 74. A copy of such notice shall also, if possible, be served on the judgment-debtor. When at the hearing of such notice the third party shows no cause, and admits the debt to be due, the Court may intimate to him that he should pay into Court the amount admitted by him to be due, or so much thereof as may be sufficient to satisfy the decree, and that if he fails to do so he may be subject to a suit.

47. Where the property to be attached consists of the share or interest of the judgment-debtor in moveable property belonging to him and another as co-owners, the attachment shall be made by a notice to the judgment-debtor prohibiting him from transferring the share or interest or charging it in any way.

48. (1) Where the property to be attached is the salary or allowances of a public officer or of a servant of a railway company or local authority, the Court, whether the judgment-debtor or the disbursing officer is or is not within the local limits of the Court's jurisdiction, may order that the amount shall, subject to the provisions of section 60, be withheld from such

O. 21, R. 46 (2).—Attachment of a mortgage-debt without copy of attachment order being fixed to the Court-house is ineffectual. 9 C. W. N. 693 ; 27 A. 378 ; 29 A. 259, 30 M. 207 ; 17 M. L. J. 488.

O. 21, R. 46 (3).—In case the debtor admits the debt, the Court should order debtor to pay the debt to the decree-holder. 97 I. C. 467. A debtor can always get a valid discharge by payment into Court if any dispute exists as to persons entitled to the money, 112 P. L. R. 1913 = 13 I. C. 205. If the decree-holder was not entitled to recover his debt, the debtor of the judgment-debtor must contest his liability and will not be absolved from the liability if he pays the amount. 28 I. C. 317 = 50 P. L. R. 1915. The debtor can plead that one claimant and not another is entitled to the debt. 11 M. L. T. 262 = 15 I. C. 193.

RIGHT OF SUIT.—A judgment-debtor whose debt has been attached can sue for his debt though he cannot recover it until the decree against him is satisfied. 10 I. C. 569 ; also 49 I. C. 88 = 5 O. L. J. 766. When a debt due from a third party to the judgment-debtor is attached but the liability is denied, a Receiver with power to sue may be appointed or the debt may be sold.

35 I. C. 469 = 10 Bur. L. T. 6 ; A. I. R. 1927 All. 41 = 97 I. C. 467 ; *Vide* 84 I. C. 1022 = 1924 Cal. 1068. A suit by an alleged assignee of a debt when it has been realised by a decree-holder is governed by Art. 62 or 120 of the Limitation Act and time begins to run from the date of receipt of money from Court, 38 Mad. 972 = 26 M. L. J. 166. In a suit on bond debts purchased, evidence to identify debt can be let in when it has been wrongly described in execution. 6 L. W. 712 = 42 I. C. 609. In the suit garnishee can show that no debt was due. A. I. R. 1926 Mad. 1011.

O. 21, R. 48.—This rule is new and supersedes the rulings in, 2 B. 44 ; 29 B. 405 ; 28 B. 198 and 30 C. 713. Prohibitory order on an Auditor of a Railway Company not to pay out security deposited will bind the company subject to its lien if any. 7 Bur. L. T. 238 = 24 I. C. 725. No order under sub-rule (3) can be made against Government without bringing the Government on record as a party. 93 P. R. 1912 = 14 I. C. 737. Attachment-power of Court to which decree is transferred. *See* 1 Luck. 46 = A. I. R. 1927 Oudh 112 ; 91 I. C. 1043 = 13 O. L. J. 174.

salary or allowances either in one payment or by monthly instalments as the Court may direct ; and, upon notice of the order to such officer as the Government may, by notification in the *Gazette of India* or in the local official Gazette, as the case may be, appoint in this behalf, the officer or other person whose duty it is to disburse such salary or allowances shall withhold and remit to the Court the amount due under the order, or the monthly instalments, as the case may be.

(2) Where the attachable proportion of such salary or allowances is already being withheld and remitted to a Court in pursuance of a previous and unsatisfied order of attachment, the officer appointed by the Government in this behalf shall forthwith return the subsequent order to the Court issuing it with a full statement of all the particulars of the existing attachment.

(3) Every order made under this rule, unless it is returned in accordance with the provisions of sub-rule (2), shall, without further notice or other process, bind the Government or the railway company or local authority, as the case may be, while the judgment-debtor is within the local limits to which this Code for the time being extends and while he is beyond those limits if he is in receipt of any salary or allowances payable out of His Majesty's Indian revenues or the funds of a railway company carrying on business in any part of British India or local authority in British India, and the Government or the railway company or local authority, as the case may be, shall be liable for any sum paid in contravention of this rule.

49. (1) Save as otherwise provided by this rule, property belonging to a partnership shall not be attached or sold in execution of a decree other than a decree passed against the firm or against the partners in the firm as such.

Attachment of partnership property.

(2) The Court may, on the application of the holder of a decree against a partner, make an order charging the interest of such partner in the partnership property and profits with payment of the amount due under the decree, and may, by the same or a subsequent order, appoint a receiver of the share of such partner in the profits (whether already declared or accruing) and of any other money which may be coming to him in respect of the partnership, and direct accounts and inquiries and make an order for the sale of such interest or other orders as might have been directed or made if a charge had been made in favour of the decree-holder by such partner, or as the circumstances of the case may require.

(3) The other partner or partners shall be at liberty at any time to redeem the interest charged or, in the case of a sale being directed, to purchase the same.

(4) Every application for an order under sub-rule (2) shall be served on the judgment-debtor and on his partners or such of them as are within British India.

(5) Every application made by any partner of the judgment-debtor under sub-rule (3) shall be served on the decree-holder and on the judgment-debtor, and on such of the other partners as do not join in the application and as are within British India.

(6) Service under sub-rule (4) or sub-rule (5) shall be deemed to be service on all the partners, and all orders made on such applications shall be similarly served.

Execution of decree against firm.

50. (1) Where a decree has been passed against firm, execution may be granted—

(a) against any property of the partnership ;

(b) against any person who has appeared in his own name under Rule 6 or Rule 7 of Order XXX or who has admitted on the pleadings that he is, or who has been adjudged to be, a partner ;

O. 29, R. 49.—A decree can be passed against an individual partner. 23 C. W. N. 500=51 I. C. 597.

O. 21, R. 50 (1).—An award against a firm having the force of a decree under S. 15 of the Ind. Arb. Act is not sufficient to have recourse to the provisions of this Rule. 29 Bom. L. R. 660=104 I. C. 94=A. I. R. 1927 Bom. 428. This Rule is limited in its operation to the case of a partner who was living at the time of the decree.

87 I. C. 992=1925 Sind 298. Under sub-rule (1) and under English Law, partners not served and who have not appeared are not liable. 36 M. 414.=22 M. L. J. 109 ; also 30 C. W. N. 111. Where summons were affixed on refusal to accept, and the party did not appear, execution could proceed against him personally as partner under sub-rule (1) (c). 26 I. C. 866=19 C. W. N. 1008. Appearance under protest—Remedy of party in execution. 31 C. W. N. 1004.

(c) against any person who has been individually served as a partner with a summons and has failed to appear :

Provided that nothing in this sub-rule shall be deemed to limit or otherwise affect the provisions of section 247 of the Indian Contract Act, 1872.

(2) Where the decree-holder claims to be entitled to cause the decree to be executed against any person other than such a person as is referred to in sub-rule (1), clauses (b) and (c), as being a partner in the firm, he may apply to the Court which passed the decree for leave, and where the liability is not disputed, such Court may grant such leave, or, where such liability is disputed, may order that the liability of such person be tried and determined in any manner in which any issue in a suit may be tried and determined.

(3) Where the liability of any person has been tried and determined under sub-rule (2), the order made thereon shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree.

(4) Save as against any property of the partnership, a decree against a firm shall not release, render liable or otherwise affect any partner therein unless he has been served with a summons to appear and answer.

51. [S. 270.] Where the property is a negotiable instrument not deposited in a Court, nor in the custody of a public officer, the attachment shall be made by actual seizure; and the instrument shall be brought into Court and held subject to further orders of the Court.

52. [S. 272.] Where the property to be attached is in the custody of any Court or public officer, the attachment shall be made by a notice to such Court or officer, requesting that such property, and any interest or dividend becoming payable thereon, may be held subject to the further orders of the Court from which the notice is issued :

O. 21, R. 50 (2).—The provisions of Order 30 do not in any way militate against sub-rule (2). The Court which passed the decree as well as the Court to which it is sent for execution can enquire into as to who constitute the firm. 86 I.C. 1013=1925 Sind 293. Where in a suit by a firm a counter-claim was set up and a decree was passed and the solicitors of the firm closed the names of the partners, the fact of their being partners could be agitated in execution. 51 Bom. 794=29 Bom. L. R. 921=103 I. C. 256=A. I. R. 1927 Bom. 447. No special leave is necessary as regards a person who has appeared in his own name under O. 30, R. 6 or who had admitted in pleadings that he is a partner, or who has been served with summons. 89 I. C. 401. Sub-rule (2) applies only in the absence of the conditions of sub-rule (1). 26 I. C. 866=19 C. W. N. 1008; also 28 I. C. 260=(1915) M. W. N. 180. This sub-rule covers also the case of a deceased partner. 24 Bom. L. R. 1037=1923 Bom. 66. A decree against a firm after death of a partner can be executed against his legal representative. 100 I. C. 204=A. I. R. 1927 Sind 130 (F. B.); A. I. R. 1927 Sind 247. See also 29 Bom. L. R. 1296. If the decree is against a firm and personally against some specified partners, unnamed partners can be made liable under this rule. 18 S. L. R. 146=1925 Sind 317. For the purpose of sub-rule (2) 'Court which passed the decree' is the Court of transfer. 43 All. 394=19 A. L. J. 187.

Sub-rule (3).—Deputy Registrar empowered to grant leave under this rule cannot determine liability of a contesting party. 4 Bur. L. J. 116=1925 Rang. 317.

O. 21, R. 50 (4) does not affect sub-rule (2) 68 I. C. 627=1923 Bom. 66. Even though the firm is insolvent execution can proceed against partners personally when they have been served with notice. 7 Lah. L. J. 165=1925 Lah. 379. Sub-rule (4) does not mean that a person sought to be made liable ought to be served with summons in the suit itself. 30 C. W. N. 11.

O. 21, R. 52.—The order under this Rule is judicial not administrative. 1925 Cal. 354. There is no warrant in the C. P. C. for the practice prevailing in Bombay regarding charging orders. 29 Bom. L. R. 689=A. I. R. 1927 Bom. 405.

SCOPE.—The rule does not allow of an anticipatory attachment of money expected to reach the hands of a public officer, but applies only to money actually in his hands. 22 B. 39. Also 44 Cal. 1072=25 C. L. J. 595; 24 I. C. 617=26 M. L. J. 364. The Court has no power to refuse an application for attachment under this Rule. 8 C. L. R. 7. Attachment of money in another Court, in another district is illegal. Proper procedure is to have the decree transferred to that Court. 26 I. C. 941=7 Bur. L. T. 277. Attachment of money in another Court made without notice to that Court is irregular. 11 I. C. 859=4 Bur. L. T. 192. The proviso is intended to prevent an unseemly conflict between two Courts. 19 B. 710. Regarding mode of distribution when the fund is attached by different Courts. See 29 Bom. L. R. 689=A. I. R. 1927 Bom. 405.

MEANING OF WORDS.—"Any Court" includes also the executing Court. A subsequent formal attachment does not render infructuous

Provided that, where such property is in the custody of a Court, any question of title or priority arising between the decree-holder and any other person not being the judgment-debtor, claiming to be interested in such property by virtue of any assignment, attachment, or otherwise, shall be determined by such Court.

53. [S. 273.] (1) Where the property to be attached is a decree, either for the payment of money or for sale in enforcement of a mortgage or charge, the attachment shall be made,—

(a) if the decrees were passed by the same Court, then by order of such Court, and

(b) if the decree sought to be attached was passed by another Court, then by the issue to such other Court of a notice by the Court which passed the decree sought

a prior subsisting one. 28 I. C. 123=20 C. W. N. 412. Money with Receiver is supposed to be in Court's custody. 35 I. C. 589=1 Pat. L. J. 449. So also money with Official Assignee. 49 Bom. 638=1925 Bom. 344. The Court of a Deputy Collector is a 'Court' within the meaning of this Rule. 10 W. R. 43. See 21 A. 405. The Official Trustee is a 'Public Officer'. 12 M. 250. The interest which a judgment-debtor has, in property held by the Official Trustee, is not validly attached by a notice given to the Official Trustee under this Rule. 12 M. 250. 'Interest or dividend,' meaning of. See 39 Bom. 88=17 Bom. L. R. 133.

PRIORITY.—Priority of payment is in favour of those applying for execution by attachment of a fund, see 44 Mad. 100=39 M. L. J. 608 (F.B.) 42 Mad. 692=50 I. C. 925; also 29 I. C. 239=38 Mad. 221. A decree-holder attaching is entitled to complete payment, even though a prior attachment before judgment subsists in favour of a suitor. 37 All. 578=29 I. C. 622. Attachment of a decree debt when a prior order appointing a Receiver has been made is invalid. 102 I. C. 413=29 Bom. L. R. 409.

APPLICATION OF THE RULE.—An execution application and notice to judgment-debtor are necessary to effect an attachment. A. I. R. 1926 Mad. 1104=51 M. L. J. 436. When the money of a judgment-debtor who has not yet been declared insolvent is in Court, it should be made available to an attaching decree-holder. 33 I. C. 723=14 A. L. J. 236. A letter containing currency notes sent by a third person to a judgment-debtor can be attached under this Rule while it is still in the Post Office. 13 M. 242; 21 C. 85. Creditors of a partnership can attach partnership assets even before accounts is settled among the partners. 29 Bom. L. R. 689=A. I. R. 1927 Bom. 405.

RIGHT OF SUIT.—A regular suit will lie for setting aside an order contemplated by the proviso. The mode of investigation and the nature of the order to be made is provided for in Rr. 58 to 63. 19 C. 286; 7 C. 553; 19 B. 710.

APPEAL.—Where the order of payment is made by a Sub Court, an appeal lies to the District Court from that order. If presented in a wrong Court, it ought not to be dismissed but returned for presentation to the proper Court. 38 I. C. 772=5 L. W. 264.

O. 21, R. 53. SCOPE.—The rule does not render the decree attached under it permanently incapable of execution. It merely operates as a stay of execution. 13 M. L. J. 265. The rule applies only to cases where the right attached is a right expressly settled by the decree, and not a

right arising from the decree by way of restitution. 24 M. 341. This rule applies where a decree for redemption has to be attached. 10 B. 444. Also to a mortgage decree. 12 I. C. 924=8 A. L. J. 1327. The decree of a Revenue Court cannot be attached under this Rule. 21 A. 405. The procedure laid down in this Rule must be followed where a decree-holder desires to render a decree obtained by his judgment-debtor available for the satisfaction of his own decree. 6 M. 418. A proceeding in execution and subsequent sale are not invalid, merely because the Court treated the decree as not being covered by this rule when really this rule applies. 85 I. C. 660=1925 All. 264. The order of attachment can be made by the executing Court as well as by the Court which passed the decree. 17 I. C. 323=13 M. L. T. 227. A decree for unascertained mesne profits is a decree for money, 2 M. L. J. 288. A certificate under O. 21, R. 71 is attachable as a decree for payment of money. 95 I. C. 1033=24 A. L. J. 385=A. I. R. 1926 All. 379.

Cl. (b).—If after receipt of order of attachment, a Court proceeds to execute the decree, and sells property in execution, the sale is invalid. 32 C. 1104.

RIGHTS OF ATTACHING DECREE-HOLDER.—The attaching decree-holder has the same remedies against sureties of the judgment-debtor as the decree-holder himself has. 44 P. R. 1919=46 I. C. 584. An attaching decree-holder will be liable in damages to his judgment-debtor if he allows the attached decree to lapse. 35 Mad. 622=21 M. L. J. 577. The attaching creditor can himself execute the decree even when the decree attached and the decree sought to be executed are decrees of one and the same Court. 15 C. 375. If it is found that the attaching decree-holder who has executed and realised the attached decree had no right he must be regarded as trustee of the person beneficially entitled to the profits of the decree. 5 Rang. 595=6 Bur. L. J. 221.

SALE OF ATTACHED DECREEES.—A decree for dissolution of partnership can be regarded as a money decree and can be attached but cannot be sold. 27 B. 556. No decree can be sold in execution of another decree. See 20 C. 111; 2 A. 290. Also 45 Bom. 343=59 I. C. 541. But see 44 I. C. 252=16 N. L. R. 72. A decree for mesne profits cannot be sold. The right procedure is to execute it. 4 Pat. L. J. 336=48 I. C. 188; 1 R. 360=1924 Rang. 21. Where the decree attached is a maintenance decree charging immoveable property it can be purchased and a separate suit brought for its sale. Or as representative of the maintenance decree-holder, he can also directly bring the property to sale. 23

to be executed, requesting such other Court to stay the execution of its decree unless and until—

[Allahabad and Oudh.] O. XXI, R. 53 (b) Add 'and to any other Court to which the decree has been transferred for execution' after the words 'such other Court' in sub-clause 1 (b) of R. 53, O. XXI.

(i) the Court which passed the decree sought to be executed cancels the notice, or

(ii) the holder of the decree sought to be executed or his judgment-debtor applies to the Court receiving such notice to execute its own decree.

[Madras.] Add the following as sub-rule 1 (c) to R. 53 of O. XXI:—

(c) If the decree sought to be attached has been sent for execution to another Court, the Court which passed the decree shall send a copy of the said notice to the former Court, and thereupon the provisions of clause (o) shall apply in the same manner as if the former Court had passed the decree and the said notice had been sent to it by the Court which issued it.

(2) Where a Court makes an order under clause (a) of sub-rule (1) or receives an application under sub-head (ii) of clause (b) of the said sub-rule, it shall, on the application of the creditor who has attached the decree or his judgment-debtor, proceed to execute the attached decree and apply the net proceeds in satisfaction of the decree sought to be executed.

(3) The holder of a decree sought to be executed by the attachment of another decree of the nature specified in sub-rule (1) shall be deemed to be the representative of the holder of the attached decree and to be entitled to execute such attached decree in any manner lawful for the holder thereof.

(4) Where the property to be attached in the execution of a decree is a decree other than a decree of the nature referred to in sub-rule (1), the attachment shall be made, by a notice by the Court which passed the decree sought to be executed, to the holder of the decree sought to be attached, prohibiting him from transferring or charging the same in any way; and, where such decree has been passed by any other Court, also by sending to such other Court a notice to abstain from executing the decree sought to be attached until such notice is cancelled by the Court from which it was sent.

[Allahabad and Oudh.] In Allahabad and Oudh add 'and to any other Court to which the decree has been transferred for execution', after the words 'such other Court' in sub-rule 4 of R. 53, O. XXI.

(5) The holder of a decree attached under this rule shall give the Court executing the decree such information and aid as may reasonably be required.

(6) On the application of the holder of a decree sought to be executed by the attachment of another decree, the Court making an order of attachment under this rule shall give notice of such order to the judgment-debtor bound by the decree attached; and no payment or adjustment of the attached decree made by the judgment-debtor in contravention of such order after receipt of notice thereof, either through the Court or otherwise, shall be recognized by any Court so long as the attachment remains in force.

54. [S. 274.] (1) Where the property is immoveable, the attachment shall be made by an order prohibiting the judgment-debtor from transferring or charging the property in any way, and all persons from taking any benefit from such transfer or charge.

Attachment of immoveable property.

M. L. T. 355=47 I. C. 630. The assignee of an attached decree cannot execute it. 11 M. L. T. 144=13 I. C. 659; *But see* 23 N. L. R. 20=99 I. C. 635=A. I. R. 1927 Nag. 132.

SAVING OF LIMITATION.—Since an attached decree can be executed, an application for execution even though dismissed will save limitation. 11 M. L. T. 144=13 I. C. 659.

O. 21, R. 53 (6) applies to attachment before judgment as well. 14 I. C. 285=22 M. L. J. 394. Attachment is complete without notice to judgment-debtor. Any adjustment after attachment

is invalid. 48 I. C. 109=9 L. W. 32 *See also* 50 Mad. 677=26 L. W. 103=103 I. C. 502=A. I. R. 1927 Mad. 728=53 M. L. J. 150 (F. B.). Payment to the judgment-debtor while the attachment of the decree subsists is invalid. 24 I. C. 795 (All.) On payment of attached decree amount into Court interests on both the decrees cease. 64 I. C. 780=35 C. L. J. 901.

O. 21, R. 54. SCOPE.—Rent in a shrotriém village is 'revenue' under this rule. 46 Mad. 736=45 M. L. J. 263. Land includes sites as well as buildings thereon. 7 Lah. L. J. 501=1925 Lah.

[Bombay] The following shall be added to sub-rule (1) of Rule 54 of Order 21 :—

“Such order shall take effect, where there is no consideration for such transfer or charge, from the date of such order, and where there is consideration for such transfer or charge, from the date when such order came to the knowledge of the person to whom or in whose favour the party was transferred or charged.”

(2) The order shall be proclaimed at some place on or adjacent to such property by beat of drum or other customary mode, and a copy of the order shall be affixed on a conspicuous part of the property and then upon a conspicuous part of the Court-house, and also, where the property is land paying revenue to the Government, in the office of the Collector of the district in which the land is situate.

[Allahabad & Oudh] Add the following as Sub-Rule (3) to O. 21, R. 54 :—

“(3) The order shall take effect as against purchasers for value in good faith from the date when a copy of the order is affixed on the property, and against all other transferees from the judgment-debtor from the date on which such order is made.”

55. [S. 275.] Where—

Removal of attachment and expenses resulting from the attachment of any property after satisfaction of decree. (a) the amount decreed with costs and all charges are paid into Court, or

(b) satisfaction of the decree is otherwise, made through the Court or certified to the Court, or

583. Under the Code, property may be attached without view to immediate sale. 14 M. I. A. 529. A debt secured by a mortgage, by a lien upon immovable property cannot be regarded as immovable property within the meaning of this rule. 12 C. 546 (550). See also 9 M. 5. This rule has no application to the attachment of a decree for redemption. 10 B. 444; 20 C. 895. The attachment of the equity of redemption of the mortgagor can be effected under this rule. 21 B. 226; also 62 I. C. 167 = 33 C. L. J. 7.

REQUIREMENTS OF A VALID ATTACHMENT.—As to how an attachment is to be effected, see 7 Lah. L. J. 501 = 1925 Lah. 583. Attachment is complete only when the procedure prescribed by this rule is followed. 39 I. C. 562; also 42 Mad. 844 = 37 M. L. J. 375 (F. B.). See also 34 I. C. 34. But see 42 Mad. 1 = 35 M. L. J. 387. Proclamation necessary for a valid attachment. 4 Lah. 211 = 1923 Lah. 423; 104 I. C. 340 = A. I. R. 1927 Cal. 885. Non-affixure of the attachment order is a fatal defect. 60 I. C. 527. Omission to post order of attachment in Collector's office is not fatal. 69 I. C. 563 = 1923 Nag. 78. See also 7 A. 731. As to what is conspicuous part of the property in the case of a fishing right in a river, see 44 I. C. 412 = 1918 Pat. 33. Non-affixure of the proclamation order on the property is a material irregularity. 1923 Lah. 671. When attachment is disputed certified copy containing report of posting of notice of attachment is not legal evidence, but may be used as basis of evidence. 3 Bur. L. J. 287 = 85 I. C. 308. As to how to prove service of prohibitory order when the records are lost, see 83 I. C. 878 = 1924 A. 747. A prohibitory order cannot be treated as notice to the world. 29 B. at p. 202. The requirements of this rule must precede the posting of the notices in the Court-house, as required by R. 68. 7 C. 34 at p. 39. See also 5 M. L. J. 70. As to the effect of failure to have the drum beaten, see 10 B. 504. A proclamation of sale by beat of drum is sufficient. The drum need not be beaten at the time of sale. 56 I. C. 523. No other notice of sale except the publication provided for by this rule is necessary. 89

I. C. 107. See also A. I. R. 1926 Oudh 45. In the case of a joint family member, his undivided share is to be attached. 53 I. C. 336 = 10 L. W. 449. Separate proclamation is not necessary to be served in every mouza comprising an estate or a tenure. 105 I. C. 689 (2) = 6 P. 588. For the effect of such an attachment, see 89 I. C. 291.

EFFECTS OF ATTACHMENT.—Attachment under this rule does not constitute dispossession of the property in actual possession. 4 B. 529. A private alienation of property after an order of attachment which has not been effected is valid. 26 I. C. 204 = 1 O. L. J. 549. A re-attachment of property after decree does not imply an abandonment of an attachment obtained before decree. 6 C. 129. See also 16 A. 133. See also 34 I. C. 34.

WHERE NO ATTACHMENT IS NECESSARY.—In the execution of a decree for the enforcement of a mortgage, property liable by virtue of the decree to be sold, need not be attached. 4 B. 515; 20 C. 805. No attachment is necessary in execution of a decree charging immovable property with payment of decree amount.—Procedure. 24 L. W. 836 = 99 I. C. 656 = A. I. R. 1927 Mad. 190. The process of attachment is intended only for the protection of the decree-holder, and even if there is no attachment as required by the Code, a sale in execution is valid. 30 M. at p. 264. See also 34 C. 787; 18 C. 188; 15 B. 222 (P.C.).

O. 21, R. 55.—In the case of an instalment decree, the instalment which has become due and in respect of which attachment has been made is the amount decreed in R. 55. 105 I. C. 799. Omission to mention encumbrance in sale application—Order that the petition is closed—Attachment does not terminate. 106 I. C. 138. Attachment cannot be deemed to be withdrawn when only part satisfaction is certified. 15 I. C. 677 = 10 A. L. J. 165. Money paid to remove attachment is not available for rateable distribution but must be paid to attaching creditor. 63 I. C. 599 = 21 Bom. L. R. 975. If the reversal of decree on first appeal raises the attachment, the confirmation of the decree on second appeal revives the attachment. 48 I. C. 386.

(c) the decree is set aside or reversed, the attachment shall be deemed to be withdrawn, and in the case of immoveable property, the withdrawal shall, if the judgment-debtor so desires, be proclaimed at his expense, and a copy of the proclamation shall be affixed in the manner prescribed by the last preceding rule.

[Allahabad] O. 21, R. 55.—Substitute the following for Rule 55 :—

(1) Notice shall be sent to the sale officer executing a decree of all applications for rateable distribution of assets made under S. 73 (1) in respect of the property of the same judgment-debtor by persons other than the holder of the decree for execution of which the original order was passed.

(2) Where—

(a) the amount decreed [which shall include the amount of any decree passed against the same judgment-debtor, notice of which has been sent to the sale officer under sub-section (1)] with costs and all charges and expenses resulting from the attachment of any property are paid into Court, or

(b) satisfaction of the decree [including any decree passed against the same judgment-debtor, notice of which has been sent to the sale officer under sub-section (1)], is otherwise made through the Court or certified to the Court, or

(c) the decree [including any decree passed against the same judgment-debtor, notice of which has been sent to the sale officer under sub-section (1)] is set aside or reversed, the attachment shall be deemed to be withdrawn, and, in the case of immoveable property, the withdrawal shall, if the judgment-debtor so desires, be proclaimed at his expense, and a copy of the proclamation shall be affixed in the manner prescribed by the last preceding rule.

[Oudh] O. 21, R. 55 (1) [Substituted by Oudh Chief Court].—(1) Where an application has been made to the court under section 73, sub-section (1), for rateable distribution of assets in respect of the property of a judgment-debtor by a person other than the holder of the decree for the execution of which the original order of attachment was passed, notice shall be sent to the sale officer executing the decree.

(2) Where—

(a) the amount decreed [which shall include the amount of any decree passed against the same judgment-debtor, notice of which has been sent to the sale officer under sub-rule (1)] with costs and all charges and expenses resulting from the attachment of any property are paid to Court, or

(b) satisfaction of the decree [including any decree passed, against the same judgment-debtor, notice of which has been sent to the sale officer under sub-rule (1)], is otherwise made through the Court or certified to the Court, or

(c) the decree [including any decree passed, against the same judgment-debtor, notice of which has been sent to the sale officer under sub-rule (1)] is set aside or reversed, the attachment shall be deemed to be withdrawn, and, in the case of immoveable property, the withdrawal shall, if the judgment-debtor so desires, be proclaimed at his expense, and a copy of the proclamation shall be affixed in the manner prescribed by the last preceding rule.

56. [S. 277.] Where the property attached is current coin or currency notes, the Court may, at any time during the continuance of the attachment, direct that such coin or notes, or a part thereof sufficient to satisfy the decree, be paid over to the party entitled under the decree to receive the same.

Order for payment of coin or currency notes to party entitled under decree.

57. Where any property has been attached in execution of a decree but by reason of the decree-holder's default the Court is unable to proceed further with the application for execution, it shall either dismiss the application or for any sufficient reason

Determination of attachment.

O. 21, R. 57. SCOPE.—Under the old Code attachment did not *ipso facto* cease as under the present rule. 23 C. W. N. 608=23 C. L. J. 411; also 36 Mad. 553=24 M.L.J. 545. The rule does not refer or apply to a case where the attachment ceases on account of an explicit order of Court. 66 I. C. 642. Object of the rule is to prevent continuance of attachment for an indefinite period by the practice of 'Striking off' for statistical purposes. 28 I. C. 62=(1915) M. W. N. 159. An order such as 'Striking off' is unknown to law, and its effect is to be determined according to circumstances in each case. It may amount to an adjournment *sine die*. 15 I. C. 406=(1912) M. W. N. 407. An order striking off the execution does not terminate the attachment. 107 I.C. 574. The rule is manda-

tory and will take effect in spite of an erroneous order continuing attachment. 38 Cal. 482=15 C. W. N. 428; but see 44 A. 274=20 A. L. J. 113. The rule operates even when the collector to whom the execution is transferred, dismisses it. 68 I. C. 643=1923 Nag. 18; also 18 N. L. R. 152=1922 Nag. 267. An attachment made under O. 38, *i.e.*, an attachment before judgment does not cease on the dismissal of the execution application. 14 I. C. 345=16 C. W. N. 1097; also 42 Mad. 1=35 M. L. J. 387; also 22 I. C. 351=26 M. L. J. 215. But see 20 I. C. 149=19 C. L. J. 248; (1925) M. W. N. 887; 92 I. C. 833=A.I.R. 1926 Mad. 211=51 M. L. J. 172. 'Default' means want of prosecution and not merely default in appearance. Thus where a decree-holder admitted mistake in property sold, and agreed to

adjourn the proceedings to a future date. Upon the dismissal of such application the attachment shall cease.

[Oudh] O. 21, R. 57 [substituted by Oudh Chief Court].—Where any property has been attached in execution of a decree, and the Court for reason passes an order dismissing the execution application, the Court must direct whether the attachment shall continue or cease. If the Court omits to make any such direction, the attachment shall be deemed to subsist.

[Bangoon] In O. 21, the following shall be inserted as Rule 57-A:—

“57-A. A judgment-debtor may secure release of his attached property by giving security to the value thereof to the Court.”

Investigation of claims and objections.

58. [S. 278.] (1) Where any claim is preferred to, or any objection is made to the attachment of, any property attached in execution of a decree on the ground that such property is not liable to such attachment, the Court shall proceed to investigate the claim or objection with the like power as regards the

Investigation of claims to, and objections to attachment of, attached property.

apply again, there is default. 41 All 157=49 I. C. 113. See also 3 Lah. 7=1922 Lah. 108. When the judgment-debtor accepts part satisfaction and agrees to give time, this amounts to default. 4 P. L. T. 418=71 I. C. 881. Omission to apply for issue of notice under R. 66 is default. 38 Cal. 482=15 C. W. N. 428. There is no default by decree-holder when the Court strikes off execution proceedings to suit its own convenience. 48 All. 698=24 A. L. J. 901=97 I. C. 102=A. I. R. 1926 All. 734. See also 107 I. C. 574. Order directing attachment to subsist while petition is dismissed for default, though irregular is binding on the parties to it. 87 I. C. 349=1925 All. 456. The presumption is that an attachment is subsisting. 31 I. C. 911. Where by way of caution a decree-holder applies for a second attachment, he does not abandon or waive the original attachment. 13 M. L. J. 221.

DISMISSAL OF EXECUTION APPLICATION.—Until the formal order dismissing the application, all executions are pending. 39 Mad. 570=29 M. L. J. 96. An attachment is not disturbed by an order for stay of execution. 46 Cal. 64=44 I. C. 249. When by mistake the execution application was sent to the records it does not amount to a dismissal. 23 O. C. 166=57 I. C. 509. An order “proclamation not filed” amounts to dismissal and the attachment ceases. 18 I. C. 441=17 C. W. N. 204. Whether an attachment ceases on the dismissal of an execution application depends on the facts of each case. 44 I. C. 566=(1917) M. W. N. 816; also 23 I. C. 155=7 I. W. 16; 38 I. C. 300=5 L. W. 204; 35 I. C. 240=3 L. W. 601; 46 Bom. 942=1923 Bom. 30. When an execution application is dismissed on the judgment-debtor’s objection and an application for review of the order is pending, the attachment continues. 31 All. 490=15 I. C. 49.

REVIVAL OF ATTACHMENT.—Restoration of an execution application to file revives attachment. 18 N. L. R. 152=64 I. C. 420. On a sale being set aside, a fresh execution application revives the old attachment. 45 I. C. 589=3 Pat. L. J. 310. A revival of attachment on the revival of an execution application does not affect the rights acquired by third parties in the meantime. 14 C. L. J. 476=16 C. W. N. 332. But see 24 A. L. J. 901=97 I. C. 102=A. I. R. 1926 All. 734. Strangers to the petition and order need only look to the order and nothing which took place behind their back will bind them. A. I. R. 1925 Mad.

1113=48 M. L. J. 116.

O. 21, R. 58. SCOPE.—Rule of *res judicata* in execution proceedings. 26 L. W. 106. The rule is only permissive. Such a claim is never compulsory. 40 Cal. 598=40 I. A. 56 (P. C.); also 18 A. 410; 23 B. 266; 18 M. 13 (17); 4 A. L. J. 574; 20 B. 403 (407). A Small Cause Court can neither attach immoveable property nor investigate claim resulting therefrom. 28 C. W. N. 16=1924 Cal. 198. The rule does not apply in the case of a mortgage decree for sale. 1925 Nag. 185. See also 68 I. C. 271=26 C. W. N. 50; 18 I. C. 215; 55 I. C. 895=2 Lah. L. J. 343; 58 P. R. 1918=44 I. C. 986; 50 I. C. 448=1919 Pat. 79. But see 8 Bur. L. T. 214=29 I. C. 941. This rule applies only to attachments after decree. 58 P. R. 1918=44 I. C. 986. It does not apply to attachment before judgment. 41 Mad. 849=35 M. L. J. 231 (F. B.); also 42 I. C. 554=6 L. W. 518. Objection can be taken to an attachment after the decree even though an attachment before judgment was not objected to. 38 Cal. 448=10 I. C. 305. Court has no jurisdiction to enquire into question of title but should confine itself to determine the question of possession. A. I. R. 1928 Mad. 163; 103 I. C. 12=A. I. R. 1927 Nag. 286. But see 98 I. C. 888=A. I. R. 1927 Sind 114. The words ‘possessed’ and ‘possession’ in these rules, include constructive possession or possession in law of debts and other intangible property. 27 M. 67 (F. B.). But see 22 W. R. 36 and 4 B. 323. The proviso regarding delay applies even to cases where the executing Court not having jurisdiction over the property, exercises it. 41 I. C. 446. In claim investigations, the court will enquire into who was in possession at the time of attachment and not whether such possession was fraudulent or void. 13 Bur. L. T. 214=64 I. C. 66. The Court is bound to decide the question of possession. 87 I. C. 189=48 M. L. J. 603; also 49 M. L. J. 706=1928 Mad. 163. The Court has no power to entertain an objection after sale of property. 4 P. L. T. 544=74 I. C. 87; 5 Rang. 751. See also 15 I. C. 53=16 C. W. N. 1023; also 87 I. C. 168 (1). Whether claim can be heard after sale. See A. I. R. 1926 Cal. 468. An investigation may be refused, but once it is made an order must be passed. 39 I. C. 345=11 Bur. L. T. 41; also 44 M. L. J. 141=1923 Mad. 295. When a claim is rejected the Court will not again interfere by a revision. 74 I. C. 546=1923 Oudh 208. In a proceeding under this rule

examination of the claimant or objector, and in all other respects, as if he was a party to the suit :

the Court cannot enquire whether the execution is time barred. 60 I.C. 375 = 2 Pat. L.T. 275. A direction to proceed with sale after simply notifying claim amounts to an adverse order. 1925 Mad. 368. But *see contra* 49 M. L. J. 706.

CLAIMS UNDER THIS RULE—WHO CAN BRING CLAIMS.—A person who has only a beneficial interest in property can prefer a claim. 11 M. L. J. 346. Also the assignee for value of a decree subsequently attached in execution of a decree against the assignor, and who seeks to have the decree released from attachment. 10 M.L.J. 116. A claim by a garnishee also comes within this rule. 38 Bom. 631 = 25 I.C. 375. Claim by a judgment-debtor as a trustee comes under this rule. 38 I.C. 152. *See also* 4 O. W. N. 102. Or by his legal representative as trustee. 75 I.C. 1053 = 1924 All. 183 (2). Purchasers after attachment cannot bring claim proceedings. 9 I.C. 194 = 16 C.W.N. 542. Transferee of property subject to a contract of a sale, prior to attachment comes under this rule. 38 I.C. 107 = 5 L. W. 234. A transferee of property attached in execution of a money decree can object under this rule. 123 P. L. R. 1912 = 13 I. C. 563. Also the Administrator-General when empowered to collect the assets of a deceased person. 23 B. 428. Also the Official Assignee, after a vesting order has been passed. 21 B. 205 (218). The claim of the Official Receiver under S. 34 of the Provincial Insolvency Act where the vesting was after attachment does not come under this rule. 41 M. L. J. 334 = 69 I. C. 326. In a decree for money with lien on mortgaged property, claims may be enquired. 101 P.R. 1915 = 32 I. C. 43. A usufructuary mortgagee in possession does not come under this rule but under R. 100. 70 I. C. 306 = 1 P. 159. But *see* A. I. R. 1927 Pat. 51; 10 Bom. H.C. R. 100; *also* 97 I. C. 255. Attachment of equity of redemption continues even though a usufructuary mortgagee applies for the release of the property. 1925 Cal. 296. A prior mortgagee cannot intervene under this rule, as it does not apply to cases where the property has not been attached. 27 A. 700; 18 B. 98; 14 C. 63. Petition by simple mortgagee for insertion of his mortgage in sale proclamation comes under this rule and its dismissal amounts to an adverse order. 25 A. L. J. 659 = 102 I.C. 792 = A. I. R. 1927 A. 593; but *see* A. I. R. 1926 Nag. 423; A. I. R. 1926 Mad. 593. A claim by a widow in possession of a house in lieu of a deferred dower, comes under this rule. 31 I. C. 722 = 80 P. R. 1915. Money paid to avert an attachment, cannot be claimed back under this rule. 34 I. C. 492 = 9 S. L. R. 213. Objection by the judgment-debtor as being *wakf* property comes under this rule. 1 P. 637 = 67 I. C. 438. If the objection is raised by the judgment-debtor in his own behalf or in a representative capacity in which he has been sued, it is a question to be decided under S. 47. 15 C. 437 (443). But *see* 17 C. 711 (F.B.); 10 M. 117 (119); 10 M.L.J. 85; 2 A. 752; 23 M. 195 (F.B.). *See also* 6 P. L. T. 725 = 1925 Pat. 482. Claim by a legal representative in the same capacity does not come under this rule. 38 I. C. 360 = 5 L. W. 158; *also* 3 P. L. T. 613 = 68 I. C. 369. Objections by an exonerated defendant does not come under this rule. 54 I. C.

536 = 37 M. L. J. 624. *See also* 1925 Nag. 185 (Mortgage decree). Rent suit—One of the tenants not impleaded—Decree against co-tenants—Claim by tenant no party—Maintainability—Effect of. Ss. 143 and 170, B.T. Act. *See* 45 C.L.J. 229 = 102 I. C. 125 = A. I. R. 1927 Cal. 381.

PARTIES TO CLAIM.—The judgment-debtor is not a necessary party to a claim. 22 B. 875 (882); 15 C. 674.

APPEAL.—Order of dismissal of objection by judgment-debtor stating that he has no saleable interest, is appealable. 28 O. C. 175 = 85 I. C. 997. *See also* 28 Punj. L. R. 121. Where a joint application was made by a party and another not a party, objecting to the attachment, and the parties acquiesced in the application being heard under this rule, an order on the application under these circumstances is appealable. 5 Rang. 110 = 101 I. C. 794 = A. I. R. 1927 Rang. 137.

AMENDMENT.—This can be allowed by substituting the name of the real claimant, where the Court is satisfied that the wrong name has been used through a *bono fide* mistake, and where the other parties are in no way misled or prejudiced. 21 B. at p. 210.

EFFECT OF ORDER.—*See* 45 Mad. 84 = 41 M. L. J. 393 = 1922 Mad. 176; A. I. R. 1926 All. 244.

LIMITATION for fresh suit begins to run from the time of refusal to investigate. Art. 11 of the Limitation Act applies. 45 A. 438 = 21 A. L. J. 342. But *see* 43 M. L. J. 467 = 45 Mad. 827. When once a claim order is made, limitation begins to run. The filing of a fresh execution application after dismissal of the prior one, does not give a fresh starting point. 66 P. R. 1916 = 35 I. C. 321. Where the order is an improper one and runs as follows:—"Whatever right the defendant has will pass by the sale. The claim put forward by the petitioner will be noted in the sale proclamation." Limitation for suit does not run from the date of the order. 44 M. L. J. 141 = 1923 Mad. 295. But *see contra* 93 I. C. 335 = A. I. R. 1926 Mad. 593; *also* 49 M. L. J. 706. Where a claim is dismissed or struck off without any adjudication, a fresh claim may be entertained. 16 W. R. 59. *See also* 21 B. at p. 210.

RIGHT OF SUIT.—A suit is the only remedy against an adverse order. 89 I.C. 888 = 1925 Nag. 288. Unless a claim is put in under this rule a suit for bare declaration would be barred by S. 42 of the Sp. Rel. Act. 5 R. 699. A defeated claimant cannot reiterate his claim in a suit by the successful party. 1925 Mad. 368 = 92 I. C. 737. But if the attachment ceases later on account of the dismissal of the execution petition, he will not be precluded from raising the question of title in defence, even after a year. 1925 Mad. 1113 = 48 M.L.J. 616. Claim petition dismissed—Suit by defeated claimant—Burden of proof on the question of title is on the plaintiff. 10 Lah. L. J. 42. The right to suit is not affected by the sale of the property. 70 I. C. 332 = 3 P. L. T. 832.

REVISION.—A wrong order can be set aside in revision. 1925 Mad. 588 = 48 M. L. J. 603; 103 I. C. 12.

Provided that no such investigation shall be made where the Court considers that the claim or objection was designedly or unnecessarily delayed.

(2) Where the property to which the claim or objection applies has been advertised for sale, the Court ordering the sale may postpone it pending the investigation of the claim or objection.

Postponement of sale.

[Allahabad and Oudh] O. 21, R. 58 (2).—In Allahabad and Oudh add, "or may in its discretion make an order postponing the delivery of the property after the sale pending such investigation. And in no case shall the sale become absolute until the claim or objection has been decided" at the end of sub-clause (2) in R. 58, O. 21.

59. [S. 279.] The claimant or objector must adduce evidence to show that at the date of the attachment he had some interest in, or was possessed of, the property attached.

Evidence to be adduced by claimant.

60. [S. 280.] Where upon the said investigation the Court is satisfied that for the reason stated in the claim or objection such property was not, when attached in the possession of the judgment-debtor or of some person in trust for him, or in the occupancy of a tenant or other person paying rent to him, or that, being in the possession of the judgment-debtor at such time, it was so in his possession, not on his own account or as his own property, but on account of or in trust for some other person, or partly on his own account and partly on account of some other person, the Court shall make an order releasing the property wholly or to such extent as it thinks fit, from attachment.

Release of property from attachment.

O. 21, B. 59.—The rule does not mean that if the claimant establishes that he has some interest, he can succeed irrespective of the question of possession; nor should his claim be disallowed if he fails to establish the interest set up, irrespective of the question of possession of judgment-debtor. 24 I. C. 62. Ordinarily Court enquires into possession only, occasionally into title as well. 39 I. C. 275=10 Bur. L. T. 14. But the enquiry is not necessarily confined only to possession. 10 I. C. 994; also 48 I. C. 182=11 Bur. L. T. 118. But see 24 I. C. 62; also 59 I. C. 947=43 Mad. 760; 8 I. C. 117=35 Mad. 35.

EVIDENCE.—The applicant has a right to establish what the law requires, by any evidence sufficient for the purpose, and the Court has no power to require from him any particular kind of evidence. 22 W. R. 392. If no evidence of possession is adduced the Court should deal with the question of title only. 32 I. C. 34. When a judge refuses to receive evidence, any order passed by him is *ultra vires*. 22 W. R. 422; 27 All. 16 (F. B.). A revision lies if the Court acts with material irregularity. 76 I. C. 677=1 R. 276. See also 60 I. C. 616.

O. 21, B. 60. SCOPE OF RULE.—An order for release has not the effect of putting an end to an attachment duly made. 33 C. 1158.

NATURE OF INVESTIGATION.—The investigation under this rule should be confined to determining whether or not the property attached was in the possession of the claimant on his own account. 10 C. 1057; see also 18 C. 290. The Court should decide on merits when a claim is put in and not drive the claimant to a regular suit. 248 P. L. R. 1914=27 I. C. 256. The extent to which the investigation should be carried out depends on the circumstances of each case. 15

C. 521 (P. C.); 1 C. W. N. 617. See also 29 C. 543; 18 M. 265; 12 C. 108. When an intervenor claims a share of attached property the Court should determine the respective shares of the debtor and intervenor. 27 A. 464. See 29 M. 225. A conditional order on a claim should not be passed. 44 I. C. 1007. On this rule, see also 91 I. C. 414=A. I. R. 1926 Mad. 355.

APPLICATION OF THE RULE.—A mortgagee in possession holds the property in trust for the mortgagor to the extent of his interest therein, and so far it must be released from the attachment. 10 I. C. 994.

IN TRUST.—These words apply to cases in which the possession of a claimant as a trustee, is of such a character as to be really the possession of the debtor, and not to cases in which very intricate questions of law may arise as to whether valid trusts may result in particular instances. 14 C. 617 (620). See also 21 B. 287. Transfer of property after release from attachment on claim is liable to be set aside if the order itself is set aside by a regular suit. 62 I. C. 348=25 C. W. N. 544. See also 2 Bur. L. J. 113=1923 Rang. 237. When in order to prevent the taking to Court of property attached, the claimant pays to the Amin the amount of the decree, he must, if he wants to have the money refunded, file a regular suit. The Court cannot direct a refund. 22 B. 473. An order in favour of a decree-holder does not enure for the benefit of the other decree-holders who are not parties to the proceedings. 18 A. 413.

APPEAL.—No appeal lies from an order passed under this rule. 28 B. 458. Whether appeal lies under S. 15 of the Letters Patent against order dismissing a claim. See 25 M. 555.

61. [S. 281.] Where the Court is satisfied that the property was, at the time it was attached, in the possession of the judgment-debtor as

Disallowance of claim to property attached.

his own property and not on account of any other person, or was in the possession of some other person in trust for him, or in the occupancy of a tenant or other person paying rent to him, the Court shall disallow the claim.

62. [S. 282.] Where the Court is satisfied that the property is subject to a

Continuance of attachment subject to claim of incumbrancer.

mortgage or charge in favour of some person not in possession, and thinks fit to continue the attachment, it may do so, subject to such mortgage or charge.

63. [S. 283.] Where a claim or an objection is preferred, the party against whom an order is made may institute a suit to establish the right which he claims to

Saving of suits to establish right to attached property.

O. 21, R. 61.—The Court cannot merely on suspicion hold that the claim is untenable. 29 C. 543. Effect of order. See 17 Cal. 260. Possession of a claimant under a fraudulent and collusive sale must be deemed to be in trust for the judgment-debtor. 17 I. C. 12=16 C. W. N. 959. When a claim is disallowed but the attachment is raised, a suit for possession within one year under Art. 13 of the Lim. Act is not necessary. 45 Bom. 561=59 I. C. 774.

O. 21, R. 62. SCOPE.—The Code makes a distinction between a case in which property is sold subject to a mortgage and a case in which notice of an alleged mortgage is given in a proclamation of sale. The former is provided by this rule, the latter by R. 66. 28 A. 418 at p. 420. See also 41 Bom. 64=36 I. C. 627. Comparison of this rule with O. 23, R. 1. 20 N. L. R. 106=1925 Nag. 2.

APPLICATION OF THE RULE.—A mortgagee in possession can prefer a claim. 10 Bom. H. C. R. 100. A sale subject to a charge, on the application of a person in possession claiming a charge of maintenance on the property is valid. 44 Bom. 860=58 I. C. 217. See also 35 Bom. 275=10 I. C. 913. A purchaser under a sale subject to a mortgage, cannot dispute the mortgage. 47 Cal. 446=24 C. W. N. 269. See also 29 I. C. 690=21 C. W. N. 401; 50 I. C. 909; 15 N. L. R. 15=1923 Nag. 282; 30 I. C. 238; 2 O. L. J. 225; 50 I. C. 580; 12 Bur. L. T. 43. But where the Court did not direct the sale of the property subject to a mortgage, but the mortgage is simply declared at the time of sale, the auction purchaser is not precluded from questioning the validity of the mortgage. 36 I. C. 732=3 O. L. J. 422. A purchaser of property subject to a mortgage can plead limitation in a suit by the mortgagee. 23 I. C. 448=17 O. C. 38.

O. 21, R. 63. OBJECT AND SCOPE.—The object of the suit is to get rid of the attachment. Therefore no suit need be filed when the attachment is raised and a suit abates on the removal of attachment. (1917) M. W. N. 851=42 I. C. 683. But see 26 I. C. 532=26 M. L. J. 499. See also A. I. R. 1926 Nag. 197; 27 Punj. L. R. 408=8 Lah. L. J. 350=93 I. C. 997=7 Lah. 235=A. I. R. 1926 Lah. 348 (No suit where the decree holder himself withdraws the attachment). A regular suit is a continuation of the claim proceedings. 1925 Nag. 82. It is in the form of an appeal, because the summary investigation might not have furnished sufficient material decision. 90 I. C. 196. A suit can be instituted even when the attachment had virtually ceased the decree having been satisfied from other properties of the

judgment-debtor. 9 C. 10; 18 B. 241; 21 B. 58; 31 C. 228; 29 M. 225. But see 27 C. 714; 16 A. 165 (169) (F. B.); 18 B. 260; 12 C. 696 (701); 17 C. 436; 1 A. L. J. 531=22 B. 640. When attachment before judgment ceases on the dismissal of a suit, it does not effect on abatement of a suit under this rule. 27 I. C. 800. Whether the suit decides the question of title arising in execution. 43 Mad. 760=39 M. L. J. 350 (F. B.), overruling 43 I. C. 651=33 M. L. J. 705=41 Mad. 612 (F. B.) and 34 I. C. 778=30 M. L. J. 565. The Court is not restricted to determine only the question of the attachability of the property but can also question the validity of the decree itself. 23 I. C. 755. The rule covers not merely a declaratory suit, but also one for consequential relief. 40 Mad. 733=31 M. L. J. 394. If an attaching creditor withdraws the attachment, a suit by him is maintainable not under this rule but under S. 42 of the Specific Relief Act. 33 I. C. 124=9 Bur. L. T. 89; 29 M. 151 (F. B.). See also 34 I. C. 125=9 Bur. L. T. 199. See also 5 Rang. 699. A suit under S. 42, Specific Relief Act, before sale would be premature. 52 I. C. 157. Non-objection does not amount to consent, and suit under this rule is not one to set aside a consent order. 28 I. C. 536=(1915) M. W. N. 237.

NATURE OF ORDER IN A CLAIM.—The dismissal for default of a claim amounts to negating it. 26 C. W. N. 126=1922 Cal. 166. Also 15 I. C. 683=16 C. W. N. 882; 64 I. C. 209=24 O. C. 213; 97 I. C. 178=22 N. L. R. 94=A. I. R. 1926 Nag. 423. But an order "not pressed, dismissed" is not one under the rule. 1925 Mad. 265=80 I. C. 233. Also the dismissal of a claim petition for want of jurisdiction does not come under this rule. 41 M. L. J. 198=63 I. C. 431. The order is conclusive even when the claim is rejected as no evidence is adduced to prove it. 32 C. 527. Also 17 M. L. T. 223=28 I. C. 244. An order for removal of attachment is final even though passed *ex-parte*. 2 Bur. L. J. 60=1923 Rang. 156. Order under this rule is conclusive. 66 P. R. 1916=35 I. C. 321; 8 N. L. J. 170=A. I. R. 1925 Nag. 390. The word 'conclusive' means final, *i.e.*, not appealable. 1 R. 276=1923 Rang. 195. The order in a claim case is conclusive only with regard to the parties to the claim and the disputed property. 44 Cal. 698=21 C. W. N. 222; also 18 All. 413. The judgment-debtor when a party is bound by a claim order only to the extent of the adjudication. The purchaser takes it subject to rights as determined by the Court. 37 M. L. J. 547=34 I. C.

the property in dispute, but, subject to the result of such suit, if any, the order shall be conclusive.

530. Such an order would bind the judgment-debtor if he is a party to it, and the question whether he was a party to it will depend upon the circumstances under which it was made and the terms of it. 13 M. L. J. 367. Even an order passed without investigation is conclusive. 27 I. C. 944=2 L. W. 205; 104 I. C. 289=A. I. R. 1927 Lah. 680. See also 6 N. L. J. 66=71 I. C. 404; 69 I. C. 522=1923 Nag. 69; 1 Rang. 481=2 Bur. L.J. 173. But see 22 B. 875 (882); also 27 C. 714 (722). Mere recording of objections without an adjudication does not amount to an order against the objector. 52 I. C. 938=(1919) M. W. N. 805. But see 37 M. L. J. 159=52 I. C. 720. An order that the allegation of the claimants will be notified to bidders is one made against the claimants and amounts to a rejection of a claim petition. 41 Mad. 985=35 M. L. J. 335 (F. B.). See also 1925 Mad. 365. This rule does not introduce an exception to the rule that the defendant is bound to set up every defence available to him. 17 M. 389. But see 10 B. 659. Attachment—Objection by lessee upheld—Subsequent suit by purchaser for ejectment—Lease objected to on the ground of S. 52, T. P. Act—Maintainability. See 8 L. R. 264 (Rev.)=104 I. C. 292=A. I. R. 1927 All. 657.

SUIT IS THE ONLY REMEDY.—An unsuccessful party must bring a suit to establish his right. He cannot be permitted to raise any defence in any other way. 1922 Cal. 164; 71 I. C. 45 (1). See also 6 L. W. 281=41 I. C. 684. On dismissal of an execution petition on an objection an appeal or a suit lies, but no revision. 38 I. C. 299. But if the claim is disallowed no appeal lies. 38 All. 537=35 I. C. 6; 38 I. C. 152; 34 I. C. 759=3 L. W. 377. Since no proper order without proper investigation can be passed, the findings are subject to question in second appeal being mixed questions of law and fact. 37 I. C. 92=19 O. C. 357.

APPLICABILITY OF THE RULE.—Where the attachment is raised within a year from the date of the order, no suit need be filed. 97 I. C. 178=22 N. L. R. 94=A. I. R. 1926 Nag. 423; 94 I. C. 120. A suit by a decree-holder under this rule against a reversioner claimant is not barred under S. 47, C. P. C. 71 I. C. 1012=1923 All. 192. A suit against the judgment-debtor for refund of consideration by an unsuccessful claimant is not a suit under this rule and need not be brought within a year. 46 All. 45=1924 All. 302. The rule applies even when a garnishee objects but his objection is overruled. If he does not bring a suit, to declare that nothing was due to the judgment-debtor the claim order would be final and conclusive. 44 M. L. J. 388=1923 Mad. 562. A suit for bare declaration under this rule would be barred by S. 42 of the Sp. Rel. Act unless a claim has been put in under R. 58. 5 Rang. 699. See also 103 I. C. 763=A. I. R. 1927 Lah. 631.

LIMITATION.—The suit must be brought within one year from the passing of the order complained of. 15 C. 521 (P. C.); 22 B. 640; 20 B. 801; 11 C. 673 (678); 26 C. 778. Art. 11 of the Lim. Act does not come into operation until an adjudication on the merits of an objection is made, 3 Lah. 7=1922 Lah. 108. Also 44 M. L. J. 141=1923 Mad. 295. A mortgage suit more

than one year after claim was disallowed, would be barred, even though, no actual attachment was made in pursuance of an order of attachment. 41 M. L. J. 594=45 Mad. 90. See 38 M. L. J. 397=56 I. C. 481. See also 37 M. L. J. 159=52 I. C. 720; A. I. R. 1927 All. 593. Where a suit in which an attachment before judgment was obtained, was dismissed, but on appeal, the decree was reversed, the reversal does not restore the attachment. The period of limitation therefore starts from the date of dismissal of a fresh claim at the time of executing the appellate decree. 87 I. C. 756 (2)=1925 Cal. 1147. Where the claim is disallowed but the attachment ceases under R. 57, the question of title can be raised even after a year. 1925 Mad. 1113=48 M. L. J. 616. See also 39 M. L. T. 108=104 I. C. 424=A. I. R. 1927 Mad. 893.

FOR COSTS OF CLAIM PETITION.—See 20 L. W. 557=83 I. C. 89=1925 Mad. 233 (1).

JURISDICTION.—In a suit to establish a right to attached property the value of the subject-matter of the suit for determining jurisdiction will be the amount of the decree in satisfaction of which it is sought to bring the property to sale. 2 A. 799; 9 A. 140; 17 A. 69. The value of the declaratory suit is the value of the decree in execution of which the property was sold and not the value of the property sold. 40 All. 505=45 I. C. 494; also 38 All. 72=31 I. C. 879; 253 P.L.R. 1914=25 I. C. 180. But see 82 P.R. 1913=18 I. C. 820; 17 I. C. 196=41 P.R. 1913. The amount which settles jurisdiction is the amount which the execution creditor will recover if he is successful, and not the value of the property attached. 15 C. 104. The nature of the claim and the right sought to be enforced, determine the Court in which the suit has to be instituted. 7 C. 608.

COURT-FEE.—See 16 A. 308 (F.B.); 10 B. 610 (F.B.); 17 M. L. J. (P. C.) 618; 13 C. 162; 64 I. C. 49.

FRAME OF SUIT.—In a suit under this rule the attachment is the cause of action, and different purchasers of the attached property can be joined as defendants in the same suit. 27 M. 94; 28 A. 41; 16 B. 615; see also 17 C. 436 (P.C.); 23 B. 266; 4 M. 131; 13 B. 72; 10 B. 659; 17 M. 389; 7 C. 608. An ordinary creditor, much less an attaching decree-holder, need not sue in a representative character to set aside a fraudulent alienation. 42 Mad. 143=36 M. L. J. 231; also 59 I. C. 947=43 Mad. 760 (F.B.); 71 I. C. 20.

PARTIES TO THE SUIT.—When after a claim is disallowed, the claimant sells his interest in the property to a third person, the rule does not prevent the purchaser from bringing a suit. 26 A. 89. Auction purchaser in execution of decree can be added as party. 103 I. C. 763=A. I. R. 1927 Lah. 631. The decree-holder is not a necessary party in a claim suit by a defeated claimant when the purchaser was a third party. 70 I. C. 168=1923 Mad. 58; 103 I. C. 763=A. I. R. 1927 Lah. 631. A decree-holder is not a necessary party to a suit under R. 63, O. 21, C. P. C., by an unsuccessful objector. 105 I. C. 799. A judgment-debtor who throughout contested the claim is a party and can bring the suit under this rule. See

Sale generally.

- 64. [S. 284.]** Any Court executing a decree may order that any property attached by it and liable to sale, or such portion thereof as may seem necessary to satisfy the decree, shall be sold, and that the proceeds of such sale, or a sufficient portion thereof, shall be paid to the party entitled under the decree to receive the same.

Power to order property attached to be sold and proceeds to be paid to person entitled.

- 65. [S. 286.]** Save as otherwise prescribed, every sale in execution of a decree shall be conducted by an officer of the Court or by such other person as the Court may appoint in this behalf, and shall be made by public auction in manner prescribed.

Sales by whom conducted and how made.

[Bangoon] In Order 21, the following shall be substituted for Rule 65 :—

65. (1) Sales shall be conducted by the Bailiff, or Deputy Bailiff, but the duty may be entrusted to a process-server when the property is moveable property not exceeding Rs. 50 in value. 22 I.C. 797=84 P.R. 1914; also 1 L.W. 772=25 I.C. 700. 1919.

PARTY AGAINST WHOM ORDER IS MADE.—A plaintiff to whom notice of the claim proceedings has not issued cannot be considered as a party against whom an order has been made. 25 M. 721.

THE BURDEN OF PROOF lies on the unsuccessful party. 13 I. C. 455=22 C. L. J. 380; 60 I. C. 751; 50 I. C. 884=47 P. L. R. 1919; 77 I. C. 50=1923 Nag. 334; 35 I. C. 427=19 O. C. 64; 53 I. C. 892=1919 Pat. 409; 37 I. C. 767=10 Bur. L. T. 238; 14 I. C. 813=5 Bur. L. T. 47; 41 Mad. 205=34 M. L. J. 295. The onus of proving that the property is the judgment-debtor's lies on plaintiff, and whether or not defendant has a title, the plaintiff must prove the title of the judgment-debtor. 17 B. 94 (99). Transfer to another creditor after decree but before attachment by itself is no indication of fraud. 100 I. C. 993 (1)=6 Bur. L. J. 8=A. I. R. 1927 Rang. 168. But if the plaintiff adduces evidence sufficient to raise a presumption that the alienation to defendant might be fraudulent, then the onus lies upon the defendant to prove *bona fides*. 67 I. C. 876=3 Lah. L. J. 198. Proof by unsuccessful claimant is required not only of execution of document but of the passing of consideration and delivery of possession. 4 O. W. N. 794=105 I. C. 208=A. I. R. 1927 Oudh 440. But see also 4 O. W. N. 926=32 C. W. N. 28=46 C. L. J. 349=105 I. C. 788=29 Bom. L. R. 1481=A. I. R. 1927 P. C. 237=53 M. L. J. 388 (P.C.). Regarding proof and shifting of onus, see A. I. R. 1926 Lah. 25. When passing of consideration and transfer of possession is proved, the onus is shifted on the defendant to show that a fraud was intended. 55 I. C. 72; A. I. R. 1926 Nag. 293; also 89 I. C. 953 (1). The onus of proving *mala fides* and want of consideration on the plaintiff's part is on those who resist the claim. 55 I. C. 205. Plaintiff can also show that there was no attachment or that it was invalid. A. I. R. 1927 Mad. 450.

DEFENCES.—The defendant may impeach a transaction voidable as against him. 55 I. C. 752. A plea of fraudulent transfer is a good defence to a suit by a transferee. 57 I. C. 430=22 Bom. L. R. 743. Also 43 Mad. 760=36 M. L. J. 350 (F.B.) overruling 41 Mad. 612=43 I. C. 651 (F.B.) and 34 I. C. 778=30 M.L.J. 565. See also 59 I.C. 947=43 Mad. 760; 54 I.C. 798=16 N.L.R. 3. An auction-purchaser cannot question the title of the mortgagee when his purchase is subject to the mortgage. 51 I. C. 100=45 P. L. R.

PROCEDURE IN THE SUIT.—The question of title of claimant should be enquired into as on the date of claim. In a suit to set aside claim order, subsequent perfection of title is not a valid defence. 33 M. L. J. 316=42 I. C. 438. It is irregular to admit the depositions of parties in the claim investigation. The finding in the suit must be based on the evidence tendered and taken in the suit itself. 22 I.C. 676; 14 W.R. 95. In the suit, though the claim was with reference to the whole of the property, the Court can pass a decree declaring a partial interest. 28 I.C. 576=21 C.L.J. 302.

EFFECT OF DECREE IN THE SUIT.—The decree in the suit by a decree-holder revives the attachment. 48 I.C. 386=5 O.L.J. 647. A transfer of property pending a suit is *lis pendens*. 38 Mad. 535=26 M.L.J. 449. The decree that the property could not be sold, renders void all proceedings taken in execution. 20 I.C. 790=18 C. W. N. 910. Where a suit under this rule to declare a mortgage has been dismissed, a fresh suit to enforce the mortgage is barred. 44 Mad. 268=40 M.L.J. 7.

O. 21, R. 64.—A debt can be sold under this rule. 35 I. C. 469=10 Bur. L. T. 6. Court cannot sell property not attached. 42 I. C. 259; also 9 I.C. 918=13 C. L.J. 243. Moveable property need not be in the custody of the court at the time of sale. 28 I. C. 62=(1915) M. W. N. 159. Although an order absolute for sale of all the mortgaged property has been passed, the executing Court is not bound to sell the whole of the property. 27 A. at p. 265. Execution sale, when the decree is for larger amount than what was due, is not vitiated. 14 I. C. 839=15 C. L. J. 423. When property has once been sold in execution it cannot again be sold at the instance of another decree-holder. 12 C. 317. But see 30 C. 559 (F.B.). The Court cannot refuse to sell on the ground that a stranger to the suit impeaches the decree. 5 B. 532; 15 B. 98.

AN APPEAL will lie from an order passed under this rule. 4 C.L.R. 27.

O. 21, R. 66.—A sale should ordinarily be conducted at some place within the jurisdiction of the Court ordering the sale. 13 B. 22. In the absence of the Sub-Judge, it is not competent to the District Judge to perform the duties required by this rule. 12 W.R. 238. After the property is knocked down on a bid, the purchaser will not be permitted to withdraw his bid. 21 C.L.J. 174=19 C.W.N. 633.

and when, in the opinion of the Court, for reasons recorded in the diary of the case, the Bailiff or Deputy Bailiff cannot personally conduct the sale.

(2) Subject to the terms of the proviso to rule 43 and of rule 74, some one day in each week shall be set apart and regularly observed for holding sales, in execution of decrees; and some well-known place in the vicinity of the Court-house or the public bazaar shall be selected for the purpose.

(3) Subject as aforesaid, and unless the Court is of opinion that for any special reason a sale on the spot where the property is attached or situated will be more beneficial to the judgment-debtor all property, whether moveable or immoveable, attached in execution of decree shall be sold at the time and place selected.

The day to be set apart, and the place selected for holding the sales, and any changes therein shall be reported for the information of the High Court.

(4) The following scale is laid down as to the amount which may be deducted from the proceeds of the sale of property sold in execution of the decree, as the expenses of sale, and paid to the officer conducting the sale under the orders of the Court as his authorized commission:—

When the proceeds of sale do not exceed Rs. 500,—5 per cent.

Where they exceed Rs. 500 and do not exceed Rs. 5,000,—5 per cent. on the first Rs. 500 and 2 per cent. on the remainder.

Where they exceed Rs. 5,000—at the above rate on the first Rs. 5,000 and one per cent., on the remainder. The calculation of the commission shall be on the whole amount realized in pursuance of one application for execution.

(5) Subject to the provisions of sub-rule (13) of Rule 45-B, no further sum beyond this authorized commission and the costs of conveyance of property to the place of sale shall be deducted from the sale-proceeds.

Note.—As regards the travelling allowance of Bailiffs going out to sell property on the spot, see Article 1039 and item 29 of Appendix 20, Civil Service Regulations.

(6) When a sale of immoveable property is set aside under the provisions of Rule 92 (2) below, no commission shall be paid to the Bailiff for selling the property.

(7) No officer of a subordinate Court shall receive any larger commission or fee in respect of any sale of property (mortgaged or otherwise) held in execution or pursuance of any decree or order of the Court directing or authorizing such sale than that allowed by sub-rule (4) above.

(8) The gross proceeds of sales shall be entered in Register II and in Bailiff's Register I and shall be paid into the treasury.

66. [S. 287.] (1) Where any property is ordered to be sold by public auction in

execution of a decree, the Court shall cause a proclamation of sales by public auction. tion of the intended sale to be made in the language of such Court.

(2) Such proclamation shall be drawn up after notice to the decree-holder and the judgment-debtor and shall state the time and place of sale, and specify as fairly and accurately as possible—

(a) the property to be sold;

O. 21, B. 66.—The Court is entitled to presume that the provisions of this rule have been complied with. 9 A. 690. The words "part of the estate" mean aliquot part of an estate. 11 B. L. R. 56. Where a debt is to be sold, and the debtor says that no debt exists the court should satisfy itself that a debt exists, before ordering its sale. 4 B. 323. See also 10 M. 194; 28 A. 262. No duty is cast by this rule on the Judgment-debtor to help the Court by particulars. 105 I. C. 335.

PROCLAMATION.—The object of the proclamation is to give notice to intending purchasers and not to the judgment-debtor. 12 W. R. 438. See also 20 A. 412. Sale proclamation can be issued before objections are disposed of, but sale before the objections are disposed of cannot be held. 43 I. C. 450. Separate proclamations are not necessary, when properties are situate in different villages unless proper notice could not otherwise be given. 9 I. C. 698=13 C. L. J. 192.

NOTICE.—The provisions under this rule for notice are directory and not mandatory. They are not for the benefit of the judgment-debtor but with a view to ascertain exact rights. 44 I. C. 252. Omission to issue notice on a fresh execution application for settlement of terms of proclamation does not constitute an irregularity. 65 I.

C. 988=24 O. C. 391 also 90 I. C. 351=A. I. R. 1926 Oudh 76. Omission to give notice of sale to the judgment-debtor renders the sale void. 38 I. C. 98=11 Bur. L. T. 40. But see *contra* 99 I. C. 515=A. I. R. 1927 Lah. 84. So also want of notice to L. R. of judgment-debtor. 49 A. 830=102 I. C. 239=25 A. L. J. 507. An *ex parte* order settling the terms of a proclamation does not operate as *res-judicata* in an application for release of property which had been attached without notice to him, 46 M. 768=45 M. L. J. 346.

TIME AND PLACE.—No sale can take place except at the time advertised. 16 C. at p. 798. The date of proclamation is the day on which the public are made known of its subject-matter. The Court can fix another date when the due date has already expired. 39 I. C. 715=4 O. L. J. 115 (note). Non-mention of time of sale is a material irregularity. 51 I. C. 864=15 N. L. R. 125. Also 28 I. C. 184=18 O. C. 1. A proclamation which does not state the place of sale is irregular, 9 A. 511. See also 5 Bur. L. J. 183. The sale should ordinarily be held at some place within the jurisdiction of the Court ordering the sale. 13 B. 22.

Clause (a).—Absence of plan of house does not vitiate sale. 1925 Oudh 150 (1).

(b) the revenue assessed upon the estate, or part of the estate, where the property to be sold is an interest in an estate or in part of an estate paying revenue to the Government ;

(c) any incumbrance to which the property is liable ;

(d) the amount for the recovery of which the sale is ordered ; and

(e) [S. 237, last para.] every other thing which the Court considers material for a purchaser to know in order to judge of the nature and value of the property.

[Bangoon.] In O. XXI, R. 66, the following shall be added at the end of Sub-R. (2).—

Provided that no such notice shall be necessary in the case of immoveable property not exceeding Rs. 500 in value.

(3) Every application for an order for sale under this rule shall be accompanied by a statement signed and verified in the manner hereinbefore prescribed for the

Clause (b).—Omission of statement of revenue assessed, in a sale proclamation is an irregularity on which a sale can be set aside, 45 M. L. J. 403=28 C. W. N. 593=75 I. C. 546=1923 P. C. 93 (P. C.).

Clause (c).—It is the duty of the Court to obtain from all available sources, a list of existing encumbrances, but the Court does not and cannot guarantee that the list published contains all existing encumbrances, or that the incumbrances notified are valid, 27 A. 97 (110); (F.B.) See also 30 C. at p. 606 (F.B.); 13 M. L. J. 227; 23 I. C. 871=1 O. L. J. 50; 50 I. C. 145=6 O. L. J. 67. Non-mention of restrictive clauses in the matter of redemption, in the case of mortgages which were mentioned in the sale proclamation, does not render the sale liable to be set aside, 13 L. W. 444=62 I. C. 735.

Clause (e).—Omission to mention income from the property does not vitiate the sale, 39 I. C. 59=11 P. L. R. 1917=106 I. C. 138. Value cannot be put by the Court before day fixed for hearing of the parties, 3 Pat. L. T. 342=65 I. C. 360. Undervaluation, when resulting in material injury is a good ground for setting aside a sale, 13 I. C. 337=14 C. L. J. 541. Also 9 I. C. 693=13 C. L. J. 192; 24 I. C. 468=7 Bur. L. T. 64. Value of property is a mere estimate but it must be a fair estimate, 1 P. 214. See also 48 I. C. 141=3 Pat. L. J. 518; 2 Pat. L. J. 130=37 I. C. 872. A sale can be set aside on the ground that a valuation other than one put by the Court was inserted in the sale proclamation, 73 I. C. 317; also 49 I. C. 195=4 Pat. L. J. 39. When the valuation given by both the parties had been inserted in the sale proclamation, See 83 I. C. 430=1924 Cal. 589. The estimated value of the property and its income need not be stated, 8 C. W. N. 264. But see 8 C. W. N. 257. The property must be described with reasonable accuracy. *Ibid.* Omission to mention value of land is not a serious irregularity, unless it has a prejudicial effect, 1922 Cal. 93. Clause (e) does not require the Court to make an investigation into the question as to the value of the property to be sold, 31 C. 922; but see 105 I. C. 212=A. I. R. 1927 Mad. 943. In order that a plea of undervaluation should be upheld it must not only be shown that there was undervaluation in fact but also that it prejudiced the judgment-debtor, 32 C. W. N. 309.

Sub-Rule (3).—Verification by a person acquainted with the facts is enough, 59 I. C. 282=1 P. L. T. 647. Non-filing of verified statement is mere irregularity, 105 I. C. 335.

RIGHT OF PURCHASER.—All that the Court sells is the right, title and interest of the judgment debtor, as these existed at the date of sale and as these could have been honestly disposed of by the judgment-debtor himself, 27 A. 684. Also 20 I. C. 753. Sale of debt due to judgment-debtor—Suit to recover debt. Debtor can prove debt amount to be smaller than what was sold, 29 Bom. L. R. 285=101 I. C. 335=A. I. R. 1927 Bom. 234. A purchaser of immovable property buys at his own risk, unless the sale is vitiated by fraud, 9 Bur. L. T. 169=33 I. C. 1003. But when property is sold subject to a lien, the purchaser cannot question the lien, 47 I. C. 224. As to validity of a purchase by an undivided brother of the decree-holder in Court auction, See 21 L. W. 226=86 I. C. 886 (1). A purchaser cannot question validity of prior mortgages, 24 I. C. 2=1 O. L. J. 175. Also 45 I. C. 777=5 O. L. J. 114. But where a mortgage is simply notified at the time of sale, but the sale is not subject to mortgage, purchaser can question validity of mortgage, 44 All. 714=20 A. L. J. 722=1922 All. 443. See also 36 I. C. 732=3 O. L. J. 422; 28 I. C. 360=2 O. L. J. 140; 18 I. C. 461. But see 12 I. C. 855=4 Bur. L. T. 142. The purchaser can contest a mortgage even when it is notified in the proclamation, 43 All. 489=63 I. C. 895; 55 I. C. 354; 25 C. W. N. 942=34 C. L. J. 333. When a sale in which the decree-holder was the purchaser, is set aside, the judgment-debtor is entitled to set off against the decretal amount, the net income derived by the decree-holder, 24 I. C. 468=7 Bur. L. T. 64. When the proclamation is ambiguous, the decree must be looked into to see what was actually sold, 96 I. C. 771=A. I. R. 1926 All. 730.

ESTOPPEL.—A judgment creditor is not estopped from raising plea of error in statement of decretal amount in sale proclamation, unless the judgment-debtor is prejudiced thereby, 12 I. C. 97=10 M. L. T. 94. See also 64 I. C. 763=43 All. 703. Failure to serve sale proclamation does not vitiate the sale when the judgment-debtor knows of it, 1922 Cal. 93. A judgment-debtor who was aware that the description in the sale proclamation was defective, and who stands by, cannot question the sale on that ground alone, 12 M. 91; 21 C. 66 (P.C.); see also 29 A. 612. A decree-holder cannot subsequent to sale, set up an encumbrance in his own favour, not set up in the execution proceedings, 47 Cal. 446=24 C. W. N. 269. When a judgment-debtor having notice of the proceedings once fails to

signing and verification of pleadings and containing, so far as they are known to or can be ascertained by the person making the verification, the matters required by sub-rule (2) to be specified in the proclamation.

(4) [S. 287.] For the purpose of ascertaining the matters to be specified in the proclamation, the Court may summon any person whom it thinks necessary to summon and may examine him in respect to any such matters and require him to produce any document in his possession or power relating thereto.

Mode of making proclamation. **67. [S. 289.]** (1) Every proclamation shall be made and published, as nearly as may be, in the manner prescribed by rule 54, sub-rule (2).

(2) Where the Court so directs, such proclamation also shall be published in the local official Gazette or in a local newspaper, or in both, and the costs of such publication shall be deemed to be costs of the sale.

(3) Where property is divided into lots for the purpose of being sold separately, it shall not be necessary to make a separate proclamation for each lot, unless proper notice of the sale cannot, in the opinion of the Court, otherwise be given.

68. [S. 290.] Save in the case of property of the kind described in the proviso to rule 43, no sale hereunder shall, without the consent in writing of the judgment-debtor, take place until after the expiration of at least thirty days in the case of immoveable property, and of at least fifteen days¹ in the case of moveable property, calculated from the date on which the copy of the proclamation has been affixed on the court house of the Judge ordering the sale.

raise an objection, he cannot again challenge the sale on any ground. 13 I. C. 337=14 C. L. J. 541. Also 4 P. L. T. 721=2 P. 1916. Where the Court deputed a Commissioner to settle the terms of the proclamation, even knowledge of the judgment debtor of the contents of the proclamation cannot validate the sale. 94 I. C. 8=49 Mad. 333=(1926) M. W. N. 936=23 L. W. 652=A. I. R. 1927 Mad. 755=51 M. L. J. 165. Failure to attend at the settlement of proclamation does not estop plea of non-liability to attachment. 46 Mad. 768=45 M. L. J. 346. When a party does not raise any objection to incorrect sale proclamation, he is estopped from questioning about any irregularity consequent on it. 38 Mad. 387=25 M. L. J. 198. Also 21 Nag. L. R. 23=88 I. C. 831. Refusal by trial Court to fix a particular order in which property is to be sold is no bar to the executing Court considering the same question. 23 L. W. 765=(1926) M. W. N. 566=96 I. C. 492=A. I. R. 1926 Mad. 834=51 M. L. J. 135.

REVISION.—An order for issue of proclamation is subject to revision by the High Court. 2 P. L. J. 130=1917 Pat. 105.

APPEAL.—An order under this rule is not appealable under O. 43, R. 1. 59 I. C. 282=1 Pat. L. T. 649. See also A. I. R. 1926 Cal. 1184. As to what kinds of orders under this rule are appealable. See 23 L. W. 765=96 I. C. 492=A. I. R. 1926 Mad. 834=(1926) M. W. N. 566=51 M. L. J. 135. An appeal lies against an order disallowing the objection of the judgment-debtor. 30 C. 617. But see 27 M. 259 (F.B.). No appeal lies against an order under sub-rule (4). 36 I. C. 402=10 Bur. L. T. 115. Order settling the order in which properties are to be sold is appealable. 45 M. L. J. 478=1924 Mad. 365. An order fixing upset price is not appealable. 44 M. L. J. 599=1923 Mad. 619. No appeal lies against an order settling the terms of a sale proclamation. 46 I. C. 564. But see 49 I. C. 539. Order refusing to notify incumbrances

is not appealable. 4 Pat. 731=6 Pat. L. T. 843. See also 48 All. 260=92 I. C. 644=A. I. R. 1926 All. 268. No appeal against an order refusing to re-open valuation fixed in sale proclamation. 6 P. L. T. 507=90 I. C. 276. An order accepting the valuation put upon a property is not appealable. 22 I. C. 548 also 17 I. C. 88=16 C. W. N. 970. Order fixing valuation is not appealable. 38 I. C. 616=2 Pat. L. J. 13. See also 11 I. C. 759=14 C. L. J. 607; 99 I. C. 455; 91 I. C. 819=A. I. R. 1926 Cal. 610. An order for issue of sale proclamation when a stay has been ordered at the instance of the judgment-debtor is not appealable. 64 I. C. 547=35 C. L. J. 170.

SECOND APPEAL.—If under valuation and want of notice of sale are the grounds of a petition under R. 90, they properly come under R. 66 and a second appeal is competent. (1925) M. W. N. 701=A. I. R. 1925 Mad. 1142.

STEP-IN-AID.—An oral application for the settlement of terms of proclamation is a step-in-aid of execution. 2 P. L. J. 5=38 I. C. 540.

O. 21, R. 67.—The omission to fix a copy of the sale proclamation in the Collector's office does not render the sale *ipso facto* void. 18 C. 422 (F. B.); 12 B. at p. 370.

¹ In Allahabad and Oudh for fifteen days read seven days.

O. 21, R. 68.—A sale held in contravention of this rule should, on the application of the judgment-debtor or decree-holder, be set aside. 7 A. 289; 21 C. 66 (P. C.). But the sale is not *ipso facto* void. 31 C. 385.

CONSENT.—An application made on the day of sale by the judgment-debtor, that a part only of his property may be sold instead of the entirety, cannot be considered as such a "consent" as would do away with the necessity of proclamation being issued, 30 days before the day fixed for sale. 5 C. 259. See 6 C. W. N. at p. 57.

REVISION.—An order under this rule can be set aside on revision. 5 C. 878.

- 69. [S. 291.] (1)** The Court may, in its discretion, adjourn any sale hereunder to a specified day and hour, and the officer conducting any such sale may in his discretion adjourn the sale, recording his reasons for such adjournment :

Adjournment or stoppage of sale.

Provided that, where the sale is made in, or within the precincts of, the court-house, no such adjournment shall be made without the leave of the Court.

(2) Where a sale is adjourned under sub-rule (1) for a longer period than seven days, a fresh proclamation under rule 67, shall be made, unless the judgment-debtor consents to waive it.

(3) Every sale shall be stopped if, before the lot is knocked down, the debt and costs (including the costs of the sale) are tendered to the officer conducting the sale or proof is given to his satisfaction that the amount of such debt and costs has been paid into the Court which ordered the sale.

[Allahabad and Oudh.] **69 (2)**—*Substitute* 'fourteen days' for 'seven days' in Sub-clause (2) of Rule 69. O XXI and *add* the following proviso to the same sub-cl. (2) :—Provided that the court may dispense with the consent of any judgment debtor who has failed to attend in answer to a notice issued under rule 66.

[Bombay] In sub-rule (2) of R. 69 of O. XXI "thirty days" shall be substituted for "seven days".

- 70. [S. 287, last para.]** Nothing in rules 66 to 69 shall be deemed to apply to any case in which the execution of a decree has been transferred to the Collector.

Saving of certain sales.

- 71. [S. 293.]** Any deficiency of price which may happen on a re-sale by reason of the purchaser's default, and all expenses attending such re-sale, shall be certified to the Court or to the Collector or subordinate of the Collector, as the case may be, by the

Defaulting purchaser answerable for loss on re-sale.

O. 21, R. 69. SCOPE.—The rule has no application to a case where the sale is postponed on the ground that the decree has been satisfied. 4 Pat. L. T. 495 = 75 I. C. 676. This rule applies to sales held in virtue of an order absolute for sale under S. 89 of the T. P. Act (O. XXXIV, R. 5) 19 A. 205 ; 20 A. 354. But see 31 C. 373. When a sale is adjourned under this rule its provisions must be followed with exactitude. 20 Mad. 159.

ADJOURNMENT.—Bidding by decree-holder—Sale kept open for some days to get higher bids—Does not amount to adjournment but is a continuous sale and not fresh proclamation is necessary. 6 P. 432 = 104 I. C. 215 = 8 Pat. L. T. 796 = A. I. R. 1927 Pat. 312. The sale should be adjourned to a specified day and hour, and omission to specify this a material irregularity. 31 C. 815 (818) ; 29 A. 196 (P. C.) ; 7 Cal. 34. See also 13 I. C. 337 = 14 C. L. J. 541. 49 All. 402 = 25 A. L. J. 302 = 99 I. C. 926 = A. I. R. 1927 All. 241. Adjournment *sine die* is irregular and sale is liable to be set aside. 41 I. C. 68 = 3 Pat. L. W. 357. As to whether a sale can be adjourned to a holiday, see 3 A. 333. When a Court adjourns a sale, but the information not reaching the Nazir in time, the sale is concluded, the sale is void. 12 A. 96 ; 12 M. L. J. R. 97 see 17 C. 152. Where an execution sale is not conducted within the precincts of the Court house the officer conducting it has a discretion to adjourn the sale to the next day. 107 I. C. 274.

Sub-rule (2).—Non-issue of a fresh proclamation under R. 69 (2) is a mere irregularity and in the absence of proof of substantial injury the sale cannot be set aside. 38 I. A. 200 = 39 Cal. 26 = 16 C. W. N. 1 (P.C.) also 43 All. 433 = 19 A.L.J.

262. 2 Luck. 490 = 100 I. C. 787 = 4 O. W. N. 273. But see 25 I. C. 17. Even though the judgment-debtor consents, the Court must issue a fresh proclamation in case the judgment-creditor so requires it. 24 M. at p. 316. A fresh proclamation is essential. 2 Bur. L. J. 54 = 1923 Rang. 154. A waiver of fresh proclamation on postponement of sale, does not amount to waiver of objections to the previous one. 14 C. L. J. 346 = 16 C. W. N. 704.

Sub-rule (3).—A bid may be retracted at any time before the hammer is down. 14 M. 235. The sale of a third lot is not vitiated by irregularity under Sub-rule (3) when the money due under the decree is paid only after knocking down of the first two lots. 26 I. C. 273 = (1914) M. W. N. 873. A payment made under this rule cannot be called a voluntary payment. 18 W. R. 503. When a sale is so held, the person holding the equity of redemption can, at any time before sale pay the decretal sum and costs and stop execution proceedings. 26 A. 28 = 31 C. 863 ; 11 C. W. N. 495.

O. 21, R. 71. SCOPE.—Intended to minimise hardship from purchaser's default. It applies unless the defaulting purchaser would be substantially prejudiced. Omission of time and place of sale, and date of re-sale are mere irregularities. 21 L. W. 232 = 87 I. C. 1 = A. I. R. 1925 Mad. 631. The rule is not exhaustive. Other remedies are also open. 50 I. C. 59 = 1919 Pat. 210. The judgment-creditor is not bound to proceed under this rule, and may proceed against other property belonging to the judgment-debtor. 8 C. 291. See also 21 W. R. 149 and 2 B. 562. The provisions of this rule extend to all sales, whether of moveable or immoveable property

officer or other person holding the sale, and shall, at the instance of either the decree-holder or the judgment-debtor, be recoverable from the defaulting purchaser under the provisions relating to the execution of a decree for the payment of money.

Decree-holder not to bid for or buy property without permission.

72. [S. 294.] (1) No holder of a decree in execution of which property is sold shall, without the express permission of the Court, bid for or purchase the property.

(2) Where a decree-holder purchases with such permission, the purchase-money and the amount due on the decree may, subject to the provisions of section 73, be set off against one another, and the Court executing the decree shall enter up satisfaction of the decree in whole or in part accordingly.

Where a decree-holder purchases, amount of decree may be taken as payment.

(3) Where a decree-holder purchases, by himself or through another person, without such permission, the Court may, if it thinks fit, on the application of the judgment-debtor or any other person whose interests are affected by the sale, by order set aside the sale; and the costs of such application and order, and any deficiency of price which may happen on the re-sale and all expenses attending it, shall be paid by the decree-holder.

and also to re-sales held under Rr. 77, 84 and 86. 7 C. 337. The rule applies as well to sales under the Prov. Ins. Act. 62 I. C. 307=17 N. L. R. 49. The rule applies when there is default, either in the initial deposit under R. 84 or of the balance under R. 85. 44 A. 266=20 A. I. J. 105 (F.B.) As to the effect of permission to bid given to decree-holder, when a heavy up set price was fixed. See 83 I. C. 379=1924 Bom 515. Only the decree-holder or the judgment-debtor can apply under this rule. Attachment of the deposit by the defaulting decree-holder enures for the benefit of all who are entitled to rateable distribution. 49 Mad. 570=97 I. C. 86=A. I. R. 1926 Mad. 872.

RE-SALE.—The re-sale contemplated by this rule must be of the same property that was first sold, and under the same description, 16 C. at p. 58; 16 W. R. 14. The property resold must be substantially the same, and any difference will not matter, if that would occur in the ordinary course of things, or was brought about by the first purchaser's default, 41 Mad. 474=34 M.L.J. 156. The re-sale must be held forthwith and no fresh proclamation is necessary. The auction-purchaser is not liable to pay deficiency when the re-sale is after 6 months. 32 I. C. 907. See also 28 O. C. 327=1925 Oudh 397.

DEFAULTING PURCHASER.—A purchaser of property who fails to pay the deposit directed to be paid by R. 84, is a defaulting purchaser. 5 B. 575. The decree holder may himself be the defaulting purchaser. 12 M. 454. The purchaser is liable only for the deficiency of price and the expenses attending the re-sale and is not liable to pay interest. 9 W. R. 500; 3 W. R. 3; 16 W. R. 14; 14 M. 454. The real and not the ostensible purchaser is liable. 20 W. R. 80; 12 W. R. 236.

A **SUIT** by the purchaser lies to set aside an order to make good the deficiency. 12 I. C. 360=7 N. L. R. 134. Also 19 A. 22. See *contra* 29 O. C. 18=A. I. R. 1925 Oudh 360. An order under this rule is one under S. 47. A separate suit does not lie. 87 I. C. 284=1925 Oudh 360 (2).

SO AN APPEAL and a second appeal will lie against an order passed under this rule. 25 C. 99.

See also 18 M. 439. 23 N. L. R. 14=100 I. C. 691 (2)=A. I. R. 1927 Nag. 112. No second appeals when the decree is for less than Rs. 500. 59 I. C. 192=45 B. 223.

O. 21, R. 72. SCOPE.—The rule does not apply to purchases made before its enactment. 8 Bom. L. R. 873. Leave contemplated by this rule should be very cautiously given. 16 Cal. 132; 7 Cal. 346. A permission to bid and an order to set off decree debt is subject to the rights of other decree-holders, having right to rateable distribution. 59 I. C. 86=12 L. W. 328. The purchase by a decree-holder is subject to the final result of the litigation between him and judgment-debtor. 27 M. 98. Delay by the decree-holder purchaser in deposit of money is not a material irregularity and the sale is not vitiated. 2 Bur. L. J. 166=1924 Rang. 81. The Court can refuse to confirm a sale on failure to fulfil conditions subject to which the permission to bid was given. 1 P. 235=69 I. C. 872 also 15 I. C. 888=10 O. C. 86.

8nb-rule (3.)—The sons of a judgment-debtor are not persons interested in the sale of ancestral property held in execution of a money-decree against their father, so as to be entitled to apply under this rule to set aside a sale. 13 M.L.J. 231 at p. 235. See also 11 M. 356 (359); 16 M. 287; 22 B. 271; 5 B. 130; 10 C. 757; 14 M. 498; 11 C. 731. The purchase by a benamidar of decree-holder is similarly only voidable. 44 Bom. 352=56 I. C. 349=22 Bom. L.R. 296 also 27 C. W. N. 208=37 C. L. J. 403 also 47 C. 377=24 C. W. N. 220 (F.B.) When no express permission was given but the decree-holder was permitted to bid throughout permission can be inferred and without proof of loss the sale cannot be set aside. 6 P. 432=104 I.C. 215=8 Pat. I. T. 796=A. I. R. 1927 Pat. 312. The purchase by the decree-holder without permission is not void altogether but only liable to be set aside on application and upon cause shown. 49 I. A. 312 (P. C.)=1 Pat. 733=44 M. L. J. 718 (P. C.) also 39 I. C. 3=41 Bom. 357. 101 I. C. 89 (2). Proof of substantial loss is not necessary to set aside a purchase by the decree-holder without permission. 13 L. W. 616=62 I. C. 854.

[Bombay.] After R. 72 of O. XXI, the following shall be inserted as Rule 72-A, namely.—

"72-A. If leave to bid is granted to the mortgagee of immoveable property, a reserve price as regards him shall be fixed of not less than the amount then due for principal, interest and costs in case the property is sold in one lot, and not less in respect of each lot (in case the property is sold in lots) than such sum as shall appear to be properly attributable to it in relation to the amount aforesaid."

[Allahabad and Oudh.] In Allahabad and Oudh *delete* Sub-rules (1) and (3) of Rule 72 and read Sub-Rule (2) as Rule 72; and in the rules so read *substitute* for the words "with such permission" "property sold".

[Oudh.] Substituted by Oudh Rule, 72 (1)—The holder of a decree in execution of which property is sold, shall be competent to bid for, or purchase the property, provided that the judgment-debtor may by application, supported by an affidavit, apply to the Court to debar the decree-holder from purchasing the property; and the Court may, on such application, either debar the decree-holder from purchasing the property, or grant permission to do so on such terms as may seem just.

(2) Same as Allahabad Rule 72.

73. [S. 292.] No officer or other person having any duty to perform in connection with any sale shall, either directly or indirectly, bid for, acquire or attempt to acquire any interest in the property sold.

Restriction on bidding or purchase by officers.

Sale of Moveable Property.

74. (1) Where the property to be sold is agricultural produce, the sale shall be held :—

Sale of agricultural produce.

(a) if such produce is a growing crop, on or near the land on which such crop has grown, or,

(b) if such produce has been cut or gathered, at or near the threshing-floor or place for trading out grain or the like or fodder-stack on or in which it is deposited :

Provided that the Court may direct the sale to be held at the nearest place of public resort, if it is of opinion that the produce is thereby likely to sell to greater advantage.

(2) Where, on the produce being put up for sale,—

(a) a fair price, in the estimation of the person holding the sale, is not offered for it, and

(b) the owner of the produce or a person authorized to act in his behalf applies to have the sale postponed till the next day, or if a market is held at the place of sale, the next market-day, the sale shall be postponed accordingly and shall be then completed, whatever price may be offered for the produce.

75. (1) Where the property to be sold is a growing crop and the crop from its nature admits of being stored but has not yet been stored, the day of the sale shall be so fixed as to admit of its being made ready for storing before the arrival of such day, and the sale shall not be held until the crop has been cut or gathered and is ready for storing.

Special provisions relating to growing crops.

(2) Where the crop from its nature does not admit of being stored, it may be sold before it is cut and gathered, and the purchaser shall be entitled to enter on the land, and to do all that is necessary for the purpose of tending and cutting or gathering it.

[Punjab.] In O. XXI. R. 75, after the word "stored" *add* the following words "or can be sold to greater advantage in an unripe state, such as green wheat or gram."

[Oudh.] O. XXI. R. 75 (2).—In Oudh after the words "being stored" *add* "or where it appears to the Court that the crop can be sold to greater advantage in an unripe state".

APPEAL.—An order refusing leave to bid is not appealable. 38 Cal. 717=15 C. W. 862=38 L. A. 126 (P. C.). No second appeal lies. 21 C. 789.

O. 21. R. 73.—Pleadings of parties are not

debarred from purchasing property sold in execution. 10 M. 111. Nor their clerks. 49 A. 292=25 A. L. J. 173=99 I. C. 443 (2)=A. I. R. 1927 All. 76. But where the pleader is instructed to purchase for his client, *see* 15 M. 98.

76. [S. 296.] Where the property to be sold is a negotiable instrument or a share in a corporation, the Court may, instead of directing the sale to be made by public auction, authorize the sale of such instrument or share through a broker.

Negotiable instruments and shares in corporations.

77. [S. 297.] (1) Where moveable property is sold by public auction the price of each lot shall be paid at the time of sale or as soon after as the officer or other person holding the sale directs and in default of payment the property shall forthwith be re-sold.

Sale by public-auction.

(2) On payment of the purchase-money, the officer or other person holding the sale shall grant a receipt for the same, and the sale shall become absolute.

(3) Where the moveable property to be sold is a share in goods belonging to the judgment-debtor and a co-owner, and two or more persons, of whom one is such co-owner, respectively bid the same sum for such property or for any lot, the bidding shall be deemed to be the bidding of the co-owner.

78. [S. 298.] No irregularity in publishing or conducting the sale of moveable property shall vitiate the sale; but any person sustaining any injury by reason of such irregularity at the hand of any other person may institute a suit against him for compensation or (if such other person is the purchaser) for the recovery of the specific property and for compensation in default of such recovery.

Irregularity not to vitiate sale, but any person injured may sue.

Delivery of moveable property, debts and shares.

79. [S. 299.] (1) Where the property sold is moveable property of which actual seizure has been made, it shall be delivered to the purchaser.

[S. 300.] (2) Where the property sold is moveable property in the possession of some person other than the judgment-debtor, the delivery thereof to the purchaser shall be made by giving notice to the person in possession prohibiting him from delivering possession of the property to any person except the purchaser.

[S. 301.] (3) Where the property sold is a debt not secured by a negotiable instrument, or is a share in a corporation, the delivery thereof shall be made by a written order of the Court prohibiting the creditor from receiving the debt or any interest thereon, and the debtor from making payment thereof to any person except the purchaser, or prohibiting the person in whose name the share may be standing from making any transfer of the share to any person except the purchaser, or receiving payment of any dividend or interest thereon, and the manager, secretary or other proper officer of the corporation from permitting any such transfer or making any such payment to any person except the purchaser.

80. [S. 302.] (1) Where the execution of a document or the endorsement of the party in whose name a negotiable instrument or a share in a corporation is standing is required to transfer such negotiable instrument or share, the Judge or such officer as he may appoint in this behalf may execute such document or make such endorsement as may be necessary, and such execution or endorsement shall have the same effect as an execution or endorsement by the party.

Transfer of negotiable instrument and shares.

O. 21, B. 76.—The Court is not bound to sell through a broker. 8 W. R. 415.

O. 21, B. 77.—The rule applies to the sale of moveable property other than a negotiable instrument or stock. 4 C. 946. The officer conducting the sale has a discretion to allow the purchase-money to be paid at a reasonable time after sale. 4 N. W. P. H. C. R. 37. The word "forthwith" indicates that no fresh proclamation is necessary. 12 M. 454. A suit will lie to set aside the sale if the title is guaranteed. 2 B. 258.

O. 21, B. 78.—There is no provision in the case for setting aside a sale of moveable property 49 I. C. 140 = 12 P. R. 1919. See also A. I. R. 1927 All. 41. Money is not 'moveable property'.

1 Rang. 360 = 1924 Rang. 21. A sale of moveable property is void, where at the time of the actual sale, the judgment-debtor is dead, and his legal representatives are not brought on the record. 8 M. L. J. 288. Effect of sale, where the attachment has not been duly made. See 5 A. 86, 2 B. 258 and 8 M. L. J. 288. Where the article sold was not of the particular description as offered and bought, the buyer can reject them and recover the money paid. 54 I. C. 315. There is no warranty of title in sales of moveables. 2 R. 202 = 97 I. C. 1029 = A. I. R. 1926 Rang. 214.

O. 21, B. 80.—The Court can cancel a previous endorsement as well under this rule. 12 I. C. 913 = 4 Bur. L. T. 138.

(2) Such execution or endorsement may be in the following form, namely:—

A B by C D, Judge of the Court of (or *as the case may be*), in a suit by EF, against A B.

(3) Until the transfer of such negotiable instrument or share, the Court may, by order, appoint some person to receive any interest or dividend due thereon and to sign a receipt for the same; and any receipt so signed shall be as valid and effectual for all purposes as if the same had been signed by the party himself.

81. [S. 303.] In the case of any moveable property not hereinbefore provided for the Court make an order vesting such property in the purchaser or as he may direct; and such property shall vest accordingly.

Vesting order in case of other property.

[**Lower Burma.**] In O. XXI the following shall be inserted as Rule 81-A:—

"81-A. Whenever guns or other arms in respect of which licences have to be taken by purchasers under the Indian Arms Act, 1878, are sold by public-auction in execution of decrees, the Court directing the sale shall give due notice to the Magistrate of the district of the names and addresses of the purchasers, and of the time and place of the intended delivery to the purchasers of such arms, so that proper steps may be taken by the police to enforce the requirements of the Indian Arms Act."

Sale of Immoveable Property.

What Courts may order sales.

82. [S. 304.] Sales of immoveable property in execution of decrees may be ordered by any Court other than a Court of Small Causes.

83. [S. 305.] (1) Where an order for the sale of immoveable property has been made, if the judgment-debtor can satisfy the Court that

Postponement of sale to enable judgment-debtor to raise amount of decree.

there is reason to believe that the amount of the decree may be raised by the mortgage or lease or private sale of such property, or some part thereof, or of any other immoveable property of the judgment-debtor, the Court may, on his application, postpone the sale of the property comprised in the order for sale on such terms and for such period as it thinks proper, to enable him to raise the amount.

(2) In such case the Court shall grant a certificate to the judgment-debtor authorizing him within a period to be mentioned therein, and notwithstanding anything contained in section 64, to make the proposed mortgage, lease or sale:

Provided that all moneys payable under such mortgage, lease or sale shall be paid, not to the judgment-debtor, but, save in so far as a decree-holder is entitled to set off such money under the provision of Rule 72, into Court:

Provided also that no mortgage, lease or sale under this rule shall become absolute until it has been confirmed by the Court.

O. 21, R. 81.—A mortgagee of moveables cannot follow the moveable property into the hands of the auction-purchaser, 1925 Cal. 164. On these section. *See also* 92 I.C. 370 = A.I.R. 1925 Rang. 303.

O. 21, R. 82.—The sale of immoveable property by a Court of Small Causes confers no title on the purchaser, 17 W. R. 309. *See also* 7 M. 592; 8 M. 8. A Court of Small Causes must proceed under S. 39 in all cases where execution is sought against the immoveable property of the judgment-debtor. 7 M. 592; *see also* 8 M. 8.

O. 21 R. 83.—Sub-rule (3) is new and follows the ruling in 6 M. L. J. 187. *See also* 33 C. 335. The provisions of this rule are in applicable to a decree for sale in a mortgage suit. 55 I. C. 816 = 5 L. L. J. 67. Extension of time for redemption to enable the mortgagor to raise the amount by private sale is prohibited by the Code and no appeal lies from a refusal order, 46 M. L. J. 71 = 1924 Mad. 234. There should be a reasonable probability of the debt being discharged within a

reasonable short period. 21 W. R. 146. In 15 W. R. 322 six months' time was given. Sanction must be given by the Court which passed the order for sale. The sanction of any other Court is of no use. 23 B. 287. Where a property is purchased on the basis of the Court's certificate granted before an attachment by another decree-holder, the purchaser gets a good title. No formal confirmation is necessary. Order to pay the money to the creditor amounts to confirmation. 21 I.C. 210. *See also* 19 B. 539. The guardian of a minor also cannot alienate property of the minor without the sanction of the Court. To have such a transfer set aside, the guardian must return the consideration. 36 C.L.J. 326 = 49 Cal. 911. Where the decree was against two divided brothers, and the elder alone obtained permission to sell by private sale, he could not sell the younger's share as well. The younger on payment of half the purchase money could get back his half share from the purchaser. 11 L.W. 213 = 52 I.C. 956.

(3) Nothing in this rule shall be deemed to apply to a sale of property directed to be sold in execution of a decree for sale in enforcement of a mortgage of, or charge on, such property.

84. [S. 306.] (1) On every sale of immoveable property the person declared to be the purchaser shall pay immediately after such declaration a deposit of twenty-five per cent. on the amount of his purchase-money to the officer or other person conducting the sale, and in default of such deposit, the property shall forthwith be re-sold.

(2) Where the decree-holder is the purchaser and is entitled to set off the purchase-money under rule 72, the Court may dispense with the requirements of this rule.

[Oudh] **O. 21, R. 84 (2)** [added by Oudh].—The Court shall not dispense with the requirements of this rule in a case in which there is an application for rateable distribution of assets.

85. [S. 307.] The full amount of purchase-money payable shall be paid by the purchaser into Court before the Court closes on the fifteenth day from the sale of the property :

Time for payment in full of purchase-money.

Provided that in calculating the amount to be so paid into the Court, the purchaser shall have the advantage of any set off to which he may be entitled under rule 72.

86. [S. 308.] In default of payment within the period mentioned in the last preceding rule, the deposit may, if the Court thinks fit, after defraying the expenses of the sale, be forfeited to the Government, and the property shall be re-sold, and the

O. 21, R. 84. SCOPE.—The rule does not prevent the judgment-creditor from proceeding against other properties belonging to his debtor. 8 C. 291. The conditions of this rule are indispensable, and there is no sale where they are not followed. 5 A. 316. See also 16 C. 33 and 14 M. 227.

DEPOSIT.—The deposit is to be made only after the bid is accepted and the person bidding declared to be the purchaser. No deposit can be required from intending bidders. 9 M. I. A. 328. An offer may be retracted at any time before it is accepted. 14 Mad. 235. The sale is complete not on the acceptance of the deposit by the officer conducting the sale, but when an order accepting the bid is made by the presiding officer. 2 P. 548 = 76 I.C. 113. If the deposit is not made under this rule, the sale is not null and void. It is a mere irregularity. 67 I.C. 427. But see 9 I. C. 66 = 15 C. W. N. 350. The officer conducting sale cannot extend time for payment of deposit and failure to deposit immediately annuls sale. 30 I. C. 230 = 2 O.L.J. 216. But see 67 I.C. 427. The decree-holder can withdraw the deposit only after confirmation of sale and is entitled to interest. 25 I. C. 859.

RE-SALE.—The word "forthwith" indicates that no fresh proclamation is necessary. 12 M. 454. As to whether the sale can be adjourned, see 16 C. 33 (38); 12 M. 454. When property is put up again forthwith and sold under this rule, it is re-sold within the meaning of R. 71. 12 M. 454. If the re-sale is held after a fresh proclamation, the sale is not held 'forthwith' and the bidder cannot be held liable for the deficiency. 107 I.C. 274 = 1928 Lah. 249. The defaulting purchaser is not absolved from liability for want of bidders at the re-sale. 95 I.C. 865 (2) = A.I.R. 1926 Mad. 739 = 51 M. L. J. 658. Where the highest bidder dies, to require the next higher bidder to deposit the money is illegal and open to revision. 42 Mad.

776 = 37 M. L. J. 274. In a re-sale the officer conducting the sale need not commence from the next highest bid below that made by the defaulter. 1 W.R. Mis. 11. See 7 C. 337.

APPEAL.—An order setting aside sale on default to deposit purchase-money is not appealable. 58 I. C. 597.

O. 21, R. 85.—The words "into Court" have been added to remove the distinction which was drawn in 20 B. 745 between days on which the Court and those on which the Court's office, respectively, is closed or open. When the time for payment expires during the recess, the money may be paid on the day the Court re-opens. 13 M. L. J. 271. The sending of a postal money order by the purchaser does not satisfy the rule. He is bound to see that the money reaches the Court in time. 22 B. 415; 7 M. 211. See 7 C. 337. The 15 days time does not apply, on confirmation of sale by Appellate Court, to repayment of money which had been withdrawn on sale being set aside by the Lower Court's order. 42 I. C. 552 = (1917) M. W. N. 861. Extension of time can be granted with consent of parties. 100 I.C. 800 = A.I.R. 1927 Lah. 337; yet when no objection was made when it was extended and the sale confirmed and money drawn out; the sale cannot be set aside on account of want of consent. 43 M. L. J. 477 = 69 I.C. 1001 = 1923 Mad. 48. The property is liable to be re-sold when the decree-holder purchaser does not deposit the balance after deducting the decree amount. 51 I. C. 316. Joint purchasers—Balance money paid by one enures for the benefit of the other as well. 51 C. 992 = A. I. R. 1926 Cal. 719 = 1925 Cal. 164 = 81 I. C. 1029.

O. 21, R. 86.—The deposit alone can be forfeited and not the right which the decree-holder has under the decree. 7 W. R. 110. The words "if the Court thinks fit" are inserted to remove the hardship caused in certain circumstances,

defaulting purchaser shall forfeit all claim to the property or to any part of the sum for which it may subsequently be sold.

87. [S. 309.] Every re-sale of immoveable property, in default of payment of the purchase-money within the period allowed for such payment, shall be made after the issue of a fresh proclamation in the manner and for the period hereinbefore prescribed for the sale.

Notification on re-sale.

Notification in the manner and for the period hereinbefore prescribed for the sale.

88. [S. 310.] Where the property sold is a share of undivided immoveable property, and two or more persons, of whom one is a co-sharer respectively bid the same sum for such property or for any lot, the bid shall be deemed to be the bid of the co-sharer.

Bid of co-sharer to have preference.

89. [S. 310-A.] (1) Where immoveable property has been sold in execution of a decree, any person, either owning such property or holding an interest therein by virtue of a title acquired before such sale, may apply to have the sale set aside on his depositing

Application to set aside sale on deposit.

in Court,—

vide 25 M. 535; 95 I. C. 46 = A. I. R. 1926 All. 509. The decree-holder himself, even though the purchaser at the re-sale, can apply to attach the deposit made by the first defaulting purchaser. 48 M. L. J. 335 (P. C.) = 86 I. C. 373 = 1925 P. C. 61. The deposit should be refunded on good grounds shown for failure to pay the balance. 59 I. C. 705 = 17 N. L. R. 15. Even apart from this rule the Court can order re-sale on failure to fulfil conditions subject to which the decree-holder was permitted to bid. 1 P. 235 = 69 I. C. 872.

O. 21, R. 87.—*See* 12 Mad. 454. There is no illegality in not mentioning time and place of re-sale in the sale proclamation, if no deficiency results. 87 I. C. 1 = 1925 Mad. 631.

O. 21, R. 88. SCOPE.—The ordinary law of pre-emption is applicable to sales in execution of decrees, and hence this rule which affords a remedy, 13 A. 224 (228). *See also* 27 A. 670 (677). The object of the rule is to enable a co-sharer to keep out strangers. 26 I. C. 95 = 12 A. L. J. 1148. A pre-emption suit will not lie against such a bidder. (*Ibid.*) The requirements of the rule are satisfied if the co-sharer asserts his right of pre-emption when bidding for the same amount. 36 I. C. 654 = 3 O. L. J. 405.

WHO ARE CO-SHARERS.—The members of a joint and undivided Hindu family, other than that member who is recorded in the Collector's register as sharer in the mehal are co-sharers. 7 A. 184. A Hindu widow holding by inheritance her deceased husband's share in a village is also a co-sharer. 1 A. 452. But possession by her for life of a share in a village, in lieu of maintenance, does not make her a co-sharer. 6 A. 17. *See also* 7 A. 860.

BID THE SUM.—There must be a distinct bid by the co-sharer in the ordinary manner of offering bids. 3 A. 827. *See also* 2 A. 850.

ILLUSTRATIVE CASES.—The conditions of pre-emption under the Mahomedan Law do not apply to claims under this rule. 6 N. W. P. 289. If the claimant has fulfilled the conditions of sale and his rights are clear, the Court executing the decree is bound to give effect to the right. 6 N. W. P. 272; 7 N. W. P. 97. *See also* 1 A. 272 and 3 A. 112; 1 A. 277; 6 N. W. P. 289. A person claiming to be a co-sharer cannot object to the confirmation of the sale in favour of the

person recorded as the auction-purchaser. 5 A. 42.

APPEAL.—No appeal lies against an order passed under this rule. 3 A. 674; 5 A. 42. Also from an order refusing to restore to file an application under this rule, which has been dismissed for default. 29 A. 596.

O. 21, R. 89. SCOPE.—Proceedings under this rule are execution proceedings. O. 9 does not apply. 28 Bom. L. R. 686 = 50 Bom. 457 = 96 I. C. 411 = A. I. R. 1926 Bom. 377. Provisions of O. 21, R. 89, C. P. C., are to be strictly complied with. 106 I. C. 568. Object of the rule is to prevent sales for inadequate prices. 40 Bom. 557 = 18 Bom. L. R. 571. The right conferred by this rule is not an absolute right which can be enforced by suit against any particular person. 18 C. 481. The rule must be strictly construed. One judgment debtor is not entitled to take advantage of any deposit made by his co-judgment-debtor, independently made. 42 M. L. J. 71 = 65 I. C. 983. *Also* 39 Mad. 429 = 28 M. L. J. 262. *But see* 22 I. C. 53. The rule applies to cases where the attachment was made prior to the date on which this rule became law. 18 M. 477; 22 C. 767 (F. B.); to the sale of a tenure in execution of a decree for its own arrears. 23 C. 393; to sales in enforcement of decrees on an award by arbitrators in a partition suit. 27 C. W. N. 466 = 1923 Cal. 582; to sales in mortgage decrees and to sales on the Original Side of the Calcutta High Court. 46 Cal. 69 = 24 C. W. N. 1032. As to High Courts generally, *see* 59 I. C. 432 = 24 C. W. N. 536. *See also* 41 M. L. J. 465 = 68 I. C. 916; 25 M. 244 (F. B.); 25 B. 104; 28 A. 778; 25 C. 703 (F. B.). Rule not applicable to sales under Public Demands Recovery Act. 18 C. L. J. 628 = 18 C. W. N. 766; nor to execution proceedings taken by a Collector under S. 70. 25 A. 167. *But see* 31 B. 207; 13 M. L. J. 221; 31 B. 207. "Court" means a Civil Court and not of the sale officer when sale proceedings take place. 100 I. C. 726 (1). The word "property" means tangible property sold whether or not persons other than the judgment-debtor have any interest and it does not mean the right, title and interest of the judgment-debtor alone. 54 M. L. J. 445 = 27 L. W. 307.

(a) for payment to the purchaser, a sum equal to five per cent. of the purchase-money, and

WHO CAN APPLY.—The expression "by virtue of a title acquired before purchase" does not qualify "any person owning such property." So a purchaser from the judgment-debtor after sale can apply under this rule. 24 M. L. J. 205=18 I. C. 579; 40 Bom. 557=37 I. C. 211; 44 Mad. 554=40 M. L. J. 497 (F.B.); 54 I. C. 753; 22 I. C. 193=38 M. L. J. 775; 52 I. C. 344; 4 P. L. J. 340=51 I. C. 873. *See contra* 1922 Lah. 302; 42 All. 7=52 I. C. 331; 26 C. W. N. 149=49 C. 454; 34 All. 186=13 I. C. 134; 9 I. C. 745=14 O. C. 33; 98 I. C. 739=A. I. R. 1927 Mad. 151; 24 L. W. 759; 48 All. 188=93 I. C. 24=A. I. R. 1926 All. 204 (F.B.). A transferee under an unregistered document by the judgment-debtor after sale is not prevented from applying under this rule. 42 Mad. 503=49 I. C. 806. But *see* 22 I. C. 193=38 Mad. 775. The judgment-debtor can apply even though the deposit money was raised by sale of his equity of redemption to his mortgagees. 86 I. C. 732=1925 Oudh 349 (2). Also a judgment-debtor who has effected a private sale of his property during the pendency of the attachment proceedings. 25 B. 531. A transferee after attachment can apply. 26 C. L. J. 127=36 I. C. 510. Also a mortgagee after attachment. 100 I. C. 82=A. I. R. 1927 Mad. 445=52 M. L. J. 157. A mortgagor has an interest and he can apply. 33 All. 481=10 I. C. 863. A prior mortgagee who was not a party to the suit, and when the sale was subject to a mortgage not stating amount or priority, can apply. 28 O. C. 221=1925 Oudh 429. A mortgagee who has purchased the equity of redemption in one portion can apply. 2 Pat. 715=74 I. C. 102. Also a mortgagee. 21 M. 416. Also a prior mortgagee. 53 I. C. 958=27 M. L. T. 130; 27 I. C. 831=13 A. L. J. 271; 12 I. C. 783=178 P. W. R. 1911. But *see* 33 All. 481=10 I. C. 863. A usufructuary mortgage depositing is not a volunteer. 20 A. L. J. 42=1923 All. 127; *also* 25 O. C. 78=1922 Oudh 146. A benamidar can apply. 29 C. 1 at p. 6. A permanent under tenure-holder under the E.B. and Assam Tenancy Amendment Act has an interest in the property to set aside sale in a rent decree. 52 I. C. 237=23 C. W. N. 597. Lessee can apply. (1928) M. W. N. 159=27 L. W. 307=54 M. L. J. 445. A purchaser of a portion of an occupancy holding can apply whether his interest is valid against the landlord or not. 8 C. W. N. 232. *See also* 8 C. W. N. 55. *See also* 31 C. W. N. 1050=A. I. R. 1927 Cal. 817=55 Cal. 108. A dar-mokaridar can apply. 32 C. 107. Also an under raiyat. 11 C. W. N. 742. A member of a joint Hindu family can apply if the share of another member is sold. (1928) M. W. N. 101 (1). Also a decree-holder who is also a purchaser, on the ground that the decree has been adjusted, without the concurrence of the judgment-debtor. 104 I. C. 753. A man is not debarred from defending his action under R. 89 because he desisted from his action under O. 21, R. 58. 25 L. W. 106=(1927) M. W. N. 53=38 M. L. T. 30 (H. C.); 99 I. C. 893=A. I. R. 1927 Mad. 327. The expression "owning such property by virtue of title acquired before such sale" applies as well to long-standing title as one recently derived from the judgment-

debtor. (*Ibid.*)

WHO CANNOT APPLY.—A person who purchases property before it is attached, and whose claim is rejected, and who files a suit under R. 63 cannot apply. 7 C. W. N. 243; 28 A. 84; 30 C. 214; *see also* 30 B. 575; 30 M. 507; 17 M. L. J. 129. The person applying should have an existing interest on the date of the application. 17 C. W. N. 1207=22 I. C. 192=15 Cr. L. J. 48=41 Cal. 305. A person whose title is not affected by the sale cannot apply. 15 C. L. J. 83=10 I. C. 880=16 C. W. N. 904. Receiver under S. 20 of the Provincial Insolvency Act cannot apply. 93 I. C. 271=A. I. R. 1926 Mad. 357=50 M. L. J. 239. Nor a decree-holder who attaches before sale. 28 I. C. 948=13 A. L. J. 401. An attaching creditor cannot apply. 6 C. W. N. 57. Nor a person in whose favour there is an agreement to sell. 17 L. W. 680=1923 Mad. 659. A second mortgagee when the sale is on decree for the prior one, cannot apply under this rule. 31 I. C. 37=9 S. L. R. 86. A mortgagee of non-transferable occupancy holding cannot apply. 29 I. C. 916; *also* 22 C. L. J. 108=20 C. W. N. 40. A mortgagee after sale cannot apply. 39 M. L. J. 84=55 I. C. 856 (F. B.). It was held that a person whose interest was not sold and cannot have passed under the sale could not apply, and a puisne mortgage could not apply. 25 M. 244. *See also* 26 M. 332. A person expecting to get title and possession in a pending litigation cannot apply. 39 All. 700=41 I. C. 880. A part purchaser before sale cannot apply on the ground that the decree amount has been paid by himself and other purchasers of the rest of the property. 52 I. C. 641.

FORM OF APPLICATION.—It need not be in writing. 63 I. C. 140; 13 I. C. 404=9 A. L. J. 12; 14 M. L. T. 534=22 I. C. 291. But mere deposit does not amount to an application. 66 I. C. 44=1922 Mad. 83; *also* 9 I. C. 33; 43 Bom. 735=53 I. C. 135; 32 I. C. 45. Lodgment schedule does not amount to an application. (1926) M. W. N. 297 (1)=23 L. W. 757 (1)=95 I. C. 128 (1)=A. I. R. 1926 Mad. 620; at least an oral application is necessary. 32 I. C. 783=3 L. W. 174; 86 I. C. 493 (1)=1925 Mad. 909. In a written application no specific prayer to set aside sale is necessary. 4 P. L. T. 295=58 I. C. 629. As to defective applications, *see* 1925 Nag. 17. When a prior application to pay decree amount after attachment is dismissed, it does not operate as *res judicata* to an application under this rule. 44 M. L. J. 325=1923 Mad. 487 (2). An application to set aside sale is not invalid because of the absence of prayer to that effect. 106 I. C. 333.

PARTIES TO THE APPLICATION.—The purchaser and the decree-holder are necessary parties to an application under rule. 15 A. 407. But *see* 4 P. L. T. 491=2 P. 800; *also* 1923 Cal. 394.

FORUM.—Though sale was in execution by a revenue court, application under this rule must be made in the Civil Court. 44 Bom. 50=54 I. C. 670.

DEPOSIT "FOR PAYMENT TO THE DECREE HOLDER."—The words mean that the decree-

(b) for payment to the decree-holder, the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, less any amount which may, since the date of such proclamation of sale, have been received by the decree-holder.

[Allahabad and Oudh] 89 (1).—For the words 'any person . . . such sale' in sub-rule (1), substitute 'the judgment-debtor, or any person deriving title through the judgment-debtor, or any person holding an interest in the property'.

(2) Where a person applies under rule 90 to set aside the sale of his immoveable property, he shall not, unless he withdraws his application, be entitled to make or prosecute an application under this rule.

holder is the person solely entitled to the money paid into Court. 30 C. 262. If the decree-holder be the purchaser he is entitled to the 5 per cent. on the purchase-money. 26 C. 449 (F. B.); 22 M. 286; 10 M.L.J. 228. If the decree is joint in favour of two, but one alone gets permission and is purchaser, he alone is entitled to the profits. 6 P. 386=103 I. C. 724 (2)=A. I. R. 1927 Pat. 288. A mere payment of the sale proceeds into Court does not satisfy the requirements of the rule. 23 B. 723; 8 C. W. N. 355; 7 Bom. L.R. 263. As to what amounts to a valid deposit, see 1 P. L. J. 459=35 I. C. 779. The deposit must be in the Civil Court and not in the treasury. 40 All 425=45 I. C. 773. A deposit by a stranger other than a *vakil* or attorney is not valid. 12 I. C. 404=9 A. L. J. 12. A deposit under O. 21, R. 89, C. P. C., is a voluntary deposit and the person making the deposit cannot maintain a suit to have the sale set aside and for refund of the money deposited. 7 Pat. 30. Deposit by auction-purchaser under sale, before confirmation, cannot be taken advantage of by any person to support his application under this rule. 31 I. C. 913. 'Amount specified in the sale proclamation' meaning of. See 23 L.W. 720=96 I. C. 77=A. I. R. 1926 Mad. 765=50 M. L. J. 580. 'Any amount' means what actually was received by the decree-holder and does not include sale proceeds. 25 Bom. L. R. 446=73 I. C. 454. No cash payment is necessary. Agreement to set off decretal amount amounts to payment. 14 I. C. 326=(1912) M. W. N. 756; also 24 M. L. J. 205=18 I. C. 579. But not by cheque. 27 I. C. 656=8 Bur. L.T. 80. Where a short amount was paid, having been misled by an officer of Court, on payment of balance sale should be set aside. 22 I. C. 842, see also 18 Cal. 481. Where a sum less than the sum due is deposited owing to a *bona fide* mistake in calculating the amount, see 26 C. 449 (F. B.); also 21 A. L. J. 162=1923 All. 315. The order setting aside sale and entering satisfaction when the amount was deposited, the order is valid and not *ultra vires*, merely because the creditor did not include interest in the execution petition. 41 C. L. J. 391=1925 Cal. 948. The extent of deposit is the amount of decree in execution of which the sale was made, and not those of other decree-holders claiming rateable distribution. 17 I. C. 920=23 M.L.J. 585; also 37 Bom. 387=15 Bom. L.R. 244. Money once paid to set aside sale cannot be recovered from the decree-holder after sale on the ground that the judgment-debtor had no saleable interest in the property. 45 Bom. 1094=23 Bom. L. R. 455. See also 13 I. C. 144=16 C. L. J. 156. When the mortgagor pays the amount, it has the effect of redeeming the properties. 60 I. C. 560=

7 O. L. J. 620. The acceptance by a landlord of a deposit from a transferee means a recognition of the transferee as tenant. 36 I. C. 701. Where a conditional deposit was made, but the condition was withdrawn before an application to draw the money was filed, it was held that the deposit was a valid one. 2 P. 534=72 I. C. 907. Two deposits by both the judgment-debtor and a mortgagee after sale, each portion of sale amount and two applications by them, can be treated as one proceeding and the sale be set aside. 49 A. 839=25 A. L. J. 576=102 I. C. 471=A. I. R. 1927 All. 561.

Sub-rule (2).—When an application under R. 90 is dismissed for default, the applicant is not precluded from applying under this rule. 43 I. C. 340=20 O. C. 339; 106 I. C. 568. Where an application under R. 90 is made before the sale is concluded, its existence is no bar to an application under this rule. A. I. R. 1926 All. 754. An applicant under this rule cannot impugn the sale on grounds set out in R. 90. 28 C. 74. When a judgment debtor is allowed to apply under this rule, the Court cannot entertain objections to the sale. 21 A. L. J. 340=1923 All. 503. See also 47 All. 850=1925 All. 778.

LIMITATION.—See 87 I. C. 722=1025 Oudh 411. See also 28 Bom. L. R. 510=95 I. C. 549 (1)=A. I. R. 1926 Bom. 335. Deposit is condition precedent to an application. It is the deposit which must be within time. 33 I. C. 996=3 L. W. 271. Whole amount must be deposited within 30 days. 1925 Nag. 30. As to what is to be taken as the date of sale for purpose of limitation, see 29 C. 626. See also A.I.R. 1926 Bom. 335. Time begins to run from the day when the purchaser was declared and was ordered to deposit 25 per cent. 30 All. 65=10 A. L. J. 475. Time runs from the date of deposit under R. 84. (*Ibid.*) It matters not if the sale is even confirmed if the deposit is in time. 27 I. C. 656=8 Bur. L.T. 80. The Court has no power to extend time. 36 I. C. 809; A. I. R. 1926 Lah. 639. If it can do so with the consent of parties, see 36 I. C. 809. Even with the consent of parties time cannot be extended. 39 I. C. 664=2 P. L. J. 164. Delay not due to any act of the person depositing but to the officer of the Court is to be excused. 10 I. C. 51=13 C. L. J. 467; 52 I. C. 161=17 A. L. J. 991; 15 C. L. J. 83=10 I. C. 889=16 C. W.N. 904; 9 N. L. J. 57=96 I. C. 376 (1)=A. I. R. 1926 Nag. 331; or due to the delay of the treasury. 37 All. 591=13 A. L. J. 793. The application too, not merely the deposit, must be within time. 66 I. C. 44=1922 Mad. 83; also 48 M. L. J. 405=1925 Mad. 639; 87 I.C. 722=1925 Oudh 411.

(3) Nothing in this rule shall relieve the judgment-debtor from any liability he may be under in respect of costs and interest not covered by the proclamation of sale.

90. [S. 311.] (1) Where any immoveable property has been sold in execution of

Application to set aside sale on ground of irregularity or fraud.

a decree, the decree-holder, or any person entitled to share in a rateable distribution of assets, or whose interests are affected by the sale, may apply to the Court to set aside the sale on the ground of a material irregularity or fraud

in publishing or conducting it :

APPEAL.—No appeal lies against an order setting aside a sale. 27 A. 263. But see 31 B. 207 ; 6 C. W. N. 57 ; 30 M. 507 ; 5 C. L. J. 204. But against an order refusing to set aside, an appeal lies. 12 I. C. 169 = 12 M. L. T. 380. See also 36 I. C. 809. No appeal lies on an order refusing stay, when the sale itself was not confirmed. 3 Rang. 132 = 1925 Rang. 271. No second appeal lies under this rule. 44 Bom. 472 = 56 I. C. 597 ; see also 38 Cal. 339 = 15 C. W. N. 844 ; 17 I. C. 884 = 8 N. L. R. 177 ; 36 I. C. 769.

REVIEW.—Whether a restoration of an application under this rule, dismissed for default, is possible, is doubtful. But a review petition lies. 22 M. L. J. 148 = 12 I. C. 351.

REVISION.—A revision lies when the lower Court improperly refuses to set aside sale. 21 A. L. J. 162 = 1923 All. 315. But see 40 All. 425 = 16 A. L. J. 433.

O. 21, R. 90. SCOPE OF RULE.—Proceedings under this rule also come within the scope of S. 47. 34 I. C. 829 = 30 M. L. J. 611. But is not a proceeding in execution. 62 I. C. 608 = 6 Pat. L. J. 253. But see 87 I. C. 413 = 1925 Mad. 1142. See also 53 Cal. 679 = A. I. R. 1926 Cal. 773. The addition of words "or fraud" takes the case out of Sec. 47 and brings it under this rule. 4 Lah. 243. A sale can be partially set aside under this rule. 44 C. L. J. 167 = 98 I. C. 206 = A. I. R. 1926 Cal. 1219.

MEANING OF TERMS DECREE-HOLDER.—This expression is not limited to the decree-holder at whose instance the property was first attached. 10 M. 57. The 'interest' contemplated is interest at the time of sale and not at the time of application. 87 I. C. 94. "Interest" means interest in the property sold. The general creditors expecting a higher dividend have not such an interest as is contemplated by the rule. 39 I. C. 932 = 10 S. L. R. 189. But see *contra* 103 I. C. 499 = A. I. R. 1927 Mad. 783 = 53 M. L. J. 229 ; (1928) M. W. N. 216.

APPLICABILITY.—The subsequent setting aside of an *ex parte* decree, after sale in pursuance of the decree, does not affect the title of the purchaser. 38 Cal. 622 = 15 C. W. N. 875. The rule does not apply when a sale of one decree sold in execution of another is sought to be set aside. 64 I. C. 388. The rule applies when the ground of setting aside sale is fraud. 1 L. W. 1033 = 26 I. C. 369 ; also 66 I. C. 220. Fraud after publication of sale proclamation is covered by this rule. 48 I. C. 560 = 3 P. L. J. 645. A question of jurisdiction cannot be raised in an application under this rule. 3 A. L. J. 140. See also 18 A. 141 (144). When setting aside the sale, the Court has power to order interest on the purchase-money as well to be paid to the purchaser. 48 I. A. 24 = 40 M. L. J. 141 = 25 C. W. N. 366 (P. C.). An objection that the property attached and sold is not by law saleable, cannot

be entertained under this rule. See 7 A. 641 ; 7 A. 365 ; 21 B. 463 ; 6 M. 237 ; 20 C. 8 (P. C.) ; 7 C. 63 ; 24 M. 311 (315). See also 6 C. W. N. 42 ; 6 C. W. N. 48 (57) ; 30 C. at p. 152 ; 8 C. 932 ; 25 M. 244 (F. B.) ; 6 C. W. N. 5 ; 1 P. L. T. 742 = 57 I. C. 261. An objection that a minor was not properly represented does not come under this rule. 9 I. C. 252 = 9 M. L. T. 260. But see *contra* 64 I. C. 25 = 35 C. L. J. 9 ; also 29 I. C. 211. The rule applies to receivers appointed by the Court. 6 Bom. L. R. 1140. An application to set aside a sale held by a Collector cannot be entertained under this rule. 11 A. 94 (F. B.). This rule will not apply if the sale itself is a nullity. 35 I. C. 404. A sale held even on the face of an injunction to stop it, is a nullity. 88 I. C. 532 = 1925 Oudh 424.

INVALID SALES.—See 10 C. 410 ; 7 A. 676 ; 12 A. 96 ; 16 A. 5 ; 11 A. 333 ; 21 A. 311 ; 10 A. 506. A sale conducted at a time and place other than that notified, is not a sale at all. 7 A. 676. So also is a sale held before the expiration of the 30 days required by R. 68, and without the consent of the judgment-debtor. 11 A. 333. But see 65 I. C. 363 = 2 P. 207. Effect of a sale held without the property being attached. 5 A. 86 ; 21 A. 311 ; 10 A. 506. See also 32 C. 296 at p. 314 ; 68 I. C. 843 = 1923 Nag. 18 ; 18 C. 188 ; 34 C. 787 ; 1 R. 533 = 1924 Rang. 124 ; 21 I. C. 46 ; 36 I. C. 292. A summary rejection of an application under this rule without an investigation is improper and will not be sustained. 85 I. C. 779 = 1925 Nag. 289.

NOTICE.—When no notice is given under R. 150 of the Civil Rules of Practice (Mad.), the sale is void. 16 M. L. J. 9 ; also when no notice is given under O. 21, R. 22. 91 I. C. 711 = A. I. R. 1926 Cal. 539.

LIMITATION.—The application must be made within 30 days of the date of sale. The period might be extended under S. 18 of the Lim. Act on the ground of fraud. 14 C. 679. See also A. I. R. 1926 Cal. 229 ; 30 C. at p. 153. But not under S. 4 of the Lim. Act. 92 I. C. 839. See 29 C. 626, as to what day is to be taken as the "Date of sale". Time runs not from the date of sale, but from the date of knowledge of fraud. 60 I. C. 801 = 48 Cal. 119. But see 48 I. C. 970 ; also 60 I. C. 529 (Pat.). It is sufficient if the application is in time. It does not matter if the particulars of the irregularities are filed more than 30 days after sale. 48 All. 286 = 92 I. C. 567 = 24 A. L. J. 286 = A. I. R. 1926 All. 305. Where the real purchaser was included as a party after 30 days, while the application was within time against the ostensible purchaser, the application is within time, if the applicant did not know of the existence of a real purchaser at the time of the application. 76 I. C. 507 = 1023 All. 462. As to whether an application by a *bona fide*

Provided that no sale shall be set aside on the ground of irregularity or fraud

purchaser on the ground of fraud is barred, *see* 27 C. W. N. 587 = 1923 Cal. 538. When a purchaser can apply, *see* 38 M. L. J. 228 = 55 I. C. 333; 47 All. 479 = 1925 All. 459; *also* 18 N. L. R. 98 = 1922 Nag. 113; 5 Pat. L. T. 41 = 74 I. C. 760 (2); 107 I. C. 494. But *see* 47 C. L. J. 62 *contra*.

FORM OF APPLICATION.—A formal array of parties is not an absolute necessity in an application under this rule. 25 I. C. 907 = 17 O. C. 306. *See also* 7 Pat. L. T. 532 = 1926 P. H. C. C. 83 = 94 I. C. 31 = A. I. R. 1926 P. 266. It is not the duty of the judgment-debtor to name in his application all the auction-purchasers. 49 A. 788 = 25 A. L. J. 524 = 102 I. C. 126 = A. I. R. 1927 All. 513. Separate applications by different judgment-debtors can be consolidated and heard together and the whole sale set aside. 14 C. L. J. 346 = 16 C. W. N. 704. The Court cannot set aside a sale upon other grounds not pleaded by the applicant. 21 A. 140. *See also* 53 I. C. 794. Absence of application bars defence of invalidity of sale in a suit by non-transferable occupancy tenant. 28 C. W. N. 821 = 1925 Cal. 81.

PARTIES TO THE APPLICATION.—The decree-holder is a necessary party to an application under this rule. 15 A. 407. A beneficial owner is not a necessary party. 29 A. 682. The purchaser is also a necessary party. A. W. N. (1891) p. 121; *also* 50 I. C. 5; 8 L. R. 199 (Rev.); but *see contra* in 39 Cal. 687 = 16 C. W. N. 570; *see also* 62 I. C. 61 = 2 Pat. L. T. 386. Auction-purchaser is not a necessary party.

WHO CAN APPLY.—(1) The decree-holder, (2) any person entitled to share in a rateable distribution of assets, and (3) any person whose interests are affected by the sale. Under S. 146 any person claiming under any of the persons aforesaid can also apply. 3 A. 554 (559) (F.B.). *See also* A. I. R. 1927 Mad. 67. Authorised vakil of the judgment-debtor can apply. A. I. R. 1926 Lah. 514. As to whether an attaching creditor can apply, *see* 84 I. C. 119 = 1924 Cal. 386. *See also* 51 M. L. J. 661. Other co-sharer landlords can apply under this rule, when a defaulting tenure is sold. 50 I. C. 329 = 23 C. W. N. 619. When a minor was not represented by a guardian *ad litem* in execution proceedings, his mother can apply to have the sale set aside as natural guardian. 40 Cal. 635 = 40 I. A. 140 = 25 M. L. J. 140 (P. C.). The auction-purchaser himself may apply. 105 I. C. 405 = A. I. R. 1927 Rang. 301 = 5 R. 516. Also a person who has purchased the property at a prior execution sale, such prior sale not having been confirmed. 8 C. 367. A purchaser from the judgment-debtor prior to attachment. 15 C. 488 (F. B.). A person claiming to be a co-sharer in undivided immoveable property. 5 A. 42. The judgment-debtor who sold the property prior to execution sale can apply where the properties are sold as his. 22 L. W. 872 = 92 I. C. 597 (1) = A. I. R. 1926 Mad. 217. The following persons were also held entitled to apply. A mortgagee who holds a mortgage on the property sold. 13 C. 346. A person claiming to be the beneficial owner of property which has been sold as the property of the ostensible owner. 20 C. 418. *See also* 19 M. 107. A person claiming to be a purchaser of a tenure prior to attachment. 22 C. 802. The real

owner of property that has been sold in execution of a decree against the benamidar. 6 M. L. J. 24. A transferee of a portion of non-transferable occupancy holding can apply to set aside a rent sale by the entire body of landlords. 23 I. C. 839 = 19 C. W. N. 326. An interim receiver appointed under S. 20, Prov. Insol. Act, can apply under O. 21, R. 90, C.P.C. (1928) M.W.N. 216. A mortgagee purchaser of an entire non-transferable holding can apply under this rule to set aside a sale in execution of a subsequent rent decree. 31 I. C. 359 = 22 C. W. N. 143. *See also* 86 I. C. 612 = 1925 Cal. 925; 6 P. L. T. 295 = 1925 Pat. 461. A Hindu reversioner can apply. 4 Pat. L. J. 360 = 1919 Pat. 303 = 51 I. C. 359. *See also* A. I. R. 1926 Mad. 959.

WHO CANNOT APPLY.—A stranger cannot apply. A. I. R. 1927 Cal. 82 = 97 I. C. 757 (2). A judgment-debtor duly served cannot apply under this rule. 1925 Cal. 552. A person claiming by title paramount to that of the judgment-debtor cannot apply. 1 Bur. L. J. 234 = 70 I. C. 900. An adjudged insolvent whose property has vested in the receiver cannot apply. 35 I. C. 530. A person obtaining an attachment before judgment cannot apply. 16 C. L. J. 566 = 17 C. W. N. 80; *also* 42 C. L. J. 37 = 1925 Cal. 1103. *A fortiori* a person obtaining an attachment before judgment of properties other than those sold is not entitled to apply. 27 M. L. J. 302 = (1914) M. W. N. 871. A person who has filed a declaratory suit regarding the property ordered to be sold cannot apply under this rule, while his suit is pending. 38 All. 358 = 34 I. C. 272. A person not a party to a mortgage suit cannot apply. 20 I. C. 16. A decree-holder for money against the mortgagor cannot set aside a mortgage sale. 1925 Sind 101. Objection to a purchase without leave of Court cannot be raised by strangers to the suit. 17 I. C. 126. Judgment-debtors or sham alienees from them who knew but kept quiet at the time of sale that the property was not attached or that the property was not within the Court's jurisdiction, are estopped from objecting to the sale. 24 M. L. J. 70 = 18 I. C. 498. Non-appearance of judgment-debtors after notice at the time of fixing of terms of sale proclamation will bar them from raising objections later on. 22 I. C. 780. Where the judgment-debtor has knowledge of irregularities and stands by without raising any objection at the time, he will not be permitted to take advantage of them in an application under this rule. 32 I. C. 990. Where the purchaser is the decree-holder himself, he will be deemed to have notice of the charges to which the property is subject. 57 I. C. 1004 = 48 Cal. 93. Where a judgment-debtor having knowledge of irregularities gave an undertaking not to question the sale later, he will be bound by his undertaking. 47 I. C. 831; 9 I. C. 698 = 13 C. L. J. 192. The rights of the purchaser cannot be affected by any compromise between the judgment-debtor and the decree-holder. 88 I. C. 534 (2) = 1925 Oudh 693.

MATERIAL IRREGULARITY.—The word "irregularity" is wide enough to include an illegality. 11 A. 342, and connotes want of conformity to some recognized rule of procedure. 5 M. L. J. 70. Irregularities appearing during

unless upon the facts proved the Court is satisfied that the applicant has sustained

the course of investigation as well as those alleged in the application are to be taken into consideration. 103 I. C. 532=A. I. R. 1927 Nag. 319. Sale in contravention of terms of decree is a material irregularity. 33 I. C. 692=(1916) 1 M. W. N. 256. There is no basis for making a distinction between a material irregularity and an illegality in the conduct of a sale. In one sense whatever is irregular is also illegal. 5 M. L. J. 70. As to irregularities in conducting the sale, see 7 A. 641. Sale will be set aside if there is (a) collusion between judgment-debtors and decree-holders, (b) when the value of property is grossly inadequate, and (c) when price fetched is very low. 6 Pat. L. T. 295=1925 Pat. 461.

WHAT ARE IRREGULARITIES.—On proof of irregularities sale must be set aside, though the property would be worth less than the decree amount, and the decree-holder had since allowed the decree to be barred by limitation. 15 I. C. 728=16 C. W. N. 1022. An omission in a sale proclamation must be very material one. 53 I. C. 143. The question of valuation can be raised in an application under this rule, though it has been decided at the time of settlement of proclamation. 105 I. C. 689 (2)=6 P. 588. Where the sale proclamation mentions only annual net income but not an adequate price, there is material irregularity. 21 I. C. 592. An understatement of the value of the property in the sale proclamation, calculated to mislead bidders, is a material irregularity. 20 A. 412 (P. C.); 23 M. 568. See also 52 I. C. 23; 14 C. L. J. 346=11 I. C. 438=16 C. W. N. 704; 38 Mad. 387=14 M. L. T. 320=21 I. C. 389=25 M. L. J. 198; 33 I. C. 946; 16 I. C. 974=16 C. L. J. 98; 11 I. C. 295=15 C. W. N. 965; 44 I. C. 412=1918 Pat. 33. A misstatement of value knowingly made is a material irregularity. 52 I. C. 23. See also 42 I. C. 394=1917 Pat. 353; 105 I. C. 153. So also omission of land revenue in sale proclamation. 40 M. L. J. 403=28 C. W. N. 593=75 I. C. 546=1923 P. C. 93 (P. C.). So also omission to state the amount of revenue assessed in the sale proclamation. 9 C. 656 (P. C.). But see also 7 Cal. 723; 23 M. 628, omission to state the hour of sale. 24 C. 295; 49 All. 402=25 A. L. J. 302=99 I. C. 926=A. I. R. 1927 All. 241. Also publication of the proclamation at a distance of half a mile from the property. 6 C. W. N. 44. Also delay in deposit under R. 84. 9 I. C. 66=15 C. W. N. 350; 14 Mad. 228; 9 All. 511; 16 Cal. 33; 28 All. 238. Want of notice under R. 66 is an irregularity. 4 Lah. 243=1923 Lah. 592; also 18 I. C. 715; 99 I. C. 515. Insufficient notice of sale, resulting in a low price is an irregularity. 144 P. L. R. 1914=25 I. C. 51; also omission to issue fresh proclamation on adjournment of sale. 100 I. C. 787; 4 O. W. N. 273. Also omission to affix the sale proclamation to some conspicuous place on the property attached. 7 C. 466. Omission to affix the sale notice in the Collector's office as required by R. 67. 8 C. 932. See also 46 Mad. 736=45 M. L. J. 263. Omission to have the drum beaten as required by R. 54. 10 B. 504; also 67 I. C. 752. Omission to state the place of sale. 9 M. 511; 5 Bur. L. J. 183=100 I. C. 74=A. I. R. 1927 Rang. 84. But see 41 M. L. J. 465=68 I. C. 916.

Also when the proclamation is made on the spot only 5 days before the date fixed for sale. 7 C. at p. 40. But see 4 A. 300; also 48 I. C. 611. Also the holding of the sale on a date other than that notified in the proclamation. 156 P. L. R. 1915=30 I. C. 524; also 65 I. C. 746=35 C. L. J. 140. The absence of attachment prior to the sale of immoveable property in execution of a decree is a material irregularity. 21 A. 311. See also 10 A. 506; 5 A. 86. But see 9 C. 918=13 C. L. J. 243. An omission to state whether the sale is subject to mortgages is a proper ground for setting aside the sale. 50 I. C. 384=21 Bom. L. R. 281. Where the sale is held at a different place from that advertised. 39 M. L. J. 188=44 M. 35. Also the absence of specification of incumbrances and the statement of a very low value. 6 C. W. N. 386. See also 6 C. W. N. 56; 18 N. L. R. 98=65 I. C. 875. Also a mistake in the dimensions of the property. 96 I. C. 196=A. I. R. 1926 Lah. 587. A sale, free of mortgages but advertised subject to mortgage is a material irregularity. 9 I. C. 383. Sale can be set aside where the legal representatives of a decreed judgment debtor was not brought on record. 23 C. W. N. 608=29 C. L. J. 411. See also 18 C. W. N. 1266=20 C. L. J. 341; 18 C. L. J. 628=18 C. W. N. 766; 23 I. C. 251=26 M. L. J. 267; 6 P. L. T. 67=1925 Pat. 384. Where a minor son of a deceased judgment-debtor was not brought on record, it is a material irregularity. 19 I. C. 120. Where the execution application in which the sale was held was barred by limitation. See 1 Luck. C. 543=105 I. C. 545=A. I. R. 1927 Oudh 488. Suppression of processes in connection with sale. 108 I. C. 33=47 C. L. J. 351=32 C. W. N. 519.

WHAT ARE NOT IRREGULARITIES.—There is no irregularity in the conduct of sale in case the officer conducting the sale sells the property twice over. 2 A. 111. Where the date for sale is not mentioned, see 40 C. L. J. 311=84 I. C. 700=1925 Cal. 201. The use at a sale, of language by an intending bidder in disparagement of the property, is a "material irregularity". 5 C. 308; 7 C. 346; but such remarks made by bystanders or by purchasers other than the decree-holder do not constitute such an irregularity. 17 C. 152. See also 23 M. 227 (P. C.). As to the purchase of property by the decree-holder without the permission of the Court, see 11 C. 732. As to omission to give notice to the judgment-debtor under O. 21, R. 22, see 3 A. 426; 6 M. 237; 15 I. C. 506=40 Cal. 45; also 37 I. C. 387=20 M. L. T. 479; 17 I. C. 126. Effect of a guardian of a minor judgment-debtor not having been appointed, see 39 I. C. 765. A sale is not invalid if the attachment has been made under a wrong section. 18 A. 469. The sale on a closed holiday is not always an irregularity. 3 A. 333. When a Court sells property without having jurisdiction to sell it, this does not amount to an irregularity in publishing or conducting the sale. 18 A. 144. Omission to state value of property is not material irregularity. A. I. R. 1927 Mad. 1009 (1). Though there was an under-valuation yet if the price fetched was adequate, the sale cannot be set aside on the ground of under-valuation. 57 I. C.

substantial injury by reason of such irregularity or fraud.

892; 16 I.C. 394; *see* 10 I.C. 475 = 15 C. W. N. 577. Where in a sale proclamation a certain property was included in a wrong lot by mistake, it is not such an irregularity as to entitle the sale to be set aside. 32 I.C. 990. Where an entire holding is sold, the giving of wrong numbers of lots is not a sufficient irregularity. 41 I.C. 282 = 2 P.L.J. 623. A compromise, in which all persons affected by the sale, are not parties, and which is not recorded by the Court, does not result in setting the sale aside. 85 I.C. 529 (2) = 1925 Cal. 779. The sale of property consisting of numerous plots of land situated in various villages in one lot does not by itself constitute a gross irregularity. 107 I.C. 295.

GROUND FOR SETTING ASIDE SALE—WHAT ARE NOT.—Waiver of irregularities, *see* 91 I.C. 407 = A. I. R. 1926 Cal. 577. Mere suspicious circumstances about sale and low price in the absence of fraud. 20 L. W. 736 = 1925 Mad. 202. An objection that the attachment and sale was time-barred. 2 P. L. J. 157 = 38 I.C. 876. Dissuading bids. 102 P.L.R. 1911 = 9 I.C. 816. Where the price fetched is below that fixed by consent in sale proclamation. 1 P. 214 = 1922 P. 550; *also* 21 L.W. 521 = 1925 Mad. 729. Also where the property is sold for a price which subsequently appears to be too low. 8 B. 424. Irregularity without loss is not. 4 Pat. 696. Fraud of decree-holder in bringing to sale property, after satisfaction of decree, is not. 10 I.C. 625. Irregularities in proclamation of sale not objected to, cannot be grounds for setting aside sale. 49 All. 788.

FRAUD.—Fraud is different from irregularity. As to what amounts to fraud, *see* 85 I.C. 622 = 1925 Pat. 521; *also* A. I. R. 1926 Cal. 229. Fraud antecedent to sale proceedings—Evidence of. *See* 93 I.C. 870 = A. I. R. 1926 Cal. 829. A person alleging fraud must prove that the existence of his right to set aside the sale was concealed by fraud. 87 I.C. 555. Low price does not raise a presumption of fraud. 89 I.C. 107 = A. I. R. 1926 Oudh 45. Purchase by decree-holder's vakil's clerk without informing the decree-holder amounts to fraud. 2 O.W.N. 297 = 1925 Oudh 381. Auction-purchaser must be a party to the fraud, and the fraud must come to the judgment-debtor's knowledge subsequent to the confirmation of the sale. 20 M. 10; 8 C.W.N. 230; 5 C.L.J. 328; 23 M. 227 (P.C.); 24 C. 546. *See* 30 C. at p. 153. It is not necessary that the purchaser should be a party to the fraud. 4 P.L.T. 306 = 72 I.C. 625; *also* 18 I.C. 715; 99 I.C. 946 = 44 C.L.J. 565. Mere want of diligence is not fraud. Facts must be stated. 2 P.L.T. 401 = 6 P.L.J. 319. The mis-statement of value in a sale proclamation does not necessarily amount to fraud; but in particular circumstances may justify the inference of fraud. 2 Pat. L.T. 501 = 2 P. 65. Where the decree-holder colludes with strangers in purchasing the property for much less than the decretal sum, it amounts to fraud. 15 I.C. 888 = 16 O. C. 86.

INJURY.—The word "injury" means loss which is wrongful. When a man loses what he had been in the habit of wrongful gaining, it is not substantial injury. 7 O. W. N. 439.

Substantial injury is essentially necessary. 83 I.C. 1028 = 1924 All. 698. *See also* 20 Cal. 599; 7 Cal. 730; 12 Mad. 19; 18 All. 37; 7 Cal. 466; 20 Mad. 159; 24 Cal. at p. 295; 30 Cal. at p. 9; 104 I.C. 196 = A.I.R. 1927 Cal. 873; 7 Pat. L.T. 468 = 93 I. C. 935 = A. I. R. 1926 P. 202; 96 I.C. 196 = A.I.R. 1926 Lah. 587. Party must prove such an irregularity as resulted in substantial injury. 25 I.C. 18; 45 I.C. 212; 5 L. L.J. 30 = 1923 Lah. 213; 37 I.C. 964 = (1917) M.W.N. 89; 33 I.C. 692 = (1916) 1 M.W.N. 256; 32 I.C. 990; 70 I.C. 900 = 1 Bur. L.J. 234. *See also* 39 Cal. 26 = 38 I.A. 200 = 16 C.W.N. 1 (P.C.). Although the price realised is grossly inadequate, the Court must be "satisfied upon the facts proved" that it was caused by material irregularity in publishing or conducting the sale. *See* 20 M. 159; 30 C. at p. 9; 18 A. 37; 18 A. 141. But *see also* 31 C. 815 (818). *See also* (1926) M.W.N. 631 = 24 L.W. 406 = 97 I.C. 574 = A.I.R. 1926 Mad. 959 and 6 C. W. N. 836. An adjournment of sale by bailiff without the Court's sanction and the absence of a fresh proclamation is not a sufficient ground in the absence of substantial injury. 20 I.C. 192 = 6 Bur. L.T. 65. Absence of publication of sale is not a sufficient ground without proof of loss. 5 Pat. L.W. 15 = 46 I.C. 84. Mere omission of publication in the Gazette is not ground to set aside sale in the absence of proof of substantial injury. 53 I.C. 794. Where only a part of the property advertised was sold without a fresh proclamation proof of substantial loss is necessary to set aside the sale. 11 L.W. 477. Mere omission to state value is not a serious irregularity. Proof of substantial loss in addition is necessary. 4 Lah. L.J. 441 = 1922 Lah. 35.

SUIT TO SET ASIDE SALE.—When an application under this rule is dismissed no suit under R. 92 will lie. 5 R. 606 = 105 I.C. 706. When a person seeks to set aside a sale by reason of a title adverse to that of the judgment-debtor at the date of attachment his proper remedy is a regular suit. 16 M. 476. A sale after proclamation notifying a decree giving prior charge, can be set aside only by a regular suit, if the decree giving prior charge was set aside subsequent to sale. 1925 Mad. 325. The rule does not apply when the fraud alleged is that a minor defendant was represented as major. A regular suit three years after his majority is the only remedy. 38 Mad. 1076 = 28 M.L.J. 525. When fraud is alleged, this rule applies before confirmation of sale. After confirmation a suit is the only remedy. 51 I.C. 447. *See also* A.I.R. 1926 Oudh 45. But *see* 44 Mad. 351 = 40 M.L.J. 55. *See also* 70 I.C. 675 = 1922 Pat. 422. In a suit to set aside sale, fraud need not be specifically alleged; an inference of suggestion is sufficient. 63 I. C. 425 = 19 A. L. J. 530. A member of a family not bound by a decree against some other members can file a separate suit to set aside the sale of the family properties and need not apply under this rule. 2 Pat. 386; *also* 6 Pat. L. T. 742 = 85 I.C. 1014. A suit lies in a Civil Court to declare that a sale held by a Collector is valid, and that an order passed by him under this rule setting aside the sale is inoperative. 25 A. 355.

[Allahabad.] Substitute the following for the original proviso in Order XXI, Rule 90 :—

“ Provided that—

(a) no sale.....or fraud ;

(b) no such application shall be entertained upon any ground which could have been taken by the applicant on or before the date on which the sale proclamation was drawn up.”

[Oudh.] Add the following as a proviso to Rule 90, Order XXI :—

“ Provided also that no such application for setting aside the sale shall be entertained upon any ground which could have been, but was not, put forward by the applicant before the commencement of the sale.”

Application by purchaser to set aside sale on ground of judgment-debtor having no saleable interest.

91. [S. 313.] The purchaser at any such sale in execution of a decree may apply to the Court to set aside the sale, on the ground that the judgment-debtor had no saleable interest in the property sold.

[Bombay.] The following rule shall be added as rule 91-A :—

“ 91-A. Where the execution of a decree has been transferred to the Collector and the sale has been conducted by the Collector or by an officer subordinate to the Collector, an application under rules 89, 90 or 91, and in the case of an application under rule 89, the deposit required by that rule if made to the Collector or the officer to whom the decree is referred for execution in

DISMISSAL FOR DEFAULT.—O. 9, R. 9 applies to an order of dismissal for default of an application under this rule. 59 I.C. 575=23 O.C. 349. See also 26 A. L. J. 382. But see 83 I.C. 749. See also 45 C.L.J. 60.

APPEAL.—An appeal lies from an order refusing to set aside a dismissal for default of an application under this rule. 33 I.C. 531=20 C.W.N. 1203. See also 38 Cal. 622=15 C. W. N. 875. When appeal lies from an order under this rule. 40 Cal. 635=40 I. A. 140=17 C. W. N. 637=25 M. L. J. 140 (P.C.). But see 16 I.C. 690=22 C.L.J. 266 ; 4 P.L.T. 735=74 I.C. 594. See also 46 C.L.J. 172=104 I.C. 825=A. I. R. 1927 Cal. 833. An appeal from an order dismissing an application under this rule cannot be the subject-matter of a second appeal. 18 C. 422 (F.B.) ; 21 C. 799 ; 27 C. 414. See also 11 M. 319 ; 40 All. 122=43 I.C. 522 ; 15 I.C. 679=16 C. W. N. 1015 ; 9 I. C. 135 ; 2 Pat. 916=4 Pat. L.T. 721 ; 56 I.C. 646=1 P. L. T. 267 ; 39 I.C. 374=11 Bur. L. T. 26 ; 62 I. C. 986 ; 94 I.C. 521=A. I. R. 1925 Lah. 624. No second appeal from an order under this rule. 87 I.C. 555 ; 30 C.W.N. 586=66 I.C. 669=A.I.R. 1926 Cal. 790 ; A.I.R. 1926 Cal. 229. An appeal lies from an order of dismissal on the ground that the application was time-barred. There is no second appeal even when the purchaser is the decree-holder and the applicant, the judgment-debtor. 6 Lah. 250=1925 Lah. 624. But want of notice of sale proclamation and undervaluation are objections under S. 47 and therefore a second appeal lies. 87 I.C. 413=1925 Mad. 1142.

REVISION.—See 9 M. 145. Revision by High Court is not generally possible because revision of a dismissal order will be confirmation, and, as such, that will be open to appeal under R. 92. 41 C.L.J. 286=1925 Cal. 510 ; but see 48 All. 286.

O. 21, R. 91.—This rule is the only exception to the doctrine of *caveat emptor*. 6 Lah. 283=1925 Lah. 467. The rule applies to the purchaser and its scope is limited to the case of a person whose property is purported to be sold, and who had no saleable interest therein. 20 C. 8 (P.C.) ; 27 A. 537 ; 9 C. 626 ; 3 A. 527. See 1 A. 568 (F.B.) ; 9 C. 217. Where the decree-holder purchased after entering satisfaction discovered

defect in judgment-debtor's title, the only remedy of the purchaser was to set aside the sale under this rule within limitation time under Art. 166, Lim. Act. He cannot take further execution of his decree. =104 I.C. 614=A. I. R. 1927 Mad. 835=53 M. L. J. 255. The rights conferred by the rule are not exhaustive. The dispossessed purchaser can sue for recovery of his money. 4 Lah. 354=1924 Lah. 115. But see 61 I.C. 805=13 Bur. L.T. 152. To set aside a sale under this rule the real owner is not a necessary party. The proper course is to proceed against him by suit. 24 I.C. 44=1 L.W. 412. A suit for recovery of purchase money does not lie. 1925 Lah. 199. Knowledge of want of title in the judgment-debtor will bar an application by the purchaser under this rule. 23 I. C. 383=7 Bur. L.T. 18. When a decree has been transferred to the Collector for execution a purchaser at a sale held by him can apply 9 A. 43. Concealment of encumbrances by decree-holder is no ground for setting aside the sale. 74 I.C. 134. Setting aside sale by decree-holder, ground for. 7 Pat. L.T. 25=A.I.R. 1925 Pat. 702. A decree-holder is not entitled to set aside sale on the ground of any adjustment between the parties after sale. 88 I. C. 537=1925 Pat. 702.

SALEABLE INTEREST.—Complete absence of any amount of saleable interest alone and not the fact of smallness of interest that this rule contemplates. 21 I. C. 774=19 C.W.N. 1291 ; also 46 I. C. 614=3 P. L. J. 516 ; 10 Cal. 368. Property not belonging to judgment-debtor—attachment and sale—void or valid—Limitation to set aside sale. 52 M.L.J. 148. Where a whole piece of land is sold, the Court is precluded from severing a parcel of land on the ground that the judgment-debtor has a saleable interest in one lot. 15 I.C. 109=23 M.L.J. 108. Where the same property has been sold twice over, the purchaser can sue for refund of purchase money from the creditors to whom it was paid. 40 All. 411=44 I.C. 697. But see *contra* in 28 C.W.N. 20=1924 Cal. 172 ; also 68 I. C. 126=25 C. W. N. 756. When the purchaser was the executor of the judgment-debtor in his personal capacity, he will not be debarred from applying to set aside the sale. 28 I. C. 898=19 C. W. N. 152. See also 2 Pat. 829.

accordance with any rule framed by the local government under section 70 of the Code, shall be deemed to have been made to or in the court within the meaning of rules 89, 90 and 91."

92. [Ss. 312 and 314.] (1) Where no application is made under rule 89, rule

Sale when to become absolute or be set aside.

90 or rule 91, or where such application is made and disallowed, the Court shall make an order confirming the sale, and thereupon the sale shall become absolute.

O. 21, R. 92.—Issue of certificate cures irregularities. 97 I. C. 757 (2). This rule does not apply where the property concerned was not sold at all, but was wrongly taken by the auction-purchaser. 6 P.L.T. 473=1925 Pat 376. Settlement between decree-holder and judgment-debtor before confirmation. No order of confirmation can be passed. 100 I. C. 565. This rule does not oust the inherent power of the Court to cancel a sale of its own motion. 46 Mad 583=44 M.L.J. 680. As to applicability to proceedings under the Madras Estates Land Act, see 22 L. W. 794. An order under this rule decides a question of title to the land in dispute between the parties. 16 C.L.J. 542=17 C.W.N. 84.

CONFIRMING SALE.—Absence of formal order of confirmation where in substance and effect the Court did confirm the sale is immaterial. 104 I. C. 384=A.I.R. 1927 Cal. 881. It is the actual sale which the Court confirms and not any transactions which by inadvertence, fraud or collusion may have been described in any reference to the sale made in a document subsequent thereto. 27 B. 341. A confirmation in entirety cannot be made when the sale has been set aside as regards one of the judgment-debtors. 61 I. C. 571. If satisfaction is reported before confirmation, a sale cannot be confirmed. 18 N. L. R. 134=1922 Nag. 248. The auction-purchaser has no absolute right for confirmation if there is any irregularity, though it may not be his. 38 Mad. 387=25 M. L. J. 198. When a wrong property has been attached and sold, the confirmation in respect of properties not attached is invalid. 41 Cal. 590=41 I. A. 38=18 C. W. N. 313=26 M. L. J. 89 (P. C.). The Court may refuse confirmation when the decree-debt was paid to the decree-holder after sale. 27 I. C. 601. Destruction of property after sale by act of God is no ground for refusing to confirm sale. 88 I. C. 693; A. I. R. 1926 Nag. 17. Sale can be set aside as regards a portion of the properties sold. 24 I. C. 64=18 C. W. N. 947.

SHALL BECOME ABSOLUTE.—See 7 M. 512; 17 C. 719; 21 B. 434. Also 12 M. L. T. 311=17 I. C. 242. Certificate cures irregularities. A. I. R. 1927 Cal. 82. A sale is final on confirmation. Its finality, in the absence of confirmation may also be inferred by conduct of the executing Court. 81 P. R. 1915=31 I. C. 254. Order dismissing application to set aside sale merely on default of appearance of parties cannot be regarded a confirmation of sale. 53 Cal. 679=96 I. C. 705=30 C. W. N. 570=A. I. R. 1926 Cal. 773. See also 29 O. C. 86=A. I. R. 1925 Oudh 622. An order against a pre-emptor in confirmation, as he did not appear before Collector, in a sale held by him, is final. 45 A. 203=21 A. L. J. 53 (F. B.). The legal effect of a sale depends on the decree-holder's status at the commencement of proceedings and not at the time of sale. 45 Cal. 294=21 C. W. N. 847.

The title of purchaser dates only from confirmation and not from sale. 9 I. C. 25=8 A. L. J. 32. But where the delay in confirmation is due to quarrel between rival bidders, interest should be paid up to confirmation on the sale amount, 22 I. C. 946=19 C. L. J. 358.

SUB-RULE (2).—The provisions of this rule are mandatory. The deposit should be made within 30 days from the date of sale. 33 I. C. 998=3 L. W. 271. Proceedings under sub-rule (2) are not final and a third party is not bound by it. 24 I. C. 44=1 L. W. 412.

PROVISO.—NOTICE.—Where the judgment-debtor is dead notice must issue to his representative. 7 B. 424. See *contra* 98 I. C. 69=A. I. R. 1927 Oudh 23. Formal notice is not necessary if there is actual notice otherwise. 1925 Cal 157; A. I. R. 1928 Cal. 267=107 I. C. 476. Notice itself need not be served within 30 days. 37 Bom. 387=19 I. C. 475; 68 I. C. 238=1922 Oudh 129; 69 I. C. 745=1922 All. 282; 107 I. C. 494. Service of notice under this rule on all persons affected by the sale is not compulsory. 67 I. C. 286. But any order passed behind the back of persons who had obtained orders for rateable distribution will not bind them as they are affected by the application to set aside the sale. 35 M. L. J. 604=48 I. C. 38. Notice to purchaser before setting aside sale is necessary. 10 I. C. 148=15 C. W. N. 685; 104 I. C. 148=A. I. R. 1927 Lah. 681. Otherwise the order is one without jurisdiction. 32 I. C. 891. Auction-purchaser is not a necessary party in the sense that in the application he should be described as one of the parties, 104 I. C. 148=A. I. R. 1927 Lah. 681.

LIMITATION.—The 30 days under sub-rule (2) is to be computed from the date of deposit under R. 84. 50 I. C. 914.

ILLUSTRATIVE CASES.—As to the effect on a sale by the death of the judgment-debtor after the sale is held and before it is confirmed, see 3 A. 765 (F.B.); 9 A. 411; 10 A. 83; 29 B. 435. Where an objection to confirmation is raised before the Collector who held the sale he must refer it to a Civil Court. If he confirms the sale, a suit will lie to declare the sale void. 44 Bom. 551=22 Bom. L. R. 759. Where there is no sale within the meaning of the Code, as to whether suit lies, see 16 C. 794 (708). The rejection of an application under this rule is no bar to a regular suit for the same purpose. 11 M. 269; 5 Lah. L. J. 9=1923 Lah. 224; 104 P. L. R. 1916=36 I. C. 212. But see 3 Bom. L. R. 463. Suit to set aside sale on the ground of fraud, after it is confirmed, does not lie. 89 I. C. 107. A suit will lie when the purchaser has been misled by any fraud or misrepresentation. 20 C. 8 (P. C.); 29 C. 370. See 47 A. 217=84 I. C. 1031. A judgment-debtor cannot file such a suit. 26 B. 40. The plaintiff in such a suit must be stamped as if it were a suit for the recovery of the property. 9 C. L. R. 231. As to whether the

(2) Where such application is made and allowed, and where, in the case of an application under rule 89, the deposit required by that rule is made within thirty days from the date of sale, the Court shall make an order setting aside the sale :

Provided that no order shall be made unless notice of the application has been given to all persons affected thereby.

(3) No suit to set aside an order made under this rule shall be brought by any person against whom such order is made.

[Allahabad and Oudh.] In O. XXI, R. 92 (1) after the words "the Court shall make" add "subject to the provisions of rule 58 (2)."

93. [S. 315, cls. (1) and (3).] Where a sale of immoveable property is set aside under rule 92, the purchaser shall be entitled to an order for repayment of his purchase-money, with or without interest as the Court may direct, against any person to whom it has been paid.

Return of purchase-money in certain cases.

rule applies to proceedings in execution of certificates under Bengal Act I of 1895, *see* 33 C. 451; 34 C. 787.

APPEAL AND REVISION.—No appeal lies against an order refusing to confirm sale, 98 I.C. 866=A. I. R. 1927 Lah. 71 (2). No appeal against an order of confirmation, 98 I. C. 69=A. I. R. 1927 Oudh 23. An order setting aside a sale is appealable by the purchaser, 40 All. 425=45 I. C. 773; 104 I. C. 148=A. I. R. 1927 Lah. 681. But not by a party to the suit under S. 47. 33 I. C. 235=3 L. W. 105. Where a party did not apply to have the order refusing to stay sale, revised nor applied to have the sale set aside, the appellate Court cannot stay proceedings relating to confirmation, 3 Rang. 132=89 I. C. 300. *See also* 29 Cal. 584. No second appeal lies from an order setting aside a sale. 22 C. 802; 28 C. 4; 41 I. C. 753; *also* 4 Lah. 243=1923 Lah. 592; 72 I. C. 788=1923 Lah. 287; 25 O. C. 78=1922 Oudh 146; 90 I. C. 228 (1)=42 C. L. J. 176; 2 O. W. N. 376=1925 Oudh 622. 101 I. C. 520=28 Punj. L. R. 130; A. I. R. 1926 Cal. 460. An order setting aside sale *suo motu* falls under S. 151 and not under this rule. The order is not appealable but revisable, 18 S. L. R. 130=1915 Sind 253. A revision lies on an order setting aside sale on the ground that the decree was amended after sale. 85 I. C. 660=1925 Cal. 157.

Sub-Rule (3).—A. I. R. 1926 Lah. 165.

O. 21, R. 93. SCOPE OF RULE.—The rule clearly implies that the purchase-money may be paid to the decree-holder before the date of the confirmation of sale, 12 C. 255; 8 M. 101; 1 A. 568 (F.B.); 6 W. R. 147; *also* 28 O. C. 136=1925 Oudh 404; 3 Pat. 947=88 I. C. 219. Under the old Code a suit will lie for the refund of purchase money when the judgment-debtor had no saleable interest in the property. Under the present Code, the only remedy is under this rule. *See* 42 I. C. 453; *also* 65 I. C. 230; 37 I. C. 763; (1920) M. W. N. 736=60 I. C. 66. But *see* A. I. R. 1926 Cal. 297; 53 Cal. 758=96 I. C. 64=43 C. L. J. 418=A. I. R. 1926 Cal. 971. Compare 41 I. C. 924; 36 All. 529=26 I. C. 59 with 43 All. 60=58 I. C. 105; *see also* 27 C. W. N. 183=50 C. 115; 23 M. L. J. 487=17 I. C. 437; 64 I. C. 628; 46 I. C. 783=22 C. W. N. 760; 39 Mad. 803=29 M. L. J. 467. To such a suit Art. 120 of the Lim. Act. will apply. 35 All. 419=19 I. C. 986. *See also* 30 C. W. N. 79=91 I. C. 768=A. I. R. 1926 Cal. 297. Where

the Court sale is not vitiated by fraud, the only extent to which the purchaser can claim relief is that indicated by this rule, 17 M. 231. As to whether the purchaser is entitled to a refund only when he is unable to obtain possession or is dispossessed, *see* 8 M. 99; *also* 46 I. C. 103=16 A. L. J. 511; 52 I. C. 818=15 N. L. R. 140. But *see* 22 O. C. 42=51 I. C. 95; 41 I. C. 200. The money is returnable only on the sale being set aside, 39 All. 114=37 I. C. 9. There is no implied warranty of title in Court sales, 46 I. C. 783=22 C. W. N. 760; 49 I. C. 359=(1918) M. W. N. 655; 29 I. C. 392=2 L. W. 517; 42 I. C. 440; 39 I. C. 763=2 P. L. J. 361; 52 I. C. 174=12 Bur. L. T. 211.

FARTIES.—The judgment-debtor is a necessary party to an application under this rule, 6 M. 197. *See also* 7 B. 424. When the sale is set aside it is doubtful whether the judgment-debtor or the decree-holder has to pay the poundage which a third party purchaser had to pay, 33 I. C. 235=3 L. W. 105. But *see* 39 Mad. 803=29 M. L. J. 467. No more than 6 per cent. interest should be allowed on the money to be returned, 45 I. C. 109=40 Mad. 1009. An order for refund can be executed as if it were a decree, 47 I. C. 630=23 M. L. T. 355.

SUIT.—After the purchase-money has been returned by order of Court, a separate suit lies for interest on the purchase money and the expenses of sale, 5 A. 364. The judgment-debtor is a necessary party to the suit, 10 C. W. N. 274. If the purchaser was misled by the carelessness of the Court in permitting a mistake in sale proclamation, he can either sue for refund of proportionate part of purchase-money or can set aside the sale, 9 Bur. L. T. 169=33 I. C. 1003. The purchaser can sue the judgment-debtor in cases of fraud, 46 Bom. 833=1922 Bom. 205. If the sale is not set aside, the purchaser who finds that the judgment-debtor had no title to a portion of the property cannot sue to recover a proportionate part of the purchase-money, 51 I. C. 595=52 P. R. 1919. But *see* 79 P. L. K. 1913=18 I. C. 795.

LIMITATION.—*See* 16 M. 361; 11 A. 372. *See also* 30 C. W. N. 79=91 I. C. 768=A. I. R. 1926 Cal. 297.

APPEAL.—No appeal lies from an order refusing a refund, 12 A. 397; 14 A. 201. But *see* 16 C. 535.

REVISION.—*See* 9 M. 437 and 17 M. 228.

94. [S. 316.] Where a sale of immoveable property has become absolute, the Court shall grant a certificate specifying the property sold

Certificate to purchaser.
and the name of the person who at the time of sale is declared to be the purchaser. Such certificate shall bear date the day on which the sale became absolute.

[Bangoon.] In O. XXI, the following shall be inserted as Rr. 94-A and 94-B :—

94-A. A copy of every sale certificate issued under Rule 94 shall be sent forthwith to the Sub-Registrar within whose sub-district the land sold or any part thereof is situate.

94-B. If in execution of a decree any interest in land is sold, the names and addresses of the purchaser or purchasers and the interest thereby acquired shall be certified to the Superintendent of Land Records as soon as the sale has been confirmed under Rule 92 (1).

O. 21, R. 94. SCOPE OF SECTION.—See 4 M. 172. The grant of certificate is ministerial, not judicial. 4 Pat. 760=90 I. C. 501. The rule imperatively requires the Court to grant a certificate and does not impose on the purchaser the duty of making an application, as a condition precedent. 4 M. 172. Also 1 P. L. J. 446=38 I. C. 576. A sale certificate is not a title-deed. It is merely evidence of title. 24 C. W. N. 1011=47 C. 1108.

TO WHOM CERTIFICATE IS GRANTED.—The certificate is to be issued in the name of the actual purchaser. 54 I. C. 726=24 C. W. N. 27. If the purchaser is dead, the certificate may be granted to his legal representative. 24 B. 120; 11 C. W. N. 158. The purchaser so long as he is not in possession of the property will be open to objections as to his title to the property. 45 Bom. 1186=23 Bom. L. R. 514. The purchaser gets only the rights of the vendor. 21 C. W. N. 854=41 I. C. 511. Also 29 I. C. 17; 12 I. C. 831=4 Bur. L. T. 135. The vendee even in the absence of a deed has a good title. 41 I. C. 850=22 C. W. N. 522. A certificate of sale issued in respect of property not attached is invalid. It cannot be treated as a misdescription of the property. The proper procedure is to commence execution proceedings over again. 41 Cal. 590=41 I. A. 38=26 M. L. J. 89 (P. C.). If certain items in the joint family property of a co-parcener are sold and if subsequently at a partition other items are allotted to the co-parcener, the purchaser cannot ask for a substitution of the properties. 37 M. L. J. 620=54 I. C. 515. An application for a sale certificate need not be in writing, and, if in writing, need not be stamped. 13 B. 670. Undisclosed principal of auction-purchaser—Right to sale certificate. 105 I. C. 880 (1).

CONTENTS AND EFFECT OF SALE CERTIFICATE.—See 18 B. 175; 21 W. R. 93; 27 B. 339; 28 B. 162. See 27 M. 142 (P. C.). The certificate completes the title of the purchaser. 12 I. C. 360=7 N. L. R. 134. Sale passes what is contained in the proclamation and what is attached. Certificate is not conclusive as to what is sold by its recital. 4 Pat. 760=99 I. C. 501; 7 Pat. L. T. 280=A. I. R. 1925 Pat. 615. Entries in sale certificates are not binding on strangers. 20 I. C. 753. Parties to sale cannot question title of the purchaser. 50 I. C. 157=21 O. C. 400. When the certificate recites that the right of redemption is sold, the right to redeem of any other co-parcener of the defendant is also barred. 41 Bom. 357=19 Bom. L. R. 75.

CONSTRUCTION OF.—Mere inaccuracy of language or misdescription will not vitiate a sale certificate. 7 W. R. 245; 15 W. R. 490. In certificates, boundaries prevail over areas, mentioned therein. 22 I. C. 26=18 C. L. J. 541. But area as detailed by survey and paimash numbers prevail over a sweeping general boundary. 11 M. L. T. 15. A purchaser is not bound by a wrong description regarding situation of land. 52 I. C. 739. Also 11 I. C. 395=13 C. L. J. 660. Extraneous evidence might be received to identify the property comprised in the sale certificate. 25 W. R. 401. Evidence to counteract terms of a certificate is inadmissible. 22 I. C. 280=19 C. L. J. 182. Evidence cannot be adduced to prove that more than what the certificate actually gives was purchased. 26 W. R. 104.

AMENDMENT OF.—A certificate granted by the Court can be amended on an application for review under S. 114. 26 C. 530. The amendment cannot be made *ex parte*. 23 W. R. 301. See also 23 I. C. 811=19 C. L. J. 209; 20 I. C. 588. An amendment showing a larger purchase is without jurisdiction. 18 I. C. 725. Notice to judgment-debtor is necessary. When an amendment is asked for, without notice, it is an irregularity. 16. L. W. 760=1922 Mad. 63.

CANCELLATION OF CERTIFICATE.—When certificate issued on a rent sale is cancelled, the decree for rent remains unaffected. 35 I. C. 339=20 C. W. N. 819. The auction-purchaser derives his title from the Court's act. Where the Court's act is induced by mistake it may be set aside. 38 Mad. 387=26 M. L. J. 198. The onus of proving fraud is on the judgment-debtor when the certificate is sought to be cancelled. 34 I. C. 911.

REGISTRATION.—A sale certificate requires registration. 4 B. 155; 3 M. 37. See 7 M. 248; 7 M. 418; 11 B. 588.

GRANT OF FRESH CERTIFICATE. See 9 B. 526.

DATE OF CERTIFICATE.—S. A. 84. When the mortgagee decree-holder is the purchaser the title relates back to the date of the mortgage. 9 I. C. 840. A certificate issued during pendency of a maintenance suit begun after sale is not affected by *lis pendens* and is complete. (1915) M. W. N. 15=28 M. L. J. 666.

LIMITATION.—The provisions of the Limitation Act relating to applications do not extend to applications to obtain a sale certificate. 4 M. 172. See also 6 B. 586.

APPEAL.—No appeal lies against an order refusing to amend a certificate. 23 A. 476. Also against an order granting an amendment. 26 C. 529.

95. [S. 318.] Where the immoveable property sold is in the occupancy of the judgment-debtor or of some person on his behalf or of

Delivery of property in occupancy of judgment-debtor.

some person claiming under a title created by the judgment-debtor subsequently to the attachment of such property and a certificate in respect thereof has been granted under rule 94, the Court shall, on the application of the purchaser, order delivery to be made by putting such purchaser or any person whom he may appoint to receive delivery on his behalf in possession of the property, and, if need be, by removing any person who refuses to vacate the same.

96. [S. 319.] Where the property sold is in the occupancy of a tenant or other person entitled to occupy the same and a certificate in

Delivery of property in occupancy of tenant.

respect thereof has been granted under rule 94, the Court shall, on the application of the purchaser, order delivery to

O. 21, R. 95. SCOPE.—A purchaser of Nankar rights need not apply for possession. 36 I. C. 768=3 O. L. J. 436. In execution delivery must be either under this or the next rule 55 I. C. 946. Any person claiming under the "purchaser" can also apply. See S. 146. See 28 M. 89, also 38 I. C. 338. A decree-holder entitled to possession cannot forcibly remove the judgment debtor from possession. 5 Bom. L. R. 977. An order for delivery of possession is not a mere general order to be worked in subsequent execution proceedings 43 I. C. 155=7 L. W. 16.

"POSSESSION".—Means such possession as the nature of the property is capable of. 5 O. W. N. 372=A. I. R. 1927 Oudh 251 (F. B.). As to different effects as to limitation and adverse possession created by formal and actual delivery, see 27 C. W. N. 24=1923 C. 138; also 23 I. C. 811=19 C. L. J. 209; 43 All. 520=19 A. L. J. 469; 39 All. 460=15 A. L. J. 361; 24 Bom. L. R. 232=46 Bom. 710; 43 Bom. 559=21 Bom. L. R. 357. But 43 I. C. 268=34 M. L. J. 97 (P. C.) decides that symbolical possession will interrupt title by adverse possession. As between the purchaser and judgment-debtor, the property vests in the purchaser. 34 C. 199. A purchase of right, title and interest of a co-sharer, passes title to what was in exclusive possession of the co-sharer. 38 I. C. 338. When an application under Rule 97 is dismissed, it does not bar a fresh application under this rule. 16 I. C. 432=(1913) M. W. N. 179. See also 25 L. W. 108.

AFTER GRANT OF SALE CERTIFICATE.—It is not incumbent on the Court to put a purchaser into possession until he has obtained a sale certificate. 5 B. 206. The right of a purchaser to apply for possession accrues when the certificate has been granted, that is to say, when it has been issued to him. 17 B. 228.

LIMITATION.—An order under this rule on an application by the decree-holder auction-purchaser is an order under S. 47 and is governed by Art. 182 of the Lim. Act. 103 I. C. 335=A. I. R. 1927 Nag. 294.

SUIT.—An auction-purchaser may sue for possession without proceeding under this rule and R. 96. 9 C. 602; 14 C. 644; 10 M. 55; also 89 I. C. 134. A suit will lie when an attempt by the auction-purchaser to obtain possession in execution proceedings has proved unsuccessful. 12 C. 169. Also when possession given under the rule has been infructuous. 10 C. 402. He can also file a suit when his application under this

rule is rejected as being beyond time. 29 A. 463; 19 A. 499; 7 C. 418; 4 A. 184; 8 M. L. J. 193; 18 A. 36. But see 90 I. C. 952=1925 Mad. 1198. If possession may be obtained by purchaser of joint interest except in the case of purchase of interest of an undivided co-parcener. See 102 I. C. 311=A. I. R. 1927 Sind 199. When a person other than the judgment-debtor resists the purchaser from getting possession, he cannot again apply under this rule. He can only apply under R. 97, or file a suit. 26 A. 365. But see 13 M. 504. But see also 24 I. C. 512. When once possession is given, the decree cannot be re-executed on the plaintiff being dispossessed. 6 W. R. 108. Judgment-debtor's possession after delivery of possession to purchaser is trespass. 3 Pat. L. T. 335=66 I. C. 817. Subsequent ouster gives rise to a fresh cause of action. 5 B. 387, and a fresh start for computation of limitation. 43 All. 520=19 A. L. J. 469.

APPEAL.—No appeal lies from an order allowing auction-purchaser's application. 29 A. 207. See 18 A. 36; 6 C. L. J. 749; 40 All. 216=16 A. L. J. 150; 20 C. W. N. 829=1 Pat. L. J. 232. (F. B.). An appeal under S. 47 and no suit lies from an order rejecting an application under this rule. 90 I. C. 952=1925 Mad. 1198. On this, see 53 Cal. 781=95 I. C. 494=43 C. L. J. 345=30 C. W. N. 649=A. I. R. 1926 Cal. 798 (F. B.).

O. 21, R. 96.—21 A. 269; 17 M. L. J. 598. This rule will not apply to property in the hands of a receiver, and he can be sued only with leave of Court. 63 I. C. 685=14 S. L. R. 137. As to distinction between symbolical and paper delivery, see 44 I. C. 839. An order under this rule is a judicial order. 45 I. C. 608. And therefore after the warrant for delivery cannot be stopped. 1 Luck. Cas. 226=103 I. C. 695 (1)=A. I. R. 1927 Oudh 304. Symbolical possession does not of itself effect a transfer of possession by a person not a party to the decree. 42 I. C. 449=3 P. L. W. 133. A formal possession under this rule does not affect strangers at all. 45 I. C. 606=20 O. C. 70. The remedy of the purchaser of an undivided share is a suit for partition, when he is obstructed by one entitled to possession of the whole. 25 M. L. T. 153=49 I. C. 629. Purchaser buying with knowledge of subsisting tenancy will be deemed to know of its duration as well. 6 Bur. L. J. 7=100 I. C. 1014 (1)=A. I. R. 1927 Rang. 127 (2). There is no period of limitation under this rule for an application for delivery of possession after confirmation. 40 I. C. 605.

be made by affixing a copy of the certificate of sale in some conspicuous place on the property, and proclaiming to the occupant by beat of drum or other customary mode at some convenient place, that the interest of the judgment-debtor has been transferred to the purchaser.

Resistance to delivery of possession to decree-holder or purchaser.

97. [Ss. 328 and 334.] (1) Where the holder of a decree for the possession of immoveable property or the purchaser of any such property sold in execution of a decree is resisted or obstructed by any person in obtaining possession of the property, he may make an application to the Court complaining of such

Resistance or obstruction to possession of immoveable property.

resistance or obstruction.

(2) The Court shall fix a day for investigating the matter and shall summon the party against whom the application is made to appear and answer the same.

98. [Ss. 329, 330 and 334.] Where the Court is satisfied that the resistance or obstruction was occasioned without any just cause by the judgment-debtor or by some other person at his instigation, it shall direct that the applicant be put into posses-

Resistance or obstruction by judgment debtor.

O. 21, R. 97. SCOPE OF RULE.—Proceedings under this rule whether execution proceedings. See A.I.R. 1926 Mad. 412 = 23 L. W. 227 = (1926) M. W. N. 245 = 92 I. C. 533 = 50 M. L. J. 200. Person obstructing need not be physically present. 23 L. W. 157 = (1926) M. W. N. 163 = 92 I. C. 61 = A. I. R. 1926 Mad. 359. A decree-holder is not bound to pursue his remedies under this rule. 8 B. 602 ; 10 M. 53. This rule is solely for the benefit of a purchaser at a sale in execution. 13 M. 506. But see 26 A. 365. Also A. I. R. 1926 Mad. 353. The enquiry into objections is not confined to cases where the order is for possession only but also where the order is for demolition as well. 4 Bur. L. J. 178 = 1925 Rang. 374. When the decree is silent regarding the building the executing Court cannot order its demolition. 5 Bur. L. J. 201 = 100 I. C. 301 (1) = A. I. R. 1927 Rang. 82. See also 92 I. C. 667 (1) = A. I. R. 1925 Rang. 374.

DECREE FOR POSSESSION OF PROPERTY.—A decree for partition is a decree for possession of property. 16 M. 127. The rule applies to a decree for possession under S. 2 of the Sp. Rel. Act. 23 L. W. 157 = (1926) M. W. N. 163 = 92 I. C. 61 = A. I. R. 1926 Mad. 353. A sub-tenant cannot resist. He is not in possession on his own account. 23 Bom. L. R. 1316 = 1922 Bom. 449 (2). Neither can a sub-lessee of a sub-tenant of the judgment-debtor. 23 Bom. L. R. 1251 = 46 Bom. 526. As to when symbolical delivery is effective, see 1925 Mad. 1140 = 49 M. L. J. 303.

FRESH APPLICATION.—When an application by an auction-purchaser not being the decree-holder is rendered infructuous on account of obstruction, he need not apply under this rule but can put in another application if within time fixed by Art. 167 of the Lim. Act. 4 P. L. J. 94 = 49 I. C. 150 (F. B.). When once a delivery has been complete, a second application is not maintainable. 43 M. L. J. 179 = 1923 Mad. 25. After resistance a fresh application for possession can be made under R. 95. 13 M. 504. But see 26 A. 365. Obstruction to decree-holder getting possession—Application taking objection not filed—Subsequent obstruction—Fresh application lies. (1928) M. W. N. 236 (24 I. C. 512, F.). When once delivery is given, any subsequent act of resistance cannot be the subject of a complaint

under this rule. 13 W. R. 418.

LIMITATION.—A minor is to apply within a month after coming of age. 11 B. 173. See 13 M. 504. As to effect of order upholding claim of sons of judgment-debtor in their own right, see 83 I. C. 923 = 1924 All. 495.

SUIT.—In execution of a decree for possession against lessee in favour of lessor, if the sub-lessee obstructs, the remedy is by suit. 60 I. C. 969 = 47 Cal. 907. When the obstruction is by members of an undivided family to whom the property belonged but who were not parties to the suit, the remedy is by suit only. 14 I. C. 282. A suit by auction-purchaser for possession is maintainable even if the express words are absent in the decree. 57 I. C. 177. When an application under this rule is rejected, the applicant can file a regular suit. 8 B. 481. When an application by mortgagee decree-holder under this rule is dismissed, the remedy is by suit and not an appeal against the order of dismissal. 53 I. C. 923. A purchaser of immoveable property sold for arrears of Abkari revenue is entitled to be put in possession by the Civil Court by removal of obstruction if any. 1 M. L. J. 594 ; 13 W. R. 467.

O. 21, R. 98. SCOPE.—The rule applies only to obstruction by judgment-debtor or some other person at his instigation. 31 I. C. 799. A purchaser *pendente lite* comes within the definition of a judgment-debtor. 85 I. C. 1004 = 1925 Cal. 1243. Auction-purchaser is a representative of the judgment-debtor and proceedings can be taken against him under S. 146. 12 L. W. 350 = 59 I. C. 894. Provincial Small Cause Court can order ejectment where the obstruction is offered by the judgment-debtor. 45 M. L. J. 66 = 1924 M. 74. The words "at the instance of the applicant" have been inserted to give effect to the ruling in 26 M. 494. In case possession is ordered, it should be given in one of the ways prescribed by the Code. 8 W. R. 79. Acquiescence in the obstruction in a prior attempt for possession does not prevent another application to remove second obstruction. 66 I. C. 722 = (1921) M. W. N. 698. A Court has no jurisdiction to proceed with an enquiry which results in an order under O. 21, R. 98 without giving notice to the objector. 106 I. C. 491 (1)

sion of the property, and where the applicant is still resisted or obstructed in obtaining possession, the Court may also, at the instance of the applicant, order the judgment-debtor, or any person acting at his instigation, to be detained in the civil prison for a term which may extend to thirty days.

[Allahabad and Oudh.] In Order 21 Rule 98 after the words "or by some other person at his instigation" add "or on his behalf"; after "or any person acting at his instigation" add "or on his behalf"; after "for a term which may extend to thirty days" add "and may order the person or persons whom it holds responsible for such resistance or obstructions to pay jointly or severally in addition to costs, reasonable compensation to the decree-holder for the delay and expense caused to him in obtaining possession. The order made thereon shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree".

99. [S. 331.] Where the Court is satisfied that the resistance or obstruction was occasioned by any person (other than the judgment-debtor) claiming in good faith to be in possession of the property on his own account or on account of some person other than the judgment-debtor, the Court shall make an order dismissing the application.

Resistance or obstruction
by *bona fide* claimant.

100. [Cf. Ss. 332 and 335.] (1) Where any person other than the judgment-debtor is dispossessed of immovable property by the holder of a decree for the possession of such property or, where such property has been sold in execution of a decree,

Dispossession by decree-
holder or purchaser.

APPEAL.—No appeal lies against an order made under this rule. 3 M. 81. See 21 B. 392; 13 M. 504; 14 C. 235. See also 51 Bom. 158 = 29 Bom. L. R. 230 = 101 I. C. 40 = A. I. R. 1927 Bom. 184. But see *contra* 66 I. C. 722 = (1921) M. W. N. 698. When the purchaser is decree-holder, and the obstructor is the judgment-debtor, an order under this rule is appealable as a decree. 4 Pat. 726 = 6 P. L. T. 351; but see 92 I. C. 544 = A. I. R. 1926 Cal. 985.

O. 21, R. 99.—The decision under this rule is final so far as possession is concerned subject to a suit under R. 103. 51 I. C. 787 = 51 P. W. R. 1919. See also 99 I. C. 219 = 2 Luck. 269 = 3 O. W. N. 778 = A. I. R. 1926 Oudh 610.

"POSSESSION" is not limited to actual physical possession, but includes also constructive possession. 25 B. 478. The Court should satisfy itself as to whether the person obstructing was in possession of the property in question on his own account. 27 Bom. 302. The investigation of claims under this rule is not limited to the fact of possession. Any question of title in connection with the right to possession may be determined. 14 B. 627. See also 27 A. 453. Applicability of the doctrine of *lis pendens*. See 3 O. W. N. 778 = A. I. R. 1926 Oudh 610.

ON THEIR OWN ACCOUNT.—Unmarried sisters under Hindu Law have a right of residence until they are married in the family dwelling-house and cannot be ousted. 43 Mad. 635 = 38 M. L. J. 433. The onus of proving a better title than the plaintiff's rests with the persons obstructing and they may prove their title as a defence. 22 B. 967; see also 10 C. 50; 26 M. 517; 14 B. 627; 18 B. 40.

LIMITATION.—Where an application for possession was dismissed for default, limitation for suit to establish right does not start from this date under Art. 11 of the Lim. Act. 39 I. C. 797 = 15 A. L. J. 420.

APPEAL.—No appeal lies from an order under this rule. 9 Bom. L. R. 936 = A. I. R. 1926 Oudh 610.

REVISION.—Revision lies. 9 Bom. L. R. 936.
O. 21, R. 100. MEANING OF TERMS.—"Dis-

possessed," meaning of. 20 B. 353 (F. B.) See also 30 C. 710. "Judgment-debtor". 17 A. 222 (F. B.). Includes his representatives. 42 I. C. 526 = 2 P. L. J. 478.

SCOPE.—The rule cannot apply where S. 47 is applicable. 17 A. at p. 481. Nor where the execution has been transferred to the Collector. 37 Bom. 488 = 15 Bom. L. R. 389. As to applicability to proceedings under the Tenancy Act. See 23 A. L. J. 23. No declaratory order can be made under this rule. 103 I. C. 231 = A. I. R. 1927 Nag. 300.

APPLICABILITY.—A representative of the judgment-debtor under Sec. 47 cannot apply under this rule. 65 I. C. 476. Joint possession is not a sufficient ground to maintain an application under this rule. 83 I. C. 599 = 1924 Pat. 1198. But see 18 C. L. J. 138 = 18 C. W. N. 695; 68 I. C. 394 = 1923 Nag. 52. A usufructuary mortgage in possession can apply under this rule. 70 I. C. 306 = 1 P. 159. The purchaser of a holding not transferable by custom cannot claim under this rule. 3 P. L. J. 579 = 43 I. C. 969. See also 95 I. C. 146 = A. I. R. 1926 Cal. 956. But see *contra* 53 Cal. 913 = 99 I. C. 718 = A. I. R. 1927 Cal. 156. Transferee of property from a person against whom an order under O. 21, R. 58 has been made can apply under this rule. 98 I. C. 541 = A. I. R. 1927 Cal. 339. In case of excessive execution proper remedy of judgment-debtor is to apply for restoration under Sec. 47 and not under this rule. 38 All. 339 = 34 I. C. 231. In a claim of an exonerated party enquiry should be confined to possession only and not extended to title. 40 Mad. 964 = 38 I. C. 297 = 32 M. L. J. 532.

SUIT.—A person can file a regular suit without proceeding under this rule. 10 M. 53. A person dispossessed in execution of a decree against another is not bound to institute proceedings under this rule. 27 M. 262. See also 5 M. L. J. 252. When dispossessed under this rule a mortgagee decree-holder purchaser cannot claim compensation. 63 I. C. 126 = 25 C. W. N. 756. Equities in favour of the purchaser could be considered in the suit and not under this rule. 24 L. W. 389 = 97 I. C. 605 = A. I. R. 1926 Mad. 1127.

by the purchaser thereof, he may make an application to the Court complaining of such dispossession.

(2) The Court shall fix a day for investigating the matter and shall summon the party against whom the application is made to appear and answer the same.

101. [Ss. 332 and 335.] Where the Court is satisfied that the applicant was in possession of the property on his own account or on account of some person other than the judgment-debtor, it shall direct that the applicant be put into possession of the property.

Bona fide claimant to be restored to possession.

102. [8. 333.] Nothing in rules 99 and 101 shall apply to resistance or obstruction in execution of a decree for the possession of immoveable property by a person to whom the judgment-debtor has transferred the property after the institution of the suit in which the decree was passed or to the dispossession of any such person.

Rules not applicable to transferee *pendente lite*.

103. [S. 335, para. 2.] Any party not being a judgment-debtor against whom an order is made under rule 98, rule 99 or rule 101 may institute a suit to establish the right which he claims to the present possession of the property; but, subject to the result of such suit (if any), the order shall be conclusive.

Orders conclusive subject to regular suit.

APPEAL.—No appeal lies from an order under this rule. 41 I.C. 891=57 P.R. 1917. But where the question is between the parties to the suit or their representatives, an appeal lies. 41 M.L.J. 54=63 I.C. 730.

O. 21, R. 101.—An order under this rule is conclusive until displaced by a suit. 27 I.C. 29=(1914) M.W.N. 897. But it does not affect a party's right to possession upon redemption. 54 I.C. 276=17 N.L.R. 33. When the execution is transferred to the Collector, the Court has no power to act under this rule. But when the Collector's power is exhausted, the Court which made the decree should act. 38 Bom. 673=26 I.C. 266. No question of title can be investigated under this rule. 22 I.C. 707=19 C.L.J. 13.

ON HIS OWN ACCOUNT.—A claimant in possession on his own account though without title is entitled to succeed under this rule. 98 I.C. 541=A.I.R. 1927 Cal. 339. A mortgagor in possession of the mortgage is in possession on his own account. 2 A. 94. A member of a joint Hindu family cannot say that he is in possession of any particular portion of the joint property on his own account. 17 B. at p. 721. Possession by enjoyment and receipt of rent is enough. 15 W. R. 70. But see 33 C. 487.

LIMITATION.—An order dismissing a claim must be challenged within one year. 45 M.L.J. 690=47 Mad. 100.

REVISION.—An order under this rule cannot be rectified in revision as a remedy lies under Rule 103. 129 P.L.R. 1911=10 I.C. 183.

O. 21, R. 102.—See 42 I.C. 523=6 L.W. 568; A.I.R. 1926 Mad. 963=51 M.L.J. 256.

O. 21, R. 103.—This rule applies only where an order under Rule 98, 99 or 101 has been passed. 69 I.C. 557=1923 Lah. 145. The orders referred to do not refer to those passed without investigation and not on the merits. 23 N.L.R. 94=97 I.C. 178=A.I.R. 1926 Nag. 423. The rule is confined to suits for possession by purchaser under his purchase. It does not bar suits based on other causes of action. 30 C.W.N. 163=42 C.L.J. 578. This rule applies where strangers

are involved, and Sec. 47 where the parties in the suit are involved. 41 M.L.J. 54=63 I.C. 730. See also 39 M.L.T. 281. The word "party" means party to the petition and to the execution. 43 Mad. 696=39 M.L.J. 456. See also 102 I.C. 446=8 Pat.L.T. 654. Symbolical delivery does not amount to dispossession. 1 L.W. 31=24 I.C. 771. A transfer by vendee from the defendant is valid in the absence of an order preventing the vendee from disposing of the property pending the suit. 89 I.C. 990=1925 Bom. 413.

SUIT.—In a suit under this rule the plaintiff's title alone and not the mode in which or the point of time at which the ouster took place is material. 16 I.C. 741=18 C.W.N. 473. Where a claim was not treated as a suit, but the question was treated as an interlocutory proceeding an order will not operate as *res judicata* in any subsequent proceeding. 44 M.L.J. 443=72 I.C. 582=1923 Mad. 514. Where the decree-holder sells his own property by mistake, his only remedy is by suit. 15 L.W. 272=1922 Mad. 63.

FORUM.—The suit can be instituted only in the Court within whose jurisdiction the property lies. 6 Bom.L.R. 301. The proof required in the suit is not that of actual present possession merely, but includes a right to present possession as well. 44 Mad. 227=39 M.L.J. 626.

LIMITATION.—The suit must be filed within one year from the date of the order. Art. 11, Lim. Act, applies. See 9 M.L.J. 131; 9 M.L.J. 175; 34 C. 491; 27 M. 25; also 103 P.L.R. 1916=36 I.C. 211. Not only is a suit barred, but defence will also be barred after the prescribed time. 38 I.C. 216. But if an order for delivery was not enforced, the defence can be raised at any time to such a suit. 45 I.C. 24=23 M.L.T. 213. A mortgagee whose claim has been rejected can sue after the lapse of one year. 29 C. 25. Dismissal for default of an application under R. 101 is not an order on merits and so limitation for suit does not start from the date of the dismissal. 45 I.C. 102=14 N.L.R. 66. As to appeal, see 90 I.C. 952=1925 Mad. 1198.

[Allahabad.] Add the following Rules to O. 21.

" 104. When the certificate prescribed by section 41 is received by the Court which sent the decree for execution, it shall cause the necessary details as to the results of execution to be entered in its register of Civil Suits before the papers are transmitted to the record room.

105. Every attachment of moveable property under S. 43 of Negotiable Instruments under rule 51, and of immoveable property under rule 54, shall be made through a Civil Court Amin, or Bailiff, unless special reasons render it necessary that any other agency should be employed; in which case those reasons shall be stated in the hand-writing of the presiding Judge himself in the order for attachment.

106. When the property which it is sought to bring to sale is immoveable property within the definition of the same contained in the law for the time being in force relating to the registration of documents, and the decree is not sent to the Collector for execution under Section 68, the Court, before ordering a sale, shall call upon the sub-registrar within whose sub-district such property is situate to search his registers and report as to what incumbrances, if any, it appears from the registers to be liable.

107. Where an application is made for the sale of land or of any interest in land, the Court shall, before ordering sale thereof, call upon the parties to state whether such land is or is not ancestral land within the meaning of Notification No. 1807-1—238-10, dated 7th October, 1911, of the Local Government, and shall fix a date for determining the said question. On the day so fixed, or on any date to which the enquiry may have been adjourned, the Court may take such evidence, by affidavit or otherwise, as it may deem necessary; and may also call for a report from the Collector of the District as to whether such land or any portion thereof is ancestral land. After considering the evidence and the report, if any, the Court shall determine whether such land, or any, and what part of it, is ancestral land. The result of the enquiry shall be noted in an order made for the purpose by the presiding Judge in his own handwriting.

108. When the property which it is sought to bring to sale is revenue paying or revenue free land or any interest in such land, and the decree is not sent to the Collector for execution under section 68, the Court, before ordering a sale, shall also call upon the Collector in whose district such property is situate to report whether the property is subject to any (and, if so, to what) outstanding claims on the part of Government.

109. The reports of the sub-registrar and Collector shall be open to the inspection of the parties or their pleaders, free of charge, between the time of the receipt, by the Court and the declaration of the result of the enquiry. No fees are payable in respect of search and report by the sub-registrar and Collector.

110. The result of the enquiry under rule 66 shall be noted in an order made for the purpose by the presiding Judge in his own handwriting. The Court may in its discretion adjourn the inquiry, provided that the reasons for the adjournment are stated in writing, and that no more adjournments are made than are necessary for the purposes of the enquiry.

111. If after proclamation of the intended sale has been made any matter is brought to the notice of the Court which it considers material for purchasers to know, the Court shall cause the same to be notified to intending purchasers, when the property is put up for sale.

112. The costs of the proceedings under rules 66, 106 and 108 shall be paid in the first instance by the decree-holder; but they shall be charged as part of the costs of the execution unless the Court, for reasons to be specified in writing, shall consider that they shall either wholly or in part be omitted therefrom.

113. (Cancelled.)

114. Whenever any Civil Court has sold, in execution of a decree or other order, any house or other building situated within the limits of a Military cantonment or station, it shall, as soon as the sale has been confirmed, forward to the Commanding Officer of such cantonment or station for his information and for record in the brigade or other proper office, a written notice that such sale has taken place, and such notice shall contain full particulars of the property sold and of the name and address of the purchaser.

115. Whenever guns or other arms in respect of which licences have to be taken by purchasers under the Indian Arms Act (XI of 1878) are sold by public auction in execution of decrees by order of a Civil Court, the Court directing the sale shall give due notice to the Magistrate of the district of the names and addresses of the purchasers, and of the time and place of the intended delivery to the purchasers of such arms, so that proper steps may be taken by the police to enforce the requirements of the Indian Arms Act.

116. When an application is made for the attachment of livestock or other moveable property, the decree-holder shall pay into Court in cash such sum as will cover the costs of the maintenance and custody of the property for fifteen days. If within three clear days before the expiry of any such period or fifteen days the amount of such costs for such further period as the Court may direct be not paid into Court, the Court, on receiving a report thereof from the proper officer, may issue an order for the withdrawal of the attachment and direct by whom the costs of the attachment are to be paid.

117. Livestock which has been attached in execution of a decree shall ordinarily be left at the place where the attachment is made either in custody of the judgment-debtor on his furnishing security, or in that some land-holder or other respectable person willing to undertake the responsibility of its custody and to produce it when required by the Court.

118. If the custody of live-stock cannot be provided for in the manner described in the last preceding rule, the animals attached shall be removed to the nearest pound established under the Cattle Trespass Act, 1871, and committed to the custody of the pound-keeper, who shall enter in a register—(a) the number and description of the animals; (b) the day and hour on and at which they were committed to his custody; (c) the name of the attaching officer or his subordinate by whom they were committed to his custody and shall give such attaching officer or subordinate a copy of the entry.

119. For every animal committed to the custody of the pound-keeper as aforesaid, a charge shall be levied as rent for the use of the pound for each fifteen or part of fifteen days during which such custody continues according to the scale prescribed under Section 12 of Act (I of 1871). And the sums so levied shall be sent to the Treasury for credit to the Municipal or District Board, as the case may be, under whose jurisdiction the pound is. All such sums shall be applied in the same manner as fines levied under Section 12 of the said Cattle Trespass Act.

120. The pound-keeper shall take charge of, feed and water animals attached and committed as aforesaid until they are withdrawn from his custody as hereinafter provided and he shall be entitled to be paid for their maintenance at such rates as may be, from time to time, prescribed under proper authority. Such rates shall, for animals specified in the section mentioned in the last preceding rule, not exceed the rates for the time being fixed under Section 5 of the same Act. In any case for special reasons to be recorded in writing the Court may require payment to be made for maintenance at higher rates than those prescribed.

121. The charges herein authorized for the maintenance of live-stock shall be paid to the pound-keeper by the attaching officer for the first fifteen days at the time the animals are committed to his custody, and thereafter for such further period as the Court may direct, at the commencement of such period. Payments for such maintenance so made in excess of the sum due for the number of days during which the animals may be in the custody of the pound-keeper shall be refunded by him to the attaching officer.

122. Animals attached and committed as aforesaid shall not be released from custody by the pound-keeper except on the written order of the Court, or of the attaching officer, or of the officer appointed to conduct the sale; the person receiving the animals, on their being so released, shall sign a receipt for them in the register mentioned in rule 118.

123. For the safe custody of movable property other than live stock while under attachment, the attaching officer shall, subject to approval by the Court, make such arrangements as may be most convenient and economical.

124. With the permission of the Court the attaching officer may place one or more persons in special charge of such property.

125. The fee for the services of each such persons shall be payable in the manner prescribed in rule 116. It shall not be less than two annas, and shall ordinarily not be more than three and a half-annas per diem. The Court may at its discretion allow a higher fee; but if it do so, it shall state in writing its reasons for allowing an exceptional rate.

126. When the services of such person are no longer required the attaching officer shall give him a certificate on a counterfoil form of the number of days he has served and of the amount due to him and on the presentation of such certificate to the Court which ordered the attachment, the amount shall be paid to him in the presence of the presiding Judge; Provided that, where the amount does not exceed Rs. 5, it may be paid to the *Sahna* by money order on requisition by the Amin, and the presentation of the certificate may be dispensed with.

127. When in consequence of an order of attachment being withdrawn or of some other reason, the person has not been employed or has remained in charge of the property for a shorter time than that for which payment has been made in respect of his services, the fee paid shall be refunded in whole or in part, as the case may be.

128. Fees paid into Court under the foregoing rules shall be entered in the Register of Petty Receipts and Re-payments.

129. When any sum levied under rule 119 is remitted to the Treasury, it shall be accompanied by an order in triplicate (in the form given as Form 9 of the Municipal Account Code), of which one part will be forwarded by the Treasury Officials to the District or Municipal Board, as the case may be. A note that the same has been paid into the Treasury as rent for the use of the pound, will be recorded on the extract from the pass book.

130. The cost of repairing attached property for sale, or of conveying it to the place where it is to be kept or sold, shall be payable by the decree holder to the attaching officer. In the event of the decree-holder failing to provide the necessary funds, the attaching officer shall report his default to the Court, and the Court may thereupon issue an order for the withdrawal of the attachment and direct by whom the costs of the attachment are to be paid.

131. Nothing in these rules shall be deemed to prevent the Court from issuing and serving on the judgment-debtor simultaneously the notices required by Order 21, rules 22, 66 and 107.

132. For the purpose of all proceedings under this order service on any party shall be deemed to be sufficient if effected at the address for service referred to in Order VIII, rule 11, subject to the provisions of Order VII, rule 24.

133. If the garnishee disputes his liability the court, instead of making such order, may order that any issue or question necessary for determining his liability be tried as though it were an issue in a suit; and upon the determination of such issue shall pass such order upon the notice as shall be just.

134. Whenever in any proceedings under these rules it is alleged, or appears to the court to be probable that the debt or property attached or sought to be attached belongs to some third person or that any third person has a lien or charge upon, or interest in it, the court may order such third person to appear and state the nature of his claim, if any, upon such debt or property and prove the same, if necessary.

135. After hearing such third person, and any other person who may subsequently be ordered to appear, or in the case of such third or other person not appearing when ordered, the court may pass such order as is hereinbefore provided or make such other order as it shall think fit, upon such terms in all cases with respect to the lien, charge or interest, if any, of such third or other person as to such court shall seem just and reasonable.

136. Payment or delivery made by the garnishee whether in execution of an order under these rules or otherwise shall be a valid discharge to him as against the judgment-debtor, or any other person ordered to appear as aforesaid, for the amount paid, delivered or realized although such order or the judgment may be set aside or reversed.

137. Debts owing from a firm carrying on business within the jurisdiction of the court may be attached under these rules, although one or more members of such firm may be resident out of the jurisdiction. Provided that any person having the control or management of the partnership business or any member of the firm within the jurisdiction is served with the garnishee order. An appearance by any member pursuant to an order shall be a sufficient appearance by the firm.

138. The costs of any application under these rules and of any proceedings arising therefrom or incidental thereto, or any order made thereon, shall be in the discretion of the court.

139. (1) Where the liability of any garnishee has been tried and determined under these rules, the order shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree.

(2) Orders not covered by clause (1) shall be appealable as orders made in execution.

Illustration.—An application for a garnishee order is dismissed either on the ground that the debt is secured by charge or that there is no *prima facie* evidence of debt due. This order is appealable as an order in execution.

140. All the rules in this Code relating to service upon either plaintiffs or defendants at the address filed or subsequently altered under Order VII or Order VIII shall apply to all proceedings taken under Order XXI or Section 47.

The following form shall be used under the provisions of rule 131 of Order XXI :—

Suit No.

of 19 .

Plaintiff,

Versus

Defendant.

To

WHEREAS it is alleged that a debt of Rs. is due from you to the judgment-debtor :

Or that you are liable to deliver to the above-named judgment-debtor, the property set forth in the schedule hereto attached; take notice that you are hereby required on or before the day of 19 to pay into this court the said sum of Rs.

Or to deliver, or account to the amin of this court for the moveable property detailed in the attached schedule, or otherwise to appear in person or by advocate, vakil or authorized agent in this court at 10-30 in the forenoon of the day aforesaid and show cause to the contrary, in default whereof an order for the payment of the said sum, or for the delivery of the said property, may be passed against you (1)

Dated this day of

19 .
Munsif
Subordinate Judge.

At

[Rangoon.] To O. 21 add the following as Rule 104 :—

"104. If, in execution of a decree, any interest in land which has been surveyed is sold, the names and addresses of the purchaser or purchasers, and the interest thereby acquired, shall be certified to the Superintendent of Land Records as soon as the sale has been confined under rule 92 (1)."

[Oudh.] Added by Oudh Chief Court. O. XXI, Rr. 104—114.

104. The Court may, in the case of any debt due to the judgment-debtor (other than a debt secured by a mortgage or a charge or a negotiable instrument, or a debt recoverable only in a revenue court), or any moveable property not in the possession of the judgment-debtor, issue a notice to any person (hereinafter called the garnishee) liable to pay such debt, or to deliver or account for such movable property, calling upon him to appear before the Court and show cause why he should not pay or deliver into the Court the debt due from or the property deliverable by

him to such judgment-debtor, or so much thereof as may be sufficient to satisfy the decree and the cost of execution.

105. If the garnishee does not forthwith or within such time as the Court may allow, pay or deliver into Court the amount due from or the property deliverable by him to the judgment-debtor, or so much as may be sufficient to satisfy the decree and the cost of execution and does not dispute his liability to pay such debt or deliver such moveable property, or if he does not appear in answer to the notice, then the Court may order the garnishee to comply with the terms of such notice, and on such order execution may issue as though such order were a decree against him.

106. If the garnishee disputes his liability the Court, instead of making such order, may order that any issue or question necessary for determining his liability be tried as though it were an issue in a suit; and upon the determination of such issue shall pass such order upon the notice as shall be just.

107. Whenever in any proceedings under these rules it is alleged or appears to the Court to be probable, that the debt or property attached or sought to be attached belongs to some third person or that any third person has a lien or charge upon, or an interest in it, the Court may order such third person to appear and state the nature of his claim, if any, upon such debt or property and prove the same, if necessary.

108. After hearing such third person, and any other person who may subsequently be ordered to appear, or in the case of such third or other person not appearing when ordered, the Court may pass such order as is hereinbefore provided or make such other order as it shall think fit, upon such terms in all cases with respect to the lien, charge or interest, if any, of such third or other person as to such Court shall seem just and reasonable.

109. Payment or delivery made by the garnishee whether in execution or an order under these rules or otherwise shall be a valid discharge to him as against the judgment-debtor, or any other person ordered to appear as aforesaid, for the amount paid, delivered or realised although such order or the judgment may be set aside or reversed.

110. Debts owing from a firm carrying on business within the jurisdiction of the Court may be attached under these rules, although one or more members of such firm may be resident out of the jurisdiction :

Provided that any person having the control or management of the partnership business or any member of the firm within the jurisdiction is served with the garnishee order. An appearance by any member pursuant to an order shall be sufficient appearance by the firm.

111. The costs of any application under these rules and of any proceedings arising therefrom or incidental thereto, or any order made thereon, shall be in the discretion of the Court.

112 (1) Where the liability of any garnishee has been tried and determined under these rules, the order shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree.

(2) Orders not covered by sub-rule (1) shall be appealable as orders made in execution.

Illustration.—An application for a garnishee order is dismissed either on the ground that the debt is secured by a charge or that there is no *prima facie* evidence of debt due. This order is appealable as an order in execution.

113. All the rules in this Code relating to service on either plaintiffs or defendants at the address filed or subsequently altered under Order VII or Order VIII shall apply to all proceedings taken under Order XXI or section 47.

114. The following form shall be used under the provision of rule 104 of Order XXI :—

Execution Case No.

of 19 .

Decree-holder,

versus

Judgment-debtor.

To

WHEREAS it is alleged that a debt of Rs. is due from you to the judgment-debtor.

Or that you are liable to deliver to the abovenamed judgment-debtor the property set forth in the schedule hereto attached; take notice that you are hereby required on or before the day of 19 , to pay into this Court the said sum of Rs. to deliver, or account to the Nazir of this Court for the movable property detailed in the attached schedule, or otherwise to appear in person or by advocate, vakil or authorized agent in this Court at 10-30 in the forenoon of the day aforesaid and show cause to the contrary, in default whereof an order for the payment of the said sum, or for the delivery of the said property may be passed against you.

Dated this

day of

19 .

Munsif

Subordinate Judge

At.

ORDER XXII.

DEATH, MARRIAGE AND INSOLVENCY OF PARTIES.

1. [S. 361.] The death of a plaintiff or defendant shall not cause the suit to abate if the right to sue survives.

O. 22. R. 1. SCOPE OF RULE.—In order to work abatement of a suit or appeal it is not necessary for the Court to pass any order. 48 A. 334=93 I. C. 313=1926 All. 217. Rules 1 to 10 do not contemplate the representatives of the judgment-debtor being placed on the record after the appellate decree has been passed. 18 B. 224. The language of the rule seems to indicate that the cause of action of the original and revived suit must be the same, and that no fresh cause of action can be imported into the revised suit. 22 Cal. 92 (97). Substitution of the legal representative of a deceased plaintiff or defendant at one stage of a suit, as for instance on an appeal from an interlocutory order in the suit, is effective for all future stages of the suit. 45 Cal. 94=33 M.L.J. 486=42 I.C. 43=44 I.A. 218 (P. C.).

RIGHT TO SUE.—This is based upon facts which go to make up what is called "the cause of action". 22 C. 92. It includes a "right to appeal", and "a right to prosecute by law or to obtain relief by names of legal procedure" 26 B. 597 at p. 599 and 607; 33 I. C. 45=38 Mad. 1064; 9 Bur. L. T. 28=34 I. C. 249; *see also* 74 I. C. 14; 50 C. 650. The words "if the right to sue survives" mean, if the cause of action survive or continue. 26 B. at p. 599. *See also* 2 Luck. 464=4 O. W. N. 235=101 I. C. 174=A. I. R. 1927 Oudh 156; 104 I. C. 308=A. I. R. 1927 Nag. 343.

BURDEN OF PROOF.—As to survival of right to sue is on the person desiring to prosecute the suit or appeal. 48 All. 630=24 A.L.J. 796=A. I. R. 1926 All. 610.

ILLUSTRATIVE CASES.—When the cause of action against the deceased defendant is based on a tort or a breach of contract of personal service, and the deceased has not left any personal assets, the right to sue does not survive. 8 M. L. J. 180. *See also* 9 Bur. L. T. 38=34 I. C. 249 (action for slander); 62 P. R. 1915=28 I. C. 455 (action for personal injuries). *See also* 43 All. 630. Personal right does not abate after decree. 59 I. C. 939. Decree is property capable of inheritance. (*Ibid.*) Actions which are not personal to the plaintiff survive after the death of minor plaintiff (as, suit by minor repudiating will of father). 27 I. C. 396=27 M. L. J. 674. Right to sue *in forma pauperis* is a personal right and does not survive to the heirs of the pauper. 64 I. C. 63; as also suit for damages for breach of contract of marriage. 44 Bom. 446=55 I. C. 624. The cause of action in a suit by a father for the possession of his minor children, who are in the possession of the defendant does not survive against the widow of the deceased defendant. 25 B. 574. When a submission to arbitration has been made a rule of Court, and the right is one which is not personal the proceedings do not abate by reason of the death of a party. In such cases the procedure laid down in R. 5 should be followed. 13 M. L. J. 311. When a defendant in a suit for damages for

wrongful arrest and malicious prosecution dies pending suit, the suit abates. 13 B. 677; 65 I. C. 66=4 P. L. J. 676=52 I. C. 348; 38 I. C. 823=31 M. L. J. 772. *See also* 22 L. W. 858=50 M. L. J. 34. Suit to enforce right to a *pala* or worship does not abate on the death of the *paladar* as the cause of action is not merely of a personal nature. 53 Cal. 132=30 C. W. N. 389=94 I. C. 212=A. I. R. 1926 Cal. 490; 34 I. C. 4 (suit by manager of joint Hindu family—No survival to other members). Suit under S. 92, C. P. C.—Death of one of the plaintiffs obtaining sanction. Neither the suit nor an appeal therefrom abates. 47 M. L. J. 745=1925 Mad. 244. If in a defamation suit plaintiff gets a decree, and the defendant appeals but dies before the hearing of the appeal, the appeal does not abate and his son can be placed on the record. 26 B. 597. *See also* 26 M. 499 and 9 A. 131 F. B.; 31 C. 99; 34 I. C. 249=9 Bur. L. J. 38. As to second appeal *see* 62 P. R. 1915=28 I. C. 455. As to suits by Hindu reversioners—Declaratory suit by one survives to next reversioners. *See* 38 Mad. 406=42 I.A. 125 (P.C.). The following are not good law. 22 M. L. J. 375=15 I. C. 213; 16 I. C. 865=12 M. L. T. 664; 12 M. L. T. 199=15 I. C. 461=23 M. L. J. 719; 27 Mad. 588. *See now* the Full Bench case, 41 Mad. 659=35 M.L.J. 57 (F.B.). *See further* 18 I. C. 329=65 P.R. 1913. Suit by unmarried daughter as plaintiff—Right to sue survives to her married sisters. 38 All. 111=32 I.C. 104=14 A.L.J. 8. In joint Hindu family, surviving members represent the deceased member. 33 I.C. 123=14 A.L.J. 255. Malabar Tarwad—Suit by Karnavan and some other members complaining of mis-management by Anandravan. In Karnavan dying and defendant becoming Karnavan—Other plaintiffs can continue suit. *See* 22 L. W. 205=A.I.R. 1925 Mad. 894. Application for letters of administration by residuary legatee does not survive to his heirs. 51 I. C. 76=45 Cal. 862. Right to be appointed guardian of reversioner—if survives to his son. *See* 116 P. L. R. 1917=42 I. C. 410. In a suit for a declaration that defendant is not lawful wife of plaintiff, the cause of action does not survive. 52 I. C. 545=87 P. R. 1919. Where there is only an application for leave to sue *in forma pauperis*, and the applicant dies before leave is granted, the right to sue as a pauper being a personal right, cannot survive. 33 C. 1163; *see also* 64 I. C. 63. When an agent suing on behalf of an undisclosed principal, dies pending the suit, the suit should after the death of the agent be continued, if at all by the agent's representative, and not by the principal. 17 M. L. J. 116. Where pending a suit filed by a partner on behalf of a firm he dies, there is no question of abatement at all. 93 I. C. 144=A. I. R. 1926 All. 351. As to principles governing survival of cause of action in suits founded on torts (as) for damages for malicious prosecution. *See* 22 L. W. 858=49 Mad. 208=A.I.R. 1926 Mad. 243=50 M. L. J. 34.

2. [S. 362.] Where there are more plaintiffs or defendants than one, and any of

Procedure where one of several plaintiffs or defendants dies and right to sue survives.

them dies, and where the right to sue survives to the surviving plaintiff or plaintiffs alone, or against the surviving defendant or defendants alone, the Court shall cause an entry to that effect to be made on the record, and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants.

3. [Ss. 363 and 365.] (1) Where one of two or more plaintiffs dies and the right to

Procedure in case of death of one of several plaintiffs or of sole plaintiffs.

sue does not survive to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.

O. 22, R. 2. SCOPE OF RR. 2 AND 3.—*See* 14 I.C. 544=11 M.L.T. 409. As to what is meant by right to sue, *see* under R. 1. A legal representative must continue the litigation on the cause of action sued upon and cannot set up her own individual right. 99 I. C. 160=A. I. R. 1927 Nag. 162. The rule does not apply to proceedings in Mamlatdars' Courts. 17 B. 645; 6 W.R. 2, Ref.; 27 B. 284; 30 M. 67; 10 C. W. N. 891. Appeal against decree for rent. One of the plaintiffs who is a respondent dies. Heirs not added—Held appeal should be dismissed. 10 C. W. N. 891. The rule is not confined in its application to cases in which the right to sue survives against the surviving defendants by reason of some circumstances antecedent to the suit. 4 C. L. J. 568; 11 C. W. N. 186. In a suit against a dead man, substitution of legal representatives is a nullity. 25 Bom. L. R. 7=1924 Bom. 109; 51 I. C. 160. Scheme suit does not abate on death of original plaintiff. 48 Cal. 493 (P. C.); 47 M. L. J. 745=85 I. C. 666. Appeal decreed in ignorance of appellant's death—Decree is nullity. 27 Bom. L. R. 91=1925 Bom. 290. If an appeal against several respondents abates, it abates against all, if their interests cannot be discriminated. 64 I. C. 49. *See also* 54 I. C. 396=30 C. L. J. 203 (co-sharers 27 Cal. 417; 25 C. L. J. 469, Fol.); 51 I. C. 409=29 C. L. J. 461 (co-sharers); 47 I. C. 638=28 C. L. J. 201 (co-sharer landlords). *See also* 33 I. C. 1006=29 P. W. R. 1916; 94 I. C. 300=A. I. R. 1926 Lah. 474; 91 I. C. 558 (Lah.) 630. It would be otherwise if the liability of each of the defendants or respondents be separately ascertained. 1 R. 618=1924 Rang. 127. In case of several of joint-tort-feasors on death of one cause of action survives against others. 106 P. R. 1915=32 I. C. 18. Delay in bringing representatives on record may be excused in a proper case. 74 I. C. 912=1924 P. 319. Where legal representatives are already on record, no application is necessary. 66 I. C. 24=24 O. C. 374; 7 Lah. 399=27 Punj. L. R. 668. Application must be made in time by person ultimately found to be legal representative; another's application in time would not help the rightful party. 49 I. C. 34=15 N. L. R. 21. *See also* 11 P. L. R. 1921=59 I. C. 238. If, in a joint Hindu family, on death of manager, other members are substituted, there is no abatement. 51 P. L. R. 1913=18 I. C. 44. *See also* 14 I. C. 491=11 M. L. T. 240. If wrong legal representatives be brought on record without notice to respondent he can object at time of hearing.

44 M. L. J. 60=69 I. C. 529=1923 Mad. 367. On this rule *see also* 4 Lah. 72=(1924) Lah. 45; 35 Bom. 393=11 I. C. 559=13 Bom. L. R. 517 (limitation.)

O. 22, R. 3. CONSTRUCTION OF RULE.—*See* 5 Bur. L. T. 77=15 I. C. 366=6 L. B. R. 52.

SCOPE OF RULE.—*See* 18 B. 224 under R. 1. *See also* 17 M. 209; 26 M. 224. All legal representatives must be brought on record as plaintiffs or appellants, or if any refuses to join, as, defendants or respondents. 20 I. C. 366=11 A. L. J. 719; 16 All. 211. *See also* 28 Punj. L. R. 3=100 I. C. 418=A. I. R. 1927 Lah. 94. If some do not choose to be brought on record there is no abatement, A. I. R. 1927 Mad. 1071. Scheme suit does not abate on death of original plaintiffs. 48 Cal. 493=22 L. W. 123; 13 L. W. 318=17 N. L. R. 37=25 C. W. N. 794=62 I. C. 737=48 I. A. 12 (P. C.); nor a suit by creditors to set aside fraudulent transfers. 27 Punj. L. R. 219=7 Lah. 12=93 I. C. 1013=A. I. R. 1926 Lah. 167 nor do execution proceedings. 2 P. L. T. 245=61 I. C. 4. Nordo proceedings for ascertainment of mesne profits (*Ibid.*) In a suit by two partners, death of one partner does not cause whole suit to abate. 60 I. C. 755=19 A. L. J. 266. Appeal by two co-sharer landlords against the dismissal of their suit for rent abates on the death of one of them. 97 I. C. 569 (1)=7 Pat. L. J. 797=A. I. R. 1927 Pat. 44. *See also* 67 I. C. 10=34 C. L. J. 405. Decree passed in appeal after the death of a joint plaintiff without legal representatives being brought on record is a nullity. 45 All. 286=21 A. L. J. 91=71 I. C. 321. On the death of a *pro forma* plaintiff, it is not necessary to bring legal representatives on record. 22 I. C. 929; *so also* in the case of *pro forma* defendant. 1923 Lah. 647; *so also* in the case of *pro forma* respondent in appeal. 1923 Lah. 350; 45 All. 286=21 A. L. J. 91. Regular application is necessary. The fact that legal representatives were brought on record in memo. of objections would not prevent appeal from abating. 52 I. C. 591=25 P. W. R. 1919. But *see* 45 I. C. 949=34 M. L. J. 177. The rule only requires an application to be made by a person claiming to be the legal representative, and it is not necessary that all the representatives should apply. 10 B. 220. Right to sue in r. 3 includes in the case of mortgage suits right to obtain final decree after preliminary decree. 45 Mad. 872=42 M. L. J. 301=(1923) Mad. 237. But *see* 2 Luck. 464=4 O. W. N. 285=101 I. C. 174=A. I. R. 1927 Oudh 136; 4 O. W. N. 1002. When a

[S. 366, para. 1.] (2) Where within the time limited by law no application is made under sub-rule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the Court may award to him the costs which he may have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff.

4. [S. 368.] (1) Where one of two or more defendants dies and the right to sue

Procedure in case of death of one of several defendants or of sole defendant.

does not survive against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal

person sues for a debt and dies pending suit, his widow holding a succession certificate is alone entitled to be brought on record as his legal representative. 26 M. 224. Substitution of legal representative at one stage of suit is effective in all subsequent stages. 45 Cal. 94=33 M. L. J. 486=44 I. A. 218 (P. C.) Order for abatement of suit is a decree, and ought not to be made without notice to plaintiff. (*Ibid.*) P. C. Order setting aside abatement and bringing legal representatives on record is a conditional and not an absolute order. 8 Lah. L. J. 451=27 Punj. L. R. 638=94 I. C. 243=A. I. R. 1926 Lah. 422.

LEGAL REPRESENTATIVE.—These words must, where there are more than one legal representative, be read in the plural. 20 A. 341; *see also* 23 C. 636; 18 N. L. R. 21=(1923) Nag. 101. Admission of person as legal representative, effect of. 70 I. C. 209=1923 Nag. 209. Omission to bring legal representative of sole appellant (deceased) is not mere irregularity curable under s. 90. 9 I. C. 977. Propriety of order setting aside abatement of suit. *See* 47 Bom. 92=(1922) Bom. 449. What is sufficient cause for setting aside order of abatement, *see* 1 Lah. L. J. 26. The rule relates to the case of the plaintiff dying before judgment. It has no application to a case where a plaintiff dies after decree, and his representative wishes to appeal. 3 M. 237. *See also* 9 C. W. N. 171; 9 C. W. N. 361; 10 A. 223 F. B.; 8 M. 300; 23 M. 125. In a case in which an action would abate upon the death of the plaintiff before judgment, the action could not abate if final decree had been obtained before the death of plaintiff. 9 A. 134. F. B.; *see also* 26 B. 579. Death of one of several defendants (appellants) causes the appeal to abate only so far as the deceased appellant is concerned and not the whole. 10 I. C. 27. An objection that a person is not the legal representative of the deceased plaintiff must be taken at the earliest opportunity. When once the name of a person is entered on the record under this rule, the Court is bound to proceed with the suit, 26 M. 224. *See also* 70 I. C. 209=1923 Nag. 209. An *ex parte* order under this rule does not preclude the defendant from urging at the hearing that the suit has abated. 11 C. W. N. 698. It would be open to a defendant or respondent to apply to bring on record the legal representative. 90 I. C. 72=L. R. 6 A. 614.

ESTOPPEL.—Against original party also binds legal representative. 19 I. C. 258.

APPEAL.—An appeal lies against an order passed under this rule. 17 M. 209. But *see also* 1 Lah. 493=2 Lah. L. J. 738; 49 M. 450=95 I. C. 489=50 M. L. J. 485=73 I. C. 489=A. I. R.

1926 Mad. 586 (F. B.) An order dismissing a suit as abated, is a decree. 26 M. 224. *See also* 17 M. L. J. Recent cases 69, and 10 B. 220.

REVISION.—An order passed by a District Judge dismissing an appeal from the order of a Munsiff that the name of a representative already brought on the record be struck out, is liable to revision under S. 115. 26 M. 224.

LIMITATION.—*See* Lim. Act, Art. 176; 3 I. C. 438=10 Bom. L. T. 27; 5 Bur. L. T. 77=15 I. C. 366=6 L. B. R. 52; 13 I. C. 313=22 M. L. J. 169. (If one legal representative be brought on record in time, there is no bar of time, if other are brought in subsequently); 52 I. C. 614; 71 I. C. 176=1923 Nag. 166.

DISCRETION OF COURT.—*See* 43 M. L. J. 147=45 Mad. 703.

O. 22, R. 4. SCOPE OF RULE.—The rule is applicable to Insolvency proceedings. 7 A. 734. But *see* 10 A. 264 (F. B.) Sufficient compliance is made with the provisions of the rule, if the appellant has impleaded all the persons known to him and *bona fide* omitted one subsequently brought on record. 7 Lah. 438=28 Punj. L. R. 287=A. I. R. 1927 Lah. 6. (23 M. 125, foll. 30 A. 117, not foll.) *See also* 7 Pat. L. T. 746=94 I. C. 209=A. I. R. 1926 Pat. 276; 4 Pat. 320=89 I. C. 280=A. I. R. 1925 Pat. 551.

APPLICABILITY.—Suit for accounts. Death of defendant after preliminary decree and before final decree—suit abates. 87 I. C. 818=A. I. R. 1926 Cal. 308. So also in mortgage suit. 89 I. C. 238=A. I. R. 1926 Sind 20; but *see infra*. A suit does not abate on account of the death of a defendant after a preliminary decree is passed. The word 'suit' means only such proceedings as are antecedent to the passing of a preliminary decree or otherwise. 2 Luck. 464=4 O. W. N. 235=101 I. C. 174=A. I. R. 1927 Oudh 156. Where mortgagors obtain a preliminary decree for redemption, and some of them die and the rest are their representatives in interest by right of survivorship, R. 10 and not this rule applies and there is no period of limitation for the right to apply for the substitution of the representatives of the deceased. (*Ibid.*) *See also* 29 Bom. L. R. 244=101 I. C. 129=A. I. R. 1927 Bom. 156; but *see contra* 49 A. 310=100 I. C. 288=25 A. L. J. 175=A. I. R. 1927 All. 272. When the defendant mentioned in an application to sue *in forma pauperis* dies, the applicant is not affected by the provisions of this rule. 7 B. 373. The rule does not apply to cases in which an assignment or creation of an interest pending the appeal plus the death of the assignor, arises. Such cases fall under R. 10. q B. 151. This rule and not R. 9 applies to the bringing on record of the

representative of the deceased defendant to be made a party and shall proceed with the suit.

(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.

(3) Where within the time limited by law no application is made under sub-rule (1), the suit shall abate as against the deceased defendant.

5. [S. 367.]

Determination of question
as to legal representative.

Where a question arises as to whether any person is or is not the legal representative of a deceased plaintiff or a deceased defendant, such question shall be determined by the Court.

representatives of a deceased defendant, in a suit for dissolution of a partnership. 16 B. 27. When some of several respondents die and their representatives are not added, the appeal abates only so far as they are concerned, and must proceed against the others. 26 B. 203. *See also* 22 B. 718; 94 I. C. 30; 48 A. 251=91 I. C. 259=A.I.R. 1926 All. 234; 4 Pat. 53=89 I. C. 236 (2)=A.I.R. 1925 P. 480=7 Pat. L. T. 124; 9 Lah. L.J. 136=102 I. C. 304=28 Punj. L. R. 241; 100 I. C. 839=28 Punj. L. R. 148; 1925 Nag. 299; 85 I. C. 563=1925 All. 623; 4 Pat. 187=1925 Pat. 434; 6 Lah. 233=86 I. C. 1; 49 Bom. 118=85 I. C. 197. But in cases where the cause of action is one and indivisible like pre-emption suit and representative suit, the appeal will fail in toto. 90 I. C. 324=23 A.L.J. 935; 89 I. C. 378; 89 I. C. 953 (2)=23 A.L.J. 938=48 A. 81=A.I. R. 1926 All. 128; 94 I. C. 253 (1); 92 I. C. 35=26 Pun. L.R. 797. Where the rights of the defendants as a body were in question *held* the entire suit abates on account of the death of one. 8 Lah. L.J. 575=28 Punj. L.R. 52=99 I. C. 970=A.I.R. 1927 Lah. 87; 1925 All. 141=22 A.L.J. 1033; 89 I. C. 162; *see also* 8 L. L. J. 134=94 I. C. 563=A.I.R. 1926 Lah. 332; 94 I. C. 300=A.I.R. 1926 Lah. 474 (joint decree). An appeal as a whole does not abate on the death of a *pro forma* respondent. 1925 Lah. 651 (2)=92 I. C. 261=7 Lah. L.J. 466. Where the question in dispute in the suit does not affect the deceased defendant the suit does not abate. 26 Punj. L. R. 825=91 I. C. 32=A. I. R. 1926 Lah. 189; 28 Pun. L.R. 330=9 Lah. L.J. 174=102 I. C. 280=A.I.R. 1927 Lah. 468. The question of the abatement of the whole suit depends on whether the deceased was such a necessary party that his absence should result in the dismissal of the whole suit. 91 I. C. 991=A.I.R. 1926 Mad. 379. Where pending an appeal against a joint decree in favour of three co-sharers, one of the respondents died, *held* the appeal cannot proceed in the absence of the legal representatives of the deceased. 53 Cal. 752=95 I. C. 649 (2)=43 C.L.J. 401=A.I.R. 1926 Cal. 893. *See also* 100 I. C. 482=A. I. R. 1927 All. 331. Legal representatives already on record—Application still necessary. 90 I. C. 41=7 Lah. L.J. 544=A.I.R. 1926 Lah. 37; 3 Pat. 853=A.I.R. 1925 Pat. 123. But *see* 7 Lah. 39=27 Punj. L. R. 668=A.I.R. 1926 Lah. 607. When a suit is instituted against a dead man, the Court cannot substitute the representative as defendants. 17 M.L.J. 551. The general rule is that, as the representative of a deceased plaintiff can only prosecute the cause of action as originally framed, so the defendant can raise no other defence against him than he

could have raised against the deceased. 19 M. 347.

Sub-B. (3).—No order declaring abatement necessary. The suit abates automatically. 7 Lah. 73=94 I. C. 422=A.I.R. 1926 Lah. 234, 48 A. 334=24 A.L.J. 369=93 I. C. 313=A. I. R. 1926 All. 217 (F.B.) overruling 44 A. 459 and upholding 42 A. 540.

LIMITATION.—*See* Art. 175. 10 A. 264 (F.B.) and 16 B. 27; 87 I. C. 632=1925 Lah. 599 (1).

REVISION.—*See* 26 M. 224; 21 L.W. 21=1925 Mad. 456.

O. 22, R. 5. SCOPE OF RULE.—The dispute need not be between persons claiming to represent the deceased plaintiff. 18 M. 496. *See also* 21 Bom. 162 (168). The rule applies even when there is but one claimant and the defendant denies his representative character. 17 M. 209 (210). Contest as to who is legal representative. The dispute should be decided at or before, the final hearing on merits. 27 B. 162; 21 L.W. 21=1925 Mad. 456. Intermeddler cannot be recognised as legal representative. 21 L. W. 21=86 I. C. 178. *See* 42 Mad. 76=35 M.L.J. 632; 44 I. C. 987=(1918) M.W.N. 198. When two persons claim to represent the judgment-debtor, both of them might be placed on the record with the consent of the decree-holder. 13 B. 22. *See also* 8 M. 300; 18 B. 224; 26 M. 224. The appointment of a legal representative of a deceased plaintiff under this rule is not a determination of an issue which is properly raised in the suit. 23 A. 109. As to delegation of powers of inquiry as to who is legal representative, *see* 39 I. C. 893. Wrong legal representative brought on record—Proper legal representative's rights. 43 M.L.J. 486=46 M. 190. Proper legal representatives will be in a position to get the benefit of the decree and thus to be in possession of assets. (*Ibid.*) Inquiry into right—Question of—Adoption. 16 I. C. 798; 9 I. C. 603=9 M.L.T. 403. "COURT."—The word "Court" means the Court before whom the question arises, *viz.*, the trial Court if the question arises at the trial stage or the appellate Court if the question arises in appeal. 3 Pat. L. T. 380=65 I. C. 131. The effect of allowing an appeal to be heard and a decree passed in ignorance of the death of one of the joint plaintiffs is that the judgment and decree become a nullity. 53 I. C. 548. Death after hearing but before judgment does not affect the decree. 106 P. R. 1915=32 I. C. 18.

RIGHT OF SUIT.—Suit to establish title by legal representative. 40 Mad. 177=30 M.L.J. 274.

APPEAL.—An order refusing to implead a person as a representative of a deceased plaintiff is an adjudication of his claim and hence appealable. 43 Mad. 812=39 M. L. J. 218. *See also*

[Madras.] Add the following as a proviso to R. 5 of O. XXII :—

Provided that an appellate Court before determining it, may direct any lower Court to take evidence thereon and to return the evidence so taken together with its finding and reasons and may take such finding and reasons into consideration in determining the question.

6. Notwithstanding anything contained in the foregoing rules, whether the cause

No abatement by reason of death after hearing.

of action survives or not, there shall be no abatement by reason of the death of either party between the conclusion of the hearing and the pronouncing of the judgment, but judgment may in such case be pronounced notwithstanding the death and shall have the same force and effect as if it had been pronounced before the death took place.

7. [S. 359.] (1) The marriage of a female plaintiff or defendant shall not cause

Suit not abated by marriage of female party.

the suit to abate, but the suit may notwithstanding be proceeded with to judgment, and, where the decree is against a female defendant, it may be executed against her alone.

(2) Where the husband is by law liable for the debts of his wife, the decree may, with the permission of the Court, be executed against the husband also ; and, in case of judgment for the wife, execution of the decree may, with such permission, be issued upon the application of the husband, where the husband is by law entitled to the subject-matter of the decree.

8. (1) The insolvency of a plaintiff in any suit which the assignee or receiver

When plaintiff's insolvency bars suit.

might maintain for the benefit of his creditors, shall not cause the suit to abate, unless such assignee or receiver declines to continue the suit or (unless for any special reason the Court otherwise directs) to give security for the costs thereof within such time as the Court may direct.

(2) Where the assignee or receiver neglects or refuses to continue the suit and

Procedure when assignee fails to continue suit or give security.

to give such security within the time so ordered, the defendant may apply for the dismissal of the suit on the ground of the plaintiff's insolvency, and the Court may make an order dismissing the suit and awarding to the defendant

12 All. 200. But see *contra*. 91 I.C. 166 = A.I.R. 1926 Lah. 181 ; 38 I.C. 833 = 13 N.L.R. 32 ; 20 I.C. 898 = 16 O.C. 350 ; 20 I.C. 950 = 25 M.L.J. 279 ; 49 Mad. 450 = 50 M.L.J. 485 = 95 I.C. 489 = A.I.R. 1926 Mad. 586 (F.B.).

O. 22, R. 6. SCOPE OF RULE.—The rule supersedes the ruling in A.W.N. (1904) p. 4 ; and follows the rulings in 19 B. 807. A decree passed after defendant's death without a legal representative representing him afterwards, is a nullity. 17 C. L. J. 634 (13 All. 53 P. C. ; 26 Bom. 317 ; 17 All. 478, Foll.) The decree might be impeached in execution without resorting to separate suit. 20 I. C. 506 = 17 C. L. J. 634 ; 16 I.C. 58 = 16 C. L. J. 571 ; 2 Lah. L. J. 144 ; 38 M. L. J. 413 = 42 I. C. 530 ; 31 I. C. 198 = 38 Mad. 682 ; 40 All. 423 = 45 I. C. 21. Decree against a dead person is void *ab initio*—Execution proceedings also void. 11 I.C. 782 = 4 Bur. L.T. 164. An appellant died on the day fixed for the hearing of the appeal but before the hearing. *Held*, his legal representatives were not bound by the decree and the appeal must be reheard, 55 I. C. 498. See also 43 I.C. 161 = 14 N.L.R. 71. Death during argument—Judgment pronounced without legal representative is bad. 48 I. C. 859 ; 106 P. R. 1915. Death of party before judgment—Withdrawal of a suit. 4 Pat. L.J. 240 = 50 I.C. 529 (F.B.) Where one of the appellants to His Majesty-in-Council died before the passing of the Privy Council decree, and no substitution was made, the Privy Council decree

could not be held void by the Courts in India. 1920 Pat. 266. (1 P.L.T. 325, Foll.) Failure to substitute would have rendered the decree void only in so far as it was in favour of the deceased appellant. 58 I.C. 212 = 5 Pat. L.J. 314 ; 56 I.C. 322 = 1920 Pat. 266.

O. 22, R. 8. SCOPE AND APPLICATION OF RULE.—The rule applies only to a case where there is an actual bankruptcy or insolvency in which there is an assignee or receiver appointed. It does not apply to a case where there has been a mere application, 27 C. 219. Where plaintiff was adjudicated insolvent subsequent to suit—Notice to Official Receiver should be given. 12 L.W. 551 = 61 I.C. 300 = (1920) M.W.N. 704. The Official Assignee must be given an opportunity to prosecute the suit. 12 B. 257. For form of order see 16 B. 404. Where pending an appeal the appellant becomes insolvent the appeal can be continued only by the Receiver in insolvency. 18 I. C. 922. No limitation for Official Assignee to apply for substitution. 43 All. 621 = 19 A.L.J. 685. Where a plaintiff after instituting a suit *in forma pauperis* is adjudicated an insolvent the Receiver in insolvency can continue the suit in the same way as the insolvent. 47 I.C. 577 = 16 A.L.J. 440. As to what constitutes costs for which the Official Assignee is to give security, see 28 Bom. L.R. 1074 = 97 I.C. 797 = A.I.R. 1926 Bom. 533. Suit instituted by insolvent after adjudication—Receiver cannot continue it. 23 I.C. 813.

the costs which he has incurred in defending the same to be proved as a debt against the plaintiff's estate.

9. [S. 371.] (1) Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action.

(2) The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the assignee or the receiver in the case of an insolvent plaintiff may apply for an order to set aside the abatement or dismissal; and if it is proved that he was prevented by any sufficient cause from continuing the suit, the Court shall set aside the abatement or dismissal upon such terms as to costs or otherwise as it thinks fit.

[S. 372-A.] (3) The provisions of section 5 of the Indian Limitation Act, 1877¹ shall apply to applications under sub-rule (2).

10. [S. 372.] (1) In other cases of an assignment, creation or devolution of any interest during the pendency of a suit, the suit may, by leave of the Court, be continued by or against the person to or upon whom such interest has come or devolved.

O. 22, R. 9. SCOPE OF RULE.—The rule does not apply to a case in which the defendant or respondent dies. 7 M. 195; *see also* 8 C. at p. 842. The rule applies only to orders passed under Rr. 4 and 8. 9 C. 163. No fresh cause of action can be imported into a revived suit. 22 C. 97. *See* 9 A. 229 under R. 10. The abatement of a suit under this rule has not the force of *res judicata*. 6 Bom. L. R. 638. The mere fact that the representative of a deceased person happens to be already a party on the record in his own right does not dispense with an application for setting aside the abatement and substitution. 29 I. C. 470. Application to implead legal representative, giving no reason for delay, cannot be treated as one under this rule for setting aside the abatement. 94 I. C. 300 = A. I. R. 1926 Lah. 474. Abatement—Effect of. 39 I. C. 277 = 23 P. R. 1917; 38 M. L. J. 266 = 54 I. C. 565.

SCOPE AND APPLICATION OF SUB-CL. (2).—O. 22, R. 9 (2) is not controlled by cl. (3) and the "sufficient cause" mentioned in cl. (2) is not confined to the circumstances given in S. 5 of the Lim. Act. 42 All. 540 = 59 I. C. 903 = 18 A. L. J. 688; 36 All. 235; 51 I. C. 534; 21 L.W. 220 = 1925 Mad. 494. O. 22, R. 9 (2) contemplates that a formal order declaring that a suit or appeal has abated should be made before an application under the rule is made. (36 A. 235, Foll.; 42 A. 542, Not Foll.); 44 All. 459 = 66 I. C. 554 = 1922 All. 209.

SUFFICIENT CAUSE TO EXCUSE DELAY.—Before an abatement is set aside, the Court has to be satisfied that there was sufficient cause for not applying in time. 49 Cal. 62 = 1922 Cal. 335; 36 All. 235 = 12 A. L. J. 299; 1923 Lah. 470. As to what is sufficient cause, *see also* 50 I. C. 422 = 20 P. R. 1919; 90 I. C. 811 = A. I. R. 1926 Cal. 175; 97 I. C. 142 (1) = 8 Lah. L. J. 331. Under this rule it must be shown that the appellant was prevented by sufficient cause from going on with the suit within the time limited by law; if he so proves he is entitled, as a matter of right, to have the abatement set aside. 28 I. C. 803. The appellant must prove, to get extension of time for bringing the representative of the

deceased respondents on record, that he was not aware of death in time. 3 P. R. 1916 = 32 I. C. 829; 15 I. C. 708 = 204 P. L. R. 1912. Ignorance of death, standing by itself, may be sufficient cause; but if it is accompanied by great delay and dilatoriness it would be otherwise. 49 Cal. 62 = 1922 Cal. 335; 4 Lah. L. J. 171 = 1922 Lah. 61; 1925 Oudh 306 (2); 24 I. C. 275; 49 I. C. 531; 22 P. W. R. 1919; 46 P. W. R. 1918; 44 I. C. 9 = 24 P. L. R. 1918; 31 I. C. 697 = 12 P. W. R. 1916; *see also* 91 I. C. 560; A.I.R. 1926 Lah. 137. Delay in applying to bring the legal representative on record, caused by a slip on the part of the party's vakil should be excused if the party himself is not at fault. 41 M. L. J. 65 = 62 I. C. 795. Fraud of agent would be sufficient cause. 53 I. C. 585. *Bona fide* mistake is sufficient cause. As well as *bona fide* mistake of law. 1923 Lah. 475; 55 I. C. 883 = 1 Lah. 481; 8 P. R. 1916 = 32 I. C. 829; 67 I. C. 306 = 2 Lah. L. J. 44. Quarrel among legal representatives is no sufficient cause to excuse delay in applying to be brought on record as legal representative under O. 22, R. 9. 31 I. C. 38. That succession certificate was obtained after the expiry of time fixed for addition of legal representatives is sufficient reason to excuse the delay. 73 I. C. 215 = 26 O. C. 244. Appellant's carelessness and the culpable means adopted by him to conceal it, is sufficient to reject his application to set aside order of abatement. 30 I. C. 717 = 155 P. L. R. 1915.

LIMITATION.—The period of limitation is that prescribed by Art. 177 of the Lim. Act. 2 P. 168; 84 I. C. 1001. *See* 5 C. 139 where the suit was revived after the expiry of 3 years. *See also* 8 C. 837; 30 C. 609; 8 C. 420; 51 I. C. 534.

REVIEW.—An order setting aside abatement by a Division Bench cannot be re-opened at a subsequent stage of the case by a different Bench even though the order was made *ex parte*. The proper remedy is by a review. 29 M. L. J. 574 = 30 I. C. 669.

¹ *See* now Act IX of 1908, Ss. 4 and 5 General Acts, Vol. VI.

O. 22, R. 10. SCOPE AND APPLICATION OF RULE.—R. 10 applies only to cases which do not

(2) The attachment of a decree pending an appeal therefrom shall be deemed to be an interest entitling the person who procured such attachment to the benefit of sub-rule (1).

fall under the preceding rules of the same order. 45 M. 872=42 M. L. J. 301; 91 I. C. 166=A. I. R. 1926 Lah. 181. See also 22 L.W. 860=49 M. L. J. 704. By consent of parties and the leave of the Court a suit may be amended to cover an increased claim. 9 A. 229. The rule does not apply to cases of assignment of interest which is the subject-matter of litigation between the date of decision of the first Court and the filing of appeal. 38 I. C. 511=20 O. C. 31; 1 P. L. J. 596=38 I. C. 237. The first four rules of O. 22 cannot apply to a case in which the death of the defendant occurs between the passing of preliminary and final decrees in a suit, as there is then no right to sue surviving. 64 I. C. 307=17 N.L.R. 81. The Rules in this Order deal with the devolution of interest by the operation of law and not by act of parties. 53 M. L. J. 142=26 L.W. 171=102 I. C. 444=A. I. R. 1927 Mad. 693. A creditor of a decree-holder who has attached the decree pending an appeal against it is not entitled to be made a party respondent to the appeal, under this Rule. 20 A. 38. On this Rule, see also 5 A. 212; 9 A. 229; 20 A. 38; 23 A. at p. 335; 5 C. 726; 30 C. 609; 10 A. 97. The words "other cases" means cases other than those specifically mentioned in the previous rules. 9 C. W. N. 171. As to effect of order see 43 Mad. 37=37 M. L. J. 449. The position of the party substituted is exactly the same as that of the original person. 16 I. C. 567=17 C. W. N. 862. A deed of compromise filed during the pendency of a suit cannot be regarded as an "assignment". 5 A. 209 (212). As to Court's power to decide dispute as to assignment. See 94 I. C. 926=A.I.R. 1925 Lah. 574.

PENDENCY OF SUIT.—Whether the expression 'the pendency of the suit' in R. 10 covers the period between the original and an amended decree. See 43 M. L. J. 559=69 I. C. 977=1923 Mad. 57. Rule applies to cases of devolution of interest pending suit and not to cases of persons acquiring interest after decree. 40 I. C. 846= (1917) M. W. N. 306; 64 I. C. 307=17 N. L. R. 81; 43 M. L. J. 589=27 C. W. N. 29=49 I. A. 220=68 I. C. 973=1 P. 581 (P. C.); See also A. I. R. 1926 Cal. 173.

"INTEREST".—The interest must be the interest in the property, which is the subject-matter in the suit. 30 C. 961. The "Interest" contemplated is any interest which will be vitally affected by the suit. 43 I. C. 811. Compromise of suit—Decree not passed—Application by purchaser to be added as a party may be allowed in the discretion of the Court. 27 C. W. N. 755=1924 Cal. 188. Proceedings after a preliminary decree for sale or redemption till the final decree is passed, are proceedings in the suit, and the private purchaser of the property after such a decree acquires an interest which entitled him to be made a party to the suit. 37 All. 226=27 I. C. 771; 25 Bom. L. R. 308=75 I. C. 743=1923 Bom. 303; 27 C. W. N. 710=75 I. C. 255=1924 Cal. 90; 51 I. C. 233=29 C.L.J. 362.

DEVOLUTION OF INTEREST.—These words do not mean devolution by death. 28 C. at p. 175. See also 27 I. C. 704=20 C. L. J. 107. The devo-

lution spoken of in R. 10 is not confined to devolution in ways other than by death. 64 I. C. 307=17 N. L. R. 81. They include devolution of an interest by reason of an adjudication in insolvency and a vesting order thereunder. 25 M. at p. 413. See 30 B. 257. Where a trustee dies or retires, the estate devolves on the new trustee who can be added under the rule. 92 I. C. 520=A. I. R. 1926 Mad. 540. The insolvency of the defendant in a money suit does not affect the devolution of any interest on the Official Receiver. 29 I. C. 30=8 S. L. R. 325; 53 M.L. J. 142=26 L. W. 171=102 I. C. 144=A. I. R. 1927 Mad. 693. There is no devolution of interest where a company goes into liquidation. Only the powers of the directors are transferred to the liquidator. 9 N. L. J. 40=94 I. C. 380=A. I. R. 1926 Nag 303. An application for substitution by an assignee decree-holder is within R. 10 even though the assignment was obtained not directly but only derivatively from a party to the suit. 26 I. C. 410=20 C. L. J. 107; 20 I. C. 685=18 C. W. N. 450. Where a plaint is returned for presentation to the proper court, any devolution of interest which took place while the proceedings were pending in the first Court must be taken to be a devolution in the course of the suit. 8 L.W. 21=48 I. C. 840=41 M. 510. An adoption is not the creation of an interest within O. 22, R. 10. 43 I. C. 64=15 N.L.R. 24. But see also 32 I. C. 858=20 C.W.N. 552. Attaching creditor cannot be impleaded under O. 22, R. 10. 89 I. C. 446=A. I. R. 1926 Nag. 67. Gift by father to son—Suit for pre-emption—Right of donee to continue the suit. 25 O. C. 319=1922 Oudh 289.

EXECUTION PROCEEDINGS.—Rule 10 does not apply to execution proceedings. 10 I. C. 405=174 P.L.R. 1911. See also 30 Cal. 961; 74 I. C. 577=1923 Lah. 560. But see 39 Cal. 220=16 C. W. N. 109 (*contra*). The rule does not apply to assignments after decree. 10 A. 97. Whether rule authorizes the addition of a party to suit after decree. See 42 Cal. 72=41 I. A. 251 (P. C.) (10 All. 97, Ref.).

PRACTICE AND PROCEDURE.—An order for substitution may be made *ex parte* without notice and such an order made *ex parte* can be recalled upon objection of parties interested. 16 I. C. 557=17 C. W. N. 862. But see also next case. A judicial order which may possibly affect or prejudice any party cannot be finally made unless the party affected has had an opportunity of being heard. It is based on the plainest principles of justice. 16 I. C. 567=17 C. W. N. 862. No order for substitution should be made upon an application which is not supported by affidavit or is not verified. (*Ibid*). A person may under this rule, be added or substituted as a party either on his own application or on the application of one of the parties already on the record. 18 A. 285. Deliberate delay in applying for the addition of a party, will be a ground for rejecting the application. 43 I. C. 811. Whether an Official Receiver's successor on the resignation of his office can continue the proceedings without his name being brought on record. See 40 I. C. 170=32 M. L. J. 520.

- 11. [S. 532].** In the application of this Order to appeals, so far as may be, the word "plaintiff" shall be held to include an appellant, the word "defendant" a respondent, and the word "suit" an appeal.

Application of order to appeals.

[Madras.] In O. XXII, after R. 11, add the following as R. 11-A :—

11-A. The entry on the record of the name of the representative of a deceased appellant or respondent in a matter pending before the High Court in its appellate jurisdiction, except in cases under appeal to the King-in-Council shall be deemed to be a quasi-judicial act within the meaning of Sec. 128 (2) (i) of the Code of Civil Procedure and may be performed by the Registrar, provided that contested applications and applications presented out of time shall be posted before a Judge for disposal.

Application of order to proceedings.

- 12.** Nothing in rules 3, 4 and 8 shall apply to proceedings in execution of a decree or order.

ORDER XXIII.

WITHDRAWAL AND ADJUSTMENT OF SUITS.

Withdrawal of suit or abandonment of part of claim.

- 1. [S. 373].** (1) At any time after the institution of a suit the plaintiff may, as against all or any of the defendants, withdraw his suit or abandon part of his claim.

LIMITATION.—Limitation for impleading assignees. 27 C. W. N. 710=75 I. C. 255=1924 Cal. 90. See also 32 Cal. 612; 30 Cal. 609; 22 All. 231; 8 Cal. 837.

APPEAL.—Order under R. 10 is appealable. 44 Mad. 919=41 M. L. J. 316 (F. B.). An assignee can appeal though the decree was passed *ex parte* against the assignor. 22 A. 380. But see 24 A. 532. An appeal lies under S. 12 of the Letters Patent, 24 M. 252.

REVISION.—Dispute as to the factum of assignment—Court's power to decide—Whether Revision lies. See 51 I. C. 233=29 C. L. J. 362. A wrong exercise of discretion cannot be set aside in revision. 89 I. C. 605=1925 Nag. 423.

MISCELLANEOUS.—Public trust—Death of Trustee—Subsequent Trustees impleaded as parties Defences open to. 45 Mad. 703=43 M. L. J. 147. A suit for recovery of money due to an estate instituted by a trespasser cannot be continued by the real owner. 38 I. C. 154=2 P. L. J. 199. The assignees of a right to recover mesne profits given by a decree in a suit ought to apply for continuance of the suit under O. 22, R. 10. 1 P. L. J. 427=37 I. C. 998.

O. 22, R. 11.—The principle recognised in O. 22, R. 11 applies not only to suits but to revision proceedings as well. 21 I. C. 407=18 C. L. J. 141. A rule issued at the instance of a party who is dead at the time is a nullity. 21 I. C. 407=18 C. L. J. 141. [N. B.—See also under R. 10.]

O. 22, R. 12.—The rule does not apply to execution proceedings. 87 I. C. 21=1925 Oudh 448; see also 30 C. W. N. 735=96 I. C. 378. Decree capable of execution without final decree—Substitution of legal representatives need not be within three months of party's death. 82 I. C. 604=1925 All. 66.

O. 23, R. 1. APPLICABILITY OF RULE.—This rule does not apply to suit before the Revenue authorities under Act X of 1859. 21 C. 428. See also 21 C. 514. It applies to rent suits in the N. W. P. 5 A. 406. Also to ejectment suits filed under the Agra Tenancy Act, L. R. 6 A. 65 Rev. O. 23 applies to S. 92, 1925 Cal. 187. As to whether such an order could be made in a suit

for judicial separation, when an amicable settlement has been come to after suit. See 9 B. L. R. at p. 6. An application under R. 20 of Sch. II can be withdrawn under this rule. 31 C. 516. An application which has been registered as a suit under any of the provisions of the Code, can be allowed to be withdrawn with liberty to file a fresh suit. 5 M. H. C. R. 298. When a suit has been dismissed in the lower Court, the appellate Court cannot in appeal allow the plaintiff to withdraw his suit. 11 M. 322. See also 41 C. L. J. 186=A. I. R. 1925 Cal. 711.

"AT ANY TIME".—The procedure of withdrawal laid down in O. 23, R. 1 applies only to pending suits and before the decree has been made. (29 Bom. 13; 35 Bom. 261, Foll.) 47 I. C. 817=12 S. L. R. 14. Leave cannot be granted after judgment is pronounced. 24 W. R. 23; 18 M. L. T. 460=31 I. C. 312; 62 I. C. 25; 52 I. C. 870. Leave to withdraw with liberty to sue again, cannot be given after an award is filed. 7 C. W. N. 181; 32 I. C. 347=2 O. L. J. 497. Withdrawal by one co-plaintiff without the consent of others is not permissible. 52 Cal. 139=1925 Cal. 637. See also 7 L. R. 135 (Rev.) (withdrawal of by one Appellant). A suit for account is said to be pending until the final order on taking the account is made, 30 C. 609. Where once there has been a preliminary decree ordering the taking of accounts, if the plaintiff desires to withdraw his claim for rendition of accounts but the defendant desires the case to proceed, the proper course is to transfer the plaintiff as defendant and make the defendant plaintiff. 96 I. C. 67=24 A. L. J. 694=A. I. R. 1926 All. 582.

AS TO SCOPE OF SUB-RULE (2).—15 M. L. J. 452; 2 A. L. J. 59.

SCOPE OF SUB-RULE (3).—10 M. 160; 8 C. 871; 9 B. 346.

ABANDONMENT OF PART OF CLAIM.—A suit can be withdrawn in part with liberty to sue again in respect of it. But the whole suit cannot be withdrawn with liberty to sue again in respect of part only. When only part of a suit is withdrawn the remaining part must be proceeded with and if not, it must be dismissed as to it. 5 Bom. L. R. 223; 15 M. L. J. R. 462. Where

(2) Where the Court is satisfied—

plff. withdrew part of a claim without permission, his suit for the same is barred. 40 I. C. 408 = 29 C. L. J. 11. A plaintiff may withdraw his claim against some defts. only at any time before actual judgment. 18 M. L. T. 460 = 31 I. C. 312 ; 62 I. C. 25 ; 52 I. C. 870. The phrase 'other sufficient grounds' would not cover any ground wholly dissimilar to some formal defect. The words must be taken to mean *et usdem generis* with the words in cl. (2) (a). 79 I. C. 1033 = 1925 Oudh 291 ; 22 L. W. 535 = 1925 M. 1268 ; 21 L. W. 282 = 1925 M. 617 ; 94 I. C. 983 = 23 L. W. 525 = A. I. R. 1926 Mad. 863 ; 90 I. C. 217 = A. I. R. 1926 Pat. 128 ; 50 Bom. 192 = 28 Bom. L. R. 440 = 94 I. C. 777 = A. I. R. 1926 Bom. 315. As to what are sufficient grounds for allowing plaintiff liberty, see also 13 M. I. A. 160 ; 9 A. 155 ; 11 A. 187. Mistaken view of law no ground for withdrawal. 88 I. C. 512. Liberty would be granted if suit would fail for multifariousness, which is a defect of a formal nature. 40 All. 7 = 42 I. C. 856 ; 37 All. 326 = 28 I. C. 857 ; 22 Bom. L. R. 1183 = 59 I. C. 210 ; 45 B. 206 ; 44 Bom. 598 ; 67 I. C. 530 ; 35 Bom. 261 = 10 I. C. 813 ; 70 I. C. 484 = 1922 Cal. 58. A defect which goes to the root of plaintiff's claim is not a formal defect. 21 L. W. 282 = 1925 M. 617. Omission to obtain permission of Insolvency Court is a formal defect. 2 Rang. 643 = 1925 R. 105. Where it is apparent from the pleadings and the proceedings in the Lower Court that the plaintiff has no clear conception of his rights leave to withdraw with liberty to file a fresh suit will be granted. 17 I. C. 396 = (1912) M. W. N. 1003. Leave was granted when it was not possible for the plaintiff to adduce evidence within the time fixed by the Court. 16 W. R. 100. See also 15 Bom. 160. But failure to produce evidence in time is no ground for permitting withdrawal. 7 Lah. L. J. 290 = 1925 Lah. 497. See also 22 L. W. 535 = 1925 M. 1268 ; 21 L. W. 282 = 1925 M. 617.

SUBJECT-MATTER.—This means clearly "the subject of legal action, consideration, complaint or defence, or the fact or facts constituting the whole or a part of a ground of action or defence"—21 M. at p. 37 ; 21 C. 265.

CAUSE OF ACTION DIFFERENT.—O. 23, R. 1 (3) does not bar a suit on a different cause of action. 36 Mad. 325 = 23 M. L. J. 658. See also 9 Bom. 346 (different title). "Shall" in the rule is not mandatory and is merely directory. 2 O. W. N. 901 = 1925 Oudh 699. Withdrawal without leave—Subsequent suit on different ground not barred. 59 I. C. 84. The words "subject-matter" used in O. 23, R. 1 (3) are not to be identified with the "property" in the suit. 74 I. C. 56 = 1924 Oudh 180. They mean the cause of action for a claim. (*Ibid.*) See also 92 I. C. 385 = A. I. R. 1926 Mad. 490. The withdrawal of a suit in which a right of ownership is asserted does not preclude the plaintiff from suing again upon a claim based upon an easement. 2 A. L. J. 59.

EFFECT OF WITHDRAWAL.—The withdrawal of suit bars only the plaintiff and his privies from bringing a fresh suit but not a person who has purchased the plaintiff's interest at a sale in execution under an attachment prior to the withdrawal. 39 I. C. 276 = 1917 Pat. 141. Where the Court allows some plaintiffs to withdraw with liberty

to file a fresh suit without the consent of the others, the Court acts without jurisdiction and a fresh suit is barred. 1 P. 228. Withdrawal by unnecessary plaintiffs from a suit does not necessitate the dismissal of the suit. 60 I. C. 592 ; 1 P. 228.

NEXT FRIEND.—A next friend can withdraw a suit on behalf of a minor, and any withdrawal by him would have precisely the same effect as the withdrawal of a suit by a person of full age. 10 C. 357. But a withdrawal by him without the leave of the Court is voidable at the instance of the minor. 27 M. 377. As to the courses open to minor when his next friend has fraudulently withdrawn a suit without leave to file a fresh suit, see 10 C. 357.

PRACTICE AND PROCEDURE.—Where leave to withdraw is granted without express liberty to sue again a fresh suit on the same cause of action is barred. 58 I. C. 271 = 129 P. R. 1919 ; 40 M. L. J. 126 = 62 I. C. 833 ; 46 I. C. 913.

FORM OF ORDER.—The suit cannot be dismissed with liberty to file a fresh suit. 9 A. 690 ; and the fact that such an order has not been appealed against will not give it any effect. 11 A. 187 (F. B.). An order cannot be passed directing the plaintiff to institute a new suit. 9 A. 191 (P. C.). The dismissal of a suit "in the form in which it is brought" does not amount to permission to sue again. 5 A. 595. Application for permission to withdraw a suit with liberty to bring a fresh suit—Court giving permission to withdraw but not giving in terms liberty to bring a fresh suit, held the order to be read along with petition and construed as granting permission to file a fresh suit. 5 Pat. 23 = 93 I. C. 1001 (1) = A. I. R. 1926 Pat. 259. The Court cannot pass an order returning the plaint. 7 B. 487. Suit withdrawn to be regarded as never brought. 41 C. L. J. 450 = 29 C. W. N. 755 (F. B.).

NOTICE.—Notice should issue to the opposite party before passing any order under this rule. 6 A. 211.

COSTS.—When leave to withdraw the suit with liberty is granted, costs must follow the event. See 25 Bom. L. R. 242 = 47 B. 559 = 72 I. C. 324 ; 40 All. 612 = 46 I. C. 71 ; 14 I. C. 97 = 9 A. L. J. 358. See also 15 Bom. 160 ; 1 M. H. C. R. 247. But see 2 O. W. N. 901 = 1925 Oudh 699. The Court can extend the time to pay costs when it is absolutely impossible for the party to pay such costs on or before the day so fixed. 29 M. 370. When a suit is withdrawn with liberty to sue again "on payment of costs, and a subsequent suit is filed without payment of costs," subsequent payment cures the irregularity. The Court can refuse to proceed with the suit till the costs are paid. 31 C. 965 (968). On this point, see also 5 Pat. 306 = 96 I. C. 942 = A. I. R. 1926 Pat. 409 ; 95 I. C. 875 = A. I. R. 1926 P. 472.

POWER OF APPELLATE COURT.—A Court of Appeal has power to grant permission to withdraw a suit with liberty to file a fresh suit. 74 I. C. 894 = 1924 All. 260 ; 41 C. L. J. 186 = 1925 Cal. 711 ; 45 I. C. 913 ; 45 M. L. J. 212 = 46 Mad. 811 = 1924 Mad. 79 ; 40 Mad. 259 ; 37 I. C. 414 = 32 M. L. J. 477 (F. B.). Before doing so, it must set aside the decree of the first Court. 95 I. C. 424 (2) = A. I. R. 1926 Nag. 444. The

(a) that a suit must fail by reason of some formal defect, or
 (b) that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim,

it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or abandon such part of a claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of a claim.

(3) Where the plaintiff withdraws from a suit, or abandons part of a claim, without the permission referred to in sub-rule (2), he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim.

(4) Nothing in this rule shall be deemed to authorize the Court to permit one of several plaintiffs to withdraw without the consent of the others.

2. [S. 374.] In any fresh suit instituted on permission granted under the last preceding rule, the plaintiff shall be bound by the law of limitation in the same manner as if the first suit had not been instituted.

Limitation law not affected by first suit.

3. [S. 375.] Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plain-

Compromise of suit.

Court must be very cautious in granting permission. 24 A. L. J. 721=96 I. C. 480=A. I. R. 1926 All. 548. An appellant is not entitled to withdraw his suit in the Appeal Court under O. 23, R. 1 (1) as a matter of course. 61 I. C. 584=A. I. R. 1923 Oudh 252. O. 23, R. 1 does not allow a plaintiff who has appealed to get rid of the decree that has been made by the simple process of withdrawing the suit. 47 I. C. 817=12 S. L. R. 14; see also 11 M. 322; 41 C. L. J. 186. In proper cases High Court on appeal can take action under O. 23, R. 1. 40 All. 7=42 I. C. 856=15 A. L. J. 809.

APPEAL.—An order made by an Appellate Court giving permission to withdraw a suit with liberty to bring a fresh suit, is not a decree, and is not appealable. 18 C. 322; 88 I. C. 1029 (1)=A. I. R. 1926 Oudh 185 (1). If such an order is passed by a Court of first instance, and the District Court on appeal sets aside the order and dismisses the suit, the order of the District Court is a decree and is appealable. 27 C. 362. An order permitting the withdrawal of an appeal is not a decree. 15 B. 370 (373).

REVISION.—An order granting leave to withdraw without considering or recording any grounds for allowing withdrawal is a wrong exercise of jurisdiction and a revision would lie. 20 A. L. J. 90=64 I. C. 948=1922 All. 185. See also 25 Bom. L. R. 242=47 Bom. 559; 40 All. 612=16 A. L. J. 493; 14 I. C. 97=9 A. L. J. 358; 15 All. 160; 11 Mad. 322. See also 85 I. C. 548=1925 All. 272; 87 I. C. 175=1925 All. 466. Where there was proper exercise of jurisdiction by the lower Court no revision lies. 19 A. L. J. 47=60 I. C. 899. The High Court has power to revise the order granting withdrawal of suit with liberty to bring a fresh one without any formal defect. 41 I. C. 934; 40 I. C. 77; 44 Cal. 454=39 I. C. 969=25 C. L. J. 455; 35 I. C. 843; 34 I. C. 934; 10 I. C. 346; 27 M. L. J. 480=26 I. C. 57; 3 P. L. J. 460=46 I. C. 179. See also 7 Lah. L. J. 290=1925 Lah. 497.

REVIEW.—An order permitting the withdrawal of an appeal can be reviewed. 15 B. 370.

O. 23, R. 2.—The effect of this rule is that

limitation is to apply to the second suit as if it was the first. 29 B. 219. Limitation for fresh suit. 25 I. C. 188=12 A. L. J. 989. The fact that a suit is withdrawn does not entitle the plaintiff in a fresh suit, to any deduction of time during which the former suit had been pending. (11 W. R. 5 (P. C.), Dist.; 9 Cal. 255 (P. C.), Ref. to); 20 I. C. 205. See also 23 I. C. 458=163 P. L. R. 1914. Adjustment—Award—Supersession of—Subsequent reference through Court—Effect of. See 24 Bom. L. R. 361=46 Bom. 854.

O. 23, R. 3. APPLICABILITY OF RULE.—The rule applies to cases referred to arbitration. 1925 M. 50.

MEANING OF WORDS.—"Adjustment," meaning of. 45 M. L. J. 763=28 C. W. N. 930=1923 P. C. 178 (P. C.). "Award is no adjustment". See 47 All. 637=23 A. L. J. 561 (F. B.). "Proved to the satisfaction of the Court", meaning of. See 24 C. 908 (F. B.). "Suit" in R. 3 includes the appellate stages and execution proceedings following the decree. 62 I. C. 608=6 P. L. J. 253.

LAWFUL AGREEMENT, ADJUSTMENT OR COMPROMISE.—"To determine whether a compromise is lawful" it is necessary to consider the facts of the litigation, the terms of the compromise, and the circumstances under which it is entered into. "Where a compromise by a trustee involves a breach of trust, it is not lawful". 12 M. L. J. 360. Mere offer not enough to constitute adjustment. 9 I. C. 426. An agreement between the parties to a suit to abide by the decision which may be made in another proceeding amounts to an adjustment. 8 L. W. 470=51 I. C. 540; 37 Mad. 408=22 M. L. J. 447. Agreement to abide by the sums fixed by the other side may be good agreement. 25 I. C. 935=8 S. L. R. 91. An agreement by the parties to a suit to abide by the sum to be named by their pleaders is not a lawful adjustment. 19 I. C. 450=6 S. L. R. 166.

EFFECT OF COMPROMISE AND DECREE.—Intention of parties to have a formal document drawn up will not affect settled compromise. 56 I. C. 26=11 L. W. 179. A compromise is a

tiff in respect of the whole or any part of the subject-matter of the suit, the Court

binding agreement between the parties and none the less so binding, because followed by a decree. 21 I. C. 538=18 C. L. J. 187. A consent order is only an order of the Court, carrying out the agreement between the parties. 29 I. C. 156=19 C. W. N. 565. The provisions of this rule, whenever they are applicable, must be given effect to even in cases which are governed by the Dekkhan Agriculturists' Relief Act. 24 Bom. L. R. 88=46 Bom. 560. See also 57 I. C. 751. Effect of decree on rights of absent respondents. 19 I. C. 915. A decree passed under O. 23, R. 3 in terms of a compromise arrived at between parties to suit becomes final and conclusive if not appealed against. 29 I. C. 156=19 C. W. N. 565; 21 I. C. 538=18 C. L. J. 187; 19 I. C. 915; 40 Mad. 177=30 M. L. J. 274; 31 I. C. 21. A defendant who is a party to the suit, but not a party to the compromise is bound by the decree if it is not appealed against. 24 I. C. 491 following 31 M. 474. Effect of decree on compromise, when there has been a misapprehension as to right. See 24 I. C. 491. A contract of a compromise which has passed into a decree is governed by the same principles as are applicable to the construction of contracts. 10 M. L. T. 326=12 I. C. 334=35 Mad. 75=21 M. L. J. 709.

POWERS AND DUTY OF COURT.—Under R. 1 the Court has to deal with plaintiff alone, but under R. 3 the Court has to deal with plaintiff and defendant and has to find out if there is any agreement between them for compromise. 37 I. C. 421. The terms of settlement must be examined with care and caution. 16 I. C. 611. If the compromise is fraudulent, Court may refuse to pass a decree thereon. 52 I. C. 105. The Court must be satisfied that the agreement is lawful and it can pass a decree in accordance therewith only in so far as it relates to the suit. 25 C. W. N. 806=34 C. L. J. 96. A Court making a decree by consent is performing a judicial and not a ministerial act. (*Ibid.*) Also 50 I. C. 363. The Court must satisfy itself by the evidence taken that the agreement or compromise is a lawful one. 23 M. 101. See also 17 A. at p. 532; 91 I. C. 790 (2)=24 A. L. J. 210=A. I. R. 1926 All. 278. Beyond that the Court cannot examine the terms of the compromise. 91 I. C. 790=A. I. R. 1926 All. 278. The Court is not bound to record compromise or adjustment not assented to by all the parties. 86 I. C. 351=1925 Lah. 280. The Court has jurisdiction to pass a right as well as a wrong decree and if it decides wrongly the wronged party can only take the course prescribed by the law for setting matters right. 51 I. C. 439 (32 M. L. J. 434, Foll.). A consent decree wrongly passed owing to some legal or technical defect is not a nullity. (*Ibid.*) Where a compromise effected by the parties is conveyed to the Court by pleaders on both sides, the parties cannot object on the ground that the pleaders had no such authority. 60 I. C. 22=12 L. W. 562. The Court has power to frame an additional issue to decide whether a lawful compromise has been effected between the parties. 20 B. 304; 19 M. 419. See also 8 M. 482; 9 M. 103; 7 B. 304. A consent decree cannot be challenged on the ground that it is erroneous in law, nor on the grounds on which a contract can be impeached.

(29 Cal. 854, Foll.); 35 Mad. 75=21 M. L. J. 709. The Court can decide the fact of settlement out of Court and grant a decree in accordance therewith, if it is established. 36 I. C. 375=21 C. W. N. 366. Arrangement prior to decree to treat it as inexecutable will not be given effect to. 43 Mad. 725=39 M. L. J. 222.

LEGALITY OF COMPROMISE.—O. 23, R. 3 does not always compel the Court to pass a decree in accordance with a compromise. 4 P. L. J. 580=53 I. C. 833. The Court must see that the compromise is a lawful agreement and will look into the merits when necessary to determine its *bona fides*. (*Ibid.*) Where the claim is beyond the jurisdiction of the Trial Court, it is not competent to the Court to pass a compromise decree. Its duty is to return the plaint under O. 7, R. 10, C. P. Code. 66 I. C. 837=16 L. W. 155. The compromise may be regarded as an abandonment of the claim so far as it was beyond the jurisdiction of the Court and the decree on the compromise may be valid. (*Per Coutts Trotter.*) (*Ibid.*) Compromise is not unlawful merely because the parties do not get the shares to which they would be legally entitled. 55 I. C. 716. An agreement which carries a penal clause such as may be caused by S. 74 of the Contract Act is not "unlawful". 91 I. C. 790 (2)=24 A. L. J. 210=A. I. R. 1926 All. 278. The Court in recording a consent decree is bound to consider whether the compromise is a lawful one. 35 Mad. 75=21 M. L. J. 709; 26 M. L. J. 315=23 I. C. 72; (1922) M. W. N. 83=66 I. C. 837; 55 I. C. 716; 38 C. L. J. 272=1924 Cal. 159. No compromise can prevent the law of limitation from taking effect. 13 O. L. J. 138=92 I. C. 732=A. I. R. 1926 Oudh 311. All terms in a contract which are opposed to public policy are invalid and will not be enforced by the Courts. 26 M. at p. 33. Compromise in fraud of some of the parties—Not allowed. 1923 Oudh 252. A Court will not recognise any compromise of an action with the facts of which it is entirely unacquainted or if one of the terms of the compromise is a clear violation of a statutory rule. 55 I. C. 504; 47 I. C. 817=12 S. L. R. 14; 50 I. C. 577=37 M. L. J. 65; 37 I. C. 764; 4 P. L. J. 580=53 I. C. 833. S. 6, cl. (a) of T. P. Act renders certain transfers unlawful on grounds of public policy, and the Court cannot allow them to be effected by means of a consent decree. 26 M. 31. Any agreement or compromise as regards the genuineness or execution of a will, if its effect is to exclude evidence in proof of the will, is not lawful. 31 C. 357. The principles of compromise under the Divorce Act are considered in 10 A. 559. See also 22 M. 214.

MATTERS OUTSIDE THE SUIT.—The only compromise which a Court is bound to enforce is which adjusts the suit wholly or in part, not one which goes beyond the suit. 13 C. 170.

SO FAR AS IT RELATES TO THE SUIT.—These words must be restricted to relief which the Court could have given in the suit, and will not include reliefs which could only have been given in a suit based upon a different cause of action. 18 M. 410 (414); 5 M. L. J. 145. See also 5 C. W. N. 485; 22 M. 214. See 9 A. 229; 30 M. 478; 3 P. L. J. 43=43 I. C. 282. Where there is a

shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the suit.

compromise beyond the scope of a suit and the compromise has not been registered but the parties have acted on it there is an equitable estoppel and the parties cannot resile from the compromise. 42 Cal. 801=42 I. A. 1=28 M. L. J. 548=28 I. C. 980 (P. C.). A compromise decree constitutes an estoppel though it relates to matters outside the suit. 42 I. C. 223=33 M. L. J. 615. Where a compromise goes beyond the subject-matter of the suit, the proper procedure for the Court is to recite the compromise in the decree but to make part of the decree only so much of the compromise as relates to the subject-matter of the suit. 65 I. C. 47 (47 Cal. 485 (P. C.), Ref.). See also 25 C. W. N. 990=48 Cal. 1059; 38 C. L. J. 72; 59 I. C. 344=22 Bom. L. R. 1286; 51 I. C. 273=31 P. R. 1919; 29 O. C. 276=92 I. C. 722=13 O. L. J. 320. Where a petition includes matters not in suit the Court should pass a decree with regard to matters in suit only and not to reject the petition entirely. 78 P. R. 1917=40 I. C. 675. An objection to the inclusion of a term in a compromise decree, on the ground that it goes beyond the subject-matter, ought to be taken by way of appeal and cannot be urged when execution is sought. 38 Mad. 959=26 M. L. J. 331=23 I. C. 581 (36 Cal. 193, not Foll.); 30 I. C. 263=2 L. W. 608; 53 I. C. 354=(1919) M. W. N. 376; 1925 M. 1101=49 M. L. J. 490; 29 O. C. 276. A Court should record the entire compromise filed by the parties and draw up a decree giving the parties the right to execute the decree in respect of the matters which properly fall within the scope of the rule. 3 P. L. J. 255 (F. B.); 52 I. C. 20=4 P. L. J. 667; 38 Mad. 959=26 M. L. J. 331.

PARTIAL COMPROMISE.—Partial compromise to which some of the parties only agree is good as to them. 34 I. C. 518. Others can object to it on showing good grounds. 85 I. C. 678=A. I. R. 1926 Cal. 193. Partial compromise is not binding on persons not parties to the compromise. 45 I. C. 33.

ORAL COMPROMISE.—The mere fact of an oral compromise having been come to cannot supersede a mortgage unless the Court accepts it and passes a decree in accordance with it. 24 I. C. 93=12 A. L. J. 672. S. 92, Evidence Act, does not prevent oral evidence of the terms of the compromise being given. 29 I. C. 860.

COUNSEL'S AUTHORITY TO COMPROMISE.—Express authority is not needed for a counsel to enter into a compromise within the scope of the suit; and where there is limitation of authority and that limitation is communicated to the other side, consent by counsel outside the limits of his authority would be of no effect. 1 P. 480=67 I. C. 96; 4 Pat. 766=92 I. C. 179=A. I. R. 1926 Pat. 73. See also 19 A. L. J. 63=60 I. C. 912; 60 I. C. 22=12 L. W. 562; 41 C. L. J. 213=29 C. W. N. 597. Compromise by Counsel out of Court, without consent of party is not valid. 52 Cal. 386=29 C. W. N. 566. The implied authority of agents extends only so long as the litigation proceeds in the ordinary way, but they cannot consent to a decree on compromise without special authority. 36 I. C. 375=21 C. W. N. 82.

ARBITRATION.—Where the parties to a suit for partition compromise it by agreeing to refer the matter to arbitration there is an end of the suit, and the Court cannot supersede the decree and proceed with the suit, if arbitration fails. 33 All. 743=38 I. A. 181=21 M. L. J. 1151 (P. C.). See also 25 Bom. L. R. 452=1923 Bom. 401. Where in a suit, a reference to arbitration is made by the parties without the intervention of the Court and an award is made thereon, it can be recorded as an adjustment and a decree can be passed in terms of the award. 45 Bom. 245=22 Bom. L. R. 1043. See also 40 Bom. 386=18 Bom. L. R. 559; 38 Bom. 687=16 Bom. L. R. 653; 37 Bom. 639=19 I. C. 786; 49 Cal. 608=1922 Cal. 404; 97 I. C. 465=A. I. R. 1926 Mad. 1211. A mere agreement to refer to arbitration, is not an adjustment. 38 Bom. 687=16 Bom. L. R. 653. When an award made on a reference to arbitration in a pending suit without the intervention of the Court is disputed by a party the Court should inquire whether the award which is alleged to be an adjustment or compromise was justly, legally and properly arrived at. 37 Bom. 639=15 Bom. L. R. 340. An informal reference to arbitration in a pending suit cannot be given effect to. 49 Cal. 608=69 I. C. 808=1922 Cal. 404. See also 25 C. W. N. 127=47 Cal. 6; 34 I. C. 220; 23 C. L. J. 482; 3 Lab. I. J. 162; 24 P. R. 1914=25 I. C. 710. Proceedings under R. 17, Sch. II can be compromised and a decree passed thereon. 23 I. C. 591=69 P. L. R. 1914. Arbitration—Partial award—Decree on—Power of Court to pass. 45 M. L. J. 76=74 I. C. 603=1923 Mad. 576. A private reference to arbitration in a pending suit followed by a lawful award is a lawful agreement amounting to an adjustment. (26 Bom. 76; 24 Cal. 908; 24 Mad. 326, Foll.; 33 Bom. 69, Diss.); 23 M. L. J. 290=16 I. C. 478; 36 Mad. 353=21 M. L. J. 990; 49 I. C. 746; 46 I. C. 902; 25 O. C. 213=1922 Oudh 189; 5 Bur. L. T. 125=15 I. C. 959.

COMMISSIONER.—After a suit has been referred to a Commissioner to take accounts, a decree can be passed under this rule. 26 B. 76.

EXECUTION PROCEEDINGS.—O. 23, R. 3 is inapplicable to execution proceedings. 44 I. C. 164; 1925 Oudh 136. But see 97 I. C. 768. Once a compromise decree has been passed with reference to the rights of the parties to a suit, their further remedy is by way of execution and not by a suit. 52 I. C. 188=151 P. R. 1919. Execution cannot be issued upon a Razinama unless the terms are embodied in the decree of the Court. 2 M. H. C. 303.

GUARDIANSHIP PROCEEDINGS.—A guardian appointed by the Court cannot be removed by a compromise. 47 I. C. 817=12 S. L. R. 14. Compromises affecting minors. 20 M. 104. Record of compromise by guardian—Decree of court necessary. 62 I. C. 688.

PROBATE PROCEEDINGS.—A compromise in probate case is binding only upon the parties to it. 33 I. C. 273=23 C. L. J. 82; 20 C. W. N. 986=1 Pat. L. J. 377. A compromise in a probate case only makes the case non-contentious, but does not take away the Court's duty to grant or refuse probate. 20 C. W. N. 986=1 Pat. L. J. 377.

[Rangoon] To Rule 3 of O. XXIII, the following proviso shall be added :—

" Provided that before recording and passing a decree in accordance with an agreement, compromise or satisfaction in a suit instituted under the provisions of S 92, Civil Procedure Code, the Court shall direct notice returnable within a reasonable time to be given to the Government Advocate, Burma, or the officer with whose consent the suit was instituted of the agreement, compromise or satisfaction proposed to be recorded. The Government Advocate or such officer as aforesaid may thereupon appear before the Court and be heard in the matter of such agreement, compromise or satisfaction.

Proceedings in execution of decrees not affected.

4. [S. 375-A.] Nothing in this Order shall apply to any proceedings in execution of a decree or order.

ORDER XXIV.

PAYMENT INTO COURT.

Deposit by defendant of amount in satisfaction of claim.

1. [S. 376.] The defendant in any suit to recover a debt or damages may, at any stage of the suit, deposit in Court such sum of money as he considers a satisfaction in full of the claim.

TRUST PROPERTIES.—A *bona fide* compromise by the trustee of a public trust relating to trust properties is a lawful compromise. 60 I.C. 22 = 12 L.W. 562.

PRELIMINARY DECREE.—If the preliminary decree is satisfied in part out of Court, the Court at the final taking of accounts will permit such payment towards the satisfaction of the decree. 40 I.C. 138 = 2 Pat. L.J. 533. See also 58 I.C. 299 = 2 P.L.T. 38; 43 I.C. 399. In a suit for taking partnership accounts if an appeal is preferred from the preliminary decree the jurisdiction of the Original Court to record a compromise under O. 23, R. 3 is not ousted by reason of the appeal. 52 I.C. 899 = 13 S.L.R. 135. Until a decree for redemption is passed under O. 34, R. 7 the suit can be adjusted under this rule. 25 M. at P. 317 (F.B.).

PRACTICE AND PROCEDURE.—The Court should first pass an order directing the compromise to be recorded and then pass a decree in accordance therewith. 24 I.C. 630 = 96 P.R. 1914; 33 I.C. 759 = 43 Cal. 85. If the compromise that is filed is a valid and lawful one, the court is bound to pass a decree in terms thereof and cannot add a new party afterwards. 50 M.L.J. 59 = 92 I.C. 311 = A.I.R. 1926 Mad. 341.

RECORD OF COMPROMISE.—What is. 29 I.C. 860.

SIGNATURE.—A party who is present in Court at the time of compromise and who does not object to it, is bound by it though he has not signed it especially if he gets some benefit under it. 242 P.L.R. 1914 = 25 I.C. 874.

REVENUE PROCEEDINGS.—R. 3 of O. 23 applies to civil as well as revenue proceedings. 39 I.C. 545 = 21 O.C. 346.

APPEAL.—An appeal lies against the decree on compromise on the ground that it embodies matters not relating to the suit. 5 M.I. J. 145. An appeal lies from the order recording the compromise at the instance of a party who denies the truth of the compromise. 1925 M. 606 = 48 M.L.J. 249. The question as to the validity of consent decree cannot be gone into in appeal against that decree. (5 C. W. N. 877, Foll.); 9 I.C. 210 = 13 C.L.J. 16; 33 I.C. 769 = 43 Cal. 85; 78 P.R. 1917 = 40 I.C. 675. Order holding that no compromise is proved is not open to appeal. 73 I.C. 177 = 1924 Lah. 248. A decree dismissing the

suit on the ground that a plea in bar of the suit on the basis of an alleged compromise is established cannot properly be said to be one made under O. 23, R. 3. 46 I.C. 775. See also 62 I.C. 608.

MISCELLANEOUS.—As to the power of a Court to grant relief against a forfeiture clause inserted in a compromise decree, see 31 B. 15 (F.B.). Even when only a money decree was prayed in the plaint there is nothing in the rule to prevent the Court from making the sum decreed a charge on immoveable property. 16 M.L.J. 354 = 30 M. 478. See also 17 M.L.J. 255. The decree is conclusive only so far as it relates to so much of the subject-matter of the suit as is dealt with by the compromise. 18 M. 410 (414); 30 M. 421; see 31 B. 15 (F.B.). A compromise can be set aside in a regular suit on the ground of fraud. 5 C. 27. Even when the party may have been under a mistaken belief and may have failed to exercise due care and caution. 17 M.L.J. 82. Or by review of judgment. 10 C. 612. See also 15 B. 594. A suit will also lie to set aside a compromise decree upon grounds other than that of fraud, i.e., on the ground that the pleader engaged by the guardian of a minor, compromised the suit against the express wishes of the guardian. 34 C. 83. Also on the ground that the Court sanctioned the compromise under a misapprehension of material facts. 6 C. 687. The rule cannot be extended by analogy to proceedings held under S. 83, T. P. Act. 13 M. 316. A judgment by consent operates as a waiver of any defect or irregularities provided it does not go to the jurisdiction. 35 Mad. 75 = 21 M.L.J. 709.

O. 23, R. 4.—O. 23, R. 4 is explicit in its terms and declares O. 23 to be inapplicable to proceedings in execution of a decree or order and an arrangement entered into after decree for payment of the sum decreed in instalments is not binding, and limitation for execution of the decree runs nevertheless 72 I.C. 477 = 1924 Lah. 342; 12 A.L.J. 235 = 22 I.C. 961; 18 I.C. 81. See also 18 Cal. 515; 15 Mad. 240; 10 Bom. 62. O. 23, R. 4 does not affect the rule of estoppel. 13 I.C. 81.

O. 24, B. 1. Payment into a Government treasury is equivalent to payment into Court. 7 M. 211. The deposit must be made unconditionally. 14 M. 49; 97 I.C. 475 = A. I. R. 1927 Cal. 72.

2. [S. 377.] Notice of the deposit shall be given through the Court by the defendant to the plaintiff, and the amount of the deposit shall (unless the Court otherwise directs) be paid to the plaintiff on his application.

Notice of deposit.

3. [S. 378.] No interest shall be allowed to the plaintiff on any sum deposited by the defendant from the date of the receipt of such notice, whether the sum deposited is in full of the claim or falls short thereof.

Interest on deposit not allowed by plaintiff after notice.

4. [S. 379.] (1) Where the plaintiff accepts such amount as satisfaction in part only of his claim, he may prosecute his suit for the balance ; and, if the Court decides that the deposit by the defendant was a full satisfaction of the plaintiff's claim, the plaintiff shall pay the costs of the suit incurred after the deposit and the costs incurred previous thereto, so far as they were caused by excess in the plaintiff's claim.

(2) Where the plaintiff accepts such amount as satisfaction in full of his claim, he shall present to the Court a statement to that effect, and such statement shall be filed and the Court shall pronounce judgment accordingly ; and, in directing by whom the costs of each party are to be paid, the Court shall consider which of the parties is most to blame for the litigation.

Procedure where he accepts it as satisfaction in full.

Illustrations.

(a) *A* owes *B* Rs. 100. *B* sues *A* for the amount, having made no demand for payment and having no reason to believe that the delay caused by making a demand would place him at a disadvantage. On the plaint being filed, *A* pays the money into Court. *B* accepts it in full satisfaction of his claim, but the Court should not allow him any costs, the litigation being presumably groundless on his part.

(b) *B* sues *A* under the circumstances mentioned in illustration (a). On the plaint being filed, *B* disputes the claim. Afterwards *A* pays the money into Court. *B* accepts it in full satisfaction of his claim. The Court should also give *B* his costs of suit, *A*'s conduct having shown that the litigation was necessary.

(c) *A* owes *B* Rs. 100, and is willing to pay him that sum without suit. *B* claims Rs. 150 and sues *A* for that amount. On the plaint being filed *A* pays Rs. 100 into Court and disputes only his liability to pay the remaining Rs. 50. *B* accepts the Rs. 100 in full satisfaction of his claim. The Court should order him to pay *A*'s costs.

ORDER XXV.

SECURITY FOR COSTS.

1. [S. 380.] (1) Where, at any stage of a suit, it appears to the Court that a sole plaintiff is, or (when there are more plaintiffs than one) that all the plaintiffs are, residing out of British India, and that such plaintiff does not, or that no one of such plaintiffs does, possess any sufficient immoveable property within British India

When security for costs may be required from plaintiff.

Money sought to be attached before judgment paid by debtor into court—Attachment is irregular—Such payment should be considered as deposit under O. 24, R. 1. See A.I.R. 1927 Rang. 278. O. 24, Rr. 1 to 3 do not apply to execution proceedings. 97 I.C. 479.

O. 24, R. 2.—The Court has a discretion to refuse to allow money to be paid out, but that discretion is to be exercised reasonably. 26 C. 766 (769). What tender causes cessation of interest. 34 M.L.J. 439=45 I.C. 638. Where the amount for the recovery of which the suit has been instituted has been deposited in Court, the Court has got a discretion as to the disposal of costs. 13 I.C. 200=(1911) 2 M. W.N. 568 ; 13 I.C. 188=(1912) M. W.N. 38. Where the defendant pays money into Court, Court should record a finding as to whether a demand was made or not, so as to determine by whom the

costs should be paid. 13 I.C. 188=(1912) M. W.N. 38. Where the amount deposited in Court in execution might have been immediately on deposit paid out to the decree-holder in part discharge of his claim, the judgment-debtors may be relieved from paying interest. 40 All. 125=16 A.L.J. 15.

O. 24, R. 3.—It is doubtful whether this rule applies to cases where the tender is made direct to the creditor. 3 C. 468.

O. 24, R. 4.—In cases not being suits to recover a debt or damages, where money is paid into Court, the principle underlying this rule ought to regulate the discretion of the Court in directing the payment of costs. 21 B. 502.

"DEBT OR DAMAGES".—What are. 21 B. 502.

O. 25, R. 1. SCOPE OF RULE.—The rule applies to cases where the plaintiff brought a suit for partition of property in which he was entitled

other than the property in suit, the Court may, either of its own motion or on the application of any defendant, order the plaintiff or plaintiffs, within a time fixed by it, to give security for the payment of all costs incurred and likely to be incurred by any defendant.

[Allahabad] In Order XXV, Rule 1, Sub-rule (1) after the words "other than property in suit," add "or that the plaintiff is being financed by a person not a party to the suit."

(2) [S. 382.] Whoever leaves British India under such circumstances as to afford reasonable probability that he will not be forthcoming whenever he may be called upon to pay costs shall be deemed to be residing out of British India within the meaning of sub-rule (1).

(3) [S. 380.] On the application of any defendant in a suit for the payment of money, in which the plaintiff is a woman, the Court may at any stage of the suit make a like order if it is satisfied that such plaintiff does not possess any sufficient immoveable property within British India.

[Oudh] Order XXV, Rule 1, Sub-rule (4).—Add the following as sub-clauses (4) and (5):—

(4) Where the plaintiff has, for the purpose of being financed in the suit, transferred or agreed to transfer any share or interest in the property in suit to a person who is not already a party to the suit, the Court may order such person to be made a plaintiff to the suit if he consents, and may either of its own motion or on the application of any defendant order such person within a time to be fixed by the Court to give security for the payment of all costs likely to be incurred by any defendant. In case of his default, the Court may dismiss the suit so far as his right to, or interest in, the property in suit is concerned or may declare that he shall be debarred from claiming any right to, or interest in, the property in suit.

(5) If such person declines to be made a plaintiff, the Court may implead him as a defendant and may order him, within a time to be fixed by the Court to give security for the payment of costs likely to be incurred by other defendant. In case of his default, the Court may declare that he shall be debarred from claiming any right to, or in rest in, the property in suit.

to a share, the extent of the share alone being in dispute. 10 B. L. R. at p. 25. The power given under this rule is discretionary. 21 C. at p. 836. See also 17 C. 610. The rule should not be so applied as to drive away all poor plaintiffs. The Court should see whether at first sight the suit appears *bona fide* and whether the defence is such as is likely to succeed. 6 Bom. L. R. 1072. Liability of person standing surety for security for costs. See 92 I. C. 546 = A. I. R. 1026 All. 657.

PRACTICE AND PROCEDURE.—A Court has power to demand security for costs where it finds that the plaintiff is not the real litigant but a puppet in the hands of others. 32 I. C. 786 = 18 C. W. N. 119; 20 I. C. 703 = 19 C. L. J. 59 = 2 Bur. L. J. 78 = 1923 Rang. 244. If an insolvent sues as nominal plaintiff for the benefit of somebody else, which somebody is a female minor who is also a party to the suit, he must give security. 27 B. 100. Where the plaintiff has got a substantial interest in the suit the order for security should not be made nor should it be made merely because the plaintiff is a poor man and cannot pay the costs if he loses. (2 Cal. 233; 14 Cal. 533. Rel. on); 18 C. W. N. 119 = 19 C. L. J. 59; 75 I. C. 309 = 1923 Rang. 244; 36 I. C. 320; 10 Bur. L. T. 105; 13 Bom. L. R. 955 = 36 Bom. 415. Except in exceptional cases security for costs ought not to be required from an infant female plaintiff, nor from her next friend. 23 B. 100. Security for costs of appeal, when to be demanded. 32 I. C. 786; 46 Cal. 156 = 22 C. W. N. 1018. Security for the defendant's costs cannot be ordered if there are grounds tending to prove that the defence is true. 18 I. C. 217. No order should be made before the written statement is filed. 18 I. C. 217. Suit by undischarged bank-

rupts for after-acquired property if security for costs can be demanded. 46 Cal. 156 = 22 C. W. N. 1018. As to how security given is to be realized, see S. 145. Also 16 C. 323.

SUIT FOR PAYMENT OF MONEY.—A suit for dissolution of partnership on account and for the recovery of the stridhanam property belonging to a female plaintiff is not a suit for payment of money within O. 25, R. 1 (3). 68 I. C. 607 = 1923 Cal. 316 (2). So also a suit for administration of an estate consisting largely of immoveable property. 3 Rang. 211 = 1925 Bang. 300. Suit for declaration of title to moveables or their value if suit for money. See 14 I. C. 290 = 16 C. W. N. 763.

PAUPER PLAINTIFF.—A woman allowed to bring a pauper suit cannot be required to furnish security for costs, as an order of security would mean a refusal of permission to sue as a pauper. 36 I. C. 320 = 10 Bur. L. T. 105; 13 Bom. L. R. 955 = 36 Bom. 415. See also 27 Bom. 100. Mere poverty is no ground for requiring a plaintiff to give security for costs. 14 C. 533. See also 4 B. 244; 3 M. 66 and 7 A. 542.

"RESIDING".—The residence intended by this rule is residence under such circumstances as well afford a reasonable probability that the plaintiff will be forthcoming when the suit is decided. 3 B. 227. See 14 B. 541. Temporary residence in British India for purposes of suit is not residence within the rule. 46 Bom. 589 = 64 I. C. 703.

APPEAL.—An order passed on the original side of the High Court requiring the plaintiff to give security for costs is a judgment within the meaning of S. 15 of the Letters Patent, and is appealable. 26 M. 502.

2. [S. 381, first three paras.] (1) In the event of such security not being furnished within the time fixed, the Court shall make an order dismissing the suit unless the plaintiff or plaintiff's are permitted to withdraw therefrom.

Effect of failure to furnish security.

(2) Where a suit is dismissed under this rule, the plaintiff may apply for an order to set the dismissal aside, and, if it is proved to the satisfaction of the Court that he was prevented by any sufficient cause from furnishing the security within the time allowed, the Court shall set aside the dismissal upon such terms as to security, costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.

(3) The dismissal shall not be set aside unless notice of such application has been served on the defendant.

ORDER XXVI.

COMMISSIONS.

Commissions to Examine Witnesses.

1. [S. 383.] Any Court may in any suit issue a commission for the examination on interrogatories or otherwise of any person resident within the local limits of its jurisdiction who is exempted under this Code from attending the Court or who is from sickness or infirmity unable to attend it.

Cases in which Court may issue commission to examine witness.

O. 25, B. 2.—Next friend of minor plaintiff unable to give security for costs—Suit should not be stopped. 13 Bom. L. R. 480=35 Bom. 329. The dismissal of a suit under this rule is no bar to a fresh suit. 26 B. 637. Appeal. See 8 A. 108 (F. B.).

O. 26, R. 1. SCOPE OF RULE.—O. 26 amplifies and explains S. 75. 3 Lah. 209=1922 Lah. 47. Examination of witnesses on commission is in the discretion of the Court. 46 Mad. 574=44 M. L. J. 202. See also 32 C. W. N. 128. The Court should not allow witnesses to be examined on commission without adequate reason, and the grounds on which a commission can issue are ordinarily those specified in R. 1, O. 26. 42 Bom. 136=43 I. C. 729. As to the obligation of a Court to issue a commission, see 8 B. L. R. at p. 16. A commission to examine witnesses may issue when a case is referred to arbitration. 7 Bom. L. R. 560; see also 8 Bom. L. R. at p. 16; 18 W. K. 230; 15 C. 775.

MEANING OF TERMS.—The word "may" means "is given authority to". 46 Mad. 574=44 M. L. J. 202.

ILLUSTRATIVE CASES.—In the case of a witness not under the control of the party who resides beyond the limits fixed commission should issue as a matter of right, unless the Court is satisfied that the party is merely abusing the Court's power. 46 Mad. 574=44 M. L. J. 202=1923 Mad. 321. The Court ought to issue commissions for the examination of witness at the instance of a party if all the conditions requisite therefor are fulfilled, irrespective of whether that party will be ultimately benefited thereby. 12 I. C. 74=21 M. L. J. 889; 46 Mad. 574=44 M. L. J. 202. If a parda lady can be examined in Court in her palki, no commission need be issued. 18 W. R. 230. See also 15 C. 775. But see contra 86 I. C. 513=1925 M. 905. A purdanashin woman cannot claim to be examined on commission as a witness at a place of her own choice. 48 C. 448. The mere fact that a woman lost her husband a few months ago does not justify the issue of a commission. 14 B. 584. Issue of commission to

Hindu lady recently widowed.—Witnesses being old as a ground for examination on commission—Principles applicable—Erroneous order—Interference in revision. See (1927) M. W. N. 218=A. I. R. 1927 Mad. 524 (31 Mad. 60; 39 C. L. J. 98; 42 Bom. 136 Rel. on; (1922) M. W. N. 524 Dist.). In the case of an old man of feeble health the Court can order an examination on commission at his own house. 85 I. C. 619=1925 Cal. 1118. A commission should issue to examine the head of a Mutt who is an ascetic. 28 M. 28, as to a religious preceptor see 42 B. 136. A commission will not issue for the examination of an infant of tender years. 23 B. 626. A commission will not be issued for the examination of a plaintiff, on his application except under very strong circumstances. 1 Ind. Jur. N. S. 357; 57 I. C. 955=13 Bur. L. T. 33. But the case is different when the application is made by a defendant. 57 I. C. 955. In the case of a defendant outside jurisdiction the Court will not regard the case with the same strictness as the case of the plaintiff who has instituted his suit in a forum of his choice though he resides beyond the jurisdiction of such Court. (*Ross v. Woodford*, (1894) 1 Ch. 38 and *New v. Burns* 64 L. J. Q. B. 104, Ref.); 35 C. L. J. 78=68 I. C. 9=1922 Cal. 42; 73 I. C. 923=1924 Lah. 475. See also 46 M. L. J. 131. Where the witness is the servant of the party applying, it is not reasonable to issue a commission. 20 W. R. 253.

PRACTICE AND PROCEDURE.—Mere inconvenience or great distance from the Court to the plaintiff's place of residence, is not a sufficient ground. 57 I. C. 955=13 Bur. L. T. 33. Where commission is issued to examine a specific witness and a witness not named is examined, court would ignore such evidence. 59 I. C. 539=47 Cal. 583. There is nothing prohibiting the granting of copies of cross interrogatories to the opposite party before a commission is issued for the examination of a witness and it is reasonable that each side should know the questions the other desires to put. 39 I. C. 944=10 S. L. R. 210. Commissioner's report—Objection to, should

2. [S. 384.] An order for the issue of a commission for the examination of a witness may be made by the Court either of its own motion or on the application, supported by affidavit or otherwise, of any party to the suit or of the witness to be examined.

3. [S. 385.] A commission for the examination of a person who resides within the local limits of the jurisdiction of the Court issuing the same may be issued to any person whom the Court thinks fit to execute it.

Where witness resides within Court's jurisdiction.
Persons for whose examination commission may issue.

4. [S. 386.] (1) Any Court may in any suit issue a commission for the examination of—

(a) any person resident beyond the local limits of its jurisdiction ;
(b) any person who is about to leave such limits before the date on which he is required to be examined in Court ; and

(c) any civil or military officer of the Government who cannot, in the opinion of the Court, attend without detriment to the public service.

(2) Such commission may be issued to any Court, not being a High Court, within the local limits of whose jurisdiction such person resides, or to any pleader or other person whom the Court issuing the commission may appoint.

(3) The Court on issuing any commission under this rule shall direct whether the commission shall be returned to itself or to any subordinate Court.

5. [S. 387.] Where any Court to which application is made for the issue of a commission for the examination of a person residing at any place not within British India is satisfied that the evidence of such person is necessary, the Court may issue such commission or a letter of request.

Commission or request to examine witness not within British India.

Court to examine witness pursuant to commission.

6. [S. 388] Every Court receiving a commission for the examination of any person shall examine him or cause him to be examined pursuant thereto.

be heard by the Court. 14 L. W. 620=68 I. C. 469.

APPEAL.—An order refusing to issue a commission to examine a witness whose personal attendance cannot be enforced is a judgment within the meaning of S. 15 of the Letters Patent, and is appealable, 30 C. 143. But see *contra* 35 M. 1; 3 Rang. 293=1925 Rang. 290.

REVISION.—An order refusing a commission cannot be the subject of revision, 9 M. 256. Interlocutory order appointing Commissioner is not open to Revision. 74 I.C. 812=1923 Mad. 43.

O. 26, R. 2.—Rule 2 does not say that the application for commission must be supported by the affidavit of the party or of the witness, but only says that the application of a party or of a witness, is to be supported by affidavit or otherwise. 103 I. C. 141=A. I. R. 1927 Rang. 175.

O. 26, R. 4. SCOPE OF RULE.—This rule is exhaustive and provides for all cases in which the Legislature intends that a commission should issue, 28 M. 28. The issue of a commission to examine a witness is a matter of judicial discretion and will not be granted unless the application is made *bona fide*. 19 I. C. 643; 103 I. C. 141=A. I. R. 1927 Rang. 175. In cases under O. 26, R. 4, a distinction has been observed between an application by a plaintiff asking for a commission to examine himself and an application by a defendant asking for a commission to examine himself. 35 C. L. J. 78=1922 Cal. 42. See also 3 Pat. 863=84 I. C. 993=1925 Pat.

125. Where the defendant is his own sole witness and applied for a commission to have himself examined as he was living more than 200 miles away in a Native State, the application should be allowed. 73 I.C. 923=1924 Lah. 475; 16 I.C. 750. "It is a very unusual thing to grant a second commission and it ought never to be allowed except upon substantial grounds". 7 Times Rep. 653. *A de bene esse* examination of a witness about to leave the jurisdiction of the Court must be taken by the Court, unless the parties consent to the evidence being taken on commission. 5 B.L. R. 252. A commissioner for the examination of witness is entitled to note his observation as to the demeanour of the witnesses examined by him. 48 I. C. 561=28 C. L. J. 306. Report of a commissioner appointed by an Assistant Collector in a suit for profits under S. 164 of the Agra Tenancy Act, cannot be admitted in evidence. 39 All. 694=42 I. C. 720. A Court of appeal should exercise great caution when invited to interfere with an order of the trial Court made with jurisdiction in the exercise of its discretion as to granting a commission. 35 C. L. J. 78=1922 Cal. 42.

O. 26, R. 5.—The costs of a commission to England should be taxed on the same scale and principle as would be adopted in England, 15 B. 209.

O. 26, R. 6.—A party who has not joined in a commission is entitled to cross-examine the witnesses who are examined under it, 14 W. R. O. C. 17.

7. [S. 389.] Where a commission has been duly executed, it shall be returned, together with the evidence taken under it, to the Court from which it was issued, unless the order for issuing the commission has otherwise directed, in which case the commission shall be returned in terms of such order; and the commission and the return thereto and the evidence taken under it shall (subject to the provisions of the next following rule) form part of the record of the suit.

Return of commission with depositions of witnesses.

8. [S. 390.] Evidence taken under a commission shall not be read as evidence in the suit without the consent of the party against whom the same is offered, unless—

(a) the person who gave the evidence is beyond the jurisdiction of the Court, or dead or unable from sickness or infirmity to attend to be personally examined, or exempted from personal appearance in Court, or is a civil or military officer of the Government who cannot, in the opinion of the Court, attend without detriment to the public service, or

(b) the Court in its discretion dispenses with the proof of any of the circumstances mentioned in clause (a), and authorizes the evidence of any person being read as evidence in the suit, notwithstanding proof that the cause for taking such evidence by commission has ceased at the time of reading the same.

Commissions for Local Investigations.

9. [S. 392.] In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter is dispute, or of ascertaining the market-value of any property, or the amount of any mesne profits or damages

Commissions to make local investigations.

O. 26, R. 8.—When a defendant examines a witness on commission and the commission is returned to the Court, the plaintiff in opening his case is entitled to treat the evidence as part of the record, without treating it as his own evidence, 26 C. 591. That the evidence was given in the absence of the other side is not enough to make the deposition of a witness taken on commission inadmissible, 10 W. R. 236. A Court may refuse to hear read in evidence the deposition of a defendant taken on commission, where, there is no evidence to prove that the defendant was unable to attend personally at the time of the trial, 22 W. R. 331. Evidence taken on commission, until tendered and admitted as evidence in the suit, cannot be made use of by either party, 30 Cal. 999 (1903); 9 C. W. N. 794. On this point see also A. I. R. 1926 Sind 34; 44 C. L. J. 288=A. I. R. 1927 Cal. 43; 32 C. W. N. 128; A. I. R. 1927 Cal. 43.

O. 26, R. 9. APPLICATION OF RULE.—The rule applies to proceedings under S. 158 of the Ben. Ten. Act, 17 C. 277. There is no error of law when a Judge does not direct a local investigation of his own motion, in a case where he is not moved to do so by the parties. B. L. R. Sup. Vol. 358. It is within the discretion of the Court to order or refuse a local inquiry, 12 W. C. 76. Application for local investigation by Court on the day set down for trial would not be granted 13 I. C. 194. The local investigation presupposes the existence on record of independent evidence which requires to be elucidated, 16 M. 350. The rule does not authorize the Court to delegate to a Commissioner the trial of any material issue which it is bound to try, 16 M. 350. The object of local investigation is to obtain evidence which from its peculiar nature can only be obtained on the spot, 2 N. W. P. 196. A commission for

local investigation cannot be issued after the evidence is closed and the case is ready for judgment, 51 I. C. 399. Where a party to a local investigation goes on with the trial he cannot at the last moment ask for giving fresh evidence against report of such investigation, 16 I. C. 39.

WHO CAN BE APPOINTED.—A Judge from whose decision an appeal is pending, is a most unsuitable person to make a local investigation, 17 W. R. 300. A Judge may make a local inspection in person at his discretion. Under the present Code, a Judge may issue a commission in any case where he deems it fit to do so, irrespective of his own convenience. [39 Mad. 501 Cons.; 31 Bom. 38 (P. C.) Expl.] 44 Mad. 640=40 M. L. J. 554. The District Judge can appoint a Munsiff to be Commissioner, 11 C. L. R. 533. For instance of improper appointments; see 6 W. R. 81.

OBJECTIONS TO REPORT.—Parties are entitled to object to the Commissioner's report and prove their objection by examining the Commissioner or other witness, 42 I. C. 221=164 P. W. R. 1917; 38 I. C. 491; 19 C. L. J. 87=18 C. W. N. 697; 72 P. L. R. 1914=22 I. C. 526. It is within the discretion of a Judge to accept the report of a Commissioner, 47 I. C. 650=28 C. L. J. 203. A defendant who does not appear before a Commissioner cannot ordinarily object to his report, 60 I. C. 434. Court has a discretion to permit or refuse a party to examine the Commissioner, 47 I. C. 650=28 C. L. J. 203. Objections to the report of a Commissioner cannot be raised for the first time in Second Appeal, 27 I. C. 595=70 P. L. R. 1915.

SUPERSEDING COMMISSIONER.—A Local Commissioner appointed by consent of parties cannot be superseded simply on the ground that

or annual net profits, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court :

Provided that, where the Local Government has made rules as to the persons to whom such commission shall be issued, the Court shall be bound by such rules.

10. [S. 393.] (1) The Commissioner, after such local inspection as he deems necessary and after reducing to writing the evidence taken

by him, shall return such evidence, together with his report in writing signed by him to the Court.

(2) The report of the Commissioner and the evidence taken by him (but not the evidence without the report) shall be evidence in the suit and shall form part of the record ; but the Court or, with the permission of the Court, any of the parties to the suit may examine the Commissioner personally in open Court touching any of the matters referred to him or mentioned in his report, or as to his report, or as to the manner in which he has made the investigation.

Report and depositions to be evidence in suit.

Commissioner may be examined in person.

(3) Where the Court is for any reason dissatisfied with the proceedings of the Commissioner, it may direct such further inquiry to be made as it shall think fit.

Commissions to Examine Accounts.

11. [S. 394.] In any suit in which an examination or adjustment of accounts is necessary, the Court may issue a commission to such person as it thinks fit directing him to make such examination or adjustment.

Commission to examine or adjust account.

12. [S. 395.] (1) The Court shall furnish the Commissioner with such part of the proceedings and such instructions as appear necessary, and the instructions shall distinctly specify whether the Commissioner is merely to transmit the proceedings which

Court to give Commissioner necessary instructions.

he is incompetent to go into the accounts, being ignorant of the language. 27 I. C. 598=70 P. L. R. 1915.

SECOND ENQUIRY.—When an inquiry is being carried on, a second inquiry should not be ordered without setting aside the first. 23 W. R. 93. Where the result of a local investigation is unsatisfactory the Court is not bound to order another inquiry. It can decide the case on the evidence. 50 I. C. 301 (23 C. L. J. 600, dist.). When a judge has ordered, his successor should not interfere with the order but should carry it out. 1 W. R. 102. The appellate court should not order local investigation where the parties refused to have one, in the lower Court. 12 C. 45

O. 26, R. 10. [N.B.—See also under R. 9.] A commission issued to an Amin to hold local investigation is not a process within the meaning of cl. (1) of S. 25 of the Court Fees Act. 17 C. 281. When a commissioner is appointed to prepare a map of a locality, statements of the village officers made to him with regard to the right in suit are admissible in evidence. 24 B. 41. Commissioner for ascertainment of mesne profits may rely on local inspection but must record witnesses evidence. 47 M. 800=1925 M. 145=48 M. L. J. 89; 92 I. C. 133=A. I. R. 1925 Mad. 145. The evidence taken should only be with reference to points for the determination of which local inspection is required. 9 W. R. 83. See also 17 W. R. 282. A Commissioner should give to the parties notice of the time when the local investigation is to be held. 12 M. 139; 17 W. R. 230. See R. 18. Commissioner's report is only evidence and not binding on the court—If report is not satisfactory court can order another commission. 7 Pat. L. T. 795=96 I. C. 327

=A. I. R. 1926 P. 462. Decree based on incomplete report of Commissioner can be set aside. 104 I. C. 369=9 Lah. L. J. 339. The report of a Commissioner in a previous suit is not admissible in evidence in a subsequent suit, unless its accuracy be proved. 12 C. L. R. 50. The report cannot be rejected in case the Commissioner's remuneration has not been paid. 17 C. 281; and his evidence only on the point to which the commission refers. 14 W. R. 493; 24 W. R. 208. After receipt of the report, a day should be fixed for hearing objections, and notice given to the parties, 21 W. R. 2. The time fixed for the return of the commission can be extended. 9 B. 250.

APPEAL.—No appeal will lie from an order directing a local investigation. 7 W. R. 425. See also 12 W. R. 76.

O. 26, R. 11.—[N.B.—See also under R. 9.] As regards the procedure to be adopted in taking accounts, see 7 C. 654; see also 6 C. 754; 14 C. 147; 1925 Sind 265; 87 I. C. 764; A. I. R. 1926 Cal. 349; 91 I. C. 766=A. I. R. 1925 Sind 265. Commissioner is to determine only the quantum and not the factum of liability of an agent. 52 Cal. 766=1925 Cal. 1069. Court cannot delegate all its powers and functions in the matter of taking evidence and determining issues to a Commissioner. 89 I. C. 333; see also 89 I. C. 343=1925 Pat. 576. Decree based on incomplete report of Commissioner can be set aside. 104 I. C. 369=9 Lah. L. J. 339. The remuneration of a Commissioner appointed to examine accounts should, as a rule, be a definite amount, and not a monthly allowance. 3 M. 259.

O. 26, R. 12. [N.B.—See also under R. 9.] Although the Commissioner's report should have

he may hold on the inquiry, or also to report his own opinion on the point referred for his examination.

Proceedings and report to be evidence.

Court may direct further inquiry.

(2) The proceedings and report (if any) of the Commissioner shall be evidence in the suit, but where the Court has reason to be dissatisfied with them, it may direct such further inquiry as it shall think fit.

Commissions to make Partitions.

13. [S. 396, para. 1.]

Commission to make partition of immoveable property.

as declared in such decree.

Where a preliminary decree for partition has been passed, the Court may, in any case not provided for by section 54, issue a commission to such person as it thinks fit to make the partition or separation according to the rights

14. [S. 396. paras. 2 & 3.]

Procedure of Commissioner.

(1) The Commissioner shall, after such inquiry as may be necessary, divide the property into as many shares as may be directed by the order under which the commission was issued, and shall allot such shares to the parties, and may, if authorized thereto by the said order, award sums to be paid for the purpose of equalizing the value of the shares.

(2) The Commissioner shall then prepare and sign a report or the Commissioners (where the commission was issued to more than one person and they cannot agree) shall prepare and sign separate reports appointing the share of each party and distinguishing each share (if so directed by the said order) by metes and bounds. Such report or reports shall be annexed to the commission and transmitted to the Court; and the Court, after hearing any objections which the parties may make to the report or reports, shall confirm, vary or set aside the same.

(3) Where the Court confirms or varies the report or reports it shall pass a decree in accordance with the same as confirmed or varied; but where the Court sets aside the report or reports it shall either issue a new commission or make such other order as it shall think fit.

very great weight attached to it, it is not absolutely binding. 6 M. H. C. R. 36; *see also* 6 M. H. C. R. A. C. 149 and L. R. 1 I. A. 346; 72 P. L. R. 1914=22 I. C. 526. (Suit for dissolution of partnership). As to what the Commissioner's report should contain, *see* 3 B. 161. When a Commissioner makes a report, the Court of first instance and the Court of Appeal should consider it before accepting a decree in accordance with it. 5 C. W. N. 692.

O. 26, R. 13.—The intention of the rule is that, upon the first hearing the Court shall determine whether the plaintiff is entitled to a partition, and shall ascertain who the several persons interested in the property are. 7 C. 318. *See also* 18 M. L. T. 145=2 L. W. 693. Proceedings taken under this rule are proceedings in the suit itself, and not proceedings in execution of a decree. 22 Cal. at p. 432; 52 I. C. 614. The Court has no power under this rule to order its Amin to cause a wall to be built separating portions of property of which partition has been decreed. 19 A. 194. The word "person" has been used in the singular to meet the rulings in 29 A. 235 (F. B.); 6 Bom. L. R. 586. Powers of Commissioner appointed to make a partition—Difference between commissioner and arbitrator. A. I. R. 1927 Pat. 135; 1926 P. H. C. C. 161=95 I. C. 321=7 Pat. L. T. 739.

APPEAL.—No appeal lies from an order appointing a Commissioner. 16 M. L. J. 21.

O. 26, R. 14. SCOPE.—Application for partition by compromise is not application for execution. 2 L. W. 693=30 I. C. 380. A casting of lots for the purpose of allotting shares to the parties is not opposed to O. 26, R. 14; 29 I. C. 245=2 L. W. 430. The most equitable way by which properties could be assigned to co-parceners will be to draw lots after dividing the properties with reference to the number of shares. 29 I. C. 245=2 L. W. 430. A Commissioner cannot prepare a number of schemes and ask the Court to accept one. 6 Bom. L. R. 586. Commissioner, allotment by—Approved by order of Court—Effect 14 M. L. T. 157=20 I. C. 908. Objections are entertainable to the report of the Commissioner under R. 14. 25 I. C. 277. In dealing with the objections to the report of a Commissioner an Appellate Court has the same power as the Original Court. 56 I. C. 972=12 Bur. L. T. 228. A party cannot be heard in the Appellate Court unless he had filed his objections in the Original Court. 56 I. C. 972=12 Bur. L. T. 228.

APPEAL.—An application under this rule for the appointment of a Commissioner, is not a matter coming within the scope of S. 47 and appeal lies from an order made on it. 17 M. L. J. 144. But no appeal lies against an order of court confirming or varying a report of a Commissioner made in a partition suit under C. P. C., O. 26, R. 14 (3). 91 I. C. 317=A. I. R. 1926 Oudh. 195.

General provisions.

15. [S. 397.] Before issuing any commission under this Order, the Court may order such sum (if any) as it thinks reasonable for the expenses of the commission to be, within a time to be fixed,

Expenses of commission to be paid into Court.

paid into Court by the party at whose instance or for whose benefit the commission is issued.

[Madras.] Re-number the existing R. 15 in O. XXVI as R. 15 (1) and insert the following as Sub-R. (2) :—

(2) Before executing and returning any commission issued by foreign courts under the provisions of S. 78, the court or the Commissioner required to execute the commission may levy such fee as the High Court may from time to time prescribe in this behalf in addition to the fees prescribed for the issue of summons to witnesses and for expenses of such witnesses under R. 2 of O. XVI.

16. [S. 398.] Any Commissioner appointed under

Powers of Commissioners.

this Order may, unless otherwise directed by the order of

appointment,—

(a) examine the parties themselves and any witness whom they or any of them may produce, and any other person whom the Commissioner thinks proper to call upon to give evidence in the matter referred to him ;

(b) call for and examine documents and other things relevant to the subject of inquiry ;

(c) at any reasonable time enter upon or into any land or building mentioned in the order.

17. [S. 399.] (1) The provisions of this Code relating to the summoning, attendance and examination of witnesses, and to the remuneration of, and penalties to be imposed upon, witnesses, shall

Attendance and examination of witnesses before Commissioner.

apply to persons required to give evidence or to produce documents under this Order whether the commission in

execution of which they are so required has been issued by a Court situate within or by a Court situate beyond the limits of British India, and for the purposes of this rule the Commissioner shall be deemed to be a Civil Court.

(2) A Commissioner may apply to any Court (not being a High Court) within the local limits of whose jurisdiction a witness resides for the issue of any process

O. 26, R. 15.—Court has got power to impose any terms that it chooses as condition precedent to granting prayer for local investigation. 104 I. C. 314 = A. I. R. 1927 Cal. 907.

COMMISSIONER'S FEES.—Under O. 26, R. 15, the Court has to order the parties to make the deposits for the necessary remuneration of the Commissioners and as it has to be entered in the decree, it is necessary to determine the fee of the Commissioner before the final disposal of the case. 57 I. C. 291 = 1 P. L. T. 170. There must be some confidence reposed in the Commissioners, who are pleaders and officers of the Court and their report. 47 I. C. 291 = 1 P. L. T. 171. It is not proper that the Commissioner should be left to realise his fees by execution. 9 I. C. 313 = 15 C. W. N. 221. The proper course is to call on the Plaintiff to deposit the full amount in Court and refuse to draw up the decree before the sum is so deposited. 9 I. C. 313 = 15 C. W. N. 221, of the defendant, also is liable to pay a share, the plaintiff ought to be made to deposit it in Court and such sum ought to be allowed to the plaintiff in the decree. (*Ibid.*) The Court will not order the costs of a Commission to examine a defendant who is a parda lady, to be paid by her. 5 C. 866 ; 10 C. W. N. 234.

SUIT.—A Commissioner can sue for the recovery of his remuneration. 4 M. 399 ; but

cannot seek to recover it by way of execution. 10 M. L. J. 241. Where money is not deposited in court, an order passed on the Commissioner's application directing payment to him is covered by S. 36 and is a decree under S. 47. 52 Cal. 269 = 1925 Cal. 57.

EXECUTION.—The order of a Court directing the parties to a partition suit to deposit the Amin's fees is not capable of execution. 21 I. C. 191. See also 9 I. C. 313 = 15 C. W. N. 221. The Dt. Judge has no power to disallow a portion of the remuneration claimed by a Commissioner for local investigation in connection with a suit pending in the Court of the Subordinate Judge. 44 I. C. 496 = 23 C. W. N. 295. On this rule See also 3 M. 259 ; 17 C. 281 and 15 B. 209.

O. 26, R. 16.—An Amin appointed to hold a local investigation has power to examine witnesses relative to the matter he has to inquire into 1 B. L. R. (S.N.) 2. The Commissioner cannot deal with the case as if he is the Judge or arbitrator. If the report does not show what the accounts are, it is waste paper—6 C. L. J. 105. Where statements recorded on commission were not read over to the witness they are admissible in evidence and it is open to the Court to grant sanction for perjury in respect of such statements. 74 I. C. 445 = 1923 Oudh 119.

O. 26, R. 17.—See 23 Cal. 404.

which he may find it necessary to issue to or against such witness, and such Court may, in its discretion, issue such process as it considers reasonable and proper.

18. [S. 400.] (1) Where a commission is issued under this Order, the Court shall direct that the parties to the suit shall appear before the Commissioner in person or by their agents or pleaders.

Parties to appear before Commissioner.

(2) Where all or any of the parties do not so appear, the Commissioner may proceed in their absence.

[Allahabad and Oudh.] In O. XXVI, R. 18, sub-rule (1) after the words "by their agents or pleaders," add "and shall direct the party applying for examination of the witness, or in its discretion any other party to the suit, to supply the commissioner with a copy of the pleadings and issues."

[Rangoon.] The following shall be substituted for O. XXVI, R. 18, sub-rule 1 :—

"When a commission is issued under this order, the parties to the suit shall appear before the Commissioner in person or by their agents or pleaders, unless otherwise directed by the Court, within fifteen days."

The following shall be added as rules 19 to 26 of O. XXVI respectively :—

Fees to Commissioners for Local Investigation and Commissioners for partition or to take accounts or for the examination of witnesses.

19. Civil Courts in issuing commissions will be guided by the provisions of Rule 15, and subject to the provisions of Rule 23 will exercise their own judgment in fixing a reasonable sum for the expenses of the commission.

20. Under Government of India Resolution in the Home Department (Judicial No. 101101, dated the 21st July, 1875) Judicial Officers are prohibited from accepting any remuneration for executing commissions issued by Courts of other provinces.

21. It is to be understood that no part of the fee sent for the execution of a commission is to be accepted, either personally or on behalf of Government. The execution of a commission is an official duty which Judicial Officers are bound to perform when called upon, and is not work undertaken for a private body.

22. In all cases the unexpended balance, which remains after all charges have been deducted, should be returned to the Court issuing the commission.

23. The following fees are to be allowed to Commissioners of Partition or to take accounts or for the examination of witnesses namely :—

Commissioners' fees for every effective meeting shall not exceed three gold mohurs for the first two hours and one gold mohur for each succeeding hour.

Fees to Commissioners for administering an oath or solemn affirmation to a declarant of an affidavit.

24. When under the orders of a Court in the town of Rangoon, of a Divisional Court, or of a District Court an oath or solemn affirmation is administered to a declarant of an affidavit at his request elsewhere than at the Court, a fee of Rs. 16 shall be paid by the said declarant : Provided that—

(a) the administration of the oath or of solemn affirmation elsewhere than in Court shall be authorized by the Court by order in writing ;

(b) if more than one affidavit is taken at the same time and place, the fee shall be Rs. 8 for each affidavit after the first ;

(c) in no case shall the fees for taking any number of affidavits at the same time and place exceed Rs. 80 ;

(d) in pauper suits and appeals, when the affidavit of a pauper is taken, no fee shall be charged.

25. Affidavits taken under rule 24 shall be taken out of Court hours. The fees shall be retained by the Commissioner for administering the oath or solemn affirmation.

26. No fee shall be charged for the administration of an oath under the order of any Court other than those specified in Rule 24.

[Madras.] After O. XXVI, read the following order as O. XXVI-A :—

XXVI-A

"1. The Court may in any suit issue a commission to such person as it thinks fit to translate accounts and other documents which are not in the language of the Court.

2. The report of the Commissioner shall be evidence in the suit and shall form part of the record.

3. Before issuing any commission under this order the Court may order such sum (if any) as it thinks reasonable for the expenses of the commission to be within a time to be fixed, paid into Court by the party at whose instance or for whose benefit the commission is issued.

O. 26, R. 18.—A party refusing to appear take any objection to his report 6 W. R. 130. before ad Amin is not at liberty afterwards to

ORDER XXVII.

SUITS BY OR AGAINST THE GOVERNMENT OR PUBLIC OFFICERS IN
THEIR OFFICIAL CAPACITY.

1. In any suit by or against the Secretary of State for India in Council, the
 Suits by or against Govern-
 ment.

 the plaintiff or written statement shall be signed by such person
 as the Government may, by general or special order, ap-
 point in this behalf, and shall be verified by any person
 whom the Government may so appoint and who is acquainted with the facts of the
 case.

2. [S. 417.] Persons being *ex-officio* or otherwise authorised to act for the
 Government in respect of any judicial proceeding shall be
 deemed to be the recognized agents by whom appearances,
 acts and applications under this Code may be made or
 done on behalf of the Government.

3. [S. 418.] In suits by or against the Secretary of State for India in Council,
 instead of inserting in the plaint the name and descrip-
 tion and place of residence of the plaintiff or defendant
 it shall be sufficient to insert the words "The Secretary
 of State for India in Council."

4. [S. 419.] The Government pleader in any Court, or such other person as the
 Local Government may for any Court appoint in this be-
 half, shall be the agent of the Government for the pur-
 pose of receiving process against the Secretary of State
 for India in Council issued by such Court.

5. [S. 420.] The Court, in fixing the day for the Secretary of State for India in
 Council to answer to the plaint, shall allow a reasonable
 time for the necessary communication with the Govern-
 ment through the proper channel, and for the issue of
 instructions to the Government pleader to appear and answer on behalf of the said
 Secretary of State for India in Council or the Government, and may extend the time
 at its discretion.

[Madras.] For O. XXVII, R. 5 substitute the following rule :—

The Court in fixing the day for the Secretary of State for India in Council to answer the plaint
 shall allow not less than three months' time from the date of summons for the necessary commu-
 nication with the Government through the proper channel and for the issue of instructions to the
 Government Pleader to appear and answer on behalf of the said Secretary of State for India in
 Council or the Government and may extend the time at its discretion.

6. [S. 421.] The Court may also, in any case in
 which the Government pleader is not accompanied by any
 person on the part of the Secretary of State for India in
 Council, who may be able to answer any material questions
 relating to the suit, direct the attendance of such a person.

7. [S. 423.] (1) Where the defendant is a public officer and, on receiving the
 summons, considers it proper to make a reference to the
 Government before answering the plaint, he may apply to
 the Court to grant such extension of the time fixed in
 the summons as may be necessary to enable him to make
 such reference and to receive orders thereon through the proper channel.

(2) Upon such application the Court shall extend the time for so long as
 appears to it to be necessary.

O. 27, R. 2.—In a Government appeal the
 vakalat was signed by the Personal Assistant to
 the Collector on behalf of the latter. It appear-
 ed from the Government notification that the
 Personal Assistant and the Collector had been

authorised to sign vakalats in such suits. *Held*,
 that the vakalat was not in proper form but that
 it could be altered after the appeal has been
 disposed of. 105 I. C. 84 = 39 M. L. T. 112.

8. [S. 426.] (1) Where the Government undertakes the defence of a suit against a public officer, the Government pleader, upon being furnished with authority to appear and answer the plaint, shall apply to the Court, and upon such application the Court shall cause a note of his authority to be entered in the register of civil suits.

[S. 427.] (2) Where no application under sub-rule (1) is made by the Government pleader on or before the day fixed in the notice for the defendant to appear and answer, the case shall proceed as in a suit between private parties :

Provided that the defendant shall not be liable to arrest, nor his property to attachment, otherwise than in execution of a decree.

[Allahabad.] Add the following as Rule 9 :—

"9. In every case in which the Government pleader appears for the Government as a party on its own account, or for the Government as undertaking, under the provisions of rule 8 (1), the defence of a suit against an officer of the Government, he shall, in lieu of a vakalatnama, file a memorandum on unstamped paper signed by him and stating on whose behalf he appears. Such memorandum shall be, as nearly as may be, in the terms of the following form :

Title of the suit, etc.

I, A. B., Government Pleader, appear on behalf of the Secretary of State for India in Council (or the Government of the United Provinces, or as the case may be,) Respondent (or etc.), in the suit ; or, on behalf of the Government [which, under O. XXVII, R. 8 (1) of Act (V of 1908), has under-taken the defence of the suit] respondent (or, etc.), in suit."

ORDER XXVIII.

SUITS BY OR AGAINST MILITARY MEN [OR AIRMEN].¹

Officers or soldiers who cannot obtain leave may authorize any person to sue or defend for them.

1. [S. 465.] (1) Where any officer [soldier or airman]¹ actually serving the Government in a military [or air force]¹ capacity is a party to a suit, and cannot obtain leave of absence for the purpose of prosecuting or defending the suit in person, he may authorize any person to sue or defend in his stead.

(2) The authority shall be in writing and shall be signed by the officer [soldier or airman] in the presence of (a) his commanding officer, or the next subordinate officer, if the party is himself the Commanding officer, or (b) where the officer, soldier [or airman] is serving in military [or air force]¹ staff employment, the head or other superior officer of the office in which he is employed. Such Commanding or other officer shall countersign the authority, which shall be filed in Court.

(3) When so filed the countersignature shall be sufficient proof that the authority, was duly executed, and that the officer or soldier [or airman]¹ by whom it was granted could not obtain leave of absence for the purpose of prosecuting or defending the suit in person.

Explanation.—In this Order the expression "Commanding Officer" means the officer in actual command for the time being of any regiment, corps, detachment or depot to which the officer, soldier [or airman]¹ belongs.

2. [S. 466.] Any person authorized by an officer [soldier or airman]¹ to prosecute or defend a suit in his stead may prosecute or defend it in person in the same manner as the officer, [soldier or airman]¹ could do if present ; or he may appoint a pleader to prosecute or defend the suit on behalf of such officer [soldier or airman]¹.

Person so authorized may act personally or appoint pleader.

Service on person so authorized, or on his pleader, to be good service.

3. [S. 467.] Processes served upon any person authorized by an officer [soldier or airman]¹ under rule 1 or upon any pleader appointed as aforesaid by such person shall be as effectual as if they had been served on the party in person.

ORDER XXIX.

SUITS BY OR AGAINST CORPORATIONS.

1. [S. 435.] In suits by or against a corporation, any pleading may be signed and verified on behalf of the corporation by the secretary or by any director or other principal officer of the corporation who is able to depose to the facts of the case.

Subscription and verification of pleading.

[Madras.] Insert the following as Rule 1-A of O. XXIX :—

1-A. "In suits against a Local Authority the Court in fixing the day for the defendant to appear and answer shall allow not less than two months' time between the date of summons and the date for appearance."

2. [S. 436.] Subject to any statutory provision regulating service of process, where the suit is against a corporation, the summons may be served—

(a) on the secretary, or on any director, or other principal officer of the corporation, or

(b) by leaving it or sending it by post addressed to the corporation at the registered office, or if there is no registered office, then at the place where the corporation carries on business.

Power to require personal attendance of officer of corporation.

3. [S. 436, last para.] The Court may, at any stage of the suit, require the personal appearance of the secretary or of any director, or other principal officer of the corporation who may be able to answer material questions

relating to the suit.

ORDER XXX.

SUITS BY OR AGAINST FIRMS AND PERSONS CARRYING ON BUSINESS IN NAMES OTHER THAN THEIR OWN.

1. (1) Any two or more persons claiming or being liable as partners and carrying on business in British India may sue or be sued in the name of the firm (if any) of which such persons were partners at the time of the accruing of the cause of action,

Suing of partners in name of firm.

O. 29, R. 1. SCOPE OF RULE.—O. 29, R. 1 requires that a suit against companies should be framed, so as to describe them by the proper names. 43 Cal. 441 = 22 C. L. J. 241; 22 I. C. 674 = 20 C. L. J. 39. See also 49 Cal. 524; 25 Bom. L. R. 1081 = 1924 Bom. 155. Suit against unregistered body.—All members must be impleaded. 47 All. 342 = 23 A. L. J. 37.

"CORPORATION".—The term "Corporation" is used with reference to S. 41, Companies Act. 12 C. 41. The corporation contemplated by this rule is a corporation as known to English law, that is, a corporation created with the express consent of the Sovereign, or of such antiquity that the consent of the Sovereign may be presumed. 20 A. 167. A Corporation duly created according to the law of one State may sue and be sued in its corporate name in the Courts of other states. 30 C. 103. The Cantonment Committee of Poona is a body corporate. 14 B. 286.

RAILWAY COMPANY.—Suit against Railway company in the name of agent, if proper. See 90 I. C. 680 = 7 Pat. L. T. 57 = 5 Pat. 128 = A. I. R. 1926 Pat. 40. Form of suit against Railway Company. 64 I. C. 125 = 2 Pat. L. T. 679; 52 C. 783 = 29 C. W. N. 614 = 1925 Cal. 716.

WHO CAN SUE OR VERIFY PLEADINGS.—Permission to enable a principal officer of a corporation to verify a plaint or written statement is

not necessary. 22 C. 268. In a suit by corporation a plaint signed by principal officer, who is also an Am-Mukhtear is good. 22 I. C. 674 = 20 C. L. J. 39. See also 100 I. C. 450. An attorney appointed by the company has no power never a plaint on behalf of the company. 100 I. C. 450. The rule does not require a principal officer to verify from actual personal knowledge. He may do so on his information and belief. 9 C. W. N. 608. The secretary of a non-proprietary club cannot sue in his own name for goods supplied to a member. 14 M. 362; see also 6 A. 284. UNREGISTERED SOCIETY.—All members must be made parties. 103 I. C. 45.

PAUPER SUIT.—It is open to a company in liquidation to sue *in forma pauperis* through its liquidator. 41 Mad. 624 = 34 M. L. J. 421.

PRACTICE AND PROCEDURE.—A plaintiff is bound to serve notices after amendment of the plaint has been made and the suit properly constituted. 43 Cal. 441 = 22 C. L. J. 241.

O. 30, R. 1. SCOPE OF.—87 I. C. 992 = 1925 Sind 298; 8 Lah. 1 = A. I. R. 1927 Lah. 115. One person carrying on business in the name of a firm cannot sue in the name of the firm. 25 I. C. 131 = 12 A. L. J. 1020. Suit against firm and partner personally—procedure. 27 Bom. L. R. 998 = 1925 Bom. 494. A firm must consist of two or more persons and one partner can sign and

and any party to a suit may in such case apply to the Court for a statement of the names and addresses of the persons who were, at the time of the accruing of the cause of action, partners in such firm, to be furnished and verified in such manner as the Court may direct.

(2) Where persons sue or are sued as partners in the name of their firm under sub-rule (1), it shall, in the case of any pleading or other document required by or under this Code to be signed, verified or certified by the plaintiff or the defendant, suffice such pleading or other document is signed, verified or certified by any one of such persons.

[Punjab.] To R. 1 of O. XXX the following explanation shall be added :—

"Explanation.—This rule applies to a joint Hindu family trading in partnership."

2. (1) Where a suit is instituted by partners in the name of their firm, the plaintiffs or their pleader shall, on demand in writing by or on behalf of any defendant, forthwith declare in writing the names and places of residence of all the persons constituting the firm on whose behalf the suit is instituted.

(2) Where the plaintiffs or their pleader fail to comply with any demand made under sub-rule (1), all proceedings in the suit may, upon an application for that purpose, be stayed upon such terms as the Court may direct.

(3) Where the names of the partners are declared in the manner referred to in sub-rule (1), the suit shall proceed in the same manner, and the same consequences in all respects shall follow, as if they had been named as plaintiffs in the plaint :

Provided that all the proceedings shall nevertheless continue in the name of the firm.

Service.

3. Where persons are sued as partners in the name of their firm, the summons shall be served either—

verify the plaint in a suit by the firm, 25 I. C. 131=12 A. L. J. 1020. The mere recital of the firm's "vilasam" before the name of the agent of the firm who is the plaintiff, does not suffice to make the suit one by the firm, 17 M. L. J. 116. The firm's name is a mere expression and not a legal entity. 49 Cal. 524=1922 Cal. 408; 25 Bom. L. R. 1081=1924 Bom. 155. Firm carrying on business in different places—Identity, determination of. 65 I. C. 98=1922 All. 367. Suit by one of several partners in his own name—Maintainability. 8 Lah. 1=100 I. C. 721=28 Punj. L. R. 455=A. I. R. 1927 Lah. 115. Suit by some of the members of the firm—Addition of others—Limitation. 28 I. C. 210=2 L. W. 239; 15 S. L. R. 152=65 I. C. 26. As to what amounts to misdescription of a firm's name. See 44 I. C. 283=155 P. L. R. 1917. A suit contemplated by O. 30 of the C. P. Code may be brought by or against a firm in the firm's name even though the firm may have been dissolved before the date of the suit, provided the cause of action arose before the dissolution. 67 I. C. 10=34 C. L. J. 405; 49 C. 394=69 J. C. 236=1922 Cal. 390. Service of summons on the manager of the firm is service on all partners of the firm. 12 I. C. 629; 49 Cal. 394=69 J. C. 236. See also A. I. R. 1926 Sind 75. Firm including a minor partner—Reference of suit to arbitration—Sanction of court is not necessary. 68 I. C. 750=1923 Lah. 103; 5 Lah. L. J. 5=1913 Lah. 212. Where a suit is brought by one firm against another through their representatives they can agree to refer the dispute to arbitration. 5 Lah. L. J. 5=1923 Lah. 212. But see also 48 All. 239=91 I. C. 930=24 A. L. J. 235=A. I. R. 1926 All. 238. It is permissible in India as it is in England to sue only the solvent members of a firm when a decree is sought

against it. 41 Mad. 923=35 M. L. J. 581. A bank being a limited company can be sued only in its own corporate personality and not in the name of its manager; the manager is not personally liable. 40 I. C. 549=(1917) M. W. N. 359.

PROCEDURE.—Partner refusing to join as plaintiff should be made defendant. 92 I. C. 569=A. I. R. 1925 Lah. 504. Procedure to be adopted in suit against firm and partner personally. See 94 I. C. 969=A. I. R. 1925 Bom. 494.

PAYMENT of decree amount to one partner in a suit filed in the name of a firm gives valid discharge. 92 I. C. 387=A. I. R. 1926 Sind 167.

SET OFF.—Decree in favour of partners in individual capacity—cross decree against firm, if can be set off. 29 Bom. L. R. 396.

O. 30, R. 2 (3).—O. 30, R. 2 is applicable only to plaintiffs—Whether O. 30, R. 2 (3) controls O. 21, R. 50, see 29 Bom. L. R. 921.

O. 30, R. 3.—The rule has no application when the suit is against the partners of a firm individually. 88 I. C. 489=1925 Cal. 1136. Summons to be served at the place of the business of the firm on manager or managing partner—Service effected by affixing summons at managing partner's residence by affixing—not proper service. See 95 I. C. 149=A. I. R. 1926 Sind 208. Suit against firm—Service of Process—Liability of partners not personally served. 27 Bom. L. R. 541=87 I. C. 1051. Appearance under protest 99 I. C. 495=50 B. 665. A person who has been served as a partner and entered appearance under protest is not entitled to file a written statement on his own behalf denying that he is a partner. 54 Cal. 1057=31 C. W. N. 1004=A. I. R. 1927 Cal. 758.

(a) upon any one or more of the partners, or

(b) at the principal place at which the partnership business is carried on within British India upon any person having, at the time of service, the control or management of the partnership business there,

as the Court may direct ; and such service shall be deemed good service upon the firm so sued, whether all or any of the partners are within or without British India :

Provided that, in the case of a partnership which has been dissolved to the knowledge of the plaintiff before the institution of the suit, summons shall be served upon every person within British India whom it is sought to make liable.

4. (1) Notwithstanding anything contained in section 45 of the Indian Contract

Right of suit on death of partner.

Act, 1872, where two or more persons may sue or be sued in the name of a firm under the foregoing provisions and any of such persons dies, whether before the institution or during the pendency of any suit, it shall not be necessary to join the legal representative of the deceased as a party to the suit.

(2) Nothing in sub-rule (1) shall limit or otherwise affect any right which the legal representative of the deceased may have—

(a) to apply to be made a party to the suit, or

(b) to enforce any claim against the survivor or survivors.

5. Where a summons is issued to a firm and is served in the manner provided

Notice in what capacity served.

by rule 3, every person upon whom it is served shall be informed by notice in writing given at the time of such service, whether he is served as a partner or as a person having the control or management of the partnership business, or in both characters, and, in default of such notice, the person served shall be deemed to be served as a partner.

6. Where persons are sued as partners in the name of their firm, they shall

Appearance of partners.

appear individually in their own names, but all subsequent proceedings shall, nevertheless, continue in the name of the firm.

O. 30, R. 4.—O. 30, R. 4 applies only to a case where the suit is brought in the name of the firm 48 I. C. 309=28 C. L. J. 268 ; 21 I. C. 509=17 C. L. J. 648. See also 91 I. C. 573=A. I. R. 1926 Sind 81 ; 205 L. R. 238. R. 4 applies only to such firms as are owned by two or more persons, but where a sole proprietor dies and the firm ceases to exist, in such a case it is necessary to bring on the record the legal representatives of the deceased sole proprietor under the provisions of O. 22, R. 3. 103 I. C. 142=A. I. R. 1927 Lah. 556 (2). Defect in title of the suit cannot affect the substance of the suit. 77 I. C. 476=1923 Bom. 368 ; 44 I. C. 283=155 P. L. R. 1917. Defect of parties, effect of. 48 I. C. 309=28 C. L. J. 268. In a suit by or against a firm trading in different name if one of the partners be dead, it is not necessary to join the representatives of the deceased as a party. O. 30, R. 4, contains a modification of S. 45 of the Contract Act. 21 I. C. 509=17 C. L. J. 648. A person who sues some of the partners in their individual capacity cannot change his front and sue for a relief against them as partners. 76 P. R. 1915=31 I. C. 209. The legal representative of a deceased partner is not a necessary party in suits by the surviving partner for recovery of the debts due to the firm, but they may apply to Court to be joined as parties. 7 Bur. L. T. 261=24 I. C. 268. Suit against firm liabi-

lity of partners. A. I. R. 1926 Sind 75.

LEGAL REPRESENTATIVE.—The whole scheme of O. 30, C. P. C., is against the theory that a suit against a firm is a suit against the legal representatives of a deceased partner. R. 4 of O. 30 must not be carried any further than what it expressly states. If it is sought to fix liability on the private estate of the deceased partner, apart from his interest in the partnership assets, then his legal representatives must be added. In such a case the legal representatives of the deceased partner are served with the summons though not added as parties, leave cannot be obtained to issue execution against them under O. 21, R. 50 (2) of the Code. See 29 Bom. L. R. 1926=105 I. C. 305=A. I. R. 1927 Bom. 581.

O. 30, R. 5.—The concluding words in O. 30, R. 5 lay down a definite rule of law that service on a person without notice is equivalent to service as a partner. 19 C. L. J. 581=19 C. W. N. 1008.

O. 30, R. 6.—O. 30, R. 6 entitles a plaintiff suing a firm to know who the persons are who constitute that firm and the information cannot be withheld. 78 P. R. 1918=47 I. C. 422. The word "Individually" in O. 30, R. 6 is not synonymous with "in person". *Ibid.* No partner can be forced to appear in person, but in his absence, after service of summons, he will be dealt with *ex parte*. *Ibid.*

7. Where a summons is served in the manner provided by rule 3 upon a person having the control or management of the partnership business, no appearance by him shall be necessary unless he is a partner of the firm sued.

No appearance except by partners.

8. Any person served with summons as a partner under rule 3 may appear, under protest, denying that he is a partner, but such appearance shall not preclude the plaintiff from otherwise serving a summons on the firm and obtaining a decree against the firm in default of appearance where no partner has appeared.

Appearance under protest.

9. This Order shall apply to suit between a firm and one or more of the partners therein and to suits between firms having one or more partners in common; but no execution shall be issued in such suits except by leave of the Court, and, on an application for leave to issue such execution, all such accounts and inquiries may be directed to be taken and made and directions given as may be just.

Suits between co-partners.

Suit against person carrying on business in name other than his own.

10. Any person carrying on business in a name or style other than his own name may be sued in such name or style as if it were a firm name; and so far as the nature of the case will permit, all rules under this Order shall apply.

ORDER XXXI.

SUITS BY OR AGAINST TRUSTEES, EXECUTORS AND ADMINISTRATORS.

1. [S. 437.] In all suits concerning property vested in a trustee, executor or administrator, where the contention is between the persons beneficially interested in such property and a third person, the trustee, executor or administrator shall represent the persons so interested, and it shall not ordinarily be neces-

Representation of beneficiaries in suits concerning property vested in trustees, etc.

O. 30, R. 7.—R. 7 must be read subject to R. 5 and it contemplates a case where service is on a manager. 19 C. L. J. 581=19 C. W. N. 1008.

O. 30, R. 8.—Appearance under protest, 64 I.C. 688=23 Bom. L.R. 1249. A surety bond executed in a partnership suit endures for the benefit of all those who eventually get a decree. 4 I.C. 436.

O. 30, R. 9.—The scope of O. 30, R. 9 is not to lay down when and under what circumstances suits can be laid as between partners. It only lays down the possibility of such suits and the procedure to be followed therein. (34 Mad. 112=28 Mad. 344, dist.) 45 I.C. 36=34 M.L.J. 408. Each of the parties to a partnership suit is really in turn plaintiff and defendant and in both capacities comes before the Court. (7 Bom. 167, rel. on.) 42 I.C. 436. No suit lies as between partners or between firms having common partners for recovery of monies without asking for accounts. 45 I.C. 36=34 M.L.J. 408. A suit lies by one firm against another firm notwithstanding that the firms have common partners. 44 I.C. 428=34 M.L.J. 32.

O. 30, R. 10. APPLICABILITY OF RULE.—A plaintiff is entitled to sue a defendant, in the name of the firm, in respect of a firm transaction under O. 30, R. 10; his residence is of no importance to determine jurisdiction. 10 I.C. 895. Death of sole proprietor of firm—Suit in the name of firm when can be instituted. 89 I.C. 22=23 A.L.J. 961. Sole proprietor of firm, death of—Suit in the name of the firm, when can be instituted. A.I.R. 1926 All. 161 (2).

O. 31, R. 1. SCOPE AND APPLICATION OF RULE.—R. 1 is not applicable to a suit for a declaration of the plaintiff's right to worship in a temple and for an injunction restraining the defendant from interfering with his right. 63 I.C. 963=13 Bur. L.T. 183. See also 2 Pat. L.J. 306=39 I.C. 779.

TRUSTEE.—Under R. 1 a beneficiary is not a necessary party to a suit as he can be represented by his trustee. 18 I.C. 959=17 C.L.J. 233. Where the interest of the trustees is adverse to that of the beneficiaries, the beneficiaries must be added as parties. 13 M. 197—See 12 M.L.J. 355.

BENEFICIARIES.—In suits between beneficiaries of property vested in trustees of executors and third persons, the beneficiaries must be represented by trustees or executors. 50 I.C. 509=11 Bur. L.J. 249. Where an administratrix creates a mortgage without sanction of Court the beneficiaries are necessary parties to the same. 51 Bom. 16=98 I.C. 915=28 Bom. L.R. 1360=A.I.R. 1927 Bom. 49.

SHEBAIT.—Shebait of an idol can sue for possession of property belonging to the idol. 18 I.C. 959=17 C.L.J. 233. In a suit against a temple all the trustees are necessary parties even though there is an agreement between them authorising one of them to represent the temple. 1922 Mad. 405; 77 I.C. 942.

EXECUTOR.—No one but an executor is competent to prosecute a suit as representative of the deceased. 55 I.C. 504.

sary to make them parties to the suit. But the Court may, if it thinks fit, order them or any of them to be made parties.

Joinder of trustees, executors and administrators.

2. [S. 438.] Where there are several trustees, executors or administrators, they shall all be made parties to a suit against one or more of them :

Provided that the executors who have not proved their testator's will, and trustees, executors and administrators outside British India, need not be made parties.

Husband of married executrix not to join.

3. [S. 439.] Unless the Court directs otherwise, the husband of a married trustee, administratrix or executrix shall not as such be a party to a suit by or against her

ORDER XXXII.

SUITS BY OR AGAINST MINORS AND PERSONS OF UNSOUND MIND.

1. [S. 440, Para. 1.] Every suit by a minor shall be instituted in his name by a person who in such suit shall be called the next friend of the minor.

Minor to sue by next friend.

[Punjab.] To Order XXXII, Rule 1, the following paragraph shall be added :—

“ Such person may be ordered to pay any costs in the suit as if he were the plaintiff.”

Where suit is instituted without next friend, plaint to be taken off the file.

2. [S. 442.] (1) Where a suit is instituted by or on behalf of a minor without a next friend, the defendant may apply to have the plaint taken off the file with costs to be paid by the pleader or other person by whom it was presented.

ADMINISTRATOR.—One of co-administrators of an estate can sue to recover rent with the consent of the other administrators who are impleaded as *pro forma* defendants. 53 I. C. 478 (1).

O. 32, R. 1. APPLICATION OF RULE.—O. 32 does not directly apply to proceedings in execution. 64 I. C. 25 = 35 C. L. J. 9. See also 104 I. C. 357.

SCOPE OF RULE.—This order lays down the form in which a minor should appear as a party and this form should be strictly followed. 5 C. 450. Where the plaintiff is really a minor, the case could not be proceeded with until a next friend comes on the record. 3 Rang. 239 = 1925 Rang. 325. Suit by minor *in forma pauperis*—Next friend need not be a pauper. 37 C. L. J. 394 = 1923 Cal. 656. The suit must be brought in the name of the minor and not in the name of the next friend as representing the estate of the minor—11 C. L. R. 15 ; 14 C. 159 (F. B.) See also 13 M. 480 ; 19 M. 127. The general rule is that although a minor may appear by an attorney or pleader, he can only plead or conduct the suit by his guardian. 16 M. 344. The consent of a minor to the institution of a suit by the next friend is immaterial. 3 M. 34.

EVIDENCE.—Question whether a person is a minor or not should be decided by positive evidence, and not by his appearance. W. R. 1864, 304. A certificate of guardianship is not evidence of minority. Nor a horoscope. 17 C. 849.

COSTS.—Court may direct costs to be paid by next friend personally in proper cases. See A. I. R. 1927 Mad. 1023.

ILLUSTRATIVE CASES.—Where a Court appointed a person other than a certificated guardian the next friend of the minor, defective service of notice upon the guardian under O. 32, R. 4 (2) is only an irregularity and the minor is properly represented. 13 I. C. 594. When a plaintiff although a minor sues in her own name,

and the defendants take no objection till the suit has been disposed of by the appellate Court, they cannot raise any objection in second appeal, and after the plaintiff has become a major. 19 M. 127. Objection as to minority cannot be taken after remand, if the point was not urged in the appellate Court. 13 C. 189. Guardian *ad litem*—Gross negligence—Effect. 33 I. C. 481. Where a minor files a plaint and before it is put up before the Court, attains majority, and applies to be allowed to proceed with it, the plaint must be deemed to have been properly presented on the day of the application to proceed with the plaint. 46 I. C. 747 = 16 A. L. J. 737. An appeal by an infant not represented by a guardian *ad litem* is not entertainable. 52 I. C. 985 = 29 C. L. J. 419. It is no doubt open to the minor on attaining majority to drop the suit as not properly instituted but he is not bound to do so; he could affirm the previous proceeding and continue the suit. 44 M. L. J. 515 = 1923 Mad. 553. The procedure to reject the plaint filed by a minor without a next friend is improper. The court has to grant time for next friend to come in. 4 Lah. 390 = 75 I. C. 1028. A decree against a property represented minor is binding upon him, but if he has not been properly represented, the decree is a nullity. 15 I. C. 903 = 9 A. L. J. 653. The certificated guardian of a minor must be appointed guardian *ad litem* unless for special reasons the Court thinks that some one else should be appointed in the interests of the minor. 22 I. C. 240. A decree obtained on behalf of a minor cannot be set aside merely on the ground of non-compliance with O. 32, R. 3 (1) and (2). 49 I. C. 954 = 39 P. W. R. 1919. Minor attaining majority during pendency of suit. Decree based on compromise passed with guardian *ad litem* as party—Minor can set aside the same. (1927) M. W. N. 890.

O. 32, R. 2.—When a suit is brought by a minor as a major and it is found that plaintiff

(2) Notice of such application shall be given to such person, and the Court, after hearing his objections (if any) may make such order in the matter as it thinks fit.

Guardian for the suit to be appointed by Court for minor defendant.

3. [S. 443.] (1) Where the defendant is a minor, the Court, on being satisfied of the fact of his minority, shall appoint a proper person to be guardian for the suit for such minor.

is a minor, the Court can allow a next friend to come in and proceed with the suit. 16 M.L.J. 13; see also 13 B. at p. 11. See 3 Rang. 239=1925 Rang. 325. Minor cannot be next friend of other minors. 1925 Oudh 178. As to how the question whether a person is a minor or major is to be decided, see under R. 1. As to when objection is to be taken, see 19 M. 127 and 13 C. 189.

O. 32, R. 3. MEANING OF WORDS.—"On being satisfied": meaning of. 16 M. 344; see 14 C. 204 (209). Also 17 C. 849. under R. 1. "Proper person":—24 A. 386. The words "any guardian of the minor appointed or declared by an authority competent in that behalf" in sub-R. (4) apply to a guardian appointed under a will of a Hindu father. 31 B. 413; 14 C. 212.

SCOPE OF RULE.—The provisions of this rule are imperative, and if not substantially complied with, any decree passed against the minor is a nullity. 28 A. 137; 30 C. 1021 (P.C.); 28 A. 328; 29 A. 290; 28 A. 416; 11 C. at p. 405; 24 C. 25; 30 C. 613. O. 32 does not purport to be exhaustive, and in a proper case the Court has jurisdiction to dismiss a suit if it is not in the interest of the minor. 25 I.C. 738=1 L.W. 875. Before it is competent for the Court to appoint a guardian, there must be a suit in which the minor is a defendant in existence. 11 C. at p. 405. A guardian must be appointed by the Court, even in cases, when a guardian has been appointed under the Guardian and Wards Act. 24 C. 25. The rule contemplates a case where the guardian appointed under the Guardian and Wards Act sues to have it declared that the minor was not adopted by her husband. 30 C. 613. The provisions of O. 32, relating to "suits by or against minors" are not directly applicable to proceeding in execution. 64 I.C. 25=35 C. L.J. 9. See also 104 I.C. 357. O. 32, R. 4 and other rules as to the appointment of guardian must be read with R. 3. 36 I.C. 794=4 L.W. 362. O. 32 is not exhaustive and the Court can dismiss a suit filed by a next friend, if it is not in the interests of the minor. 25 I.C. 738=1 L.W. 875. Rule 3 does not apply to commutation proceedings under the Bengal Tenancy Act. 100 I.C. 146=A.I.R. 1927 Cal. 374.

OBJECT OF RULE.—The object of Rr. 3 and 4 is that the minor in suit should be represented by fit person so that his interests will be properly guarded. 7 O.L.J. 219=56 I.C. 313. It is obligatory on the Court under O. 32, R. 3 (1) of the Code to appoint a proper person to be guardian of a minor defendant for the suit. 34 C.L.J. 293=26 C.W.N. 781. The appointment of a guardian by a Court of First Instance enures not only for the term of the proceeding in that Court, but also for purposes of appeal. 22 M. 187; 39 C.L.J. 590. Absence of formal order and "Omission to pass a formal order under" does not vitiate proceedings. 15 I.C. 903=9 A.L.J. 653; 22 I.C. 240; 61 P.R. 1915=31 I.C. 45. Defective appointment—Representation of minor in suit—No order appointing guardian—

Compromise by person professing to act as guardian—Invalid. 35 All. 487=40 I.A. 12=25 M.L.J. 492=21 I.C. 288 (P.C.); 31 I.C. 805=14 A.L.J. 589; 26 O.C. 113=74 I.C. 409. Where a father acted as the guardian *ad litem* of his minor son, the fact that there was no formal order of Court appointing him will not vitiate the proceedings, if the minor was in no way prejudiced thereby. 74 I.C. 821=1924 Oudh 178; 26 O.C. 113; 74 I.C. 409=1923 Oudh 206; 4 Pat. L.J. 213=48 I.C. 245; 35 I.C. 868; 1917 Pat. 21; 33 I.C. 941. Absence of formal order of appointment of guardian does not vitiate the proceedings. 100 I.C. 468=9 L.L.J. 206=28 Punj. L.R. 627; 92 I.C. 241=A. I.R. 1926 Nag. 267. Absence of formal order—Reference to arbitration—Minor substantially represented in proceedings by guardian—Award not a nullity. 71 I.C. 7. A decree based on the award was held to be not binding on the minor if he was not properly represented as required by O. 32, R. 3 and the irregularity cannot be condoned. 44 Bom. 202=22 Bom. L.R. 266. The mere fact that leave of the Court has not been obtained for a reference to arbitration on behalf of a minor will not vitiate the reference and the award where the interests of the minor have in no way been prejudiced. 71 I.C. 7. The appointment of father as guardian *ad litem* without his consent and who does not appear and passing decree *ex parte* even against the minor is illegal. 52 I.C. 636; 38 All. 315=35 I.C. 707=14 A.L.J. 353; 25 I.C. 620. A father should not be appointed guardian of his minor son where there is a clear conflict of interest between them. 15 C.L.J. 446=17 C.W.N. 219.

The fact that a respondent decree holder was not properly represented at the instance of the appellant judgment-debtor does not make a decree passed in the appeal in favour of that respondent void and incapable of execution. 37 All. 179=13 A.L.J. 179; 34 All. 321=9 A.L.J. 290. Defective appointment—Omission to consult minor's wishes is not a defect. 7 O.L.J. 219=56 I.C. 313; 2 Pat. 273=4 Pat. L.T. 329. Defective appointment—*Ex parte* decree—Suit to set aside. 4 Pat. L.T. 147=2 Pat. 335. No person can be appointed guardian without his consent. Where the Court has given sanction and approval for the appearance of a person as guardian, the absence of formal order of appointment is not always fatal to the proceedings. 3 Pat.L.T. 451=66 I.C. 137. A mere irregularity in the appointment of a guardian *ad litem* will not render the decree passed against the minor null and void, unless it is proved that the minor's interest has suffered thereby. (*Ibid.*) Where no notice or summons is served on the guardian of the minor, and no order was made appointing guardian and there was no appearance by the so-called guardian at any stage of the proceedings a decree passed against the minor is not binding on him. (26 C.L.J. 258; 37 A. 179; 20 C.L.J.

[S. 456.] (2) An order for the appointment of a guardian for the suit may be obtained upon application in the name and on behalf of the minor or by the plaintiff.

469; 2 P. L. T. 617, relied on.) 3 Pat. L. T. 451 = 66 I. C. 137. For determining whether a minor was sufficiently represented in the execution proceedings, Courts can look at the substance of the transaction. 64 I. C. 25 = 35 C. L. J. 9. An execution sale held of a minor's property without appointing a guardian *ad litem* is materially irregular and the guardian of the minor can set it aside. 29 I. C. 211. A duly appointed guardian for a suit is fully entitled to represent the minor in all proceedings which take place in execution of the decree. 48 I. C. 39 = 5 O. L. J. 551. A decree against a minor without a guardian *ad litem* at the time is void, as also all further proceedings. Subsequent appointment of a guardian in execution proceedings will not validate the decree nor other proceedings in its execution. 35 I. C. 154 = 31 M. L. J. 39; 18 C. L. J. 18 = 17 C. W. N. 549. The Court has no jurisdiction to sell the minor's interests even though they were safeguarded by other defendants having a common defence 35 I. C. 154 = 31 M. L. J. 39. If notice of appointment of guardian *ad litem* is not given to the minors concerned or their mother, they are not bound by the decree passed against the guardian *ad litem* who was a Court Nazir and who had no funds or instructions to defend the suit 41 All. 235 = 17 A. L. J. 249.

PROCEDURE.—Defendant alleged to be minor—Issue to be framed and decided—Court's opinion about defendant's appearance is not sufficient. 96 I. C. 273 = A. I. R. 1926 P. 489.

NOTICE.—O. 32, R. 3 (4) imperatively requires service of notice upon the minors. 43 I. C. 728. Failure to comply is only an irregularity and where the minor is not prejudiced the proceedings are not vitiated. 88 I. C. 294 = 1925 All. 548. In the absence of proof of fraud or collusion, the mere fact that notice of appointment of a guardian *ad litem* was not issued to the minor, does not entitle him to treat the proceedings as a nullity. (Case Law reviewed.) 75 I. C. 440 = 5 Lah. 38 = 1923 Lah. 575; 43 I. C. 728. But the appointment of a guardian *ad litem* is not always vitiated by the absence of notice to a minor. 42 I. C. 421 = 6 L. W. 272. There is nothing in the Code requiring the plaintiff to issue a fresh summons, to a minor defendant after he attains majority. (*Ibid.*) When the appointment of a guardian *ad litem* is proposed, notice must always be sent to the natural guardian of the minor or the person with whom he lives. 36 I. C. 794 = 4 L. W. 362. A Court can appoint an officer of Court as guardian only when there is no other guardian available. (*Ibid.*) An order appointing a guardian *ad litem* of a minor defendant without notice to the minor is without jurisdiction. 2 Pat. L. T. 116 = 6 Pat. L. J. 82; 32 I. C. 380. In appointing a guardian *ad litem* the wishes of the minor defendant, should if possible, be considered. 2 Pat. L. T. 116 = 6 Pat. L. J. 82. The natural father of a minor is his proper guardian to assert his right as adopted heir against rival claimants. 43 M. 288; 22 L. W. 560 = 49 M. L. J. 549. A mother or in her absence a grandmother may be appointed, and the fact that she is a pardanashin lady is not a disqualification. 2 Pat. L. T. 116 = 6 Pat. L. J. 82. Notice under O. 32,

R. 3 (4) for the appointment of a guardian *ad litem* must be served upon the natural guardian 45 I. C. 253 = 4 Pat. L. W. 373. If a guardian *ad litem* is guilty of negligence and makes no attempt to protect the minor's interests the decree will not be binding on the minor. (*Ibid.*) Where an officer of Court is appointed as guardian *ad litem* due notice of such appointment should be given to that officer and the suit should not be dismissed on the mere ground that process fees are not paid for the issue of summons to him. 35 P. R. 1912 = 11 I. C. 317.

OFFICER OF COURT AS GUARDIAN.—Omission to adduce evidence when amounts to negligence. 44 M. L. J. 299 = 1923 Mad. 465. In the absence of proof that the guardian *ad litem* could have adduced any useful evidence or was aware of such evidence in the prior suit it did not constitute negligence or fraud. (*Ibid.*) Officer of Court, guardian—Guardian's address and whereabouts known—Procedure illegal—Decree—Setting aside—Inherent power of Court. (1922) Mad. 485. When a suit is filed against a minor in respect of whom a proper guardian has already been appointed but whose identity or appointment is not known to the plaintiff the Court is competent to appoint an officer of the Court as guardian *ad litem*. 33 I. C. 481. Guardian *ad litem*—Mother acting as such—Failure to defend suits—Right of minor to set aside decree. 29 I. C. 220 = 13 A. L. J. 437. Guardian *ad litem* does not continue in his office after decree. 84 I. C. 68 = 1925 Cal. 23. Procedure to appoint guardian for a lunatic. 62 I. C. 770. Where the proposed guardian does not appear the Court must be moved to appoint one of the officers as guardian *ad litem*. Otherwise the decree will be null and void (15 C. L. J. 3, foll.) 17 I. C. 263 = 16 C. L. J. 318. The object of O. 32, Rr. 3 and 14, C. P. C., is to provide that the minor's interest should not suffer and that he should be properly represented in a suit filed against him. The object of giving notice to the minor is that the person may not be a minor at all and the plaintiff may have by mistake sued him as a minor. Notice to guardian and other persons interested is given for the reason that a person who is a guardian or who has the custody of the minor is the person best fitted to represent the minor. It is obligatory on the Court that no order should be made appointing a guardian *ad litem* unless and until the necessary notice is given under R. 3 of O. 32, C. P. C. 29 Bom. L. R. 1357 = 105 I. C. 537 = A. I. R. 1927 Bom. 613.

MISREPRESENTATION.—Major described as minor—Decree not binding. 49 I. C. 627. Suit by minor—*Bona fide* mistake—Amendment 1924 Lah. 157. A compromise not expressly sanctioned by the Court, though beneficial to the minors is not binding on the minors. 3 Pat. L. J. 255 = 46 I. C. 358 (F.B.). Reference to arbitration by next friend or guardian *ad litem* without leave of Court. 33 I. C. 941 = 9 Bar. L. T. 158. The period of limitation counts from the date of the plaint, and not from the appointment of the guardian. 4 A. 37.

(3) Such application shall be supported by an affidavit verifying the fact that the proposed guardian has no interest in the matters in controversy in the suit adverse to that of the minor and that he is a fit person to be so appointed.

(4) No order shall be made on any application under this rule except upon notice to the minor and to any guardian of the minor appointed or declared by an authority competent in that behalf, or, where there is no such guardian, upon notice to the father or other natural guardian of the minor, or, where there is no father or other natural guardian, to the person in whose care the minor is, and after hearing any objection which may be urged on behalf of any person served with notice under this sub-rule.

[Bombay.] The words "to the minor and" in line 2 of sub-rule (4) of rule 3 of Order 32 shall be deleted.

[Madras.] For O. XXXII, R. 3 substitute the following rule :—

"3. (1) Where the defendant is a minor, the Court, on being satisfied of the fact of his minority, shall appoint a proper person to be guardian for the suit for the minor.

(2) An order for the appointment of a guardian for the suit may be obtained upon application in the name and on behalf of the minor or by the plaintiff.

(3) The application shall be supported by an affidavit verifying the fact that the proposed guardian has no interest in the matters in controversy in the suit adverse to that of the minor and that he is a fit person to be so appointed. The affidavit shall further state the name of the person or persons on whom notice has to be served under the provisions of sub-rule (5).

(4) An application for the appointment of a guardian for the suit of a minor shall not be combined with an application for bringing on record the legal representatives of a deceased plaintiff or defendant. The application shall be by separate petitions.

(5) No order shall be made on any application under this rule except upon notice to any guardian of the minor appointed or declared by an authority competent in that behalf or, where there is no guardian, upon notice to the father or other natural guardian of the minor or, where there is no father or other natural guardian, to the person in whose care the minor is, and after hearing any objection which may be urged on behalf of any person served with notice under this sub rule. The notice required by this sub-rule shall be served six clear days before the day named in the notice for the hearing of the application and may be in form No. 11 set forth in appendix H hereto.

[Punjab.] Omit the words "to the minor and" in the last paragraph of Rule 3 and add the following as a proviso :

Provided that the Court may, if it sees fit, issue notice to the minor also.

Who may act as next friend or be appointed guardian for the suit.

4. [Ss. 445, 457.] (1) Any person who is of sound mind and has attained majority may act as next friend of a minor or as his guardian for the suit :

O. 32, R. 4.—SCOPE AND APPLICATION.—O. 32, R. 4 of the C. P. Code does not apply to a non-contentious proceeding in probate. 59 I. C. 435 = 24 C. W. N. 538. Irregularities in the appointment of guardian *ad litem* does not vitiate the proceedings in the suit. 93 I. C. 848 = A. I. R. 1926 Lah. 435. If the personal interest of the next friend conflicts with his duty towards the minor, then unless these be *uberrima fides*, he cannot act as the minor's next friend. In such a case the minor is not, properly represented and the decree in the suit would not bind him. (22 W. R. 290, foll.) 56 I. C. 97.

WHO CAN ACT AS NEXT FRIEND.—Next friend should be a person residing in British India. A guardian who cannot be served is useless, and where a guardian has left the country a fresh guardian should be appointed. 17 M. L. J. 179. A mother cannot act as next friend in a suit brought by minor sons against their father. 11 C. 733. Natural father of adopted son as guardian. See 91 I. C. 742 = A. I. R. 1925 Mad. 1285. Mortgage by father before son's birth—Suit against father and minor son—Father's interest is not adverse to minor son. 97 I. C. 703 = A. I. R. 1926 Mad. 1146. Married woman under the old Act of 1882—See 29 A. 728 ; 6 C. L. J. 36. The

rule of Mahomedan Law that an uncle cannot be guardian of the property of a minor, does not prevent an uncle representing his infant nephew as next friend in a suit. 6 C. L. R. 413. A guardian may refuse to litigate on his ward's behalf, a claim which he knows to be false and unfounded. 56 I. C. 97. Where it appears to an Appellate Court on an examination of the record that a minor has not been properly represented in the suit, the decree cannot be allowed to stand even though there has been no appeal by the minor. 51 I. C. 583. A minor, who is represented by a guardian who is the nominee of a party whose interest is adverse to the minor's, is not properly represented in the suit. 45 Cal. 538 = 41 I. C. 503 = 21 C. W. N. 1043. A minor can sue to set aside a decree on the ground that he was not properly represented in the suit. 23 A. 459. Court Guardian—Omission to record reasons for appointment of. 44 M. L. J. 515 = 1923 Mad. 553. No written permission need be given to the next friend to enable him to act as such. 12 C. 531. Defect in following the rule as to representation of minors is not necessarily fatal to the proceeding and does not render invalid a decree passed against the minors. 43 Mad. 842 = 39 M. L. J. 375.

Provided that the interest of such person is not adverse to that of the minor and that he is not, in the case of a next friend, a defendant, or, in the case of a guardian for the suit, a plaintiff.

Sr. 440, 443. (2) Where a minor has a guardian appointed or declared by competent authority, no person other than such guardian shall act as the next friend of the minor or be appointed his guardian for the suit unless the Court considers, for reasons to be recorded, that it is for the minor's welfare that another person be permitted to act or be appointed, as the case may be.

(3) No person shall without his consent be appointed guardian for the suit.

[Allahabad and Oudh.] Add as a proviso to O. XXXII, R. 3 (4).—"Provided that if the minor is under ten years of age no such notice shall be issued to him."

[S. 456.] (4) Where there is no other person fit and willing to act as guardian for the suit, the Court may appoint any of its officers to be such guardian, and may direct that the costs to be incurred by such officer in the performance of his duties as such guardian shall be borne either by the parties or by any one or more of the parties to the suit, or out of any fund in Court in which the minor is interested, and may give directions for the repayment or allowance of such costs as justice and the circumstances of the case may require.

SUB-RULE (2).—31 B. 413; 20 A. 162; 23 B. 403; 10 C. 627 (P. C.) Guardian *ad litem*—Failing to furnish security—Effect of. 54 I. C. 368. The mere omission to obtain the consent of the person whom it is proposed to appoint guardian of a minor is not fatal to the proceeding unless the minor was prejudiced thereby. 2 P. L. J. 390 = 40 I. C. 227; 15 C. L. J. 446 = 17 C. W. N. 219; 37 I. C. 389; 34 C. L. J. 293 = 26 C. W. N. 781; 43 All. 104 = 18 A. L. J. 956. Where there is no appointment and appearance of a guardian *ad litem* for a minor, the decree passed is, as against the minor, a nullity and not binding on him. 2 Pat. L. T. 617 = 62 I. C. 494.

SUB-RULE (3).—The Court has no power to appoint, against his or her will, any person, to be a next friend or guardian. 5 B. 306. Guardian cannot be appointed without his consent. 34 C. L. J. 293 = 65 I. C. 18 = 26 C. W. N. 781; 13 I. C. 414 = 15 C. L. J. 3; 29 I. C. 579 = 18 M. L. T. 401. Consent need not be express, it may be implied. 4 O. W. N. 356 = 101 I. C. 632; 4 O. W. N. 791 = 104 I. C. 814 (47 Mad. 783; 43 All. 104; 2 P. 296; 101 I. C. 632 Rel on). Effect of guardian *ad litem* not consenting to appointment. See 54 Cal. 450 = 31 C. W. N. 634 = 103 I. C. 124 = A. I. R. 1927 Cal. 488.

SCOPE OF.—O. 32, R. 4 (3) is mandatory and a Court has no jurisdiction to appoint a guardian *ad litem* on behalf of a minor, without his consent. [16 C. L. J. 318 = 20 I. C. 578, foll.; 30 Cal. 1021 (P. C.), dist.] 40 I. C. 2; 2 P. 7 = 4 P. L. T. 575; 4 Pat. L. T. 127 = 2 P. 296; 37 C. L. J. 496; 20 C. L. J. 469 = 19 C. W. N. 537; 59 I. C. 664 = 24 C. W. N. 541. Consent—Need not be express. 43 All. 104 = 18 A. L. J. 956; 47 M. 783 = 47 M. L. J. 273; 83 I. C. 290 = 1923 Pat. 231. As to cases where consent is implied, see 43 I. C. 563; 4 Pat. L. T. 127 = 2 P. 296. There is nothing however in sub-cl. (3) which requires the Court to obtain the express consent of the guardian; where the guardian so appointed is a certificated guardian, whom the Court was bound to appoint, consent may be properly presumed when he makes no objection. 4 Pat. L. T. 127 = 2 P. 296. But see 87 I. C. 238 = 1925 Oudh 633. Where the interests of a minor have not

been prejudiced, any defect in the procedure for the appointment of his guardian is not fatal. 2 P. 296 = 4 Pat. L. T. 127. The appointment of an officer of the Court as guardian *ad litem* of the minors in a suit without requiring the party at whose instance he is appointed to deposit the necessary funds to enable the guardian to defend the case, is a farce. 13 A. L. J. 179 = 37 All. 179. Where an appeal is filed against a minor under the guardian *ad litem* the appellant must pay to the guardian such sum of money as would enable him to oppose the appeal. 28 I. C. 852. SUB-RULE (4).—A vakil is an officer of the Court for purposes of O. 32 R. 4. 45 A. 395. When an officer of the Court is appointed as guardian, the Court cannot pass a decree against him as guardian of the minor. 4 B. 638; 28 B. 626. In cases where a certificated guardian of a minor is appointed the appointment of another guardian for the suit is illegal and a decree obtained in such a suit is liable to be set aside. 43 Mad. 808 = 39 M. L. J. 239. Appointment of Court guardian when natural guardian is available. See 93 I. C. 84 = (1926) M. W. N. 8 = A. I. R. 1926 Mad. 950. Duty of Court to require the party applying to make a deposit for the guardian for defending the cause. See 93 I. C. 84 = (1926) M. W. N. 8 = A. I. R. 1926 Mad. 950. Negligence in the conduct of suits on behalf of minors resulting in prejudice to the interest of the minor—Minor can avoid the decree. 48 All. 44 = A. I. R. 1926 All. 36. Appointment of Court guardian—Decree passed—Proof of fraud necessary before a suit to set aside decree is allowed. 46 C. L. J. 287 = 105 I. C. 199 = A. I. R. 1927 Cal. 865. In a suit for restitution of conjugal rights by a husband against his wife where the wife is a minor, a person who is alleged to have been responsible in bringing about the marriage of the defendant with the plaintiff should not be appointed as guardian *ad litem* of the defendant. 100 I. C. 463 = 9 Lah. L. J. 206 = 28 Punj. L. R. 627.

REVISION.—The appointment of a guardian *ad litem* is a matter of procedure, and an error therein is not revisable ordinarily. 46 I. C. 316 = 5 P. L. W. 92.

[Madras.] For O. XXXII, R. 4, *substitute* the following rule :—

4. (1) Any person who is of sound mind and has attained majority may act as next friend of a minor or as his guardian for the suit :

Provided that the interest of that person is not adverse to that of the minor and that he is not, in the case of a next friend, a defendant, or, in the case of a guardian for the suit, a plaintiff.

(2) Where a minor has a guardian appointed or declared by competent authority, no person other than the guardian shall act as the next friend of the minor or be appointed his guardian for the suit unless the Court considers, for reasons to be recorded, that it is for the minor's welfare that another person be permitted to act or be appointed, as the case may be.

(3) No person shall without his consent be appointed guardian for the suit. Whenever an application is made proposing the name of a person as guardian for the suit, a notice in form No. 11-A set forth in Appendix H hereto shall be served on the proposed guardian, unless the applicant himself be the proposed guardian or the proposed guardian consents.

(4) Where there is no other person fit and willing to act as guardian for the suit, the Court may appoint any of its officers to be the guardian, and may direct that the costs to be incurred by that officer in the performance of his duties as guardian shall be borne either by the parties or by any one or more of the parties to the suit, or out of any fund in Court in which the minor is interested, and may give directions for the repayment or allowance of the costs as justice and the circumstances of the case may require.

(5) When a guardian for the suit of a minor defendant is appointed, and it is made to appear to the Court that the guardian is not in possession of any, or sufficient funds for the conduct of the suit on behalf of the defendant, and that the defendant will be prejudiced in his defence thereby, the Court may from time to time order the plaintiff to advance moneys to the guardian for the purpose of his defence and all moneys so advanced shall form part of the costs of the plaintiff in the suit. The order shall direct that the guardian, as and when directed, shall file in Court an account of the moneys so received by him.

[Allahabad and Oudh.] *Substitute* for Original Rule No. 4 of Order XXXII.—

(1) Where a minor has a guardian appointed or declared by competent authority, no person other than such guardian shall act as next friend, except by leave of the Court.

(2) Subject to the provisions of sub-rule (1) any person who is of sound mind and has attained majority may act as next friend of a minor, unless the interest of such person is adverse to that of the minor, or he is a defendant, or the court for other reasons to be recorded considers him unfit to act.

(3) Every next friend shall, except as otherwise provided by clause (In Oudh read 'sub-rule' for 'clause'.) (5) of this rule be entitled to be reimbursed from the estate of the minor any expenses incurred by him while acting for the minor.

(4) The court may in its discretion, for reasons to be recorded, award costs of the suit, or compensation under S. 35-A or S. 95 against this next friend personally as if he were a plaintiff.

(5) Costs or compensation awarded under clause (In Oudh read 'sub-rule') (4) shall not be recoverable by the guardian from the estate of the minor, unless the decree expressly directs that they shall be so recoverable.

[Allahabad and Oudh.] Added by Allahabad and Oudh. 4-A (1) Where a minor has a guardian appointed by competent authority, no person other than such guardian shall be appointed his guardian for the suit unless the court considers for reasons to be recorded that it is for the minor's welfare that another person be appointed.

(2) Where there is no such guardian, or where the Court considers that such guardian should not be appointed, it shall appoint as guardian for the suit the natural guardian of the minor if, qualified, or where there is no such guardian the person in whose case the minor is, or any other suitable person who has notified the Court of his willingness to act, or failing any such person, an officer of the Court.

Explanation.—An officer of the Court shall for the purposes of this sub-rule include a legal practitioner on the roll of the Court.

(3) No person shall without his consent be appointed guardian for the suit; provided that in all cases the consent of such person shall be presumed, unless within fifteen days of receipt of notice from the Court, he notifies to the Court his refusal to accept appointment as such guardian. Refusal to accept notice shall be presumed to be refusal to act.

(4) Where an officer of the Court is appointed guardian for the suit under sub rule (2) the Court may direct that the costs to be incurred by such officer the performance of his duties as such guardian shall be borne either by the parties or by any one or more of the parties to the suit, or out of any fund in Court in which the minor is interested and may give directions for the repayments or allowance of such costs as justice and the circumstances of the case may require.

5. [S. 441.] (1) Every application to the Court on behalf of a minor, other than an application under rule 10, sub-rule (2), shall be made by his next friend or by his guardian for the suit.

Representation of minor by next friend or guardian for the suit.

O. 32, R. 5. ILLUSTRATIVE CASES.—When a guardian *ad litem* has been once appointed by the Court for a minor defendant his appointment continues until revoked and an appeal against a

decree passed against the minor can only be preferred by him. (44 A. 35; 22 M. 187; 2 A. L. J. 482, foll.) 44 A. 619 = 20 A. L. J. 599. Minor—Not represented, effect of—Ignorance of

[S. 444.] (2) Every order made in a suit or on any application, before the Court in or by which a minor is in any way concerned or affected, without such minor being represented by a next friend or guardian for the suit, as the case may be, may be discharged, and, where the pleader of the party at whose instance such order was obtained knew, or might reasonably have known, the fact of such minority, with costs to be paid by such pleader.

Receipt by next friend or guardian for the suit of property under decree for minor.

[6. S. 461.] (1) A next friend or guardian for the suit shall not, without the leave of the Court, receive any money or other movable property on behalf of a minor either—

(a) by way of compromise before decree or order, or

(b) under a decree or order in favour of the minor.

(2) Where the next friend or guardian for the suit has not been appointed or declared by competent authority to be guardian of the property of the minor, or, having been so appointed or declared, is under any disability known to the Court to receive the money or other movable property, the Court shall, if it grants him leave to receive the property, require such security and give such directions as will, in its opinion, sufficiently protect the property from waste and ensure its proper application.

[7. S. 462.] (1) No next friend or guardian for the suit shall, without the leave of the Court, expressly recorded in the proceedings, enter into any agreement or compromise on behalf of a minor with reference to the suit in which he acts as next friend or guardian.

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decree-holder. 27 I. C. 425. An order for execution passed against a minor without a guardian *ad litem*, is invalid; and when it is brought to the notice of the Court that such order has been passed, the court should immediately discharge the order. 9 M. L. J. 144. See also 13 B. 234. The words of the Code appear to give discretionary power to the Court to discharge the application made by minors who appear without a next friend, 22 C. 270, (74). A next friend is not a party to the suit, and cannot appeal in his own name. 9 C. 629. Nor can he execute a decree after the death of the minor. 14 W. R. 162; 22 M. 187; 29 A. 675. The Court has no power to make a minor's estate liable for costs. 13 B. 234. But see 11 C. 213.

O. 32, R. 6.—O. 32, R. 6 prohibits the next friend of a minor decree-holder from realising money due under a decree without leave of Court. 19 L. W. 686=1924 Mad. 279. Payment to manager of joint Hindu family towards a decree in favour of manager and minor coparcener cannot be recognized unless sanctioned by the Court. 1925 Mad. 230 (2)=47 M. L. J. 498. Manager of joint Hindu family acting as next friend if should furnish security. 103 I. C. 460. Order for attachment of surety's property under R. 6 cannot fall within the words "such directions as will, etc." 41 M. 40=39 I. C. 928. A Court cannot order payment of money to a person not appointed guardian by any competent authority without demanding security from him. 29 I. C. 475. The guardian *ad litem* of the minor is a trustee and must act strictly in the interests of the minor. If the minor is injured by reason of the guardian not carrying out his duties efficiently, the minor can sue for redress and claim that so far as equity demands, the decree should be set aside or modified. (35 P. R. 1898, Foll. 2 P. R. 1912, Ref.) 14 I. C. 150. Creditor—Minor plaintiff—Right of debtor to demand security. 64

I. C. 385. As regards the procedure to be followed. see 17 A. 531; 21 M. 309.

O. 32, R. 6 (2).—Stamp on security bond. See 53 Cal. 101=A. I. R. 1925 Cal 906.

O. 32, R. 7. SCOPE AND APPLICATION.—A compromise of suit made on behalf of a minor without strict compliance with the provisions of R. 7 is not enforceable against the minor. But the adult parties who are co-obligees with the minor are not on that account exonerated from liability 39 Mad. 409=43 I. A. 99=31 M. L. J. 18=34 I. C. 213 (P.C.). The rule applies to an agreement to refer a suit to arbitration, and to an agreement to be bound by an oath. 27 C. 229; 24 M. 326; 12 M. 483; 8 Lah. L. J. 414=27 Punj L. R. 729=96 I. C. 748=A. I. R. 1926 Lah. 665. But see 28 A. 35. The agreement or compromise must be lawful. (See O. 32, R. 3.). The abandonment of an issue does not amount to a compromise. 22 M. 538; 22 M. 378; 27 C. 229; 24 M. 326; 12 M. 483. But see 28 A. 35. No sanction is necessary for agreement by guardian to be bound by statement of certain witnesses. 49 All. 842=25 A. L. J. 729=107 I. C. 38=A. I. R. 1927 All. 584. Effect of want of sanction—Compromise without leave—Invalid, though supportable on other grounds. 39 Mad. 115=29 M. L. J. 856=20 C. W. N. 201=23 C. L. J. 337=32 I. C. 258 (P.C.); 47 All. 782=23 A. L. J. 523. The provision of law making it necessary to obtain the leave of the Court is of great importance to protect the interests of minors and in the absence of such leave, a compromise cannot be supported. 39 M. 115=29 M. L. J. 856 (P. C.). In absence of an order granting permission the presumption is that no permission was granted. 50 I. C. 752=17 A. L. J. 789. Where minor comes forward to set aside the compromise, the Court has no power to uphold it on the ground that it was for the benefit of the minor. 35 Bom. 322=13 Bom. L. R. 280; 44 Bom. 202=56 I. C.

(2) Any such agreement or compromise entered into without the leave of the Court so recorded shall be voidable against all parties other than the minor.

399; 50 I. C. 752 = 17 A.L.J. 789. When suit is compromised by the Court of Wards on behalf of a minor ward, the compromise does not require the leave of the Court in order that it may be binding. 37 I. C. 971 = 44 Cal. 829. A Court should be very jealous of the interest of minors and should not allow a suit or part of a suit to be withdrawn without being satisfied that it is for their benefit. (27 Mad. 377; 29 Cal. 735, Rel.); 47 I. C. 508 = 59 P. R. 1919. A suit lies at the instance of a minor to set aside such a compromise effected by his guardian *ad litem*. (2 P. R. 1912, Ref.); 47 I. C. 508 = 59 P. R. 1919. The next friend of a minor cannot transfer to a third party the decree in favour of the minor, without leave of the Court. 41 M. L. J. 75 = 63 I. C. 285.

SCOPE OF SUB-RULE (2).—41 C. I. J. 213 = 29 C. W. N. 597. Under R. 7, Cl. (2) an agreement or compromise entered into by the guardian of a minor without the sanction of the Court is voidable. 47 I. C. 508 = 59 P. R. 1919; 2 P. R. 1912 = 11 I. C. 523; 41 M. L. J. 75 = 63 I. C. 285; 12 I. C. 499 = 34 Mad. 314; 58 I. C. 178; 44 I. C. 164; 61 I. C. 118 = 14 S. L. R. 245.

EXECUTION PROCEEDINGS.—The rule applies to a compromise of execution proceedings. 26 B. 109; and contemplates the existence of a guardian and a pending litigation. 26 B. 298. See also 27 B. at p. 291; 29 M. 309. An agreement varying terms of a decree between parties some of whom are minors is not enforceable unless sanctioned by Court. 40 I. C. 820 = (1917) M.W. N. 327. A compromise effected after the passing of a decree is governed by O. 32, R. 7. Sanction of the Court is necessary where the minor is a party to the adjustment. 35 I. C. 70 = 31 M. L. J. 207.

SHALL BE VOIDABLE.—A compromise not properly sanctioned can be annulled before a minor attains majority, 26 B. 109. See 23 B. 62 and 13 B. 137. See also 30 C. 613. Compromise sanctioned by court when can be set aside. 28 Bom. L. R. 1225 = 50 Bom. 716 = A. I. R. 1927 Bom. 11; 104 I. C. 222 = A. I. R. 1927 Lah. 685 (36 Mad. 295 (P. C.) fol.). 46 C. L. J. 441 = 103 I. C. 522 = A. I. R. 1927 Cal. 796; 28 Bom. L. R. 1507 = 39 I. C. 814 = A. I. R. 1927 Bom. 87.

POWERS OF NATURAL GUARDIAN.—After appointment of a guardian *ad litem* the powers of natural guardian to deal with the minor's interest so far as they are involved in the suit are suspended. 22 Bom. L. R. 725 = 57 I. C. 417 = 44 Bom. 574. A compromise even by a father and managing member as guardian *ad litem* requires leave of Court. 36 Mad. 295 = 40 I. A. 132 = 25 M. L. J. 150 (P. C.). The natural guardian can on behalf of a minor enter into an arbitration so as to be binding on the minor if it is proper, reasonable and for benefit of minor. 44 Bom 202 = 22 Bom. L. R. 266.

PROOF OF SANCTION.—There ought to be evidence that the attention of the Court was directly called to the fact that the minor was a party to the compromise, and it ought to be shown, by an order on petition (or in some way not open to doubt) that the leave of the Court was obtained. 35 All. 487 = 40 I. A. 182 = 25 M. L. J. 492 = 21 I. C. 288 (P. C.); 56 I. C. 97; 16

I. C. 397. Sanction can be inferred from circumstances. A. I. R. 1926 Sind 128; 20 S. L. R. 116. Presumption as to minor's interests having been considering in giving sanction. See 28 Punj. L. R. 184 = 9 Lah. L. J. 141 = 102 I. C. 358 = A. I. R. 1927 Lah. 330 (94 I. C. 104; 36 P. R. 1917; 8 C. L. J. 33, Ref.). Matters to be considered in granting sanction—Court's duty to consider benefit of the minor. See 46 C. L. J. 441 = 103 I. C. 522 = A. I. R. 1927 Cal. 796 (See also 39 Mad. 115; 29 Mad. 104; 36 Mad. 53; 13 C. W. N. 163; 6 N. W. P. 179, foll. and ref. to); 28 Bom. L. R. 362 = 94 I. C. 104 = A. I. R. 1926 Bom. 291. As to who can apply for sanction in partition suit by minor, see 91 I. C. 521. A decree passed under a misapprehension of a material fact as to the true position of the minor is not binding on the minor. 1 Lah. 314 = 56 I. C. 878. An omission to record the sanction does render the compromise *ultra vires* especially in the absence of prejudice to the minors, who could only apply for review. 5 Pat. L. J. 379 = 1 Pat. L. T. 663. O. 32, R. 7 does not compel the judge to reduce this matter to writing, though it is exceedingly desirable he should do so. (29 Mad. 104; 17 All. 531; 8 C. L. J. 31, Ref.); 39 I. C. 53 = 36 P. R. 1917. Mere recording a compromise and passing a decree according to it is no sanction by the Court and therefore not binding on the minor, 39 Mad. 853 = 30 M. L. J. 465. See also 21 Mad. at p. 93; 17 All. at p. 532; 28 All. 585 (P. C.). It is not necessary that the sanction of the Court, if otherwise proved, must be in express terms. 14 I. C. 6. The attention of the Court should be directly called to the fact that a minor was a party to the compromise and that the leave of the Court was obtained on petition or in some way not open to doubt. 2 Pat. 538 = 4 Pat. L. T. 311. See also 39 I. C. 53 = 36 P. R. 1917; 55 I. C. 218. The attention of the Court must be expressly drawn to the fact and its approval obtained. 6 Pat. L. J. 199 = 60 I. C. 980. Leave of the Court must be expressly recorded. 35 I. C. 675 = 1917 Pat. 77; 6 Pat. L. J. 199 = 2 Pat. L. T. 325 = 60 I. C. 980. Even if the leave of the Court is not expressly recorded that would not make the decree a nullity. It would only make the decree voidable at the option of the minor. 2 Pat. 538 = 4 Pat. L. T. 311. No particular formula is necessary to be used by the Court in order to grant the leave. (*Ibid.*) Compromise—Sanction of Court—Some terms, not embodied in decree—Sale in pursuance of compromise—Sale by father and guardian *ad litem*—Effect. 53 I. C. 354 = (1919) M. W. N. 356.

TRANSFER OF DECREE.—Decree is property and hence the guardian can transfer a decree in favour of the minor, without the sanction of Court. 40 M. L. J. 124 = 62 I. C. 255; 56 I. C. 313.

REFERENCE TO ARBITRATION.—In the case of a minor party leave of Court need not be obtained before making an application to refer a dispute to arbitration. (28 All. 25, Foll.); 36 All. 69 = 12 A. L. J. 57; 43 Bom. 258 = 20 Bom. L. R. 970. See also 44 Bom. 202 = 22 Bom. L. R. 266. An agreement of reference to arbitration on

[Madras] Add the following in O. 32, R. 7 as Sub-rule (1-A) :—

7. "(1-A) Where an application is made to the Court for leave to enter into an agreement, or compromise or for withdrawal of a suit in pursuance of a compromise or for taking any other action on behalf of a minor or other person under disability and such minor or other person under disability is represented by counsel or by pleader, the counsel or pleader shall file in Court with the application a certificate to the effect that the agreement or compromise or action proposed is, in his opinion, for the benefit of the minor or other person under disability. A decree or order for the compromise of a suit, appeal or matter, to which a minor or other person under disability is a party, shall recite the sanction of the Court thereto and shall set out the terms of the compromise as in Form No. 24 in Appendix D to this Schedule."

8. [S. 447.] (1) Unless otherwise ordered by the Court, a next friend shall not retire without first procuring a fit person to be put in his place and giving security for the costs already incurred.

(2) The application for the appointment of a new next friend shall be supported by an affidavit showing the fitness of the person proposed, and also that he has no interest adverse to that of the minor's.

9. [S. 446.] (1) Where the interest of the next friend of a minor is adverse to that of the minor or where he is so connected with a defendant whose interest is adverse to that of the minor as to make it unlikely that the minor's interest will be properly protected by him, or where he does not do his duty, or, during the pendency of the suit, ceases to reside within British India, or for any other sufficient cause, application may be made on behalf of the minor or by a defendant for his removal; and the Court, if satisfied of the sufficiency of the cause assigned, may order the next friend to be removed accordingly, and make such other order as to costs as it thinks fit.

behalf of a minor without the consent of the Court is invalid. The minor on attaining majority can have the award set aside. 19 I.C. 424 = 15 Bom. L. R. 223. Though one member of firm is minor sanction of Courts is not necessary to refer a suit against that firm to arbitration. 1923 Lah. 103. Where the guardian of a minor party to a suit wishes to refer the matter to arbitration, the Court ought to fully apply its mind to the matter and consider if the reference would be for the minor's benefit. 59 I. C. 31 = 5 P. W. R. 1921; 52 I. C. 327 = 145 P. R. 1919; 17 I. C. 388 = 125 P. R. 1912; 15 S. L. R. 165 = 1922 Sind 1; 39 Mad. 853 = 30 M. L. J. 465. An application of the next friend of a minor under Sch. 11, Para. 1, C. P. Code, comes within O. 32, R. 7, of the Code. 52 I. C. 327 = 145 P. R. 1919; 15 I. C. 161 = 95 P. R. 1912; 30 M. L. J. 465. The application to refer a question to arbitration is an agreement within the meaning of O. 32, R. 7 because the rule has reference to the suit. 95 P. R. 1912 = 15 I. C. 161 (F. B.); 39 M. 853 = 30 M. L. J. 465. Where a decree is given on award, there is neither an appeal nor a revision. 15 S. L. R. 165 = 1922 Sind 1.

WITHDRAWAL OF SUIT.—The withdrawal of a suit by a next friend in pursuance of an agreement or compromise entered into with the defendant without the leave of the Court is voidable at the instance of the minor. 27 M. 377; 14 M. L. J. R. 442; 3 C. L. J. 119; 1 A. L. J. 130. When a next friend of a minor plaintiff withdraws from the suit, it is open to the minor through another next friend to have the suit re-opened or reviewed. 29 C. 735. See also 20 All. 98. See 27 M. 377; 17 M. L. J. 179; 12 B. 553.

WITHDRAWAL OF APPLICATION.—The guardian can withdraw his petition to enter into a compromise at any time before the leave is granted. 35 I. C. 675 = 1917 Pat. 77. See also 7 L. R. 162 (Rev.).

SECURITY.—A next friend of a minor even if he is the managing member is not entitled to draw money from Court on behalf of the minor without furnishing the security. (36 Mad. 295 (P. C.). Foll.) 29 I. C. 475.

COSTS.—Where a next friend has acted *bona fide* he is entitled to his costs out of the infant's estate. 11 C. 213; 10 C. 248. But see 13 R. 234. As to whether a minor is liable for the costs of an attorney retained by the next friend, see 7 C. 140.

O. 32, R. 8. SCOPE OF RULE.—Where a guardian *ad litem* to a minor defendant has once been appointed such appointment continues for the whole of the *lis* or until it is revoked by Court, and the guardian so appointed is the only person who can file an appeal on behalf of the minor. 41 A. 619; 45 A. 623 = 21 A. L. J. 691. The absence of an affidavit is not sufficient to render the proceedings illegal and void as against the minor on the ground that he was not properly represented. 55 I. C. 833 = 1 Lah. 27. Where the next friend of a minor sues *in forma pauperis* the Court can order the next friend to pay the costs of the defendant. 1923 Nag. 43. An application on behalf of a minor, made by a guardian *ad litem* discharged long before the date of application, should not be entertained. 6 Pat. L. J. 171 = 62 I. C. 235.

O. 32, R. 9 & 10.—Partition suit—Compromise—Father as next friend—Father's interest is not adverse to minors. 21 L. W. 659 = 87 I. C. 42 = 1925 Mad. 734 = 48 M. L. J. 417. A Court should remove a next friend under O. 32, R. 9 if it thinks his interest is adverse to that of the minor and should stay proceedings under R. 10 until the appointment of another next friend. 63 I. C. 736 = 6 Pat. L. J. 317. A suit does not abate by the next friend's death and the Court should either appoint a new next friend or keep the suit pending till the minor attains majority. 27 M. L. J. 405 = 25 I. C. 597.

(2) Where the next friend is not a guardian appointed or declared by an authority competent in this behalf, and an application is made by a guardian so appointed or declared, who desires to be himself appointed in the place of the next friend, the Court shall remove the next friend unless it considers, for reasons to be recorded by it, that the guardian ought not to be appointed the next friend of the minor, and shall thereupon appoint the applicant to be next friend in his place upon such terms as to the costs already incurred in the suit as it thinks fit.

Stay of proceedings on removal, etc., of next friend.

10. [S. 448.] (1) On the retirement, removal or death of the next friend of a minor, further proceedings shall be stayed until the appointment of a next friend in his place.

(2) **[S. 449.]** Where the pleader of such minor omits, within a reasonable time to take steps to get a new next friend appointed, any person interested in the minor or in the matter in issue may apply to the Court for the appointment of one, and the Court may appoint such person as it thinks fit.

11. [S. 458.] (1) Where the guardian for the suit desires to retire or does not do his duty, or where other sufficient ground is made to appear, the Court may permit such guardian to retire or may remove him, and may make such order as to costs as it thinks fit.

Retirement, removal or death of guardian for the suit.

(2) **[S. 459.]** Where the guardian for the suit retires, dies or is removed by the Court during the pendency of the suit, the Court shall appoint a new guardian in his place.

Course to be followed by minor plaintiff or applicant on attaining majority.

12. [S. 450.] (1) A minor plaintiff or a minor not a party to a suit on whose behalf an application is pending shall, on attaining majority, elect whether he will proceed with the suit or application.

(2) **[S. 451.]** Where he elects to proceed with the suit or application, he shall apply for an order discharging the next friend and for leave to proceed in his own name.

(3) The title of the suit or application shall in such case be corrected so as to read henceforth thus :—

“A.B., late a minor, by C.D., his next friend, but now having attained majority.”

(4) **[S. 452.]** Where he elects to abandon the suit or application, he shall, if a sole plaintiff or sole applicant, apply for an order to dismiss the suit or application on repayment of the costs incurred by the defendant or opposite party or which may have been paid by his next friend.

(5) **[S. 453.]** Any application under this rule may be made *ex parte* but no order discharging a next friend and permitting a minor plaintiff to proceed in his own name shall be made without notice to the next friend.

O. 32, R. 11.—Guardians are not bound to contest all claims whether well or ill-founded. The test is whether the inaction of the guardian amounted to neglect of duty or was in the best interests of the infant. 6 C.L.J. 448. Guardian cannot retire without Court's permission. 94 I.C. 340 = A.I.R. 1926 All. 437. (A.I.R. 1922 All. 416, Dist.) Dismissal of appeal for default of appearance by guardian of minor—Application for removal of guardian and restoration of appeal—Duty of Court. 21 L.W. 325 = 1925 Mad. 774. When a plaintiff fails or refuses to place an officer of the Court appointed as guardian in possession of funds, the Court can remove the officer appointed under this rule. 12 B. 553. The power of the Court under O. 32, R. 11 to remove the guardian for the suit of a minor defendant and appoint a new guardian instead, may be exercised at any time during the pendency of the suit and same is not

taken away by the fact that an order to try the suit *ex parte* has previously been passed. (1920) M. W. N. 241 = 55 I. C. 945. Inability on the part of the guardian *ad litem* to provide funds is sufficient cause. 9 I.C. 435 = 9 M. L. T. 333.

COSTS.—Costs cannot be decreed against the guardian of a defendant except in the case referred to in this rule. 3 M. 263. Costs cannot be decreed against a guardian who has not been appointed without his previous consent. 5 B. 306.

O. 32, R. 12.—The title of the suit or application should only be corrected when the suit or application is pending. No correction need be made after final decree, and when it only remains to proceed in execution. 22 C. at p. 274. Suit by next friend—Election to continue—Effect of. 88 I.C. 116 = 1925 Sindh 330. When the next friend is dead no application for his discharge could be made. 22 C. 274.

13. [S. 454.] (1) Where a minor co-plaintiff on attaining majority desires to repudiate the suit, he shall apply to have his name struck out as co-plaintiff and the Court, if it finds that he is not a necessary party, shall dismiss him from the suit on such terms as to costs or otherwise as it thinks fit.

Where minor co-plaintiff attaining majority desires to repudiate suit.

(2) Notice of the application shall be served on the next friend, on any co-plaintiff and on the defendant.

(3) The costs of all parties of such application, and of all or any proceedings theretofore had in the suit, shall be paid by such persons as the Court directs.

(4) Where the applicant is a necessary party to the suit, the Court may direct him to be made a defendant.

14. [S. 455.] (1) A minor on attaining majority may, if a sole plaintiff, apply that a suit instituted in his name by his next friend be dismissed on the ground that it was unreasonable or improper.

Unreasonable or improper suit.

(2) Notice of the application shall be served on all the parties concerned; and the Court, upon being satisfied of such unreasonableness or impropriety, may grant the application and order the next friend to pay the costs of all parties in respect of the application and of anything done in the suit, or make such other order as it thinks fit

[Madras] In O. 32 after R. 14 add the following as rule 14-A :—

"14-A. The appointment or discharge of a next friend or guardian for the suit of a minor in a matter pending before the High Court in its appellate jurisdiction, except in cases under appeal to the King-in-Council, shall be deemed to be a quasi-judicial act within the meaning of section 128 (2) (1) of the Code of Civil Procedure and may be performed by the Registrar, provided that contested applications and applications presented out of time shall be posted before a judge for disposal."

15. [S. 463.] The provisions contained in rules 1 to 14, so far as they are applicable, shall extend to persons adjudged to be of unsound mind and to persons who though not so adjudged are found by the Court on inquiry, by reason of unsoundness of mind or mental infirmity, to be incapable of protecting their interests when suing or being sued.

Application of rules to persons of unsound mind.

O. 32, R. 14.—The next friend of a minor plaintiff died during the pendency of the suit. The suit was subsequently dismissed, owing to the indifference of the plaintiff's relations, with costs to be paid out of the estate of the deceased next friend. *Held*, that the order as to costs was made without jurisdiction. 20 O.C. 300 = 43 I. C. 257 = 5 O. L. J. 106.

O. 32, R. 15. SCOPE AND APPLICATION.—The Court must be satisfied of the title of the next friend to intervene and it ought to be satisfied that the person is of unsound mind and that he stands in need of protection. 23 B. 658. The rule applies to execution proceedings. 19 M. 219 (226). A sale in execution of a decree obtained against a lunatic who was not properly represented is of no effect at all and is not merely voidable. (33 Cal. 1094; 32 Cal. 296, Rel.); 18 C. W. N. 1329 = 20 C. L. J. 291. The fact that a person of high position had renounced the world and become a sanyasi, devoting himself wholly to spiritual things and entirely neglecting his worldly affairs, would not of itself, however unusual such conduct might be in a man of high position of a zamindar possessing considerable landed property justify the Court in holding that by reason of unsoundness of mind or mental infirmity he was incapable of protecting his interests, when suing or being sued within R. 15. But a persistent delusion of being haunted by demons, of persecu-

tion by imaginary voices attributed to gases issuing from various parts of his body and the religious megalomania which led him to regard himself as destined, to be in some sort a saviour of the world are symptoms which would justify the conclusion that the person is suffering from systematic delusional insanity and incapable of managing his own affairs. (1927) M. W. N. 456 = 26 L. W. 94 = 31 C. W. N. 1087 = 39 M. L. T. 155 = 101 I. C. 363 (2) = A. I. R. 1927 P. C. 123 (P.C.).

THE POSITION OF LUNATIC AND MINOR IS THE SAME.—A sale of a lunatic's property in execution of a decree against him in a suit in which he was not represented by a guardian *ad litem* is a nullity and the lunatic can resist an action for possession without setting aside the sale [32 Cal. 296 = 32 I. A. 23, (P. C.) ; 38 Mad. 1076, Dist.]; 34 I. C. 551 = 4 L. W. 228. Where a decree is obtained against a lunatic on the refusal of the Court to appoint a guardian *ad litem* for him, the representatives of the lunatic cannot after his death raise an objection in execution that the decree was null and void. 45 I. C. 219 = 5 O. L. J. 90. The provisions of this rule are not exhaustive and lunatic can sue through his next friend though not adjudged a lunatic under any law. 33 C. 1094 ; 24 M. 504 ; 23 B. 658 ; see also 13 B. 656. Omission to appoint a guardian *ad litem* for a man of unsound mind does not render the whole suit invalid *ab initio*.

16. [S. 464.] Nothing in this Order shall apply to a Sovereign Prince or Ruling

Saving for Princes and
Chiefs.

Chief suing or being sued in the name of his State, or being sued by direction of the Governor-General in Council or a Local Government in the name of an agent or in any other name, or shall be construed to affect or in any way derogate from the provisions of any local law for the time being in force relating to suits by or against minors or by or against lunatics or other persons of unsound mind.

[Madras] Add as Rule 17 of Order 32:—

"17. In suits relating to the person or property of a minor or other person under the superintendence of the Court of Wards the Court in fixing the day for the defendant to appear and answer shall allow not less than two months' time between the date of summons and the date for appearance."

ORDER XXXIII.

SUITS BY PAUPERS.

Suit may be instituted *in forma pauperis*.

1. [S. 401.] Subject to the following provisions, any suit may be instituted by a pauper.

22 I. C. 673. Rule applies whether the lunatic is adjudged or not. 3 L. W. 301=34 I. C. 428; 16 I. C. 885; 29 I. C. 595=13 A. L. J. 562; 34 I. C. 551=4 L. W. 228 (7 Cal. 242; 13 Bom. 656; 24 Mad. 504, Foll.). Defendant alleged to be of unsound mind by one party denied by the opposite party—Judicial inquiry, is necessary 1922 Cal. 86. There is no established rule of practice requiring that suits relating to a lunatic's property should be brought by the lunatic's manager and not by himself. On the contrary the C. P. Code contemplates suits by persons of unsound mind whether so adjudged or not. Though it is true that a person so incapacitated has to sue by a next friend, yet next friend is not a party and the absence of a next friend is immaterial. 27 I. C. 459=19 C. W. N. 45. Person of weak mind can sue through a next friend. 83 I. C. 253=1925 Nag. 245. Notice of unsoundness—Duty to appoint guardian—Decree. 50 I. C. 109=17 A. L. J. 257.

O. 33, R. 1. SCOPE OF RULE.—An applicant to be disqualified to sue as pauper must be possessed of means sufficient to pay Court fees, and not merely entitled to property. 105 I. C. 30. A suit instituted in the ordinary way may be continued as a pauper suit. 20 C. 319; 8 B. 615. In 5 C. 819 it was held that the Court had power to allow a defendant to defend *in forma pauperis*. English law is different from Indian law. 2 Pat. 879=4 Pat. L. T. 538. No court-fee is payable upon a bill or plaint in England and only the costs of conducting the litigation such as payment of fees to lawyers, etc., has to be incurred. (*Ibid.*)

WHO CAN SUE AS A PAUPER.—A person who has obtained leave to sue under S. 18 of the Religious Endowments Act can be permitted to sue *in forma pauperis*. 24 M. 419. A minor can sue as a pauper although his next friend has substantial means. 3 M. at p. 4. The representative of a pauper cannot continue the suit *in forma pauperis* if not a pauper himself. 24 L. W. 550=1925 M. 819. Minor can sue *in forma pauperis*—Status of next friend immaterial. 37 C. L. J. 394=1923 Cal. 656. A next friend who is a pauper can sue *in forma pauperis*. 11 B. L. R. 373. An administrator of an estate can also sue as a pauper. 7 M. 390. An executor may be allowed

to petition for, and, if entitled thereto, to obtain probate *in forma pauperis*. 18 B. 237. A shebait suing his co-shebaits and an alienee for recovery of endowed property may be allowed to sue *in forma pauperis*, the fact that his co-shebaits are possessed of means is perfectly immaterial. 11 I. C. 892. O. 33 applies to suits by companies. The terms "persons" in the order includes companies also. 41 Mad. 624=34 M. L. J. 421.

EXPLANATION.—See 30 B. 593; 10 B. 207; 10 A. 467. A person who applies for leave to sue as a pauper is not bound to try and raise funds by mortgaging his claim. 3 M. 249. Suit to redeem—Equity of redemption—Should be excluded in calculating means. 19 N. L. R. 165=1924 Nag. 44. Occupancy tenancy is not property. 90 I. C. 949=A. I. R. 1925 Nag. 438. Suit *in forma pauperis*—Admission of part of the claim by defendant cannot dispauper plaintiff. 47 Bom. 523=25 Bom. L. R. 199. Meaning of the words "other than his necessary wearing apparel and subject-matter of suit." See A. I. R. 1926 Nag. 273. "Is not possessed of sufficient means" in the explanation. See 45 C. L. J. 68=100 I. C. 264=A. I. R. 1927 Cal. 309. Ordinary ornaments of woman are wearing apparel and ought to be excluded. (*Ibid.*) So also dower debt not reduced to possession. (*Ibid.*) The mere fact that applicant's husband has property is not sufficient reason for disallowing her application for leave to sue *in forma pauperis*. 44 I. C. 723=3 Pat. L. J. 178. A woman who has been permitted to sue as pauper cannot be asked to furnish security for costs under O. 25, R. 1. 36 I. C. 320=10 Bur. L. T. 105. An order for security for costs passed in an ordinary suit ceases to operate as regards the antecedent costs if leave is given to continue the suit as a pauper before the period for furnishing the security has expired. 13 Bom. L. R. 955=36 Bom. 415. The privilege of maintaining a pauper suit, is personal, granted to people who have no means of carrying on litigation and the representative of a pauper cannot continue the suit with the same privilege unless he himself is a pauper. (3 W. R. 20, Not Foll.; 3 Mad. 3, Dist.; 18 Bom. 237, Rel.), 36 Bom. 279=11 I. C. 724=13 Bom. L. R. 577; see also 25 All. 137; 33 Cal. 1163; 1 O. L. J. 709=26 I. C. 714; 18 O. C. 64; 64 I. C. 63.

Explanation.—A person is a “pauper” when he is not possessed of sufficient means to enable him to pay the fee prescribed by law for the plaint in such suit, or, where no such fee is prescribed, when he is not entitled to property worth one hundred rupees other than his necessary wearing apparel and the subject-matter of the suit.

[Bombay] The following sentence shall be added to the Explanation to Rule 1 of Order 33, Civil Procedure Code, namely:—

In determining whether he is possessed of sufficient means the subject-matter of the suit shall be excluded.

2. [S. 403.] Every application for permission to sue as a pauper shall contain the particulars required in regard to plaints in suits: a

Contents of application. schedule of any movable or immovable property belonging to the applicant, with the estimated value thereof, shall be annexed thereto; and it shall be signed and verified in the manner prescribed for the signing and verification of pleadings.

3. [S. 404.] Notwithstanding anything contained in these rules, the application shall be presented to the Court by the applicant in person,

Presentation of application. unless he is exempted from appearing in Court, in which case the application may be presented by an authorized agent who can answer all material questions relating to the application, and who may be examined in the same manner as the party represented by him might have been examined had such party attended in person.

4. [S. 406.] (1) Where the application is in proper form and duly presented, the Court may, if it thinks fit, examine the applicant, or

Examination of applicant. his agent when the applicant is allowed to appear by agent, regarding the merits of the claim and the property of the applicant.

(2) Where the application is presented by an agent the Court may, if it thinks fit, order that the applicant be examined by a commission in the manner in which the examination of an absent witness may be taken.

APPEAL.—Where money has been deposited into Court under the decree of the lower Court drawn by her sufficient for payment of Court-fee on appeal, she cannot be allowed to institute the appeal *in forma pauperis*. 23 L.W. 427=94 I. C. 337=A. I. R. 1926 Mad. 567=50 M. L. J. 114.

PRACTICE AND PROCEDURE.—A Court should not allow plaintiff to sue *in forma pauperis* without affording the defendant an opportunity to prove that the plaintiff is not a pauper (10 Bom. 207; 30 Bom. 593, Rel. upon) 23 I. C. 974. Report of Tahsilidhar as to possession of means, when good or otherwise. 28 I. C. 87=39 P.L.R. 1915. Where pauper application is dismissed, the Court can extend time for payment of Court-fee. 18 L. W. 451=46 M. L. J. 254. Where subsequent to an application to sue as a pauper, the applicant receives a sum of money, sufficient to defray the suit expenses the Court has no jurisdiction to grant leave to sue as a pauper. 61 I. C. 958=13 L. W. 76.

BURDEN OF PROOF.—As to pauperism is on the applicant himself *see* A.I.R. 1926 Nag. 273.

LIMITATION.—An application for leave to sue as a pauper presented five years after attaining majority is barred, and cannot be allowed. 26 I. C. 90=1 L. W. 668.

LEGAL REPRESENTATIVE of pauper plaintiff cannot continue the suit after plaintiff's death unless such legal representative is also a pauper. 104 I. C. 347=A. I. R. 1927 Lah. 665; (1927). M. W. N. 886.

O. 33, R. 2.—A petition to sue *in forma pauperis* which fails to comply with the provisions of O. 33, R. 2 ought to be rejected. 6 Bur. L. T. 141=20 I. C. 640. When allegations in plaint

show *prima facie* cause of action the application to sue as a pauper should not be dismissed except on merits. 30 I. C. 689. Where a pauper applicant omits to mention his immovable property and also fails to submit a list of such property when required, the application is not in proper form. 1923 Oudh 118. But *see also* 8 Pat. L. T. 794=104 I. C. 364.

O. 33, R. 3.—Form of petition—Separate affidavit instead of verification is sufficient. 1923 Lah. 684. An authorized agent in R. 3 does not include a recognized agent or a pleader as such. 80 P. L. R. 1915=28 I. C. 448. Leave to sue *in forma pauperis* ought not to be refused on insufficient ground. If the Court does so, the High Court will interfere in revision. 26 M.L.J. 343=23 I. C. 82. Presentation through the Nazir is sufficient and proper. 58 I. C. 961=17 N.L.R. 22. *See also* 47 M. L. J. 522.

O. 33, R. 4.—Where the applicant who seeks for permission to sue as pauper, is examined under R. 4, the opposite party has a right to cross-examine. 60 I. C. 738. A Court can enter into the merits of a case under R. 4 of O. 33, C. P. Code and for that purpose the judge can examine the plaintiff who applies for permission to sue as a pauper. 3 Pat. 275=A.I.R. 1925 Patna 30. In an inquiry under O. 33 the Court cannot take evidence except the evidence of the applicant himself on the merits of the claim. 52 I. C. 610=46 Cal. 651. But the Court cannot examine the witness for deciding the question of limitation or any other question than the pauperism of the applicant. 52 I. C. 610=46 Cal. 651. But *see* 50 I. C. 676 *contra*.

Rejection of application.

5. [S. 407.] The Court shall reject an application for permission to sue as a pauper—

- (a) **[S. 405.]** where it is not framed and presented in the manner prescribed by rules 2 and 3, or
- (b) where the applicant is not a pauper, or
- (c) where he has, within two months next before the presentation of the application, disposed of any property fraudulently or in order to be able to apply for permission to sue as a pauper, or
- (d) where his allegations do not show a cause of action, or
- (e) where he has entered into any agreement with reference to the subject-matter of the proposed suit under which any other person has obtained an interest in such subject-matter.

O. 33, R. 5.—Application for leave to sue *in forma pauperis*.—Elements to be considered by Court.—Plaintiff's allegations to disclose cause of action. 11 I. C. 55=13 C. L. J. 593; 15 I. C. 184=16 C. W. N. 466 (P. C.). All matters mentioned in Rule 5 need not be gone into unless raised. 96 I. C. 830=A. I. R. 1925 Lah. 642. Elaborate enquiry as to the merits not to be made. 97 I. C. 349=A. I. R. 1926 Mad. 116c. See also notes under Rule 6; nor complicated questions of limitation. 23 L. W. 406=92 I. C. 415=A. I. R. 1926 Mad. 135. "Agreement" and "proposed" explained. 37 I. C. 172. "A right to sue in R. 15 is the same thing as a cause of action" in Rule 5 57. I. C. 9=31 C. L. J. 351. "Cause of action" means a subsisting cause of action which can be enforced. 42 I. C. 519=33 M. L. J. 577; 41 Mad. 620=34 M. L. J. 399; 38 I. C. 566; 37 I. C. 172; 13 M. L. J. 292; 54 I. C. 462=10 L. W. 589; 18 L. W. 53; (1923) M. W. N. 412=1924 Mad. 80; but see also 29 P. W. R. 1913. O. 33, R. 5 (d) applies only to a case where the allegations in the petition do not disclose a cause of action. 41 Mad. 620=34 M. L. J. 399. Government pleader has a right to cross-examine the witnesses of the applicant and can also produce evidence to oppose the application. 12 I. C. 741=8 A. L. J. 1148. An elaborate enquiry into doubtful and complicated questions of law cannot be gone into at this stage. 41 Mad. 620=34 M. L. J. 399. Next friend suing on behalf of minor need not be a pauper. 58 I. C. 446=23 C. W. N. 955. Application for leave to sue *in forma pauperis*.—Dismissal of—Application for withdrawal of pauper application to sue *in forma pauperis* bars subsequent pauper suit, not regular suit on payment of fees. 52 I. C. 562. There is no distinction between an order of rejection under R. 5 and an order of refusal under R. 7. Both have the same effect. 33 I. C. 812=20 C. W. N. 669. But see next case. Rules for rejecting a plaint differ from those for rejecting an application to sue as a pauper. 5 Bur. L. T. 123=16 I. C. 83. The fact that the claim for some of the properties is not sustainable, will not justify the Court in declining to grant leave to sue as pauper. 16 I. C. 612=(1912) M. W. N. 38; 26 I. C. 90=1 L. W. 668. Question of valuation—Court cannot go into in pauper petition. 61 I. C. 891. Benamidar cannot be allowed to sue as pauper to give a non-pauper the right to evade the fiscal law by setting up a pauper nominee. 50 I. C. 520=1919 Pat. 232. Insolvency is not one of the grounds men-

tioned in O. 33, R. 5 on which such an application can be rejected. 1925 M. 791=48 M. L. J. 491. Application for leave to sue as a pauper—Verification defective. 5 Bur. L. T. 123=16 I. C. 83. In an application to sue *in forma pauperis* evidence should be confined entirely to the question of applicant's pauperism. 54 I. C. 462=10 L. W. 589. But see also 29 P. W. R. 1913. In order to bar an application under O. 33, R. 5 (e), the agreement must be with reference to the subject-matter of the proposed suit. 37 I. C. 172.

O. 33, R. 5, cl (a).—See 26 L. W. 546; 51 M. L. J. 79; 50 Mad. 63.

O. 33, R. 5, cl. (d).—As to the data and method of ascertaining the existence of cause of action. See 101 I. C. 18=A. I. R. 1927 Mad. 441=52 M. L. J. 330.

O. 33, R. 5, cl. (e) is designed in aid of *bona fide* litigants only, and it must be strictly confined to such litigants. 8 Pat. L. T. 810=103 I. C. 448=A. I. R. 1927 Pat. 352.

LIMITATION.—A Court is competent to reject an application to sue *in forma pauperis* under O. 33, R. 5 (d) on the ground that the claim is barred by limitation. 11 I. C. 857=4 Bur. L. T. 1919; 57 I. C. 9=31 C. L. J. 351; 53 I. C. 441 (1)=134 P. R. 1919; 18 I. C. 491=58 P. L. R. 1913. See (1925) M. W. N. 779. An application to sue *in forma pauperis* cannot be allowed where the cause of action is time-barred. 42 I. C. 519.

APPEAL.—No appeal lies from an order rejecting an application for leave to sue *in forma pauperis* but the applicant can bring a suit in the ordinary way. 39 I. C. 942.

REVISION.—Order rejecting application for leave to sue *in forma pauperis* is not open to revision. 20 A. L. J. 55=44 A. 248. But see 10 All. 467; 21 A. 133; 2 C. W. N. 474; 8 C. W. N. 70; 101 I. C. 18=A. I. R. 1927 Mad. 441=52 M. L. J. 330. See also cases under O. 33, R. 15. The mere fact that the schedule omits one item of property, is not sufficient ground for dismissal and the High Court can interfere in revision. 27 I. C. 891=1 L. W. 1068.

REVIEW.—A Judge refusing an application to sue *in forma pauperis* is competent to entertain a petition of review of his own order. 33 I. C. 812=20 C. W. N. 669.

SECOND APPLICATION.—R. 15 does not bar a second application to sue as pauper. 57 I. C. 9=31 C. L. J. 351. See also 96 I. C. 962=A. I. R. 1926 Mad. 875=51 M. L. J. 79.

6. [S. 408.] Where the Court sees no reason to reject the application on any of the grounds stated in rule 5, it shall fix a day (of which at least ten days' clear notice shall be given to the opposite party and the Government pleader) for receiving such evidence as the applicant may adduce in proof of his pauperism, and for hearing any evidence which may be adduced in disproof thereof.

Notice of day for receiving evidence of applicant's pauperism.

7. [S. 409.] (1) On the day so fixed or as soon thereafter as may be convenient, the Court shall examine the witnesses (if any) produced by either party, and may examine the applicant or his agent, and shall make a memorandum of the substance of their evidence.

Procedure at hearing.

(2) The Court shall also hear any argument which the parties may desire to offer on the question whether, on the face of the application and of the evidence (if any) taken by the Court as herein provided, the applicant is or is not subject to any of the prohibitions specified in rule 5.

(3) The Court shall then either allow or refuse to allow the applicant to sue as a pauper.

8. [S. 410.] Where the application is granted, it shall be numbered and registered, and shall be deemed the plaint in the suit, and the suit shall proceed in all other respects as a suit instituted in the ordinary manner, except that the plaintiff shall not be liable to pay any court-fee (other than fees payable for service of process) in respect of any petition, appointment of a pleader or other proceeding connected with the suit.

Procedure if application admitted.

9. [S. 411.] The Court may, on the application of the defendant, or of the Government pleader, of which seven days' clear notice in writing has been given to the plaintiff, order the plaintiff to be dispaupered—

Dispaupering.

(a) if he is guilty of vexatious or improper conduct in the course of the suit ;

(b) if it appears that his means are such that he ought not to continue to sue as a pauper ; or

(c) if he has entered into any agreement with reference to the subject-matter of the suit under which any other person has obtained an interest in such subject-matter.

O. 33, R. 6.—Evidence as to the plaintiff's title cannot be gone into. 45 A. 548=21 A.L.J. 441. Enquiry is to be confined to question of pauperism. 5 Bur. L.J. 174=99 I. C. 760=A. I. R. 1927 Rang 72. Evidence on the merits not to be let into. (*Ind.*) It is fully competent to a Court to take evidence under Rr. 6 and 7 on any matters specified in R. 5 and to decide on those matters to the best of its ability. 50 I. C. 520=(1919) Pat. 232.

O. 33, Rr. 6 & 7.—Court disposing of pauper application without notice to opposite pleader or Government vakil acts without jurisdiction and revision lies. 100 I.C. 726=A.I.R. 1926 Cal. 464.

O. 33, R. 7.—No person other than the guardian *ad litem* can compromise a dispute between the minor and another. 57 I. C. 417=44 Bom. 574. Suit *in forma pauperis*—Subsequent payment of Court-fee—Institution deemed to have been made on the date of the original presentation. 18 N. L. R. 44=1922 Nag. 600; 37 I. C. 921=3 O. L. J. 647.

O. 33, R. 8.—An application for leave to sue as a pauper is not a plaint till leave is granted, and till then it cannot be returned under O. 7, R. 10. If so returned the High Court will interfere in revision. 52 I. C. 688. Court has no jurisdiction to attach before judgment defendant's property before granting plaintiff's application to sue as pauper. 25 C. L. J. 159=21 C.W.N. 870. S. 3

of Limitation Act should be read along with O. 33, R. 8. Civil Procedure Code. 22 L. W. 732=49 M.L.J. 538. Pauper application under the old Court Fees Act—Leave granted after amended Act came into force—Suit decreed with costs—Basis of calculation of court-fees. See A. I. R. 1926 Mad 159.

O. 33, R. 9.—Concealment of property—Asset of doubtful value—Insurance policy. 46 B. 1017=1922 Bom. 215. Conduct which, by itself, may entitle the Court to dispauper a plaintiff. See 46 B. 1017=1922 Bom. 215. Dispaupering grounds for. 2 Pat. 879=4 Pat. L. T. 538. Pauper plaintiff agreeing to pay his pleader a large sum of money if he wins his case would be a good ground for dispaupering him. 6 Bur. L. J. 152=104 I. C. 316=A. I. R. 1927 Rang. 283. But see 96 I. C. 830=A. I. R. 1926 Lah. 642 (9 Bom. 371 Dist.). Where a plaintiff in a suit (*in forma pauperis*) dies, his executor is not liable to be dispaupered. 87 I. C. 372=1925 M. 768=48 M. L. J. 390. The word "means" in cl. (b) is to be interpreted with the help of the definition of pauper referred to above. 2 Pat. 879=4 Pat. L. T. 538. Rule 9 is intended to prevent the pauper continuing his suit when a third party has obtained an interest in the property and hence able to pay the Court-fees. 21 I. C. 536=7 S. L. R. 52.

10. [S. 414.] Where the plaintiff succeeds in the suit, the Court shall calculate

Costs where pauper succeeds.

the amount of court-fees which would have been paid by the plaintiff if he had not been permitted to sue as a pauper; such amount shall be recoverable by the Government from any party ordered by the decree to pay the same, and shall be a first charge on the subject-matter of the suit.

Procedure where pauper fails.

11. [S. 412.] Where the plaintiff fails in the suit or is dispaupered, or where the suit is withdrawn or dismissed,—

(a) because the summons for the defendant to appear and answer has not been served upon him in consequence of the failure of the plaintiff to pay the court-fee or postal charges (if any) chargeable for such service, or

(b) because the plaintiff does not appear when the suit is called on for hearing the Court shall order the plaintiff, or any person added as a co-plaintiff to the suit, to pay the court-fees which would have been paid by the plaintiff if he had not been permitted to sue as a pauper.

Government may apply for payment of court-fees.

12. The Government shall have the right at any time to apply to the Court to make an order for the payment of court-fees under rule 10 or rule 11.**13.** All matters arising between the Government and any party to the suit under

Government to be deemed a party.

rule 10, rule 11 or rule 12 shall be deemed to be questions arising between the parties to the suit within the meaning of section 47.

Copy of decree to be sent to Collector.

14. Where an order is made under rule 10, rule 11 or rule 12, the Court shall forthwith cause a copy of the decree to be forwarded to the Collector.**15. [S. 413.]** An order refusing to allow the applicant to sue as a pauper shall be

Refusal to allow applicant to sue as pauper to bar subsequent application of like nature.

a bar to any subsequent application of the like nature by him in respect of the same right to sue; but the applicant shall be at liberty to institute a suit in the ordinary manner in respect of such right, provided that he first pays the costs (if any) incurred by the Government and by the opposite party in opposing his application for leave to sue as a pauper.

Costs.

16 [S. 415.] The costs of an application for permission to sue as pauper and of an inquiry into pauperism shall be costs in the suit.

O. 33, R. 10.—O. 33, R. 10 creates two distinct and separate rights in the Crown, one right *in rem* against the property and the other right *in personam* against the pauper. 50 I. C. 315=4 P. L. J. 166. Crown can recover court-fee without a separate suit. (*Ibid.*)—Crown debts—Priority of. 34 All. 223=39 I. A. 62=22 M. L. J. 457 (P. C.). A paper succeeding partly in his case should be given the costs proportionate to his success. A pauper plaintiff should not be allowed to penalize the defendant by exaggerating his claim. 14 A. L. J. 657=38 All. 469. Where a pauper plaintiff applies for amendment of the plaint it is not competent to the Court to direct the plaintiff to pay costs of the amendment. 47 B. 104=1922 Bom. 385. The proper method of recovering court-fee payable to Government in case of the property out of which it is to be recovered is a right to future maintenance, is by Court appointing a Receiver to collect the same and pay to Government, in instalments, if necessary, in order that the maintenance holder may have something to live upon. 49 Mad. 567=A. I. R. (1926) Mad. 565=50 M. L. J. 279. As to order for payment of

court fees in suits for maintenance, see 105 I. C. 725=32 C. W. N. 48 (38 All. 469, Doubtful; 14 Mad. 163, Ref.); 94 I. C. 391=A. I. R. 1926 Cal. 859. Suit *in forma pauperis*—Costs decreed to defendant exceeding claim decreed to plaintiff—Government, if can claim charge. 14 L. W. 529=42 M. L. J. 19.

O. 33, R. 10-13.—Decree passed in pauper suit—Basis of calculation of court fees—Amended Court-Fees Act coming into force, effect of. See 96 I. C. 112=A. I. R. 1926 Mad. 474=50 M. L. J. 280; see also A. I. R. 1926 Mad. 159.

O. 33, R. 11 and 12.—Pauper suit—Compromise—Court-fee. 35 Bom. 448=12 I. C. 29. Whenever a suit is dismissed whether at the request of parties or not the plaintiff is the party defeated and must pay the Court-fees to Government. (*Ibid.*)

O. 33, R. 15.—R. 15 should be read along with Rr. 5, 6 and 7. 57 I. C. 9=31 C. L. J. 351. Orders under R. 5 or 7 bar fresh proceedings under R. 15. 33 I. C. 812=20 C. W. N. 669. A petition to sue *in forma pauperis* can be registered as plaint in the suit if full Court-fee is paid.

ORDER XXXIV.

SUITS RELATING TO MORTGAGES OF IMMOVABLE PROPERTY.

1. Subject to the provisions of this Code, all persons having an interest either in the mortgage-security or in the right of redemption shall be joined as parties to any suit relating to the mortgage.

Parties to suits for foreclosure, sale and redemption.

(24 Cal. 889, F.); 14 I. C. 297=16 C. W. N. 641. R. 15 makes it a condition precedent for a petitioner, whose application to sue *in forma pauperis* has been rejected, to pay the costs of government in opposing the application before a regular suit can be entertained; there should be a demand for it. Where there has been no such demand suit should not be dismissed. (*Ibid.*) Where an application for leave to sue *in forma pauperis* is dismissed as not pressed, it bars a fresh application in respect of the same right. (20 Bom. 86, Foll.); 1924 Lah. 312. But see 56 I. C. 207=1 Lah. 151. Fresh application can be made if the application to sue *in forma pauperis* is dismissed for default. 2 Bur. L. J. 217=1924 Rang. 161; 56 I. C. 207=1 Lah. 151; see 85 I. C. 982=1925 Mad. 986. See also 98 I. C. 26=4 Rang. 245=A.I.R. 1926 Rang. 200; 96 I. C. 962=A.I.R. 1920 Mad. 875=51 M.L.J. 79. Limitation is computed from the date when the pauper petition is filed, a pauper suit being converted into a regular suit. 28 I. C. 504=(1915) M. W. N. 228.

O. 34 and not S. 34 determines the question of the rate of interest in the case of mortgages. 54 I. A. 1=54 C. 161=25 L. W. 685=29 Bom. L.R. 752=A. I. R. 1927 P. C. 1=52 M. L. J. 373=99 I. C. 686 (P. C.).

O. 34, R. 1. APPLICABILITY.—The object of O. 34, R. 1 is that all claims affecting the equity of redemption should be disposed of in one and the same suit. 54 I. A. 68=50 Mad. 180=29 Bom. L. R. 805=100 I. C. 86=1927 P. C. 32=52 M. L. J. 338 (P. C.). For scope and object of, see 53 M. L. J. 647. A charge which has been created by the decree in a suit for money does not convert the suit into a mortgage suit and make this order applicable. 49 M. L. J. 490=1925 Mad. 1101. As regards scope of Order 34, see 25 C. L. J. 553=40 I. C. 845=21 C. W. N. 920. Also see 1925 Nag. 15. The object of the rule is to prevent the multiplicity of mortgage suits. 31 C. at p. 432; 33 C. 425 (433); 28 B. at p. 16; 32 C. 746; 28 A. 174 (F.B.); 21 A. L. J. 701=1924 A. 107; 50 M. 180. Non-production of the original mortgage-deed the terms of which are not disputed is no sufficient ground for dismissing the suit. 61 I. C. 412=19 A. L. J. 185. Non-joinder due to want of notice ought not to be penalised. 66 I. C. 631 (F. B.). Also 1922 Nag. 89 (F.B.). Where it is possible to do justice as between the parties before it, the Court should not dismiss the entire suit. 21 A. L. J. 701=1924 A. 107. See 1923 Nag. 234. Also 1925 Pat. 59. Non-joinder of parties is no ground for reversal of decree by an appellate Court. 5 L. W. 615=40 I. C. 414. Even if non-joinder is a fatal defect, it can be cured under O. 1, R. 10 (2). 27 A. 75; see also 30 C. 755. O. 34, R. 1 should be read subject to O. 1, R. 9, C.P.C. 100 I. C. 198=1927 All. 290. As to whether the rule requires that persons whose rights are admitted should be made parties, see 29

M. 84; 29 M. 217 at p. 224; 27 A. 511; 28 C. 517; 25 M. 568; 25 M. at p. 113; 30 M. 353. But see 20 A. 322. The rule lays down only who must be made parties, and does not prohibit the joinder of any person as a party. 55 I. C. 433. As to effect of non-joinder of necessary parties in a suit for sale, see 84 I. C. 262=1924 All. 928; 100 I. C. 198=1927 A. 290. An attaching creditor, since he has got the right to redeem, is a necessary party. 17 I. C. 432=17 C. W. N. 871; 1923 Nag. 311; 105 I. C. 427=23 N. L. R. 164. Non-joinder of one of two divided heirs of deceased mortgagor, enjoying in separate shares, is not fatal, and the whole amount can be recovered from the impleaded son's share. 35 All. 441=20 I. C. 41=11 A. L. J. 630. See also 43 Bom. 575=51 I. C. 223=21 Bom. L. R. 369. Non-joinder of all the heirs is not fatal. A decree for a proportionate share of money as against heirs on record should be passed. 66 I. C. 312=25 C. W. N. 594; 89 I. C. 121; 29 C. W. N. 51=1925 Cal. 152. Suit by only one of several heirs of a mortgagee is not maintainable; all must be made parties. 36 I. C. 77. See also 32 Cal. 746. Suit for redemption by one of many *urolans* of a temple without impleading the others as parties is not maintainable. 13 I. C. 234=(1911) 2 M. W. N. 537. Where some of the co-mortgagors owning distinct shares were not made parties, a decree for a sum proportionate to the interest of the parties impleaded could be given. 35 All. 247=19 I. C. 614. But see 90 I. C. 80. Also 89 I. C. 121, 48 A. 171=1926 All. 46; 66 I. C. 312. One co-mortgagee can sue by impleading the others as defendants. 20 I. C. 329. In a suit for redemption, if one of the mortgagees was exonerated, the suit must be dismissed. 45 I. C. 650=4 Pat. L. W. 391. The *kanomdar* is a necessary party to a suit for redemption. 25 M. 568. The mortgagee purchaser is not entitled to eject the purchaser of the equity of redemption when in the suit such purchaser has not been made a party. 25 I. C. 1. But see 20 I. C. 184=11 A. L. J. 362; 24 Bom. L. R. 741=1922 Bom. 334; also 49 Cal. 1048=28 C. W. N. 92=1923 Cal. 274; 22 C. W. N. 543=44 I. C. 521=28 C. L. J. 256; 10 I. C. 137; 25 A. L. J. 732=102 I. C. 645=1927 A. 611. The transferee of the equity of redemption is not bound by any decree in a mortgage suit in which he was not a party. 45 I. C. 606=21 O. C. 70. See also 34 I. C. 367=3 O. L. J. 494; 33 I. C. 760; 12 I. C. 155=14 C. L. J. 530; 65 I. C. 503; 66 I. C. 562=11 L. B. R. 119; 25 I. C. 931=7 L. B. R. 135; 1927 All. 611=102 I. C. 645=25 A. L. J. 772. Presence of the purchaser of the equity of redemption, as a witness in the suit, in the absence of proof of knowledge of the nature of the suit, does not amount to condonation of the omission to implead him, and the decree is therefore not binding on him. 13 I. C. 874=(1911) 1 U. B. R. 92. In a suit for possession from the purchaser by persons interested in the equity of

Explanation.—A puisne mortgagee may sue for foreclosure or for sale without

redemption who have not been made parties, no decree can be passed without a provision for what may be due to the defendants under the mortgage. 29 I.C. 742. When the purchaser is obstructed from taking possession in execution of a mortgage decree, by an alleged purchaser from the mortgagor, his only remedy is a suit for possession against him, giving him an opportunity to redeem. A mortgage suit will as well lie if he is in time. 11 I. C. 74=16 C. L. J. 33. *Also* 1923 All. 232. Where owner of the equity of redemption was not a party to the mortgage suit, his subsequent dispossession in execution is wrongful. 36 I.C. 744. Mortgagee cannot bring separate redemption suits for redemption of a single mortgage debt where the interest of mortgagees is divided among several co-sharers. 104 I.C. 648=1927 Bom. 513.

JOINT FAMILY.—The new Code does not affect the rule regarding the indivisibility of a mortgage nor the Mitakshara rule that no coparcener has a definite share till partition is made. 24 I. C. 831=10 N.L.R. 72. All the members of a joint family are necessary parties to a suit on a mortgage of the joint family properties and their non-joinder is fatal to the suit. 24 I. C. 252=12 A.L.J. 794; 21 I. C. 712. But *see contra* 1925 Pat. 59. A minor son in a joint Hindu family must be made a party. 28 C. 517. Where some refuse to join as plaintiffs they can be added as defendants. 14 I. C. 35=9 A. L. J. 410. The decree will be binding even on the minor members in the absence of fraud, where they have been represented by major members of the family. 21 I. C. 192. No question of non-joinder of sons can arise when the mortgage by father is not operative as against the sons. 42 Cal. 1068=19 C. W. N. 849 (F. B.). The essential point in suits by or against managers is not the distinct description of him as manager, but that he is sued or sues in respect of a family debt. 34 All. 549=9 A. L. J. 819 (F. B.). No legal proceeding not filed expressly as manager, short of actual redemption will deprive his coparceners of their right to redeem. 40 Bom. 248=18 Bom. L. R. 33. But *see* 2 Pat. L. T. 553=63 I.C. 564. The managers alone can file a suit on a mortgage without bringing the other members as parties. 2 Pat. L. T. 553=63 I. C. 564; 15 I. C. 876. But *see* 41 Cal. 727=19 C. L. J. 437. *See also* 29 I. C. 752=21 C. L. J. 452; 45 I. C. 767=7 L. W. 438; 46 I. C. 727; 1 Pat. L. W. 197=37 I. C. 833=1917 Pat. 113. A foreclosure decree against a manager will bind all the members of the joint Hindu family where the manager effectively represents all the members. 36 All. 383=18 C. W. N. 968=41 I. A. 216 (P. C.). In a suit against the mortgagor father or manager, the non-joinder of the sons is not fatal. 14 I. C. 38. *See also* 50 I. C. 243; 53 I. C. 411=125 P. R. 1919; *also* 18 I. C. 848=9 N.L.R. 1. *Also* 4 Pat. L. T. 108=1 P. L. R. 238=2 Pat. 435=1923 P. 290; 36 I. C. 542=1 Pat. L. J. 468; 47 All. 427=23 A.L.J. 246=87 I. C. 700=1925 All. 355. But notwithstanding that the manager is a party the Court should add as a party any member of the family who applies to be made a party, so as to

put forward any defence challenging the mortgage as not having been made for purpose binding on the family. 19 O.C. 58=36 I.C. 64=3 O.L.J. 322. Suit on a mortgage executed by son in a Hindu joint family—Plaintiff seeking relief against whole family—Father insisting on issue that the property was his—Issue was allowed to be framed—Father not being stranger. A. I. R. 1928 M. 199 (1926 M. 744, dis.). The sons or junior members cannot sue to redeem on the ground they were not parties to the suit in which the decree was passed against manager, unless they show that the mortgagee was aware of their interest and yet omitted to implead them. 14 I.C. 333=16 C.W.N. 1019. *See also* 40 I.C. 525=1 Pat. L. W. 736; 2 Pat. L. J. 306=1 Pat. L. W. 636=39 I. C. 779=(1917) Pat. 137.

LANDLORD AND TENANT.—To a suit to enforce a mortgage of a non-transferable occupancy holding the landlord is not a necessary party. 46 I.C. 176=22 C.W.N. 662. A tenant of the mortgagee is a necessary party. At least he is a proper party. 52 I.C. 105. The lessee who has redeemed a mortgage by the lessor and forecloses the lessor, is not liable to be ejected by the lessor. 59 I.C. 511=10 N.L.R. 180.

NECESSARY PARTIES—ILLUSTRATIVE CASES.—All persons interested in mortgagee's interest are necessary parties. 1926 Sind 145=91 I. C. 87. The entire suit fails if a necessary party is added after limitation. 36 I.C. 542=1 Pat. L.J. 468. *Also* 25 I.C. 508; 24 I. C. 25=12 A. L. J. 619. The mortgagor is a necessary party. 36 Bom. 624=17 I.C. 87; *also* 9 I.C. 940=9 M.L.T. 356. The mortgagor is not a necessary party to a mortgage suit, if the purchaser of the equity of redemption effectively represents him. 28 I.C. 386. The mortgagor's mortgagor is not a necessary party. 67 I.C. 421=3 Lah. L.J. 373. Neither the mortgagor's benamidar. 29 C.W.N. 784=1925 Cal. 973. In a suit for redemption of mortgage alleged tenants of the mortgagee are proper parties. 96 I.C. 848=1926 Bom. 522=28 Bom. L. R. 759. Suit to recover money under Koot Chit Fund—All subscribers to chit fund are necessary parties. 103 I. C. 814=53 M. L. J. 550=1927 Mad. 773. A trespasser is not a necessary party at all. 47 I. C. 536. Simply because a person has some title to the lands by reason of an entry in the village papers, he is not entitled to be made a party in a redemption suit. 87 I. C. 679=1925 All. 593. In a suit to declare a right to redeem by a necessary party not impleaded in the prior suit, the mortgagee purchaser in execution of the decree in that suit, is entitled to raise all the defences open to a purchaser. 47 Cal. 924=47 I. A. 91=39 M. L. J. 108=24 C. W. N. 954. *See also* 102 I. C. 645=1927 A. 611=25 A.L.J. 732.

PARAMOUNT TITLE.—Persons claiming paramount title are not to be made parties. 38 All. 488=43 I. A. 187=14 A.L.J. 1002=20 C.W.N. 1279=31 M. L. J. 571 (P. C.); *also* 40 All. 584=46 I.C. 559=16 A.L.J. 639; 25 I.C. 233=12 A.L.J. 1088; 44 Bom. 698=57 I.C. 577=22 Bom. L.R. 815; 54 I.C. 806; 1918 Pat. 305; 40 I.C. 865; 24 I.C. 871=1 O.L.J. 261; 44 Cal. 425

making the prior mortgagee a party to the suit; and a prior mortgagee need not be joined in a suit to redeem a subsequent mortgage.

= 21 C.W.N. 177 = 37 I.C. 277 = 27 C.L. J. 212. But see 22 I.C. 976 = (1914) M.W.N. 623; 102 I.C. 435; 39 M.L.T. 459; 100 I.C. 195; 4 R. 214 = 98 I.C. 11 = 1926 Rang. 208; 23 L.W. 664 = 1926 M.W.N. 939 = 1926 Mad. 744 = 96 I.C. 26. Also 40 I.C. 288 = 4 O. L. J. 261. But joinder of persons claiming paramount title does not make the proceedings irregular. 5 L.W. 615 = 40 I.C. 414 = (1917) M.W.N. 417. The rule that in a mortgage suit persons claiming under a paramount title are not proper parties is not inflexible. An adopted son is a necessary party in a suit on a mortgage by the executrix of the estate of his deceased adoptive father. 11 I.C. 826 = 14 C.L. J. 108. Where the leaving undetermined the title of persons claiming paramount title leads to inconvenience or hardship, it must be tried in the suit itself. 45 I.C. 691 = 4 Pat. L. W. 417. Where such a person is made a party and his title gone into, he cannot ask for a reversal of the decree on the ground of his title not being triable in the suit. 10 O. L. J. 263 = 9 O. & A.L. R. 282 = 1924 Oudh 19. Rights between legal representatives of a deceased plaintiff mortgagee *inter se* need not be gone into. 1927 Mad. 1071. Where the plaintiff in a mortgage suit dies and only some of the representatives are brought on record and others not the whole suit must be decreed. 1927 Mad. 1071. See also 1926 Cal. 1192 = 96 I.C. 698.

PRIOR MORTGAGEE.—A prior mortgagee need not be added in a suit by a puisne mortgagee. 13 I.C. 182 = (1912) M.W.N. 41; 2 Pat. L. J. 118 = 1 Pat. L. W. 653 = (1917) Pat. 194. Nor the purchaser of the prior mortgagor's rights. 88 I.C. 803. A prior mortgagee decree-holder who has obtained the decree without impleading the puisne mortgagee is entitled to use prior mortgage as a shield for prior payment, when he is sued by the puisne mortgagee on his mortgage. 43 All. 469 = 48 I.A. 365 = 42 M.L. J. 15 = 1922 P.C. 11 (P.C.). In such a suit by the puisne mortgagee, the prior mortgagee purchaser cannot set up any higher rights than any stranger purchaser, but can set up only the amount of the decree made in his suit. 42 All. 364 = 47 I.A. 71 = 38 M.L. J. 419 = 22 Bom. L. R. 553 = 55 I.C. 969 (P.C.). Where a prior mortgagee is not impleaded, the decree on the puisne mortgagee's suit is not a bar to a suit by the prior mortgagee on his own mortgage. 47 Cal. 662 = 47 I.A. 11 = 38 M.L. J. 424 = (1920) M.W.N. 308 = 18 A.L. J. 401 = 11 L.W. 518 = 55 I.C. 959 = 22 Bom. L. R. 557 (P.C.). When the prior mortgagee obtains a decree in a foreclosure suit without impleading the puisne mortgagee, it is open to him subsequently to deposit the money due to the puisne mortgagee and redeem him. 20 A.L. J. 401 = 44 A. 462 = 1922 All. 135. But see 40 M.L. J. 126 = 62 I.C. 833 = 20 M.L. T. 189. A puisne mortgagee decree-holder purchaser can redeem the prior mortgage, or at least his rights as second mortgagee are not extinguished. 38 Bom. 24 = 21 I.C. 39 = 15 Bom. L. R. 817. A foreclosure decree without impleading a subsequent mortgagee amounts to nothing. 39 I.C. 849 = 13 N. L. R.

69; (1912) M.W.N. 41. The object and nature of relief claimed should be clearly stated, when a prior mortgagee is made a party. Otherwise the decree will not bind him. 58 I.C. 73 = 1 Pat. L. T. 629. Where the puisne mortgagee impleaded the prior mortgagee and claimed priority over him, a defence ought to be raised. Where the priority raised was adjudicated, it would be *res indicata* in a subsequent suit by the prior mortgagee. 4 Pat. L. T. 108 = (1923) Pat. 118 = 1 P.L.R. 238 = 2 Pat. 435 = 1923 P. 290. A first mortgagee in possession under a prior sale, may always shield himself under his mortgage and purchase though his right to possession may be defective. 1 Bur L. J. 217 = 1923 Rang. 107. See also 33 I.C. 243.

PUISNE MORTGAGEE.—A puisne mortgagee must be joined as a party to a redemption suit. 28 A. at p. 162; 28 A. 174 (F.B.). A puisne mortgagee is a necessary party to a suit by the prior mortgagee. 81 P. W. R. 1916 = 33 I.C. 815 = 86 P.R. 1916. Also 39 Bom. 138 = 27 I.C. 1005 = 17 Bom. L. R. 144. But see also 9 A.L.J. 323 = 14 I.C. 674 (2) = 34 A. 323. When the puisne mortgagee was not impleaded, and a second suit was brought by the puisne mortgagee, the prior mortgagee is entitled only to the decree amount on his mortgage and not to any interest subsequent to his decree. 42 All. 364 = 47 I.A. 71 = 25 C.W.N. 397 = 38 M.L. J. 419 = 55 I.C. 969 = 32 C.L. J. 121 (P.C.). Where the puisne mortgagee is not made a party, he is not bound by any order for sale obtained in such suit by the prior mortgagee. Neither is he bound to pay off the decree on the prior mortgage if at the time of his own suit for sale the execution of the decree had become barred. 40 All. 407 = 45 I.A. 130 = 35 M.L. J. 1 = 28 C.L. J. 188 = 20 Bom. L. R. 798 = 22 C.W.N. 1033 = 45 I.C. 708 (P.C.). See *contra* 23 M.L. J. 281 = 17 I.C. 291 = (1912) M.W.N. 1119. A sale of the property at the instance of the prior mortgagee in a suit by him without impleading the puisne mortgagee as a party, does not affect the puisne mortgagee's right to redeem or sue on his own mortgage. (1911) 1 M.W.N. 165 = 21 M.L. J. 213 = 9 I.C. 513 = 9 M.L. T. 431; 58 I.C. 295 = 16 N. L. R. 215; see also 39 Cal. 527 = 39 I.A. 68 = 11 M.L. T. 265 = (1912) M.W.N. 37 = 9 A.L. J. 332 = 14 Bom. L. R. 280 = 16 C.W.N. 505 = 15 C.L. J. 411 = 14 I.C. 496 = 22 M.L. J. 468 (P.C.); 38 Bom. 24 = 21 I.C. 39 = 15 Bom. L. R. 817; 81 P. W. R. 1916 = 33 I.C. 815 = 86 P.R. 1916; 23 M.L. T. 106 = 44 I.C. 753 = (1918) M.W.N. 251 = 7 L.W. 420; 21 I.C. 554. Mortgage suit—Subsequent mortgagee not made party—Auction purchaser taking possession of property from the subsequent mortgagee—Ejectment suit against purchaser—Maintainability. 45 C.L. J. 4 = 100 I.C. 420 = 1927 Cal. 259. See also 24 A.L. J. 661 = 1926 All. 480 = 97 I.C. 4 (2). Where a prior and a puisne mortgagee each brings a suit without impleading the other as a party, and the properties are sold by different parties, it is incumbent on the court in a suit for establishing the priority of claim as between the purchasers, to grant relief according to

Preliminary decree in foreclosure suit.

2. In a suit for foreclosure, if the plaintiff succeeds, the Court shall pass a decree—

(a) ordering that an account be taken of what will be due to the plaintiff for principal and interest on the mortgage, and for his costs of the suit (if any) awarded to him on the day next hereinafter referred to, or

(b) declaring the amount so due at the date of such decree, and directing—

equities on the basis of the exact position of the parties. 37 I. C. 343=14 A. L. J. 1146. But see 28 I. C. 67=8 S. L. R. 264; 24 A. L. J. 661=A. I. R. 1926 All. 480=97 I. C. 4 (2). Where a prior mortgagee gets a money decree on his mortgage without impleading a puisne mortgagee and purchaser of the property in execution, he could not claim the property free of the puisne mortgage. 29 I. C. 757. In a subsequent suit for redemption by a puisne mortgagee while in the prior suit he was not made a party by a prior mortgagee, the decree should direct a redemption upon payment of what was found due on such prior mortgage up-to-date of sale. 36 All. 123=22 I. C. 387=12 A. L. J. 41; also 33 All. 370=9 I. C. 670=8 A. L. J. 155; 38 I. C. 179=1 Pat. L. W. 269; 24 A. L. J. 661=A. I. R. 1926 All. 480. The omission to implead a puisne mortgagee over a portion of the properties, does not render the suit wholly dismissable but affects only such of the properties as have been mortgaged to him. 45 All. 484=21 I. C. 271=11 A. L. J. 749. Failure of a puisne mortgage to appear and contest when impleaded estops him from claiming any priority as having paid over any prior lien. 29 I. C. 875=19 C. W. N. 947. Where a person is made a party and he claims priority as the assignee of a prior mortgagee, it is not necessary to decide his priority. 9 I. C. 643=9 M. L. T. 410. Where a puisne mortgagee was a party to the suit but not to a compromise decree passed therein, and execution was taken on the compromise decree, the puisne mortgagee's rights are not affected, and the proceedings in execution are a nullity. 41 M. L. J. 547=(1921) M. W. N. 732=15 L. W. 123=1922 Mad. 307. See also 58 I. C. 295=16 N. L. R. 215. A suit for sale of property on a subsequent simple mortgage can be maintained subject to the prior usufructuary mortgage, though the mortgagee in both cases is the same. 50 I. C. 40. See also 69 I. C. 897=10 L. B. R. 360. Neither this rule nor any other provision of law requires the holder of a first mortgage to disclose his second over the same property. There is nothing to prevent him from obtaining a decree for sale on each of them in a separate suit. 12 A. L. J. 127=85 I. C. 748=1925 Oudh 379 (2). But see also 53 I. C. 753=6 O. L. J. 482. There is nothing in law to prevent the prior mortgagee from bringing a suit without impleading a second mortgagee. Where the same person holds two mortgages, there is some risk of curtailment of some rights of the mortgagee when he chooses to sue separately on his mortgages. He may not be allowed to sell the properties in a subsequent decree when they were already sold in a prior decree. 4 Pat. L. T. 546=2 Pat. 874=(1923) Pat. 293=A. I. R. 1924 P. 77. The omission to implead the puisne mortgagee as a party to the suit within limitation time does

not involve a dismissal of the suit. (1922) Pat. 326=2 Pat. 175=4 Pat. L. T. 698=A. I. R. 1922 P. 651; 2 Pat. L. J. 118=1 Pat. L. W. 653=1917 Pat. 194; 16 I. C. 674=10 A. L. J. 134. Suit for sale—Subsequent mortgagee joined beyond limitation—Whole suit cannot be dismissed—Decree can be passed subject to subsequent mortgagee's rights. 101 I. C. 775=A. I. R. 1927 A. 488 (1).

RECEIVER.—In a foreclosure suit instituted while the mortgagor was alive and he died and his representatives are declared insolvent, the receiver is not a necessary party. 41 C. L. J. 290=29 C. W. N. 771=86 I. C. 1042=1925 Cal 785.

SIMULTANEOUS MORTGAGES.—In a suit for sale by one of two simultaneous mortgagees without impleading the other, the whole property is liable to be sold and the other has only a right of redemption. 10 I. C. 422. In a suit by a sub-mortgagee the defendant's mortgagor is not a necessary party. 27 A 511. In a redemption suit against the sub-mortgagee, the original mortgagor is not a necessary party. 24 Bom. L. R. 911=1922 Bom. 424; also 9 I. C. 765=13 Bom. L. R. 90.

O. 34, R. 2.—The words "derived title" will apply to a sub-mortgage which is derivative mortgage. 20 All. at p. 401. This rule and rule 4 do not contemplate two successive suits on one and the same mortgage. 39 All. 506=41 I. C. 233. In executing a mortgage decree the Court can sell the items in a particular order to adjust the equities of the parties before it. 29 M. 217.

ACCOUNTS.—The relationship as mortgagor and mortgagee does not cease with the decree. 28 I. C. 571=21 C. L. J. 284. A mortgagee who pays arrears of revenue to save the property from sale, after the preliminary decree, has a charge for the amount over the property. 43 I. C. 190=12 Bur. L. T. 36. Accounts should be taken before final decree. Provision for taking accounts in execution is not in accordance with law. 15 I. C. 362=(1912) M. W. N. 400. See also 23 M. L. T. 158=7 L. W. 269; 5 Pat. L. J. 595. Compromise of suit by same defendants—Necessity of evidence to found decree against others—Failure to take accounts if fatal. 31 C. W. N. 804=100 I. C. 91=1927 P. C. 17=52 M. L. J. 407=(1927) M. W. N. 147=45 C. L. J. 300 (P. C.).

COSTS.—Costs in the suit form part of the entire amount to be realised from the property. 41 C. L. J. 607=1925 Cal. 1135. In the absence of express provision to recover costs personally, the mortgagee can add the costs of appeal to the mortgage security. 45 A. 630=21 A. L. J. 617; 41 All. 473=17 A. L. J. 582. The Court can order costs to be recovered personally if there is

(c) that if the defendant pays into Court the amount so due on a day within six months from the date of declaring in Court the amount so due to be fixed by the Court, the plaintiff shall deliver up to the defendant, or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, re-transfer the property to the defendant free from the mortgage and from all incumbrances created by the plaintiff or any person claiming under him, or, where the plaintiff claims by derived title, by those under whom he claims, and shall also, if necessary, put the defendant in possession of the property, but

(d) that, if such payment is not made on or before the day to be fixed by the Court, the defendant shall be debarred from all right to redeem the property.

a condition to that effect in the mortgage deed, and an appeal lies from such an order. 47 I. C. 542. When a final decree for foreclosure is passed, it is in lieu of principal and interest as well as the costs of suit. 88 I. C. 203=1925 Oudh 351.

DATE OF PAYMENT.—The effect of fixing a time for payment in a compromise mortgage decree in a foreclosure suit ownership passes to the mortgagee when the payment was not made in time. 2 Lah. 53=3 Lah. L. J. 68. See also 58 P. L. R. 1919. It is not an absolute rule of law that less than six months cannot be allowed for redemption. 31 C.W.N. 804=1927 P. C. 17=100 I. C. 91=52 M. L. J. 407 (P. C.).

EXTENSION OF TIME.—Where a preliminary consent decree for payment in instalments is passed, the decree-holder must apply for final decree before proceeding to execute, and the Court can extend time. 1922 Nag. 182. But see 9 I. C. 771=4 Bur. L. T. 43; see also 10 I. C. 536=14 C. L. J. 648.

FINAL DECREE.—After final decree an appeal on the preliminary decree is not open. It may be amended as an appeal on the final decree. 33 C. L. J. 414=61 I. C. 923=25 C. W. N. 776.

FORM OF DECREE.—In a suit by one co-owner for redemption of the whole mortgage, the Court can ascertain the plaintiff's share and pass a decree both for partition and redemption. 32 M. L. J. 489=39 I. C. 46.

INTEREST.—The question as to rate of interest in mortgages is to be determined under Order 34 and not S. 34. A.I.R. 1927 P. C. 1=99 I. C. 686=54 C. 161=54 I. A. 1=52 M. L. J. 373 (P.C.). Interest after date of suit when not provided for in judgment, must be deemed to have been refused. 37 Bom. 326=40 I. A. 68=17 C. W. N. 573=25 M. L. J. 101 (P. C.). The Court has power to award interest in the final decree when by inadvertence it is not provided for in the preliminary decree. 42 I. C. 625=2 Pat. L.W. 208. The mortgagee can get a decree for interest on the amount decreed from the date of suit to date of realisation. 37 P. W. R. 1911=10 I. C. 846. The mortgagee is ordinarily entitled to interest at the rate stipulated in bond till the date fixed for payment. From that date to date of realisation he is entitled to reasonable interest. 31 C. 138. Also 36 All. 220=12 A. L. J. 283; 18 I. C. 965=17 C. L. J. 221; 17 C. W. N. 457=17 C. L. J. 120; 20 I. C. 917=(1913) M. W. N. 649; 30 C. 953; 31 C. 138; 29 A. 322; 29 C. W. N. 118=85 I. C. 218. The Court must award interest at contract rate even after the date fixed for redemption though the mortgage deed is silent as regards the same. 28 I. C. 195=2 L. W. 236. Interest

subsequent to date fixed for redemption is calculated on the aggregate of principal, interest and costs declared to be found payable on the date fixed for redemption. 42 Mad. 465=36 M. L. J. 288; also 31 I. C. 320. The Court can relieve penal interest or reduce it when the transaction is substantially unfair. 29 C. W. N. 118=85 I. C. 218=1925 Cal. 268 (2); 34 I. C. 745=19 O. C. 166. In a preliminary decree payment of interest till realisation means interest up to the days of grace. 2 Pat. L. T. 78=5 P. L. J. 598. If the mortgagor wishes to redeem earlier than the date fixed for payment, he must pay interest up to the day so fixed, and not only up to the date of his payment. 49 I. C. 160=12 S. L. R. 59. Interest at the contract rate need not necessarily be given after date fixed for redemption. 29 A. 322. Also 6 Pat. L. T. 459=88 I. C. 323=1925 Pat. 455. After date fixed for payment in the decree, interest must be allowed at Court rate and not at contract rate. 10 I. C. 695=7 N. L. R. 14. The period for payment fixed in the preliminary decree cannot be extended by an unsuccessful appeal either by the mortgagor or mortgagee, so as to secure interest at contract rate. 17 C. W. N. 457=17 C. L. J. 120. Though in a previous decree which has become inoperative no future interest was allowed, it does not bar the allowing of interest in a subsequent fresh suit. 58 P. R. 1915=30 I. C. 104.

NOTICE.—Notice to mortgagor between preliminary and final decrees not necessary. 24 A. L. J. 914=1926 A. 757=97 I. C. 277 (27 M. 40; 29 C. 644, Rel. on).

PAYMENT INTO COURT.—The payment must be in Court. No other settlement can be recognised. 12 P. R. 1913=16 I. C. 987; also 42 Mad. 61=35 M. L. J. 579. But see *contra* in 25 C. L. J. 553=21 C. W. N. 920; 27 I. C. 919=11 N. L. R. 16; 57 I. C. 473=5 P. L. J. 672. No uncertified adjustment can be recognised, even though the adjustment was agreed upon even before the passing of the preliminary decree. 54 I. C. 137=37 M. L. J. 356.

MODE OF CALCULATION.—The period of six months fixed in the preliminary decree runs from the date of that decree and not from the date of dismissal of an appeal from that decree, in the absence of enlargement of time by the Appellate Court. 25 C. W. N. 440=36 C. L. J. 159. Also 37 I. C. 779; 104 I. C. 730=1927 Pat. 345=8 P. I. T. 597. When accounts are directed to be taken, the date of payment should be fixed within six months from the date of declaring in Court the amount due on taking accounts. 27 I. C. 813=21 C. L. J. 75.

[Bangoon] The following shall be substituted for Order XXXIV, Rule 2 :—

In a suit for foreclosure if the plaintiff succeeds the Court shall either—

(1) pass a preliminary decree declaring the amount which will be due to the plaintiff on the mortgage for principal and interest (at the mortgage rate) six months from the date of the decree and for his costs of the suit (if any) awarded to him directing—

(a) that if the defendant within the said period pays into Court the said amount the plaintiff shall deliver up to the defendant or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required by the defendant, re-transfer to him, free from the mortgage and from all incumbrances created by the plaintiff or any person claiming under him, or, where the plaintiff claims by derived title, by those under whom he claims and shall also if necessary put the defendant in possession of the property, but

(b) that if such payment is not made within the said period the defendant shall be debarred from all right to redeem the property, or

(2) order that an account be taken of the amount due on the mortgage for principal and interest; and after the taking of the said account pass a preliminary decree as above.

[Bombay] Substitute for clause (d) of Rule 2 of Order XXXIV, the following :—

(d) that, if such payment is not made on or before the day to be fixed by the court the plaintiff shall be entitled to apply for a final decree for foreclosure under rule 3.

3. (1) Where, on or before the day fixed, the defendant pays into Court the amount declared due as aforesaid, together with such subsequent costs as are mentioned in rule 10, the Court shall pass a decree—

Final decree in foreclosure suit.

(a) ordering the plaintiff to deliver up the document which under the terms of the preliminary decree he is bound to deliver up, and, if so required—

(b) ordering him to re-transfer the mortgaged property as directed in the said decree and, also, if necessary—

(c) ordering him to put the defendant in possession of the property.

(2) Where such payment is not so made, the Court shall, on application made in that behalf by the plaintiff, pass a decree that the defendant and all persons claiming through or under him be debarred from all right to redeem the mortgaged property and also, if necessary, ordering the defendant to put the plaintiff in possession of the property :

Provided that the Court may, upon good cause shown and upon such terms (if any) as it thinks fit, from time to time, postpone the day fixed for such payment.

Power to enlarge time.

O. 34, B. 3.—Proceedings under rule 3 are proceedings in execution of a decree passed under R. 2. 27 M. 40. But see 42 I. C. 750=20 O. C. 268; also 39 Mad. 488=28 M. L. J. 491; 56 I. C. 583.

CONSENT DECREE.—A consent decree for instalment payment is not under Sec. 88 of the Transfer of Property Act and therefore execution can proceed even without a final decree. 10 I. C. 536=14 C. L. J. 648. But see *contra* 1922 Nag. 182.

EXTENSION OF TIME.—Payment after final decree cannot be accepted. 37 I. C. 779. The words "good cause" must be literally interpreted and is not to be assumed from non payment or delayed payment. 26 I. C. 701=10 N. L. R. 150. Extension is not a matter of right but is discretionary. 39 Mad. 882=31 I. C. 200. In foreclosure suits discretion must be exercised liberally. 90 I. C. 936. Where the appellate Court confirms the lower Court's decree, the time fixed in the preliminary decree runs from the date of the preliminary decree 16 I. C. 799=14 M. L. T. 194. See also 63 I. C. 799. The appellate Court can extend time for payment and fix a date itself independently of the lower Court's date. 66 I. C. 673=8 O. L. J. 407. The mortgagor has no absolute right to pay after day fixed even though no final decree has been made till such payment. 51

foreclosure absolute in proper form is made, the mortgagor can, upon a proper application, redeem the mortgage. 27 C. 705. And the mere fact that the mortgagee has been put in possession does not matter. 25 A. 231. See also 23 M. 133. The Court can extend time when an application for final decree is filed and no further separate application is necessary. 21 N. L. R. 47=1925 Nag. 291.

FINAL DECREE.—An application for final decree is expressly required and necessary. 1 Pat. L. J. 364=38 I. C. 38; also 51 I. C. 881=4 Pat. L. J. 347. No notice need be given to the judgment-debtor before the order absolute for foreclosure is made. 29 C. 644; see also 27 M. 40. But see 42 I. C. 750=20 O. C. 268. But an *ex parte* order can be set aside. 32 C. 253 (F. B.) The right to redeem revives even after foreclosure, if the mortgagee pursues his remedy on the personal covenant. 10 I. C. 748=13 Bom. L. R. 162. Suit by the holder of two independent mortgages over the same property—Sale subject to mortgages—Form of decree. 8 Pat. L. T. 255=98 I. C. 968=1927 Pat. 47.

LIMITATION.—When the mortgage decree is passed before the new C. P. Code an application for order absolute was governed by Art. 182 of the Limitation Act. 36 All. 350=27 M. L. J. 17=23 I. C. 649 (P. C.). Art. 181 of the Limitation Act

(3) On the passing of a decree under sub-rule (2) the debt secured by the mortgage shall be deemed to be discharged.

Discharge of debt.

[Bangoon] The following shall be substituted for sub-rule (1) of Rule 3 :—

"(1) Where the defendant pays into Court the amount declared due as aforesaid, within the said period together with such subsequent costs as are mentioned in Rule 10, the Court shall pass a decree—

(a) ordering the plaintiff to deliver up the documents which under the terms of the preliminary decree he is bound to deliver up,

and, if so required—

(b) ordering him to re transfer the mortgaged property as directed in the said decree and, also, if necessary—

(c) ordering him to put the defendant in possession of the property"

4. (1) In a suit for sale, if the plaintiff succeeds, the Court shall pass a decree to the effect mentioned in clauses (a), (b) and (c), of rule 2

Preliminary decree in suit for sale.

and also directing that, in default of the defendant paying as therein mentioned, the mortgaged property or a sufficient part thereof be sold and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court and applied in payment of what is declared

foreclosure. 3 Pat. L.T. 565=1 Pat. 415. But *see contra* 30 I.C. 719=42 Cal. 294. The passing of final decree is not a process in execution for the purpose of limitation. 39 Mad. 488=28 M. L. J. 491. There is no limitation for an application to pay money into Court as it is a continuing right till final decree. 25 I.C. 752=17 O.C. 347.

MERGER.—The mortgage debt merges in the final decree. 42 All. 364=47 I. A. 71=38 M. L. J. 419 (P. C.); 40 All. 407=45 I. A. 130=35 M. L. J. 1 (P.C.). *See also* 35 All. 250=18 I.C. 923. For the same reason no interest can be demanded on the mortgage amount after the mortgagee has purchased the properties in execution and been put in possession. 21 I. C. 593. On account of this merger no payment after the final decree can be taken to be a payment by way of redemption. 23 O.C. 334=60 I.C. 213. The merger does not affect the security though the security becomes merged in the decree. 27 I. C. 780=21 C. L. J. 104. The view that the prior mortgage subsists even after passing of the final decree is no longer law. Such a view was expressed in 44 I.C. 753=7 L.W. 420.

RIGHT OF REDEMPTION.—The right of redemption exists even after the preliminary decree till passing of final decree, even though the six months allowed has passed. 70 I. C. 152=26 C. W. N. 532; *also* 18 I.C. 357. The right of a puisne mortgagee to redeem survives even after a final decree in a suit by a prior mortgagor to which he was not a party. 49 Cal. 626=1922 Cal. 23. As to rights of a purchaser at a sale by prior mortgage, when the decree in favour of the puisne mortgagee is allowed to be barred. *See* 83 I. C. 1033=1925 All. 6.

O. 34, R. 4.—Even in the case of anomalous mortgages a decree for sale and foreclosure can be passed. 18 I.C. 24. A decree under this rule is only a decree *nisi* and not a final decree, and the suit in which such a decree is passed does not terminate until an order absolute is made under R. 5. 23 A. 331; 29 A. 76. A combined decree cannot be passed under this rule and under R. 6. 31 C. 792. But *see* 25 A. 541; 29 A. 12. A decree under this rule must not order defendants personally to pay costs. 30 M. 464. Property comprised in the mortgage, which is subject to a charge for maintenance, can be sold. 29 A. 205. As to

powers of a receiver appointed under this rule in a mortgage suit against the decree-holder for account and possession, *see* 29 C. W. N. 413=1924 P.C. 202 (P.C.).

CONSENT DECREE, RR. 4 AND 5.—*See* 27 C.W. N. 621=50 Cal. 650; *also* 4 Pat. L. T. 311=2 Pat. 538=49 A. 207=100 I. C. 59=1927 A. 167. R. 5 applies to a decree prepared under this rule when the decree directs the payment of the full amount due thereunder on a fixed date. 49 A. 297=1927 A. 167=100 I.C. 57. R. 4 has no application to compromise decrees providing for instalment payment. 49 A. 297. A compromise decree is enforceable according to its own terms. Under R. 5, payments out of Court can be investigated. 1 Pat. L. T. 416=57 I.C. 473=5 P. L. J. 672. A decree passed in accordance with a compromise is a final one and capable of execution. 55 I. C. 816=5 I.L.J. 67. Similarly a decree based on an award is itself executable. 4 Pat. L.T. 604=3 Pat. 221.

COMPOSITE DECREE.—When a decree is in the nature of a composite decree (a money decree with a lien on the property hypothecated, fixing a time for payment and in default ordering sale of property) no final decree is necessary. 7 Lah. L.J. 397=1925 Lah. 640. Preliminary decree is not executable—Personal liability of mortgagor arises only when proceeds of sale are insufficient—Decree under R. 6 necessary. 1926 Mad. 415=(1926) M.W.N. 143=50 M.L.J. 39=93 I.C. 99.

FINAL DECREE.—When passing a final decree the Court can recognise a payment made out of Court even though it has not been certified. 20 A.L.J. 602=44 All. 668. At the time of final decree the Court can set right any patent error or omission which is discovered in the preliminary decree. 38 All. 398=14 A.L.J. 502. An application for execution may be treated as one for final decree though the latter has not specifically been prayed for. 7 Lah. L.J. 397=1925 Lah. 640. Suit for redemption of mortgage—Mesne profits left unascertained—Application for ascertaining mesne profits—Nature of—Decree in such a case. 92 I.C. 314=1926 Mad. 305. Once an application for final decree is dismissed only an appeal lies and no second application can be filed. 42 M. L. J. 51=16 L. W. 198=1922 Mad. 65.

due to the plaintiff as aforesaid, together with subsequent interest and subsequent costs, and that the balance (if any) be paid to the defendant or other persons entitled to receive the same.

(2) In a suit for foreclosure, if the plaintiff succeeds and the mortgage is not a mortgage by conditional sale, the Court may, at the instance of the plaintiff or of any person interested either in the mortgage-money or in the right of redemption, pass a

Power to decree sale in foreclosure suit.

like decree (in lieu of a decree for foreclosure) on such terms as it thinks fit including the deposit in Court of a reasonable sum, fixed by the Court, to meet the expenses of sale and to secure the performance of the terms.

[Bombay] In sub-rule (1) of Rule 4 of Order XXXIV, after the words "as therein mentioned" substitute "the plaintiff shall be entitled to apply for a final decree for sale under Rule 5".

[Bangoon] The following shall be substituted for sub-rule (1) of Rule 4 of O. XXXIV :—

In a suit for sale, if the plaintiff succeeds, the Court shall act as prescribed in Rule 2, except that instead of the direction contained in clause (b) thereof, there shall be the following direction.—

That if such payment is not made within the said period, the mortgaged property or a sufficient part thereof be sold and the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court and applied in payment of what is due to the plaintiff as aforesaid together with subsequent interest on the said amount at the rate of six per cent. per annum from the last day of the said period up to the actual date of realization by the plaintiff and subsequent costs, and that the balance (if any) be paid to the defendant or other persons entitled to receive the same.

5. (1) Where on or before the day fixed the defendant pays into Court the amount declared due as aforesaid, together with such subsequent

Final decree in suit for sale.

costs as are mentioned in rule 10, the Court shall pass a decree—

FORM OF DECREE.—Where sale is impossible, the Court can give directions for the disposal of the fund which represents the property. 20 C.L.J. 469=19 C. W. N. 537. This rule should not be overlooked in framing mortgage decrees. 20 P. L. R. 1915=26 I. C. 913. See also 103 I. C. 437=A. I. R. 1927 Lah. 445. Where the decree is irregular not being in accordance with this rule, a sale held under it is not void. 41 Mad. 403=34 M.L.J. 463=22 C.W.N. 553=45 I. A. 54 (P.C.). Preliminary decree made final by endorsement on preliminary decree—Absence of a formal decree is only a mere irregularity. 94 I.C. 58=1926 Lah. 364. Where in a mortgage suit interest is calculated at the contract rate up to the date of the *dis datu* the decree is subject to the rule of *damdupat* up to that date. 59 I.C. 121. Interest up to realization at Court rate means interest on the whole amount due, *i.e.*, principal and interest at the contractual rate. 26 O.C. 59=1923 Oudh 241. Interest to be awarded at the contractual rate up to the date fixed for payment. 8 Lah. 721=103 I.C. 437=1927 Lah. 445=9 Lah. L.J. 301. Interest after date of sale in mortgage decree—Court has discretion to grant or not. A. I. R. 1926 Lah. 11. Where a decree fails to provide for the extinguishment of the right to redeem a fresh suit for redemption is not barred. 15 I. C. 15=10 A.L.J. 36.

LIMITATION.—Art. 181 of the Lim. Act applies to an application for the passing of the final decree. 48 I.C. 934=15 N. L. R. 36. There is no period of limitation for deposit of money directed by the preliminary decree. It can be paid at any time before the passing of the final decree. 9 O. L. J. 14=1922 Oudh 33. Where there has been an appeal from the preliminary decree, the period of 3 years fixed by Art. 181, Lim. Act, runs from the date of the decree of appellate Court and not from the expiry of the term fixed by the preliminary decree. 54 I. A. 52=8 Lah. 253=A. I. R. 1927 P. C. 25=52

M. L. J. 366=31 C. W. N. 444=100 I. C. 22 (P.C.)

NATURE OF PROCEEDINGS.—Till passing of final decree the suit is considered pending. The suit will abate if the legal representatives of a deceased plaintiff are not brought on record. 40 All. 203=16 A.L.J. 85; also 33 I. C. 496=12 N. L.K. 50. A final decree against a mortgagor dead at the time is void and incapable of execution. 4 Pat. L. J. 240=50 I. C. 529=(1919) Pat. 105 (F.B.). An application for a final decree is not one in execution. A second application therefore cannot be regarded as revival of an application which has been disposed of. 43 I.C. 518=16 A.L.J. 143; see also 39 I.C. 849=13 N. L. R. 69. Where an *ex parte* mortgage decree is set aside, the suit would be considered pending during the period when the proceedings to set aside the *ex parte* decree were pending. 65 I.C. 709. The rule does not expressly provide for the issue of notice before passing of final decree; yet an *ex parte* decree in such a case is liable to be set aside. 1922 Nag. 175.

PAYMENT INTO COURT.—Where payment of a prior mortgage is directed before sale of mortgaged property, but does not specify the date of payment, the payment must be made within six months of the date of the decree. 41 All. 320=19 A.L.J. 83. If a mortgagor pays into Court the amount determined to be due, it is a good tender though it may be finally adjudged that a larger sum is due from him. 16 I.C. 374. The Court should take into account payments by the judgment-debtor out of Court for the purpose of determining the amount to be entered in the final decree. 1 P.L.T. 416=5 Pat. L. J. 672. After the date fixed for payment interest on the costs awarded by the preliminary decree should be allowed. 89 I.C. 228=L.R. 6 A. 479.

O. 34, R. 5.—Scope of, and how it differs from Sec. 89, T. P. Act. see 90 I. C. 746. O. 34, R. 5 has no application to a compromise decree.

(a) ordering the plaintiff to deliver up the documents which under the terms of the preliminary decree he is bound to deliver up,

Decree is executable without final decree. 106 I. C. 395=1928 M. 38. Proceedings under this rule are not proceedings in execution of a decree, but in continuation of the original suit. 29 C. 651; 27 A. 625; see also 25 M. 537. O. 34, R. 5 recognises only one method of payment into Court under preliminary decree and when no such payment is made the Court is bound to pass the final decree. 1926 Mad. 1069=24 L. W. 520=97 I. C. 989.

CONSTRUCTION OF RULE.—See 29 M. 37; 28 A. 778.

CONSENT DECREE.—There is nothing in law which prohibits the payment for a compromise decree out of Court. 20 A.L.J. 602=44 All. 668. Strictly speaking this rule has no application to a compromise decree—Compromise decree—No final decree made.—Decree is executable 106 I. C. 395=A.I.R. 1928 Mad. 38. A mortgage of an impartible estate contrary to S. 4 of the Madras Act II of 1904 cannot be validated by the device of a consent decree. The mortgagor can resist an application for a final decree on the ground the mortgage was not binding. 50 I. C. 577=37 M.L.J. 65.

EXECUTION PROCEEDINGS.—A prior mortgagee getting a decree without impleading a puisne mortgagee can execute his decree for sale. 43 All. 204=61 I. C. 942 (F. B.). Execution proceedings do not terminate with sale. If sale proceeds are insufficient the holder may take further steps to recover the balance. 35 Bom. 452=18 Bom. L. R. 661. Where a preliminary decree was executed without objection by the judgment-debtor, the order operates as *res judicata*. 26 M. L. J. 225=23 I. C. 390.

FINAL DECREE.—The Court-fee for an appeal against an order rejecting an application for a final decree is an *ad valorem* fee on the amount claimed. 57 I.C. 67; also 35 All. 476=11 A.L.J. 801. It is on the appellate decree when an appeal is preferred against a preliminary decree, that the final decree ought to be passed. 39 All. 641=15 A. L. J. 734. A mortgage decree passed under Sec. 15-B. of the Dekhan Agri. Relief Act need not be made final. 25 Bom.L.R. 1214=48 Bom. 172. Once the final decree is passed the mortgage deed as well as the right to redeem are extinguished so that the security cannot be the basis of a second suit. 40 M. L. J. 126=62 I. C. 833. Cf. 3 P. L. T. 232. A final decree is essential before execution can be taken. 42 Bom. 309=20 Bom. L. R. 481; also 32 I. C. 981. Omission to draw up a formal decree is only a formal defect. 51 B. 125=1927 Bom. 131=100 I. C. 956=29 Bom. L. R. 107. See also 94 I. C. 58. Notice to judgment-debtor is not prescribed by law before passing of final decree, but in practice it is given. 19 N. L. R. 124=1923 Nag. 320. If the application is made within one year from the date of the decree, no notice to the defendant need be given 1925 M. 506. But *ex parte* order can be set aside. 32 C. 2531 (F.B.). A final decree extinguishes a personal covenant, but the charge subsists. The mortgagor's right to redeem remains in force till the actual sale and distribution of proceeds. 3 P. L. T. 232. Cf. 40

M.L.J. 126=62 I.C. 833. An application for final decree is essential and an application for execution cannot be treated as an application for a final decree. 1923 Sind 14. An oral application is sufficient and it may be presumed when an order has been made. 87 I. C. 820 (2). When payment under the preliminary decree has been made there is no necessity for an application for a final decree. 23 A. L. J. 405=47 All. 546. In a suit for sale on a mortgage only one decree for sale can be passed. 9 I. C. 815=8 A. L. J. 364. A transfer of a final decree for sale does not require registration. 86 I. C. 591=1925 Oudh 399. Mortgage suit.—One of the mortgagors dead before preliminary decree—Application for exoneration of his share filed after preliminary decree and before final decree is not maintainable. 49 A. 809=102 I.C. 1=1927 A. 589. Purchaser of equity of redemption obtaining assignment of mortgagee's rights has right to apply for final decree—Rights of assignee may be traced back to the date of suit itself [45 C. 94 (P. C.), Rel on]. 100 I.C. 338=A. I. R. 1927 M. 560.

LIMITATION.—Art. 181 of the Lim. Act applies to an application for final decree and time runs from the date when the default occurred. *i.e.*, from the date when payment ought to have been made. 22 C. L. J. 66=19 C. W. N. 473; 39 All. 532=15 A. L. J. 448; also 87 I. C. 746=1925 Cal. 1030. But see 29 I. C. 120=19; C.W.N. 470 and 649 *contra*. See also 32 I.C. 39; 25 C. W. N. 376=33 C.L. J.260. When prior to 1909 an application for an order absolute was barred under Art. 178 of the Lim. Act the present rule does not entitle the decree holder to apply for a final decree. 22 I.C. 40. When the time fixed for payment expired after the passing of the Code but the preliminary decree was passed prior thereto, Art. 182 applies. 48 I. C. 32=5 O. L. J. 572. When an appeal has been preferred on the preliminary decree, the period of limitation commences from the date of the decree in appeal. 47 I. C. 206=21 O. C. 176; also 1 P. 444=3 P. L. T. 320. But see *contra* 41 I. C. 858=20 O. C. 205. A final decree in a mortgage suit can be pending after disposal of the appeal. A. I. R. 1926 All. 291=92 I.C. 608. When after the limitation period has run against the plaintiff, one of the defendants applies to set aside the preliminary decree, this fact does not revive the plaintiff's right to apply for final decree. 87 I.C. 746=1925 Cal. 1030.

ORDER ABSOLUTE.—On the passing of an order absolute for sale, the mortgage right is extinguished and only the right under the decree subsists. 40 All. 407=45 I. A. 130=35 M. L. J. 1=28 C. L. J. 188 (P. C.) (aff. 20 I. C. 59=11 A. L. J. 634). See also 55 I. C. 969=42 All. 364 (P. C.). An application for an order absolute under S. 89 of the T. P. Act is an application in execution. 40 Bom. 321=18 Bom. L. R. 38. An order absolute against a widow as mortgagor and one of her heirs brought on record after her death, does not bind the other heirs. 39 All. 67=14 A. L. J. 982. In an execution application a prayer for sale implies also a prayer for making

and, if so required,—

(b) ordering him to re-transfer the mortgaged property as directed in the said decree,
and also, if necessary,—

(c) ordering him to put the defendant in possession of the property.

(2) Where such payment is not so made, the Court shall, on application made in that behalf by the plaintiff, pass a decree that the mortgaged property, or a sufficient part thereof, be sold, and that the proceeds of the sale be dealt with as is mentioned in rule 4.

[Bombay.] In sub-rule (2) of Rule 5 of Order XXXIV, after the words "proceeds of the sale" substitute "(after defraying the expenses of the sale) be paid into Court and applied in payment of what is declared due to the plaintiff as aforesaid together with subsequent interest at such rate as the Court deems reasonable and subsequent costs, and that the balance (if any) be paid to the defendants or other persons entitled to the same :

Provided that the Court may, upon good cause shown and upon such terms (if any) as it thinks fit, from time to time postpone the day fixed for such payment."

[Rangoon.] The following shall be substituted for sub-rule (1) of Rule 5 of O. XXXIV :—

Where the defendant pays into Court the amount due as aforesaid within the said period together with such subsequent costs as are mentioned in Rule 10 the Court shall pass a decree—

(a) ordering the plaintiff to deliver up the documents which under the terms of the preliminary decree he is bound to deliver up,
and, if so required—

(b) ordering him to re-transfer the mortgaged property as directed in the said decree,
and also, if necessary,—

(c) ordering him to put the defendant in possession of the property.

6. Where the net proceeds of any such sale are found to be insufficient to pay the amount due to the plaintiff, if the balance is legally recoverable from the

Recovery of balance due on mortgage.
the decree absolute. 34 I. C. 756 = 3 L. W. 468. Where a preliminary decree was passed before the passing of the new C. P. Code and the order absolute was made after the passing of the Act, no final decree need be passed. 4 Pat. L. T. 213 = 48 I. C. 245.

SECOND ORDER.—A second order absolute for sale can be obtained for the amount for which the first order was obtained, including the interest since accrued due. 25 A. 264. Also for selling portion of mortgaged property not sold under the first order. 25 A. 212.

POWERS OF COURT.—This rule says nothing about the specification of the mortgaged property. All it says is that the mortgaged property which the plaintiff is entitled to sell shall be sold. 38 All. 398 = 34 I. C. 79. The Court may direct that the interest of the mortgagor shall be put up for sale in the first instance, and if insufficient, then his son's, if the son also promised to pay the amount. 36 Bom. 68 = 13 Bom. L. R. 1161. The rights of the mortgagee under a final decree for sale cannot be interfered with by the Court by intercepting the rents or profits or by the appointment of a receiver. 43 I. C. 22. The Court can fix the order in which the properties are to be sold. 36 I. C. 516 = 4 L. W. 327 = 31 C. W. N. 521 = 101 I. C. 124 = 1927 C. 522. But see 51 I. C. 444 = 4 Pat. L. J. 207. A Court has no power to extend time after final decree is passed in a suit for sale. 9 O. & A. L. R. 319 = 1924 Oudh 170. When the mortgage-deed provides in what order properties are to be sold, it is not open to the decree-holder to change that order. 51 I. C. 444 = 4 Pat. L. J. 207. Properties belonging to a stranger vendee from the mortgagor need not be sold prior to selling those of the judgment-debtor.

22 M. L. J. 125 = 12 I. C. 429. Applications for passing final decree could be dismissed on the ground that list of mortgage property was not given and because of mistake calculating interest. 49 A. 592 = 1927 A. 439 = 101 I. C. 676 = 25 A. L. J. 437.

RIGHT OF REDEMPTION.—Till actual sale the right of redemption subsists. 18 A. L. J. 622 = 42 A. 517; also 9 I. C. 158. But see *contra* 43 I. C. 399. A final decree for sale if not executed within the period of time allowed by law will not bar a subsequent suit by mortgagor to redeem. 86 I. C. 527 = 1925 Mad. 1191. The right of a subsequent mortgagee who is a party to a suit on a prior mortgage, to redeem the prior mortgage continues only up to the date of the confirmation of the sale in execution of the decree obtained in that suit. 1 P. L. J. 261 = 37 I. C. 433. On this rule, see also 33 C. 890; 31 C. 863; 28 A. 28; 26 A. 185; 28 C. 73; 28 A. 193; 26 A. 318; 26 A. 504; see 25 A. 42.

APPEAL.—See 25 M. 244 (F.B.).

O. 34, R. 6.—The object of the present rule is to benefit the mortgagor and if he waives his right by consenting to a money decree he cannot subsequently object to the mortgage property being sold in execution of such decree. 9 I. C. 939 = 9 M. L. T. 261.

SCOPE OF.—This rule does not apply where the mortgaged property has been sold under a decree held by some other persons. 22 A. 404. The Court which can pass a decree under this rule is the Court which passed the decree under R. 4. 27 C. 272. Decrees passed under this rule are supplemental decrees, separate and distinct from the original decree. 21 C. 26. Where a mortgage decree merely declared a charge on the properties,

defendant otherwise than out of the property sold, the Court may pass a decree for such amount.

it is to be construed as a decree for sale and the present rule is applicable thereto. 30 I.C. 280 = 2 L. W. 689. The words "such sale" refer to the sale under K. 5. 33 C. 890; 28 A. 674. The words "the amount due" include costs. 30 M. 464.

APPLICATION.—An application under this rule does not in any way resemble an application for attachment of property. 24 I.C. 35 = 18 C.W.N. 492. An application under this rule is an application in the suit. 33 C. at p. 873. But see 25 M. 244 and 21 A. 453. When a combined decree has been passed, an application under this rule is unnecessary. 33 M. L. J. 543 = 42 I.C. 282; also 25 I. C. 50 = (1914) M. W. N. 497; 27 I. C. 72 = 18 O.C. 55; 25 I. C. 121 = 17 O.C. 153. When a right to proceed under this rule has not been determined in the suit, an application under this rule can be objected to on the ground that part of the decree amount was barred at the time of suit. 46 I. C. 892. The question of personal liability can be decided at the time the suit is decided, and the matter so decided is *res judicata* when an application under this rule is made. 28 A. 365.

FORUM.—The supplemental decree can be passed only by the Court in which the original suit was instituted. 33 M. L. J. 382 = 42 I. C. 953.

COMBINED DECREE.—The decree for sale can also provide that if the proceeds of sale are insufficient, the balance can be collected personally. 47 Cal. 370 = 36 M.L.J. 215 = 46 I.A. 294 (P.C.); also 43 Mad. 421 = 38 M.L.J. 203. In a combined decree it is not proper to direct that in default of payment, the plaintiff can recover the decree amount by sale of the properties. 24 Bom.L.R. 843 = 1923 Bom. 32. Where a preliminary decree provided also for personal decree for any 'legally' realisable balance, and the final decree omitted it, *held*, it is not a combined decree, the question whether any legally realisable balance exists, being yet to be determined. 53 I.C. 904 = 23 C. W.N. 924. When once such a decree is passed it cannot be questioned in execution proceedings. 24 I. C. 195 = 27 M. L. J. 25. When the decree provides for a personal remedy, the executing Court cannot enquire into defendant's personal liability. 32 I. C. 820. When a combined decree is passed the personal remedy may be availed of even before sale of the properties. 22 I.C. 293; 10 I. C. 975; 26 M.L.J. 83 = 21 I. C. 782.

COSTS.—A mortgagee decree-holder can realise his decree for costs otherwise than by proceeding under S. 90, T. P. Act. if the Court has passed a personal decree for costs. 15 I. C. 23 = 16 C.W. N. 731. Where the mortgaged property has been sold and found insufficient, a personal decree for costs is available. 12 M.L.T. 312 = 17 I.C. 244. Unless the decree otherwise provides, the costs may be recovered from the sale proceeds of the mortgaged property. 38 I. C. 241 = 2 P. I. J. 51.

LIMITATION.—A personal decree under this rule can be passed within six years from the date provided in the mortgage bond for payment. 17 A. L. J. 647 = 50 I. C. 640. An application for a personal decree may be made even after six years from the date of the bond provided the suit has

been filed within 6 years from the date of the bond. 27 I. C. 770 = 2 L. W. 66. Art. 181 does not apply to an application under this rule. 30 I. C. 719 = 42 Cal. 294. But *see contra* in 21 I. C. 530 = (1913) M. W. N. 867; also 39 I. C. 854 = 13 N. L. R. 76; 10 I. C. 21. Sale in pursuance of mortgage decree subsequently held void—Application for personal decree three years after that is barred. 1927 M. 941 = 97 I.C. 502 = 24 L. W. 285 = (1926) M. W. N. 574.

NOTICE.—Before making a decree under this rule, it is right to issue notice to the judgment-debtor to show cause, except possibly in cases where decree has made him personally liable. 35 I. C. 288 = 9 Bur. L. T. 245. Where the Court has to decide whether the execution of the decree should proceed without a supplemental decree under this rule an order without notice to the judgment-debtor directing execution to issue cannot be supported. 56 I.C. 801 = 31 C. L. J. 382; also 17 I. C. 927 = 16 C. L. J. 394; 30 I. C. 188 = 29 M. L. J. 120.

PERSONAL LIABILITY.—A personal decree cannot be obtained against a purchaser of the equity of redemption. 34 All. 63 = 39 I. A. 7 = 21 M. L. J. 1158 (P. C.); also 38 All. 209 = 14 A.L. J. 151; 17 C. W. N. 457 = 17 C. L. J. 120; 95 I. C. 970 (2) = 1923 P. C. 54. The secured creditor of a Hindu widow, on the security proving insufficient to satisfy his decree thereon, is entitled to proceed against the other properties. 85 I. C. 963 = 1925 All. 352. A minor mortgagee cannot get a decree under this rule against a puisne mortgagee for the costs due. 23 A. 439; 29 A. 12; *see also* 31 B. 244; 29 A. 260; 26 A. 93; 26 A. 25. An *ex parte* decree for personal liability against a person other than the mortgagor can be set aside. 60 I. C. 368 = 2 Pat. L. T. 251. An unsuccessful mortgagor-appellant must personally pay the costs of appeal but the mortgagee can also add it to the security. 41 All. 473 = 17 A. L. J. 582. The personal liability of a mortgagor when arises, *see* 50 Cal. 718 = 1924 Cal. 209. A personal decree can be made against the mortgagor at the appellate stage. 26 C. W. N. 318 = 1922 Cal. 52 (47 Cal. 370, *follow*). A decree under O. 34, R. 6 can only be made against defendants in the original suit. 1927 All. 691 = 103 I. C. 264 (1). A Court cannot direct that no property other than those mortgaged be sold. Whether the other properties can be proceeded against is to be determined under an application under this rule. 23 I.C. 389. When the mortgage decree directs that the defendants 'do pay' they are personally liable. (1918) M. W. N. 146 = 43 I. C. 871 = 7 L. W. 36. When in a compromise decree there is no provision taking away the personal liability, the mortgagor was personally liable, if sale proceeds were found insufficient. 88 I. C. 507. Personal liability is ordinarily presumed to exist in the absence of a contract to the contrary. The right to proceed against the person must be specifically reversed by the decree itself. 42 I. C. 288 = 6 L. W. 692; 26 M.L.J. 375 = 23 I. C. 544; (1927) M.W.N. 330. But *see* A.L.R. 1927 M. 779 = 53 M.L.J. 489 = 103 I.C. 528 = 39 M.L.T. 22. A personal relief against a defendant includes a relief against any property in his possession. 27 I. C. 72 = 18 O. C.

Preliminary decree in redemption suit.

7. In a suit for redemption, if the plaintiff succeeds, the Court shall pass a decree—

(a) ordering that an account be taken of what will be due to the defendant for principal and interest on the mortgage, and for his costs of the suit (if any) awarded to him on the day next hereinafter referred to, or

(b) declaring the amount so due at the date of such decree, and directing—

(c) that, if the plaintiff pays into Court the amount so due on a day within six months from the date of declaring in Court the amount so due, to be fixed by the Court, the defendant shall deliver up to the plaintiff, or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, re-transfer the property to the plaintiff free from the mortgage and from all incumbrances created by the defendant or any person claiming under him, or, where the defendant claims by derived title, by those under whom he claims, and shall, if necessary, put the plaintiff in possession of the property, but

55. A formal decree under this rule is necessary even where the original compromise decree declared the other properties too as being liable. 48 I. C. 608=3 Pat. L.J. 649. Consent decree providing for further execution in case proceeds of sale of certain properties were found insufficient—No need for applying for further decree under O. 34, R. 6. 5 O. W. N. 135.

RIGHT TO PERSONAL DECREE.—Right to personal decree accrues when final decree is made though personal decree can be made only after exhausting property by sale. 54 I. A. 129=54 Cal. 500=101 I. C. 24=1927 P. C. 73=52 M. L. J. 565 (P. C.). See also 25 A. L. J. 1042=A. I. R. 1928 All. 71. Where a member of a joint family mortgaged the family properties without necessity a personal decree against him if unchallenged in appeal by the mortgagee is valid. 21 A. L. J. 754=46 All. 32; also 38 I. C. 691. A mortgagee, if can proceed concurrently with all his remedies. 35 I. C. 43. For conditions to be satisfied before personal relief can be granted, see 17 I. C. 263=16 C. L. J. 318; 15 I. C. 911=15 C. L. J. 684; 21 I. C. 283=16 O. C. 238. When a mortgage decree for sale has been obtained, without executing it, a personal decree cannot be obtained. 42 All. 519=18 A. L. J. 628; also 20 I. C. 829=17 C. W. N. 1039. Personal decree obtained without informing of a prior refusal to grant the same cannot be set aside as fraudulent. 38 All. 7=30 I. C. 792. If a person entitled to bring the properties to sale under a decree neglects and allows a third person having no such rights to sell a portion of the property, he cannot afterwards be allowed to have a relief under this rule. 20 I. C. 320. The Court has a discretion in refusing a personal remedy when the mortgagee wilfully omits to sell the hypotheca. 48 I. C. 322=45 Cal. 702; also 38 M. L. J. 93=51 I. C. 34. A personal decree cannot be granted where the mortgagor is found to have no rights in the properties mortgaged even before sale. 14 I. C. 591=9 A. L. J. 569. But see *contra* 38 Mad. 677=23 I. C. 515; also 23 O. C. 145=57 I. C. 967; 9 I. C. 752=14 O. C. 62; 1928 A. 71=25 A. L. J. 1042. A decree against the assets in the hands of the sons can be passed where the amount realised by sale of mortgaged property was insufficient. 14 I. C. 55 (1). When the defendant becomes an insolvent, a personal decree for balance of unsatisfied amount cannot be passed. 34 All. 106=12 I. C.

587. When the personal remedy is barred a personal decree cannot be passed. 24 Bom. L. R. 410=46 Bom. 848. A personal decree cannot be obtained before a final mortgage decree is passed. 50 I. C. 924=46 Cal. 245. When in a decree for sale power is given both to the prior and puisne mortgagees to sell, either can apply for a personal decree. 33 M. L. J. 382=42 I. C. 953; also 34 I. C. 48=2 O. L. J. 614. When an application under this rule is disallowed, no separate suit for personal remedy is maintainable. 23 O. C. 145=57 I. C. 967. A personal decree may be obtained on abandonment of all claim against the property. 9 I. C. 403=14 O. C. 217 (26 All. 25; 29 All. 369; 25 All. 79; 28 All. 19, foll.); also 53 I. C. 922=(1919) Pat. 390. A decree-holder can have a personal remedy when after selling a part, he is not permitted to sell the rest and his debt is unsatisfied. 61 I. C. 635=6 P. L. J. 106. Omission of a small portion of the property in the plaint does not bar personal remedy. 42 I. C. 56=2 P. L. J. 538. Sale in execution of mortgagee decree—Sale set aside—Right to maintain application for personal decree exists. 49 A. 506=100 I. C. 775=1927 All. 395; see also 1927 M. 941=97 I. C. 502.

APPEAL.—An appeal from an order refusing to make a decree under this rule must bear *ad valorem* Court-fee calculated on the subject-matter of appeal. 40 All. 553; also 35 I. C. 158=14 A. L. J. 328; 19 I. C. 971=18 C. L. J. 133; 30 I. C. 497=18 O. C. 121.

O. 34, R. 7.—Scope of the rule, see 23 Bom. L. R. 1176=46 Bom. 348; 84 I. C. 67=1925 Lah. 71. This rule applies only to a mortgagee and has no application to the case of a co-mortgagor who has redeemed the entire mortgage. 1923 Lah. 122. As to distinction between deposits under this rule and under Sec. 83, T. P. Act, see 2 O. W. N. 826. Under O. 34, R. 7 (c) the money should be paid into Court. As to validity of payment made outside court see 102 I. C. 428=1927 Oudh 275. When deposit is made to discharge a valid mortgage a final decree itself may be passed without being preceded by a preliminary decree. 1922 All. 479. All proceedings till final decree are proceedings in suit. 37 All. 226=13 A. L. J. 307. As to form of decree, see 146 P. W. R. 1013=19 I. C. 856. A mortgagor decree-holder who fails to pay within date fixed but pays it before the decree is made absolute, is entitled to redeem. 29 I. C. 438.

(d) that, if such payment is not made on or before the day to be fixed by the Court, the plaintiff shall (unless the mortgage is simple or usufructuary) be debarred from all right to redeem or (unless the mortgage is by conditional sale) that the mortgaged property be sold.

[Bombay.] For clause (d) of rule 7 of Order 34, substitute “(d) that, if such payment is not made on or before the day fixed by the Court, the defendant shall be entitled to apply for a final decree for sale or foreclosure under Rule 8.”

[Rangoon.] The following shall be substituted for R. 7 of O. 34 :—

In a suit for redemption, if the plaintiff succeeds, the Court shall either—

(j) pass a preliminary decree declaring the amount which will be due to the defendant on the mortgage for principal and interest at the mortgage rate six months from the date of the decree and for his costs of the suit (if any) awarded to him and directing,—

(a) that if the plaintiff within the said period pays into Court the said amount, the defendant shall deliver up to the plaintiff or to such person as he appoints all documents in his possession or power relating to the mortgaged property, and shall, if so required, re-transfer the property to the plaintiff free from the mortgage and from all incumbrances created by the defendant or any person claiming under him, or, where the defendant claims by derived title, by those under whom he claims and shall, if necessary, put the plaintiff in possession of the property, but

(b) that if such payment is not made within the said period the plaintiff shall (unless the mortgage is simple or usufructuary) be debarred from all right to redeem, or (unless the mortgage is by conditional sale) that the mortgaged property be sold, or

(2) order that an account be taken of the amount due to the defendant on the mortgage for principal and interest and after the taking of the said account, pass a preliminary decree as above.

8. (1) Where, on or before the day fixed, the plaintiff pays into Court the amount declared due as aforesaid, together with such subsequent costs as are mentioned in, rule 10, the Court shall pass a decree—

Final decree in redemption suit.

(a) ordering the defendant to deliver up the documents which under the terms of the preliminary decree he is bound to deliver up, and, if so required,—

(b) ordering him to re-transfer the mortgaged property as directed in the said decree, and also, if necessary,—

(c) ordering him to put the plaintiff in possession of the property.

[Rangoon.] The following shall be substituted for sub-rule (1) of Rule 8 of O. 34 :—

Where the plaintiff pays into Court the amount due as aforesaid within the said period together with such subsequent costs as are mentioned in Rule 10 the Court shall pass a decree—

(a) ordering the defendant to deliver up the document which under the terms of the preliminary decree he is bound to deliver up,— and, if so required,—

(b) ordering him to re-transfer the mortgage property as directed in the said decree, and also, if necessary,—

(c) ordering him to put the plaintiff in possession of the property.

SUIT.—A separate suit for mesne profits after date of payment fixed in the preliminary decree would lie. 2 O. W. N. 826.

ACCOUNTS.—Only an interlocutory order and not a decree for accounts can be passed prior to preliminary decree. 23 A. L. J. 691=47 A. 803. An interlocutory order should be followed by specification of consequence of payment or non-payment of the ascertained amount on a day fixed. to make it a preliminary decree. 10 O. L. J. 374=1924 Oudh 140. When a preliminary decree fixes the amount due instead of directing an account to be taken, it does not become a final decree. 22 C. W. N. 374=44 Cal. 448. Cf. 10 O. L. J. 374=1924 Oudh 140; see 87 I.C. 585=1925 All. 402.

LIMITATION.—Suit for recovery of over-payment or surplus profits from usufructuary mortgagee is governed by Art. 148 of the Lim. Act. 26 C. W. N. 123=1922 Cal. 189. As to

form of decree where a sub-mortgagee is a party see 4 O. L. J. 475=42 I. C. 66.

O. 34, R. 8. SCOPE.—This rule applies to redemption suits only. 18 A. L. J. 771=43 A. 25. Cf. 35 All. 116=11 A. L. J. 62. The proviso applies only to cl. (4) and not to cl. (1). When the mortgagee has taken no action himself the proviso would not apply if the mortgagor makes payment of the money due under the decree. 28 O. C. 261=90 I. C. 418. Sub-rule (4) authorises a decree for sale only on application by the mortgagee. 146 P. W. R. 1913=19 I. C. 856; also 28 O. C. 46=1925 Oudh 255. A final decree could be passed under O. 34, R. 8 (1) both at the instance of mortgagor as well as mortgagee. A. I. R. 1927 Bom. 32=28 Bom. L. R. 1325=50 Bom. 730=98 I. C. 943. The mortgagor himself can apply for sale in a redemption suit. If he does not pay the amount, the suit need not be dismissed. 36 Mad. 32=21 M. L. J. 941. Condi-

(2) Where such payment is not so made, and the mortgage is not simple or usufructuary, the Court shall, on application made in that behalf by the defendant, pass a decree that the plaintiff and all persons claiming through or under him be debarred from all right to redeem the mortgaged property and also, if necessary, ordering the plaintiff to put the defendant in possession of the property.

(3) On the passing of a decree under sub-rule (2) the debt secured by the mortgage shall be deemed to be discharged.

(4) Where such payment is not so made, and the mortgage is not by conditional sale, the Court shall, on application made in that behalf by the defendant, pass a decree that the mortgaged property or a sufficient part thereof be sold and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court and applied in payment of what is found due to the defendant, and that the balance (if any) be paid to the plaintiff or other persons entitled to receive the same :

Provided that the Court may, upon good cause shown and upon such terms (if any) as it thinks fit, from time to time postpone the day fixed for payment.

Power to enlarge time.

9. Notwithstanding anything hereinbefore contained, if it appears, upon taking

Decree where nothing is found due or where mortgagee has been overpaid.

the account referred to in rule 7, that nothing is due to the defendant or that he has been overpaid, the Court shall pass a decree directing the defendant, if so required to re-transfer the property and to pay to the plaintiff the amount which may be found due to him : and the plaintiff shall, if necessary, be put in possession of the mortgaged property.

tional decree in redemption suit—Condition not fulfilled—Provisions of R. 8 not complied with by decree holder—No final decree—A second suit for redemption is maintainable. 1927 Lah. 9=7 Lah. 420=27 Punj. L. R. 659 (5 L. 371=1923 Lah. 680, Foll.)

N.B.—The words "and the mortgage is not simple or usufructuary" in sub-rule (2) follow the ruling in 29 A. 481.

FORUM.—The application under sub-rule (4) must be made to the Court of First Instance even when the decree under R. 7 has been made by the appellate Court. 23 A. 88; 23 M. 521; also 39 All. 396=39 I. C. 630; 39 Mad. 876=29 M. L. J. 708.

EXTENSION OF TIME.—According to the T. P. Act prior to passing of the new C.P. Code payment may be made before an order absolute, but according to the Code an extension of time has to be obtained. 9 I.C. 337=14 O.C. 10. The time allowed for payment can be enlarged; and this can be done even after the time originally given has expired. 28 B. 102; 26 B. at p. 126. Delayed payment may be accepted if no loss is caused to the mortgagee. 50 I.C. 201=6 O.L.J. 94; 101 I. C. 734=130 L.J. 828. Time cannot be enlarged merely because an appeal is preferred against the decree which is afterwards dismissed or withdrawn. 17 C.W.N. 457; 17 C.L.J. 120; also 41 I.C. 268=32 M.L.J. 455. But a party who is not bound to perform anything under the decree and who appeals to enlarge his interests under the decree is entitled to reckon the period in his favour from date of appellate decree. 41 I.C. 268=32 M. L. J. 455. A separate application for enlargement is not needed. 26 B. 126. Where in a partition suit an alienation was impeached as not binding and the alienee was made a party and the court directed possession from alienee, on payment of a certain amount and he defaulted, time can be extended for payment. 37 M.L.J. 695=43 Mad. 357. The Court cannot extend time when the decree

was a compromise decree by which possession was to be delivered if payment was made on a particular date and in default possession of the mortgagee was to continue. 28 I.C. 862=18 O.C. 58. When time for payment is extended interest at contract rate ought to be paid for the time extended. 9 O.L.J. 439=1922 Oudh 268. Laches on the part of mortgagee—Extension of time allowed. 100 I. C. 1039=1927 Bom. 175=29 Bom. L. R. 228.

LIMITATION.—There is no period of limitation for passing a final decree in a redemption suit. 22 I.C. 253. For an application under cl (4), Art. 181 of the Lim. Act would apply. 28 O. C. 46=1925 Oudh 255. The mortgagor could execute the decree at any time within limitation. If he failed, he would have the right to sue again for redemption so long as his right to redeem remained alive. 146 P.W.R. 1913=19 I.C. 856. So long as no final decree for sale or foreclosure is passed the mortgagor had the right to pay the amount due under the preliminary decree even beyond 12 years from the date fixed for payment under the consent preliminary decree. 28 O. C. 26=40 I. C. 418. No notice need be given to kanamdar after decree for redemption and before delivery of possession to the mortgagor. 45 M. L. J. 687=1924 M. 102.

ACCOUNTS.—In a decree for redemption, accounts must be carried forward up to the date when possession is given. 16 I.C. 184. The relationship of mortgagor and mortgagee subsists even after preliminary decree and the mortgagee should account for rents and profits. 42 I.C. 230. After the decree for redemption the Court should see that all the rights acquired by the mortgagee are transferred to the mortgagor. 57 I. C. 763. Final decree should be for mortgage amount minus excess profits. 103 I. C. 290=1927 Nag. 302.

APPEAL.—An order granting time is appealable. 35 All. 116=18 I. C. 14. But no second appeal lies. 47 Bom. 956=25 Bom. L. R. 920.

10. In finally adjusting the amount to be paid to a mortgagee in case of a foreclosure or sale or redemption, the Court shall, unless the conduct of the mortgagee has been such as to disentitle him to costs, add to the mortgage-money such costs of suit as have been properly incurred by him since the decree for foreclosure or sale or redemption up to the time of actual payment.

11. Where property is mortgaged for successive debts to successive mortgagees, any mesne mortgagee may institute a suit to redeem the interests of the prior mortgagees and to foreclose the rights of those that are posterior to himself and of the mortgagor.

12. Where any property the sale of which is directed under this Order is subject to a prior mortgage, the Court may, with the consent of the prior mortgagee, direct that the property be sold free from the same, giving to such prior mortgagee the same interest in the proceeds of the sale as he had in the property sold.

13. (1) Such proceeds shall be brought into Court and applied as follows :—

Application of proceeds. first, in payment of all expenses incident to the sale or properly incurred in any attempted sale ;

secondly, in payment of whatever is due to the prior mortgagee on account of the prior mortgage, and of costs, properly incurred in connection therewith ;

thirdly, in payment of all interest due on account of the mortgage in consequence whereof the sale was directed, and of the costs of the suit in which the decree directing the sale was made ;

fourthly, in payment of the principal money due on account of that mortgage ; and

lastly, the residue (if any) shall be paid to the person proving himself to be interested in the property sold, or if there are more such persons than one, then to such persons according to their respective interests therein or upon their joint receipt.

O. 34, R. 10. Costs which should have been included in the final decree and not so included are not claimable in execution. 44 A. 350=20 A. L. J. 170. Costs allowed in decree form part of the mortgage debt. 24 I. C. 63=12 A. L. J. 645. See 88 I. C. 829=1925 All. 68. O. 34, R. 10, C. P. C., has nothing to do with the costs awarded execution proceedings. 48 A. 682=1926 All. 722 (1)=97 I. C. 592.

COSTS IN APPEAL.—The decree for costs in appeal if personal. 19 I. C. 384. But see *contra* in 48 I. C. 329. Where an appeal was dismissed with costs and meanwhile the final decree was passed by the lower Court, the appellant would be personally liable for the costs. 24 I. C. 873. But see 93 I. C. 223=1926 All. 343 *contra*. Where only one of the defendants appealed, costs awarded are against him personally. 19 I. C. 729. Where an application is made for a final decree after an appellate decree for costs is passed against one defendant alone, the decree-holder cannot ask for the costs of appeal to be included with the amount finally held due. 20 I. C. 42=11 A. L. J. 975.

O. 34, R. 11.—A second mortgagee is entitled to the same rights as the first mortgagee with reference to his security having regard to the nature of his mortgage. 21 M. L. J. 513=9 I. C. 513. A puisne mortgagee is not bound to redeem.

If he does not elect to do so the prior mortgagees' right to sell the property is paramount as against him. 9 I. C. 403=14 O. C. 217.

O. 34, R. 12.—The provisions of this rule apply to usufructuary mortgages. 30 M. 438. The rights of a prior mortgagee though *ex parte*, can be determined in a suit by the puisne mortgagee. 27 I. C. 164. A sale without reference to a prior mortgagee and without his consent free of his mortgage is irregular. 19 I. C. 2=6 Bur. L. T. 72. A puisne mortgagee has no power to sell free of the prior mortgage without the consent of the prior mortgagee who therefore can subsequently sue on his own mortgage. 47 Cal. 662=47 I. A. 11=38 M. L. J. 424 (P. C.). It is not necessary that the decree should reserve rights admitted by the parties and order the sale to be subject to them. As to how a decree which omits to reserve such rights is to be construed, see 29 M. 84. A sale cannot be held subject to a puisne mortgage, whether the same is in favour of a third party or the decree-holder. 25 M. at p. 114.

O. 34, R. 13.—Rule applies to sales held free of prior mortgages and the principle of the rule applies also to the appropriation of sale proceeds held subject to a mortgage. 28 I. C. 691=25 M. L. J. 552. A puisne mortgagee who is not a party to the suit can claim the surplus sale proceeds. 90 I. C. 410.

(2) Nothing in this rule or in rule 12 shall be deemed to affect the powers conferred by section 57 of the Transfer of Property Act, 1882.

14. (1) Where a mortgagee has obtained a decree for the payment of money in satisfaction of a claim arising under the mortgage, he shall not be entitled to bring the mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage, and he may institute such suit notwithstanding anything contained in Order 2, Rule 2.

(2) Nothing in sub-rule (1) shall apply to any territories to which the Transfer of Property Act, 1882, has not been extended.

O. 34, R. 14. SCOPE.—Difference between the provisions of this rule and Sec. 99, T.P. Act, is that by the repeal of Sec. 99, a mortgagee can sell the mortgaged property on a claim unconnected with the mortgage. See (1925) M.W.N. 907=49 M.L.J. 643; 33 M.L.J. 601=6 L.W. 701; also 35 Bom. 248=13 Bom. L.R. 245. This rule is an exception to O. 2, R. 2. The personal remedy under a personal covenant in a mortgage-deed, cannot be had by sale of the property mortgaged. 63 I.C. 303. Also 2 P.L.J. 55=38 I.C. 791. The rule applies to enforcement of a charge for rent payable in money to the landlord by tenant. 39 M.L.J. 30=43 Mad. 786. See *contra* 48 I.C. 694=42 Mad. 114; 1927 Cal. 884=104 I.C. 353 (1)=55 Cal. 104. The rule does not apply to the case of a mortgage which did not or which could not come into operation. 55 I.C. 417. An order directing security to pay does not amount to a decree for the payment of money within this rule. 38 I.C. 130. A sale in contravention of S. 99 is merely irregular and is valid unless set aside before confirmation. 97 I.C. 256 (37 A. 165; 35 C. 61; 47 Cal 377, Foll.).

MEANING OF TERMS.—'Mortgagee' in this rule means the holder of a subsisting and effective mortgage. 39 All. 86=14 A. L. J. 902. The words "bringing the property to sale" include not only all the steps preliminary to sale but the sale itself. 41 I.C. 71=45 Cal. 530. Only sale should not be held, attachment in execution of money decree is not prohibited. 18 I.C. 201=4 O. L. J. 571.

CHARGE.—Rule applies only where the charge was created prior to decree. 46 I.C. 169. Also (1925) M.W.N. 907=49 M.L.J. 643. Where the mortgagee pays Government revenue to protect his mortgage lien, his remedy is by suit under this order. 5 P.L.J. 248=1 P.L. T. 225. A charge created by will not compulsorily registrable, whose terms the auction purchaser could not be cognizant of, cannot be enforced against the latter. 23 I.C. 867=1 O. L. J. 43.

CLAIM UNDER MORTGAGE.—A mortgagee granting lease of the property to the mortgagor cannot bring to sale the property, under a rent decree based on the lease. To escape this rule, the claim should be unconnected with the mortgage transaction. 1 P. L. T. 694=57 I.C. 384. Also 41 All. 399=17 A. L. J. 481; 1925 Mad. 127=47 M. L. J. 798; 44 Bom. 366=22 Bom. L. R. 131. See *contra* 47 Cal. 377=24 C. W. N. 229 (F.B.). A decree for costs in a suit for possession by mortgagee against mortgagor can be executed by sale of the equity of redemption. It is not a claim arising under the

mortgage. 35 All. 518=11 A. L. J. 841. Also 20 I.C. 898=16 O.C. 350. A decree-holder seeking to execute his decree for costs of the Privy Council against the property offered as security must proceed by suit as it is a claim arising under the mortgage. 27 I.C. 365=19 C.W.N. 178. A decree-holder getting a money decree on a mortgage bond with a declaration of lien on the property cannot bring the property to sale but must sue on the basis of the declared lien. 40 I.C. 230=25 C.L.J. 354. A security bond for due performance of appellate decree can be enforced in execution. 18 I.C. 900=17 C.L.J. 267 (F.B.) Also (1925) M. W. N. 907=49 M. L. J. 643. A mortgagee can very well purchase the equity of redemption sold in execution of a money decree by a stranger. 43 I.C. 212=27 C. L. J. 431. A mortgagee can sell the mortgaged property in execution, in a claim unconnected with the mortgage. 30 I. C. 988=42 Cal. 780; 18 P. R. 1916=33 I. C. 802; 20 I. C. 523=7 S. L. R. 11; 27 W.N. 38=37 C.L.J. 265.

MONEY-DECREES.—Where in a suit for sale only a money decree was passed, the mortgage having been held to be unenforceable, this rule does not bar sale in execution of the money decree. 18 A. L. J. 677=42 All. 566. Also 41 M. L. J. 160=14 L. W. 331; 19 A. L. J. 728=43 A. 677. A sale in execution of a money decree for the mortgage debt in favour of the mortgagee can be set aside in a redemption suit by the mortgagor even after confirmation of sale. 46 I. C. 493=28 C. L. J. 151; also 36 All. 516=12 A. L. J. 855. But see *contra* 37 All. 165=13 A.L.J. 138 (F.B.). Also 41 Bom. 357=19 Bom. L.R. 75; 47 Cal. 377=24 C. W. N. 229 (F.B.); 18 P.R. 1916=33 I. C. 802; 15 I. C. 589. The mortgagee purchaser in contravention of this rule is not a trustee for the mortgagor. 50 I. C. 472=(1919) Pat. 92. Also see 47 Cal. 377=24 C. W. N. 229 (F.B.). But when in a consent decree a charge was created, the decree can directly be executed and no separate suit to enforce the charge is necessary. 35 C. L. J. 61=1922 Cal. 35. Also 2 Pat. 787; 103 I. C. 449 *contra* in 22 Bom. L. R. 650=44 Bom. 981. It can have no application where the charge is created by the decree itself. 43 Bom. 631=21 Bom. L. R. 698. The rule does not apply to a case where a money decree is given under a different mortgage. 49 Bom. 208=27 Bom. L. R. 202. A maintenance decree-holder can proceed in execution against the property charged under the maintenance decree. 47 I. C. 670=23 M. L. T. 355. Also 6 Pat. L. T. 802=4 Pat. 693. Under this rule property given as security in a compromise decree

15. All the provisions contained in this Order as to the sale or redemption of mortgaged property shall, so far as may be, apply to property subject to a charge within the meaning of section 100 of the Transfer of Property Act, 1882.

Charges.

[**Ordh**] In Order 34, Rule 15 read Rule 15 as Rule 15 (1) and add the following as Rule 15 (2) :—

“(2) Where a decree orders payment of money and charges it on immoveable property on default of payment, the amount can be realised by sale of that property in execution of that very decree.”

ORDER XXXV.

INTERPLEADER.

Plaint in interpleader-suits.

1. [S. 471.] In every suit of interpleader the plaintiff shall, in addition to the other statements necessary for complaints, state—

(a) that the plaintiff claims no interest in the subject-matter in dispute other than for charges or costs ;

(b) the claims made by defendants severally ; and

(c) that there is no collusion between the plaintiff and any of the defendants.

2. [S. 472.] Where the thing claimed is capable of being paid into Court or placed in the custody of the Court, the plaintiff may be required to so pay or place it before he can be entitled to any order in the suit.

Payment of thing claimed into Court

3. [S. 476.] Where any of the defendants in an interpleader-suit is actually suing the plaintiff in respect of the subject-matter of such suit the Court in which the suit against the plaintiff is pending shall, on being informed by the Court in which the interpleader-suit has been instituted, stay the proceedings as against him ; and his costs in the suit so stayed may be provided for in such suit ; but if, and in so far as, they are not provided for in that suit they may be added to his costs incurred in the interpleader-suit.

Procedure where defendant is suing plaintiff.

Procedure at first hearing.

4. [S. 473.] (1) At the first hearing the Court may—

(a) declare that the plaintiff is discharged from all liability to the defendants in respect of the thing claimed, award him his costs, and dismiss him from the suit ; or

could not be subject to sale in execution of the decree. 1 P. L. W. 69 = 37 I. C. 397. The rule does not prevent sale of the mortgaged property of a surety under a compromise decree where the suit was for money. 38 All. 327 = 14 A.L.J. 385. Where security is given to a Court itself, a fresh suit upon the security is not necessary. The security can be realised in execution. 30 C. W. N. 683 = 95 I. C. 908 = 1926 Cal. 889. An arrangement for the maintenance payable by a zamindar and his heirs to the junior members creates a charge on the assets of the zamindary. 42 Mad. 581 = 36 M. L. J. 164 = 23 C. W. N. 549 (P. C.). The limitation period to set aside sale in contravention of this rule is 3 years. 1920 Pat. 259. Cf. 41 I. C. 533 = 2 Pat. L. J. 587. Where a person hypothecates his properties as security for mesne profits that might be awarded by an Appellate Court and executes a bond without naming the obligee, a suit to enforce the obligation against the surety is not maintainable. The remedy is by application in the original suit itself to make the surety a party and pass a decree against him for mesne profits. 42 All. 158 = 46 I. A. 228 = 33 M. L. J. 302 = 22 Bom. L. R. 521 (P. C.).

O. 34, R. 15.—The rule applies to enforcement of a charge payable in money. 39 M. L. J. 30 = 43 M. 786. Because the words of Sec. 100 of the T. P. Act are very wide the provisions of S. 68 as to the liability of a mortgagor apply to a person creating a mere charge also. 33 I. C. 321 = 27 M. L. J. 494.

O. 35, R. 1.—Interpleader-suit—Interest sufficient to disentitle plaintiff from suing—Applicability of English Law. See 4 R. 465. Where a mortgagee does not deny an assignment by him of his rights under the bond but contends that it is void, the mortgagor is not bound to bring an interpleader-suit making the mortgagee and his assignee to interplead as between them. (33 Mad. 123, Dist. ; 1 L. W. 419 = 15 M.L.T. 331 ; 23 I.C. 607 = 27 M. L. J. 134.

O. 35, R. 2.—Investment of money deposited in Court pending decision with a party is objectionable as the successful party is entitled to the money from the Court without further proceeding. 24 M.L.J. 404 = 19 I. C. 219.

O. 35, R. 4.—Interpleader suit—Non-appearance of Claimants—Procedure. 53 I.C. 365 = 21 Bom. L. R. 948.

(b) if it thinks that justice or convenience so require, retain all parties until the final disposal of the suit.

(2) Where the Court finds that the admissions of the parties or other evidence enable it to do so, it may adjudicate the title to the thing claimed.

(3) Where the admissions of the parties do not enable the Court so to adjudicate, it may direct—

(a) that an issue or issues between the parties be framed and tried, and

(b) that any claimant be made a plaintiff in lieu of or in addition to the original plaintiff, and shall proceed to try the suit in the ordinary manner.

5. [S. 474.] Nothing in this Order shall be deemed to enable agents to sue their principals, or tenants to sue their landlords, for the purpose of compelling them to interplead with any persons other than persons making claim through such principals or landlords.

Agents and tenants may not institute interpleader suits.

Illustrations.

(a) *A* deposits a box of jewels with *B* as his agent. *C* alleges that the jewels were wrongfully obtained from him by *A*, and claims them from *B*. *B* cannot institute an interpleader suit against *A* and *C*.

(b) *A* deposits a box of jewels with *B* as his agent. He then writes to *C* for the purpose of making the jewels a security for debt due from himself to *C*. *A* afterwards alleges that *C*'s debt is satisfied, and *C* alleges the contrary. Both claim the jewels from *B*. *B* may institute an interpleader-suit against *A* and *C*.

6. [S. 475.] Where the suit is properly instituted the Court may provide for the costs of the original plaintiff by giving him a charge on the thing claimed or in some other effectual way.

Charge for plaintiff's costs.

ORDER XXXVI.

SPECIAL CASE.

1. [S. 527.] (1) Parties claiming to be interested in the decision of any question of fact or law may enter into an agreement in writing stating such question in the form of a case for the opinion of the Court, and providing that, upon the finding of the Court with respect to such question,—

(a) a sum of money fixed by the parties or to be determined by the Court shall be paid by one of the parties to the other of them ; or

(b) some property, moveable or immoveable, specified in the agreement, shall be delivered by one of the parties to the other of them ; or

(c) one or more of the parties shall do, or refrain from doing, some other particular act specified in the agreement.

(2) Every case stated under this rule shall be divided into consecutively numbered paragraphs, and shall concisely state such facts and specify such documents as may be necessary to enable the Court to decide the question raised thereby.

2. [S. 528.] Where the agreement is for the delivery of any property, or for the doing, or the refraining from doing, any particular act, the estimated value of the property to be delivered, or to which the act specified has reference, shall be stated in the agreement.

Where value of subject-matter must be stated.

3. [S. 529.] (1) The agreement, if framed in accordance with the rules herein-before contained, may be filed in the Court which would have jurisdiction to entertain a suit, the amount or value of the subject-matter of which is the same as the amount or value of the subject-matter of the agreement.

Agreement to be filed and registered as suit.

O. 35, R. 5.—A Railway Company by accepting goods for carriage does not become the agent of the consignor within the meaning of the rule. The Company may file an interpleader suit. 28 I.C. 948 = 17 Bom. L. R. 348. A tenant has no right to bring a suit to determine which of the

two defendants, both of whom claim rent from him is his landlord. 48 I.C. 733 ; 13 I.C. 40 = 15 C.L.J. 653.

O. 36, R. 1.—Where a special case is stated by consent it can only be re-opened by mutual consent. 43 Bom. 281 = 20 Bom.L.R. 839.

(2) The agreement, when so filed, shall be numbered and registered as a suit between one or more of the parties claiming to be interested as plaintiff or plaintiffs, and the other or the others of them as defendant or defendants; and notice shall be given to all the parties to the agreement, other than the party or parties by whom it was presented.

Parties to be subject to Court's jurisdiction. **4. [S. 530.]** Where the agreement has been filed, the parties to it shall be subject to the jurisdiction of the Court and shall be bound by the statements contained therein.

Hearing and disposal of case. **5. [S. 531.] (1)** The case shall be set down for hearing as a suit instituted in the ordinary manner, and the provisions of this Code shall apply to such suit so far as the same are applicable.

(2) Where the Court is satisfied, after examination of the parties, or after taking such evidence as it thinks fit,—

(a) that the agreement was duly executed by them,

(b) that they have a *bona fide* interest in the question stated therein, and

(c) that the same is fit to be decided,

it shall proceed to pronounce judgment thereon, in the same way as in an ordinary suit, and upon the judgment so pronounced a decree shall follow.

ORDER XXXVII.

SUMMARY PROCEDURE ON NEGOTIABLE INSTRUMENTS.

Application of order.

1. [S. 538.] This Order shall apply only to—

(a) the High Courts of Judicature at Fort William, Madras and Bombay;

(b) the Chief Court of Lower Burma;

(c) the Court of the Judicial Commissioner of Sind; and

(d) any other Court to which sections 532 to 537 of the Code of Civil Procedure, 1882, have been already applied. [*Allahabad* added "Cl. (e) any Court in the Province of Agra exercising the powers of a Small Cause Court."]

2. (1) All suits upon bills of exchange, hundis or promissory notes may, in case the plaintiff desires to proceed hereunder, be instituted by presenting a plaint in the form prescribed; but the summons shall be in Form No. 4 in Appendix B or in such other form as may be from time to time prescribed.

Institution of summary suits upon bills of exchange, etc.

[*Bombay*] In sub-rule (1) of Rule 2 of Order 37 after the words "promissory notes" the following words shall be inserted, namely:—

O. 37, R. 1.—Other conditions being fulfilled a suit on a Shah Jog hundi will lie under O. 37. 68 I.C. 78 = A.I.R. 1927 Sind 90. A suit on a negotiable instrument provided for under O. 37, falls under the category of suits of the nature referred to in S. 128 (2) (f) and Art. 5 of Lim. Act applies to such cases. A.I.R. 1927 Sind 90 = 98 I.C. 78. O. 37 refers only to the mode of trial in suits and does not confer any jurisdiction. 13 I.C. 244 = 5 S. L. R. 155. In a suit on promissory note oral agreement as to payment of interest cannot be set up to obtain a decree thereon. 49 Cal. 716 = 1922 Cal. 513. Where in a suit on a promissory note under O. 37, the defendant applies for leave to appear and defend the suit, and the Court doubts the sincerity of the defence, it should grant leave on condition that the defendant should pay into Court the amount claimed. 60 I. C. 639 = 12 L.W. 712. In summary suits under O. 37, it is impossible to go into partnership accounts and so the plea that it is part of partnership account cannot be raised. 9 I. C. 299. Clause (e) to Rule 1, O. 37 C. P. C., added by

Lahore High Court is not *ultra vires*. 8 Lah. 156 = 9 Lah. L.J. 57 = 1927 Lah. 174.

¹ See Notifications under S. 538 of Act XIV of 1882 in the various lists of Local Rules and Orders.

O. 37, R. 2.—Substituted by Act XXX of 1926. The acceptor, drawer and endorser may be sued in one suit. 16 C. 804. Interest cannot be recovered unless specified in the note and no evidence regarding any agreement to pay can be given. 30 C 446. O. 37 contains provision for a summary procedure, which is antagonistic to an investigation of claims to a set off, unless of the clearest description. 49 I.C. 193 = 12 S. L. R. 70. An affidavit in support of an application for leave to defend as required must disclose facts sufficient to support the application. (*Ibid.*) Firm being sued—Partner entering appearance should obtain leave to defend. 50 Bom. 666 = 1926 Bom. 585. If a defendant who has obtained no leave to defend a summary suit can ask the Court to make the decretal amount payable by instalments. 50 Bom. 262 = 1926 Bom. 250 = 94 I. C. 9.

And all suits in which the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant with or without interest, arising on a contract express or implied, or on an enactment where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty, or on a guarantee, where the claim against the principal is in respect of a debt or a liquidated demand only.

(3) The provisions of section 5 of the Indian Limitation Act, 1908, shall apply to applications under sub-rule (1).

[Bangoon] In O. 37, Rule 2, the following shall be inserted as sub-rule (1 A).—

“(1-A). The sum which shall ordinarily be entered in the form of summons as the sum which the plaintiff will be allowed for costs in the decree, shall be ascertained and fixed by adding up the amounts of the following:—Court-fees on plaint and petitions—the full value of the stamps necessary. Process fees—the full value of the stamps necessary, Advocate's or pleader's fee (where an advocate or pleader has presented the plaint). If an advocate or pleader of the first grade Rs. 17. If a pleader of the second grade Rs. 10. If a pleader of the third grade Rs. 5.

(2) [S. 532.] In any case in which the plaint and summons are in such forms, respectively, the defendant shall not appear or defend the suit unless he obtains leave from a Judge as hereinafter provided so to appear and defend; and, in default of his obtaining such leave or of his appearance and defence in pursuance thereof, the allegations in the plaint shall be deemed to be admitted, and the plaintiff shall be entitled to a decree

[“(a) for the principal sum due on the instrument and for interest calculated in accordance with the provisions of section 79 or section 80, as the case may be, of the Negotiable Instruments Act, 1881, up to the date of the institution of the suit, or for the sum mentioned in the summons, whichever is less, and for interest up to the date of the decree at the same rate or at such other rate as the Court thinks fit; and

(b) for such subsequent interest, if any, as the Court may order under section 34 of this Code; and

(c) for such sum for costs as may be prescribed:]

Provided that, if the plaintiff claims more than such fixed sum for costs, the costs shall be ascertained in the ordinary way.

(2) A decree passed under this rule may be executed forthwith.”]

[Bangoon] In O. 37, Rule 2, sub-rule (2), the following shall be inserted after the words “pursuance thereof” :—

“Or of his applying for such leave within ten days from the service of the summons on him and on proof that the summons was duly served on him more than ten days before.”

3. [S. 533.] (1) The Court shall, upon application by the defendant, give leave to

Defendant showing defence on merits to have leave to appear.

appear and to defend the suit, upon affidavits which disclose such facts as would make it incumbent on the holder to prove consideration, or such other facts as the Court may deem sufficient to support the application.

(2) Leave to defend may be given unconditionally or subject to such terms as to payment into Court, giving security, framing and recording issues or otherwise as the Court thinks fit.

[Bombay] In rule 3 of Order 37, the following sub-rule (3) shall be inserted :—

(3) The provisions of section 5 of the Indian Limitation Act, 1908, shall apply to applications under sub-rule (1).

4. [S. 534.] After decree the Court may, under special circumstances, set aside

the decree, and if necessary stay or set aside execution, and may give leave to the defendant to appear to the

summons and to defend the suit, if it seems reasonable to the Court so to do, and on such terms as the Court thinks fit.

O. 37, Rr. 3 & 4.—*Ex parte* decree in summary suit—Remedy of defendant not obtaining leave to defend. 11 I. C. 433. The High Court has power to extend the time within which a defendant can come in and obtain leave to defend. 3 C. 539; 18 B. 717; 6 B. L. R. Ap. 64. Where the defendant shows a defence apparently real, leave to appear and defend will be granted. 6 B. L. R.

Ap. 64. Application under O. 37, R. 3—Question to be decided is whether there is triable issue between the parties. ‘A triable issue’ means a plea which is at least plausible; when there is triable issue leave should be granted without requiring deposit or security for defendant. 98 I. C. 72 = 1927 Sindh 60. Where money is deposited by a defendant as a condition precedent to the

5. [S. 535.] In any proceeding under this Order the Court may order the bill, hundi or note on which the suit is founded to be forthwith deposited with an officer of the Court, and may further order that all proceedings shall be stayed until the plaintiff gives security for the costs thereof.

Power to order bill, etc. to be deposited with officer of Court.

6. [S. 536.] The holder of every dishonoured bill of exchange or promissory note shall have the same remedies for the recovery of the expenses incurred in noting the same for non-acceptance or non-payment or otherwise, by reason of such dishonour, as he has under this Order for the recovery of the amount of such bill or note.

Recovery of cost of noting non-acceptance of dishonoured bill or note.

7. [S. 537.] Save as provided by this Order, the procedure in suits hereunder shall be the same as the procedure in suits instituted in the ordinary manner.

Procedure in suits.

ORDER XXXVIII.

ARREST AND ATTACHMENT BEFORE JUDGMENT.

Arrest before Judgment.

Where defendant may be called upon to furnish security for appearance.

1. [Ss. 477 and 478.] Where at any stage of a suit, other than a suit of the nature referred to in section 16, clauses (a) to (d), the Court is satisfied, by affidavit or otherwise,—

(a) that the defendant, with intent to delay the plaintiff, or to avoid any process of the Court or to obstruct or delay the execution of any decree that may be passed against him,—

(i) has absconded or left the local limits of the jurisdiction of the Court, or

(ii) is about to abscond or leave the local limits of the jurisdiction of the Court or

(iii) has disposed of or removed from the local limits of the jurisdiction of the Court his property or any part thereof, or

(b) that the defendant is about to leave British India under circumstances affording reasonable probability that the plaintiff will or may thereby be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit,

the Court may issue a warrant to arrest the defendant and bring him before the Court to show cause why he should not furnish security for his appearance :

setting aside of a decree under the rule, the decretal amount is a charge on the deposit if final judgment is passed against the defendant. The Court is not competent to enquire into the ownership of the money deposited. 38 I. C. 481=32 M. L. J. 503. An order charging the property of an insolvent debtor for the re-payment of plaintiff's claim on condition of granting permission to defend his suit is a permanent charge till re-payment of claim. 58 I. C. 10=24 C. W. N. 401.

APPEAL.—An appeal lies from an order refusing to set aside an *ex parte* decree. 2 B. 644. See 42 C. 735.

O. 38, R. 1.—An application in writing to enforce an award under para. 20 of the second schedule C. P. C. becomes a suit for the purposes of O. 38 dealing with attachment before judgment. A. I. R. 1927 Bom. 259=29 Bom. L. R. 342=101 I. C. 430. Arrest before judgment—Security for appearance—Order when to be passed—Principles guiding in passing orders. See 50 Mad. 27. A. I. R. 1926 Mad. 584=50 M. L. J. 348.

SCOPE AND OBJECT OF.—The object of the surety bond given under O. 38, R. 1 is to secure the rights of the judgment-creditor. The Government are not interested in the proceedings in any way. 28 I. C. 92=8 S. L. R. 270. Small Cause Court cannot attach immoveable property. 28 C. W. N. 16=1924 Cal. 193. Rulings to the contrary are not now good law. See now Act I of 1926. The mere fact that an appeal is pending against a decree is no reason for not enforcing execution by arrest when the execution has not been stayed. 1924 Lah. 360.

ILLUSTRATIVE CASES.—Where the master of a vessel is sued for repairs done to the vessel, and he is about to leave the jurisdiction of the Court with the vessel, he can be arrested under this rule. 14 C. 695. An officer proceeding from Burma to England on leave, and who resides for a few days at Madras, can also be arrested. 8 M. 205. Minor defendant without guardian—Conditional order of attachment of property is valid. 106 I. C. 142=1928 Mad. 1.

Provided that the defendant shall not be arrested if he pays to the officer entrusted with the execution of the warrant any sum specified in the warrant as sufficient to satisfy the plaintiff's claim ; and such sum shall be held in deposit by the Court until the suit is disposed of or until the further order of the Court.

2. [S. 479.] (1) Where the defendant fails to show such cause the Court shall order him either to deposit in Court money or other property sufficient to answer the claim against him, or to

Security.
furnish security for his appearance at any time when called upon while the suit is pending and until satisfaction of any decree that may be passed against him in the suit, or make such order as it thinks fit in regard to the sum which may have been paid by the defendant under the proviso to the last preceding rule.

(2) Every surety for the appearance of a defendant shall bind himself, in default of such appearance, to pay any sum of money which the defendant may be ordered to pay in the suit.

3. [S. 480.] (1) A surety for the appearance of a defendant may at any time apply to the Court in which he became such surety to be discharged from his obligation.

(2) On such application being made, the Court shall summon the defendant to appear or, if it thinks fit, may issue a warrant for his arrest in the first instance.

(3) On the appearance of the defendant in pursuance of the summons or warrant, or on his voluntary surrender, the Court shall direct the surety to be discharged from his obligation, and shall call upon the defendant to find fresh security.

4. [S. 481.] Where the defendant fails to comply with any order under rule 2 or rule 3, the Court may commit him to the civil prison until the decision of the suit or, where a decree is passed against the defendant, until the decree has been satisfied :

Procedure where defendant fails to furnish security or find fresh security.

Provided that no person shall be detained in prison under this rule in any case for a longer period than six months, nor for a longer period than six weeks when the amount or value of the subject-matter of the suit does not exceed fifty rupees :

Provided also that no person shall be detained in prison under this rule after he has complied with such order.

Attachment before judgment.

5. [S. 483.] (1) Where, at any stage of a suit, the Court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him,—

Where defendant may be called upon to furnish security for production of property.

O. 38, R. 2.—Money paid into Court by a defendant arrested before judgment sufficient to answer the plaintiff's claim, is ear-marked for the suit and is subject to the lien of the plaintiff for his decree amount in case he succeeds. 41 Mad. 1053 = 36 M. L. J. 355. Decree-holder's lien on the deposit subsists even when the claim of the decree-holder is disallowed but subsequently upheld in appeal. (1926) M. W. N. 683 = 97 I. C. 1020 = 51 M. L. J. 436 = 1926 Mad. 1104. The insolvency of the defendant before decree does not vest the money in the Official Receiver. (*Ibid.*) The case is different if security is given for the appearance of defendant. (39 Mad. 903 ; 29 Bom. 405, Dist.) (*Ibid.*) O. 21, R. 63 requires a claimant whose objection to an attachment before judgment has been disallowed to bring a suit on his title within the period prescribed by Art. 11. (41 Mad. 23, overruled.) 41 Mad. 849 = 35 M. L. J. 231 (F.B.)

O. 38, R. 3.—S. 135 of the Contract Act has no application to the case of a surety under O. 38, R. 3 and his obligation continues even though

the parties to the suit entered into a compromise on the strength of which a decree was passed by the Court. 37 M. L. J. 435 = 43 Mad. 272.

O. 38, R. 4.—Imprisonment under this rule becomes, after decree, imprisonment in execution of a decree. 7 B. 431. Where in execution of a money decree, the share of a Hindu coparcener in the family property was attached during his lifetime and brought to sale after his death his interest passes to the auction-purchaser and precludes the title arising from survivorship. (4 Mad. 302, (Foll.) ; 5 Cal. 48 (P.C.) ; 25 Cal. 179 (P.C.) Ref.) 24 I. C. 667 = (1914) M. W. N. 733.

O. 38, R. 5 SCOPE OF RULE AND ILLUSTRATIVE CASES.—Attachment before judgment confers no right on the party who obtains the order of attachment. 37 All. 578 = 13 A. L. J. 732. Attachment before judgment does not give any interest in the attached property. 30 I. C. 38 = 21 C. L. J. 614. The property may be moveable or immoveable, and it is immaterial whether it is in the actual possession of the

(a) is about to dispose of the whole or any part of his property, or

[S. 484.] (b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court,

the Court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the Court, when required, the said property or the value of the same or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security.

[S. 483, last para.] (2) The plaintiff shall, unless the Court otherwise directs, specify the property required to be attached and the estimated value thereof.

[S. 484, last para.] (3) The Court may also in the order direct the conditional attachment of the whole or any portion of the property so specified.

defendant or of some other person on his behalf. 17 A. 82; 9 Bom. L. R. 540. An order of attachment before judgment can only be made after defendant fails to show cause to the contrary or to furnish security. 23 I. C. 107. The power should be exercised only on clear proof of the existence of the mischief aimed at. 5 Pat. L.T. 124=A. I. R. 1924 P. 312. If the Court accepts the view that defendant has no intention of alienating the property, there is no power to order attachment. (*Ibid.*) It is not sufficient to make only general allegations. 44 I. C. 240. Intent to obstruct or to delay the execution within the terms of the rule must be clearly proved. Vague allegations will not suffice. 23 Bom. L. R. 1228=46 Bom. 431. See also 41 I. C. 89 (Trustee failing to produce accounts). Defendant attempting to dispose of property during pendency of suit is not enough. 45 Bom. 1256=23 Bom. L. R. 550. Allegation that defendant is running into debts is not sufficient. A. I. R. 1927 Cal. 354=101 I. C. 9=31 C. W. N. 432. See also 94 I. C. 880=A. I. R. 1926 Cal. 855. The Court ought to withdraw attachment before judgment on the dismissal of a suit. Attachment is not however revived by reversal of the dismissal on appeal. 9 I. C. 918=13 C. L. J. 243. An attachment applied for before judgment but actually effected after decree has still the force of the attachment before judgment. 42 Mad. 1=35 M. L. J. 387. Dismissal of the subsequent execution application will not put an end to the attachment. (*Ibid.*) An attachment before judgment ceases to be operative on the dismissal of the first application for execution (17 N. L. R. 121, Foll.) 1922 Nag. 81. Where property is attached before judgment a decree in plaintiff's favour does not determine the attachment, which continues in force. 1919 Pat. 465. An attachment followed by a decree prevents the accrual of the title by survivorship where the judgment-debtor dies after attachment of decree but before the order for sale. 24 I. C. 320=26 M. L. J. 517. An attachment before judgment becomes one in execution on an application for execution and R. 57 of O. 21 will apply to it equally with the other rules of O. 21. 63 I. C. 712=17 N. L. R. 121. A Civil Court has no power to issue a warrant of attachment before judgment on property situated without its jurisdiction. 25 I. C. 771. See also 8 M. 20; 5 B. H.C. R. 570; 24 C. L. J. 533=22 C. W. N. 160. But see 1926 Lah. 330=93 I. C. 361. Property outside the jurisdiction of High Court—Mode of

attachment. See 94 I. C. 116=1926 Bom. 278=28 Bom. L. R. 380. It is not open to a Small Cause Court to attach immoveable property before judgment. 49 Cal. 994; 28 C. W. N. 1926 (F. B.); 48 M. L. J. 406 (is not good law). See now Act I of 1926. There is no suit before the Court until the application to sue *in forma pauperis* has been granted. Consequently the Court has no jurisdiction to attach defendant's property before judgment before application is filed as a suit. 25 C. L. J. 159=21 C. W. N. 870. A mortgagee may, after preliminary decree, attach other properties of the mortgagor, if the hypothecation is insufficient and the mortgagor intends to dispose of his other properties fraudulently. 46 Cal. 245; 37 All. 423=13 A. I. J. 565. Attachment before judgment—Money deposited by sureties for release of attachment—Assets held by Court—Rateable distribution. 26 C. W. N. 169=1922 C. 19. A surety's liability ceases as soon as the first Court dismisses the suit. His liability is not revived by the appellate Court subsequently decreeing the plaintiff's claim. 29 I. C. 271=147 P. L. R. 1915; 47 M. L. J. 523; 12 B. 71; 5 R. 492. See also 12 Bur. L. T. 89=52 I. C. 930. Surety entering into agreement before trial Court is bound by decree passed in appeal. 51 Bom. 31=1927 Bom. 84=99 I. C. 820=28 Bom. L. R. 1516. But see 5 R. 492. Where a surety bond has been given for the property attached before judgment the decree in the suit can be executed against the surety also. 45 I. C. 429=11 S. L. R. 122. The liability of the surety is the same whether the judgment has been arrived at by the Courts after a regular trial or the Court pronounces judgment on an award passed by the arbitrator appointed in the suit. Arbitration is an ordinary incident of the suit. (*Ibid.*) An order of discharge of a surety without notice to the parties is rescindable at the instance of any party 37 I. C. 919. Attachment before judgment—Security—Attaching creditor whether acquires charge on money deposited 32 I. C. 190=39 Mad. 903. Order conditional under R. 5 (3) cannot be made without accompanying order under R. 5 (1) to furnish security or to show cause why it should not be furnished. 57 I. C. 907. Security and attachment whether can be ordered at the same time. 1927 Cal. 354=101 I. C. 9=31 C. W. N. 432. What is not a conditional order. 33 I. C. 689=23 C. L. J. 392. PROCEDURE under O. 38, R. 5. See 106 I. C. 808.

6. [S. 485.] (1) Where the defendant fails to show cause why he should not

Attachment where cause not shown or security not furnished.

furnish security, or fails to furnish the security required, within the time fixed by the Court, the Court may order that the property specified, or such portion thereof as appears sufficient to satisfy any decree which may be

passed in the suit, be attached.

(2) Where the defendant shows such cause or furnishes the required security, and the property specified or any portion of it has been attached, the Court shall order the attachment to be withdrawn, or make such other order as it thinks fit.

7. [S. 486.] Save as otherwise expressly provided, the attachment shall be made

Mode of making attachment.

in the manner provided for the attachment of property in execution of a decree.

8. [S. 487.] Where any claim is preferred to property attached before judgment, such claim shall be investigated in the manner

Investigation of claim to property attached before judgment.

hereinbefore provided for the investigation of claims to property attached in execution of a decree for the payment of money.

9. [S. 488.] Where an order is made for attachment before judgment, the

Removal of attachment when security furnished or suit dismissed.

Court shall order the attachment to be withdrawn when the defendant furnishes the security required, together with security for the costs of the attachment or when the suit is dismissed.

10. [S. 489.] Attachment before judgment shall not

Attachment before judgment not to affect rights of strangers nor bar decree-holder from applying for sale.

affect the rights, existing prior to the attachment, of persons not parties to the suit, nor bar any person holding a decree against the defendant from applying for the sale of the property under attachment in execution of such decree.

MEANING OF WORDS.—The words "to produce and place at the disposal of the Court" refer only to such property as is capable of being produced in Court. 17 A. 82. "Is satisfied" meaning of. 13 C. L. R. 356; 16 A. at p. 188.

APPEAL.—C. P. C., does not contemplate an appeal from an order directing the defendant to furnish security. 50 Cal. 215=1923 Cal. 639. An appeal lies from an order of attachment made under R. 6, 50 Cal. 215=1923 Cal. 639. Where an application for attachment before judgment is dismissed by the Court of first instance after hearing the defendants no appeal lies against that order. 33 I. C. 689=23 C. L. J. 392.

O. 38, R. 6.—As to scope of R. 6, see 107 I. C. 276 (1). Order conditional under R. 6 cannot be passed unless the defendant has failed to furnish security, or fails to show cause. 57 I. C. 907. See also 1927 Cal. 354=101 I. C. 9. Application for attachment—Court ordering petition closed on respondent undertaking not to alienate properties—Appeal lies against order. (1928) M. W. N. 125 (50 C. 215, Ref.)

O. 38, R. 8.—This rule which prescribes the manner of investigation, is silent as to the result. O. 21, R. 60 does not apply to claims to property attached before judgment. 20 B. at p. 407. See also 41 Mad. 23=39 I. C. 863.

O. 38, R. 9.—On the dismissal of a suit, an attachment before judgment *ipso facto* comes to an end and does not revive when an appeal is lodged. 45 Cal. 780=22 C. W. N. 927. Suit in O. 38, R. 9 does not include proceedings in appeal.

5 R. 492=105 I. C. 540=1927 Rang. 310. But see 51 Bom. 31. Surety for removal of attachment—Liability ceases on dismissal of suit. 5 R. 492=105 I. C. 540=1927 Rang. 310. But see 51 Bom. 31.

O. 38, R. 10.—O. 38, R. 10 is not limited to rights *in rem*. 23 C. L. J. 115=21 C. W. N. 158. The attachment has no effect against the Official Assignee. 26 M. 673. See 21 B. 273; 17 M. 144. See S. 53. The effect of an attachment before or after judgment is the same, provided that in the former case a decree is made for the plaintiff at whose instance the attachment takes place. 26 C. 531. When a person attaches property he also attaches the profits thereof. 12 W. R. 391. A re-attachment of property after decree does not imply an abandonment of an attachment obtained before decree. 6 C. 129 (P. C.); 16 I. C. 387. Where the attached decree is sold in execution of another decree the attachment ceases, and no further proceedings can be taken against the property on the basis of that attachment. 2 P. L. T. 240=61 I. C. 922. Attachment before judgment—Property sold—Decree—Proceeds recovered by previous decree-holder—Suit to recover share. 45 Bom. 360=22 Bom. L. R. 1407. Attachment before judgment—Money decree-holder—Right to proceed against property—Priorities. 91 I. C. 93 (2)=1926 Rang. 85. An agreement for sale entered into before an attachment before judgment is perfectly valid and can be enforced. 106 I. C. 356.

11. [S. 490.] Where property is under attachment by virtue of the provisions of this Order and a decree is subsequently passed in favour of the plaintiff, it shall not be necessary upon an application for execution of such decree to apply for a re-attachment of the property.

Property attached before judgment not to be re-attached in execution of decree.

12. Nothing in this order shall be deemed to authorize the plaintiff to apply for the attachment of any agricultural produce in the possession of an agriculturist, or to empower the Court to order the attachment or production of such produce.

Agricultural produce not attachable before judgment.

[13. Nothing in this order shall be deemed to empower any Court of Small Causes to make an order for the attachment of immoveable property.]¹

ORDER XXXIX.

TEMPORARY INJUNCTIONS AND INTERLOCUTORY ORDERS.

Temporary Injunctions.

Cases in which temporary injunction may be granted.

1. [S. 492.] Where in any suit it is proved by affidavit or otherwise,—

O. 38, R. 11.—Where there is an order in execution for sale of a property attached before judgment under Art. 11, Limitation Act, the period of limitation is one year to set aside the order. 44 Mad. 902=41 M. L. J. 252. But see also 41 Mad. 23. This rule gives the same effect to an attachment before judgment after a decree is passed as an attachment after judgment. 2 P. L. T. 719=6 P. L. J. 332. An attachment before judgment continues in force even after the decree is passed. 16 I. C. 387 (1). Re-attachment after judgment being superfluous is not proof of abandonment of original attachment. 16 I. C. 387 (1). See also 6 Cal. 129 (P.C.). Attachment before judgment—Decree passed in favour of attaching creditor—Subsequent attachment and sale of the same by a third party—Sale not confirmed—Original attachment is revived. 99 I. C. 895=44 C.L.J. 553=1927 Cal. 240.

O. 38, R. 13.—¹ This rule was added by Act I of 1926.

O. 39. APPLICABILITY.—Order 39 is applicable to proceedings in liquidation of company. A.I.R. 1926 Lah. 525.

O. 39, R. 1. PRINCIPLE OF TEMPORARY INJUNCTION.—The granting of a temporary injunction is a matter of discretion. 26 M. 168 (174). There is no general rule to guide the discretion of Courts. 29 I.C. 855=21 C.L.J. 459. If the Court finds that there is a substantial question to be investigated and that matters should be preserved in *status quo* till final disposal of that question it is sufficient ground for granting the injunction. (*Ibid.*); 103 I.C. 167. The real point is not how the question should be decided at the hearing of the case, but whether there is a substantial question to be investigated. 1922 Lah. 356. Court must first see that there is a *bona fide* contention between the parties and then on which side in the event of success the balance of inconvenience will lie if the injunction does not issue. 1922 Lah. 356; 5 Lah. L.J. 262=1923 Lah. 227; 1926 Cal. 837=95 I.C. 667=43 C.L.J. 405; A. I. R. 1926 Pat. 318=96 I.C. 623. In granting a temporary injunction the Court has to see balance of convenience and inconvenience of both sides. 66 I.C. 599; 46 C. 1001=23 C.W.N. 677. There must be a probability of the plaintiff succeeding. 18 I. C.

394=17 C. W. N. 964; 24 L. W. 839=1927 Mad. 188=99 I.C. 383. The Court will have to be satisfied that the applicant has a *prima facie* case and further that the protection of his interest requires that an injunction should issue temporarily. 17 I.C. 219=23 M.L.J. 316; 1927 M. 188=99 I.C. 383; 29 Punj. L.R. 50; 103 I.C. 372. Where a plaintiff out of possession claims possession, the Court will not grant an injunction against a defendant in possession under a claim or right unless the threatened injury would be irreparable. 46 Cal. 1001=23 C.W.N. 677. The word "injury" means an act which is contrary to law. 55 I.C. 403=2 Lah.L.J. 283. Party to prove irreparable loss would accrue if injunction is not granted. 93 I.C. 348=1926 Lah. 435. In a suit for permanent injunction a temporary injunction ought not to be refused where the refusal would defeat the object of the suit. 43 I. C. 24. As regards the proper course when applications for mandatory injunctions are made, see 16 Bom. L. R. 288=38 Bom. 381. Under colour of temporary injunction a plaintiff cannot seek a relief, which forms the cause of action in the suit. 27 I. C. 617; 29 I. C. 855=21 C. L. J. 469; 18 I. C. 394=17 C. W. N. 964. Suit for declaration only—Another suit necessary to seek relief, injury to which is sought to be prevented by injunction—Temporary injunction cannot be granted. 96 I. C. 439=1926 Lah. 504=8 L. L. J. 289. But see 92 I. C. 723=1926 Lah. 523. A plaintiff making a considerable delay is not to be assisted at the expense of the defendant. 29 I. C. 855=21 C. L. J. 469. In granting temporary injunction the Court should exercise wise discretion and see that the machinery of Court is not abused for fraudulent purposes. 9 I.C. 277. The order must not create a totally new state of things 67 I.C. 742; 66 I.C. 599. Defendant residing outside jurisdiction—Acts within jurisdiction—Interference with acts of religion. 4 P.L.T. 48. The onus is upon the petitioner to show that his inconvenience exceeds that of the other side. 70 I.C. 864=15 S.L.R. 5. A Court has no jurisdiction to grant an injunction under its inherent powers. 1927 Mad. 687=102 I.C. 700=26 L.W. 899 (43 M. 94; 25 L.W. 85, R.). A Court has no jurisdiction to issue temporary injunction against a person not a party to suit. 96 I.C. 540=1927 Lah. 284.

(a) that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree, or

PRINCIPLES.—Injunction "pending disposal of the suit" period for which it is in force. 43 All. 383=19 A.L.J. 174. The offending of religious prejudices is no ground for granting an injunction. 1 C. W. N. 429. "Suit" in O. 39 includes proceedings. 1926 L.Ah. 525=26 Punj L.R. 803.

TEMPORARY AND PERPETUAL INJUNCTIONS.—The rule refers only to temporary injunctions, leaving perpetual injunctions to be governed by the provisions of the Specific Relief Act. 6 B. 266 (279). The issue of temporary injunction is not governed by the same principles as the granting of a permanent injunction. 26 M. 168 (174). O. 39, R. 1 does not authorise the Court to grant a temporary mandatory injunction. 24 L.W. 830=1927 Mad. 188=99 I.C. 383. But see 94 I.C. 840=1926 Sindh 201.

INJUNCTION OR RECEIVER.—Distinction between a case in which a temporary injunction may be granted, and a case in which a receiver may be appointed. See 22 C. 459 (465); 1 A.L.J. 527. Proof of waste is a ground for appointing a receiver. 53 I.C. 760=10 L.W. 551; 105 I.C. 131. The digging of a well is not waste. W.R. (1864) 275.

NOTICE OF APPLICATION.—Notice, however short, should, if possible, be given before an injunction is granted. 27 B. at p. 451. See R. 3. The other side must be given an opportunity to show cause. 7 A. 550; and when an *ex parte* order is made liberty to apply to have it varied or set aside must be implied. 9 A. 36 (42).

JURISDICTION.—The High Court can grant an injunction under its general equity jurisdiction independently of the Code. 34 C. 97; 34 C. 101. The injunction should be issued to the party and not the court. 2 A. L. J. 601. Only the Court in which the suit is filed, and not the Court to which a decree is sent for execution, can grant an injunction. 12 C. 515. An inferior court can issue an injunction to stop a sale in execution of a decree by a superior Court. 23 C. 351. But see 31 C. 480 (486). A District Court cannot issue an injunction to stay waste in respect of property in dispute in a suit pending in a subordinate Court. In case it wants to do so it should withdraw the case to its own file. 2 Bom. H. C. R. 103. The mere fact that a person resides outside the jurisdiction of the Court is not *per se* sufficient to prevent the Court from granting an injunction. 2 C. W. N. 521. An application to restrain a suit in a Small Cause Court does not come within the provision of this rule. 27 B. 357. As to power of subordinate Court to stay foreign suit, see 27 L. W. 418.

PRACTICE.—Before granting a temporary injunction it is usual to put the applicant upon terms to abide by such order as the Court shall think fit to make by way of damages resulting from the passing of the order. 1 A. L. J. 527. An application for an injunction restraining the defendant in a pending suit, from prosecuting an action in a foreign Court must be made at a very early stage of the proceedings. 59 I.C. 218=24 C. W. N. 735. A party is presumed to have knowledge of a prohibitory order "not to alienate his property, when it is made in the open Court, in the presence of the parties appearing

before the Court." 42 All. 98=17 A.L.J. 1127. An interlocutory injunction in a suit for perpetual injunction is dissolved *ipso facto* by a decree granting a perpetual injunction. 42 Cal. 550=18 C.W.N. 1189.

APPEAL.—An order of injunction is purely discretionary and a party appealing against it should prove that the Court against whose judgment the appeal is preferred acted wrongly in the exercise of its jurisdiction. 22 I. C. 710=19 C. L.J. 325. See also 12 M. 186. Order refusing grant of a temporary injunction is appealable. 18 C.L.J. 39=17 C.W.N. 996. But an order granting temporary injunction cannot be the subject of an appeal but is subject to the revisional jurisdiction of the High Court. 1927 Mad. 687=102 I.C. 700=26 L.W. 899.

ILLUSTRATIVE CASES: (1) **ARBITRATION PROCEEDINGS.**—An interlocutory injunction should not be granted upon novel considerations interfering with arbitrators. (23 C. W. N. 811 (814). Foll.); 31 Cal. L. J. 167=24 C.W.N. 612=47 Cal. 611. Principles governing grant of temporary injunction restraining arbitration. 54 I. C. 546.

(2) **ALIENATION.**—An alienation pending a temporary injunction is not void. 253 P. L. R. 1914=25 I.C. 180.

(3) **CO-SHARERS.**—One co-sharer can restrain another from building on the land. 41 Cal. 436=18 C.W.N. 176.

(4) **EXECUTION PROCEEDINGS AND SALE.**—A plaintiff, who after being defeated under O. 21, R. 99, brings a suit under R. 103 of the same order, is not entitled to get a temporary injunction restraining the defendant from taking possession of the property. 27 I. C. 56=16 Bom. L. R. 676. A prohibitory order by way of injunction can be issued so long as the property in dispute is in danger of being wrongfully sold in execution of a decree but once it is sold no such order can be passed. 54 I. C. 928. A sale held in ignorance of an order by way of an injunction staying the sale is an irregularity, but the sale will not be set aside unless the judgment-debtor has sustained substantial injury by reason of such irregularity. 54 I. C. 928. Where it is fairly established that there is a danger of a wrongful sale in execution, an injunction can properly be granted. (12 Cal. 515, foll.) 25 I. C. 9. But see also 1 Pat. L. R. 462=75 I. C. 381. A Court has jurisdiction to issue an injunction upon a person residing outside its territorial limits if he has property within the jurisdiction. 75 I. C. 381=1 Pat. L. R. 462. In a case in which the defendants have submitted to the jurisdiction of a Court by entering appearance, the Court has jurisdiction to grant an injunction restraining the defendants from executing in another Court a decree which they had obtained against plaintiff. (Case-law referred to.) 1 P. 356=4 Pat. L. T. 10. A Court has no power to issue a temporary injunction to restrain the defendant from executing a decree lawfully obtained by him. 23 L. W. 85=1926 Mad. 258=92 I. C. 615.

(5) **MARRIAGE.**—Temporary injunction to restrain marriage, when not to be granted. 17 A. L. J. 1138=42 A. 134.

(b) that the defendant threatens, or intends, to remove or dispose of his property with a view to defraud his creditors, the Court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property as the Court thinks fit, until the disposal of the suit or until further orders.

[Oudh] Insert the following as proviso to Order 39, Rule 1 (b).—

"Provided that, if it appears to the Court that the property in suit is in danger of being wrongfully sold in execution of a decree, the Court may also by order grant a temporary injunction restraining the Court executing the decree from confirming the sale held in execution of the decree until the disposal of the suit or until further orders."

2. [S. 493.] (1) In any suit for restraining the defendant from committing a

Injunction to restrain repetition or continuance of breach.

breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and

(6) MUHAMMADAN ENDOWMENT.—Appointment of co-mutwalli by the first mutwalli, grantor of waqf, does not invite the application of the rule unless there is danger of waste of property. 35 I. C. 718=14 A. L. J. 554.

(7) RIGHT OF WORSHIP.—Injunction to restrain plaintiff from preventing defendants entering and worshipping in certain temple not proper. 1 P. L. J. 560.

(8) SECURITY AND ACCOUNTS.—An order directing the furnishing of security and submission of accounts passed on an application for the issue of interim injunction is not an order under R. 1. 17 I. C. 361=17 C. W. N. 318. An order to defendants to prepare an inventory and to keep accounts is not an order under the inherent powers of the Court but one under O. 39, R. 1. 1923 Lah. 48=72 I. C. 569.

(9) SPECIFIC PERFORMANCE.—A temporary injunction will be granted to a plaintiff restraining defendants from selling property to a third person during the pendency of a suit for specific performance of contract for sale. 57 I. C. 847. See also in case of contract for lease. 16 I. C. 359=17 C. L. J. 427.

(10) STRANGER TO SUIT.—A Court has no jurisdiction to issue an injunction upon a person who is not a party before it. 3 P. L. J. 456=46 I. C. 224, 51 I. C. 108=46 P. L. R. 1919.

(11) SUIT FOR POSSESSION.—Suit for possession—Restraining execution of decree for possession—Receiver—Appointment of. 24 Bom. L. R. 378=1922 Bom. 385. In a suit for possession, an injunction restraining the defendant from committing waste may be granted. 38 Cal. 791=13 C. L. J. 394.

(12) ELECTION.—Where the holding of an election would result in no harm, damage or waste injunction ought not to be granted. (1926) M. W. N. 582=97 I. C. 172 (1)=1926 Mad. 1147.

O. 39, R. 2. GENERAL.—The words "of any kind" have been inserted to supersede the rule in 22 A. 449. Sub-rule (3) has been remodelled to give effect to the decision in 19 B. at p. 155. As to whether a Court can of its own motion punish for disobedience, see 26 M. 494. The Civil Procedure Code is not exhaustive and the Court has inherent jurisdiction to act *ex debito justitiae* in order to do that real and substantial justice for the administration of which alone it exists. (23 Cal. 351, foll.) 1923 Lah. 144 (2)=73 I. C. 909. Injunction can be granted only against defendant

—Principles governing the same. 79 I. C. 233=1923 Lah. 47; 96 I. C. 286=1926 Lah. 589. Single Judge of the High Court has jurisdiction to pass the order of stay, subject to certain conditions. 17 A. L. J. 1127=42 All. 98. In a suit before the High Court on the original side, the Judge can restrain the defendant by an injunction from proceeding with a suit instituted by him in a mofussil Court. 44 Bom. 283=21 Bom. L. R. 963. Courts in India have power to issue temporary injunctions in a mandatory form. (38 Bom. 381, Diss.); 41 M. 208=33 M. L. J. 448; 24 L. W. 854=1927 Mad. 210=99 I. C. 566. On an interlocutory application, the Court has power to pass a mandatory injunction before the suit is heard. 28 I. C. 121=16 Bom. L. R. 566. It is doubtful whether mofussil Courts have power to grant mandatory injunctions on interlocutory applications. 38 Bom. 381=16 Bom. L. R. 288. A court has no jurisdiction to issue an injunction against a person not a party to the suit or to summon before it any person not a party to the injunction. 44 I. C. 496; 56 I. C. 540. A District Court can demand security from the guardian of the person of a female infant ward to prevent his giving her in marriage without the consent of her "proper male relations". 20 P. L. R. 1914=23 I. C. 351. High Court has power under O. 39, R. 2, C. P. C., to interfere and restrain a party from proceeding with a suit pending in another Court. 24 L. W. 421=(1926) M. W. N. 708=97 I. C. 938=1926 Mad. 1126.

TRADE NAME.—Infringement—Temporary injunction, grant of. See 21 I. C. 258=40 Cal. 570.

ELECTION.—Suit to contest—Injunction *pendente lite*. 20 I. C. 676=41 Cal. 384. Where the true owner of a pension is prevented by injunction from getting his pension from Government he should be committed for contempt if he disobeys the Court's injunction and gets the pension from the Government. 20 C. W. N. 457=35 I. C. 378 (P. C.). Injunction restraining defendant company from disposing of the goods—Assistant of the firm cannot be punished for disobedience. 42 Cal. 1169=21 C. L. J. 578. Sub-Judge could issue a temporary injunction staying the execution of a decree proceeding in a Munsiff's Court. 1923 Lah. 144 (2)=73 I. C. 909; 16 C. L. J. 585=15 I. C. 614=18 C. W. N. 12 (Decree of Revenue Court). Injunction—Extent of operation—Disobedience—Government's liability. 20 C. W. N. 457=35 I. C. 378 (P. C.). An injunction

either before or after judgment, apply to the Court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right.

(2) The Court may by order grant such injunction, on such terms as to the duration of the injunction, keeping an account, giving security, or otherwise, as the Court thinks fit.

(3) In case of disobedience, or of breach of any such terms, the Court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in the civil prison for a term not exceeding six months, unless in the meantime the Court directs his release.

(4) No attachment under this rule shall remain in force for more than one year, at the end of which time, if the disobedience or breach continues, the property attached may be sold, and out of the proceeds the Court may award such compensation as it thinks fit, and shall pay the balance, if any, to the party entitled thereto.

3. [S. 494.] The Court shall in all cases, except where it appears that the object of granting the injunction would be defeated by the delay, before granting an injunction, direct notice of the application for the same to be given to the opposite party.

Before granting injunction Court to direct notice to opposite party.

4. [S. 496.] Any order for an injunction may be discharged, or varied, or set aside by the Court, on application made thereto by any party dissatisfied with such order.

Order for injunction may be discharged, varied or set aside.

5. [S. 495.] An injunction directed to a corporation is binding not only on the corporation itself, but also on all members and officers of the corporation whose personal action it seeks to restrain.

Injunction to corporation binding on its officers.

which is discharged subsequently must be obeyed during its subsistence. (*Ibid.*) Disobedience of injunction issued by Court—Suit transferred to another Court—Jurisdiction of second Court to punish disobedience. 22 I. C. 499=18 C.W.N. 470; 46 Mad. 83=43 M.L.J. 71. O. 39, R. 2 (3), C. P.C., applies not only to disobedience of an order issued under clauses (1) and (2) of that rule and applies equally to disobedience of all injunctions issued under S. 94 of the Code. High Court in its appellate side has jurisdiction over the whole of the Presidency. A.I.R. 1926 Mad. 574=50 M.L.J. 401=95 I. C. 196 (2). Unless the Court has jurisdiction over the subject-matter of the controversy disobedience of its injunction is not punishable. An injunction in matters beyond the jurisdiction of a Court is void. 15 C. L. J. 147=16 C. W. N. 447. Injunction—Breach of—Karnavan restrained from contracting loans—Validity of loans contracted thereafter. 47 I. C. 778=35 M. L. J. 96. The provision as to punishment for disobedience to orders of Court is not confined to suits of the nature contemplated by R. 2. 44 I. C. 56=7 L. W. 328. O. 39 has to be read along with S. 94, Cl. (8). (*Ibid.*) R. 2 applies to case of disobedience to an order to do or abstain from doing a single act. (*Ibid.*) 39 Mad. 907=30 M. L. J. 523. Court is not bound under R. 2 (3) in the first instance to attach property and then only order imprisonment. The matter is one for the discretion of Court. 39 Mad.

907=30 M. L. J. 523. Attachment of property is not a suitable form of remedy except where a person is ordered to do something and he does not do it, 31 C. W. N. 814=1927 Cal. 598=105 I. C. 348. An order for attachment of property or imprisonment of the person guilty of disobedience of an injunction is not an enforcement of the order of injunction but is a punishment for past disobedience. (*Ibid.*) Attachment of property is not a pre-requisite for passing an order to detain a person in prison for disobedience of an order of injunction. 26 M. L. J. 37=22 I. C. 404. Abettors of contempt of Court cannot be punished. 1927 Cal. 598=105 I. C. 348=31 C. W. N. 814.

APPEAL.—An order refusing to attach property of a person who had disobeyed an injunction is appealable. 26 M.L.J. 37=22 I.C. 404; see also 1922 Lah. 347.

O. 39, R. 3.—If the object is likely to be defeated by delay, the Court may grant an *ex parte* injunction without notice to the opposite party. 64 I. C. 534=13 Bur. L. T. 227.

O. 39, R. 4.—When an injunction is granted *ex parte*, liberty to apply to the Judge to vary or set aside his order must be implied. 9 A. 36 (42). Appeal. See O. 43, R. 1, cl. (7) and 15 A. 8.

O. 39, R. 5.—The rule applies only to Corporations strictly so called, to bodies authorised by law to act as a person in law and not to unregistered or unincorporated bodies or associations. 38 I. C. 572=9 Bur. L. T. 247.

Interlocutory Orders.

6. [S. 498.] The Court may, on the application of any party to a suit, order the sale, by any person named in such order, and in such

Power to order interim sale. manner and on such terms as it thinks fit, of any moveable property, being the subject-matter of such suit, or attached before judgment in such suit, which is subject to speedy and natural decay, or which for any other just and sufficient cause it may be desirable to have sold at once.

Detention, preservation, inspection, etc., of subject-matter of suit.

7. [S. 499.] (1) The Court may, on the application of any party to a suit, and on such terms as it thinks fit,—

(a) make an order for the detention, preservation or inspection of any property which is the subject-matter of such suit, or as to which any question may arise therein ;

(b) for all or any of the purposes aforesaid authorise any person to enter upon or into any land or building in the possession of any other party to such suit ; and

(c) for all or any of the purposes aforesaid authorize any samples to be taken, or any observation to be made or experiment to be tried, which may seem necessary or expedient for the purpose of obtaining full information or evidence.

(2) The provisions as to execution of process shall apply, *mutatis mutandis*, to persons authorized to enter under this rule.

Application for such orders to be after notice.

8. [S. 500.] (1) An application by the plaintiff for an order under rule 6 or rule 7 may be made after notice to the defendant at any time after institution of the suit.

(2) An application by the defendant for a like order may be made after notice to the plaintiff at any time after appearance.

9. [S. 501.] Where land paying revenue to Government, or a tenure liable to sale, is the subject-matter of a suit, if the party in possession of such land or tenure neglects to pay the Government revenue, or the rent due to the proprietor of the tenure, as the case may be, and such land or tenure is consequently

When party may be put in immediate possession of land the subject-matter of suit.

ordered to be sold, any other party to the suit claiming to have an interest in such land or tenure may, upon payment of the revenue or rent due previously to the sale (and with or without security at the discretion of the Court), be put in immediate possession of the land or tenure ;

and the Court in its decree may award against the defaulter the amount so paid, with interest thereon at such rate as the Court thinks fit, or may charge the amount so paid, with interest thereon at such rate as the Court orders, in any adjustment of accounts which may be directed in the decree passed in the suit.

10. [S. 502.] Where the subject-matter of a suit is money or some other thing capable of delivery, and any party thereto admits that he

Deposits of money, etc., in Court.

holds such money or other thing as a trustee for another party, or that it belongs or is due to another party, the Court may order the same to be deposited in Court or delivered to such last-named party, with or without security, subject to the further direction of the Court.

O. 39, Rr. 6 and 7.—Where property attached before judgment is released on security which comprised some items of attached property, the plaintiff is preferentially entitled to execute his decree against the property given as security. 11 L. W. 6=56 I. C. 267. In a suit for damages alleged to have been caused by the erection by the defendant of an adjoining house, the defendant is entitled to an order to enter into the house of the plaintiff and to inspect the same. 24 C. 117 ; see also 16 B. 511.

O. 39, R. 8.—The term " may " must be read

with the words " at any time ". 7 M. 241. When an interlocutory order is refused by one Judge the proper course is to apply for a review or to appeal from it. 16 B. 511.

O. 39, R. 10.—In case the defendant refuses to deposit the money in Court, he is liable to pay interest from the date of the order. 16 W. R. 297. The rule does not cover a case where the money is held by another court to credit of another suit. 27 M. 168. Admission which is insufficient under O. 12, R. 6 is also so under O. 39, R. 10. 1927 Sindh 25=97 I. C. 623.

ORDER XL.

APPOINTMENT OF RECEIVERS.

1. [S. 503.] (1) Where it appears to the Court to be just and convenient, the Court may by order—
Appointment of receivers.

O. 40, R. 1. SCOPE OF RULE.—The rule clearly intends to give the power of appointing a receiver only to the Court in which the suit is brought or by which the property has been attached. 23 C. 517 (519). See also 24 B. 38 (42). O. 40 if applies to mortgage decrees. 100 I. C. 735 (1)=1927 A. 419. A receiver can be appointed even after a decree is passed. 8 M. 229 (233). The court can order that the receiver should continue permanently after decree when such continuance is necessary. 19 M. 120 (P.C.). A receiver can be appointed in respect of immovable property notwithstanding the fact that a Magistrate has passed an order under S. 145 of the Cr. Pro. Code. 22 A. 214. The discretion given by this rule is one that should be used with the greatest care and caution. 5 A. 556. The power conferred by the rule should be exercised with sound discretion. 15 C. 818 (822); 23 C. L. J. 567; 16 C. W. N. 997. Remedy is derived from English practice and is an exceptional remedy 100 I. C. 735 (1)=1927 A. 419.

GROUND FOR APPOINTMENT—AND WHO CAN BE APPOINTED.—Grounds for appointment of receiver. See 11 I. C. 703; 1925 Sind 83; 105 I. C. 167. An appointment of a receiver can be made only on proof of strong grounds of necessity. 11 I. C. 403. The first essential condition is that the applicant must have "an interest" in the property to be affected by the order. 61 I. C. 849=6 P. L. J. 366. A receiver should not be appointed where no risk of loss is shown. 12 I. C. 198=4 Bur. L. T. 241. The appointment of a receiver is a matter of judicial discretion and Courts should proceed cautiously viewing all the circumstances of the case. 28 C. W. N. 86=1924 Cal. 456. Public nature of the matter has got to be taken into account in the appointment of receiver. 96 I. C. 30=1926 Cal. 1092. It would be very improper to take property out of the hands of ladies of culture and well capable of managing the property and examining accounts. 11 I. C. 703. As to what is meant by "just and convenient". 28 C. W. N. 86=1924 Cal. 456. Appointment of the receiver is just and convenient if the main object is to preserve the property. 1923 Lah. 239 (2). A receiver should be an impartial person and wholly disinterested in the subject-matter of the suit. 18 I. C. 398=17 C. W. N. 581; 28 C. W. N. 86=1924 Cal. 456. But it is competent to the Court upon the consent of parties and in a proper case, without such consent, to appoint a person mixed up in the subject-matter of the litigation, if it will be beneficial to the estate. 28 C. W. N. 86=1924 Cal. 456. Order on an application under O. 40, R. 1 should not express an opinion on the merits of the case. (*Ibid.*) The appointment of an interim Receiver pending the final appointment of a common manager can be made only on evidence of necessity for such appointment. 34 I. C. 83. O. 40, R. 1 does not lay down notice to the opposite party. (22 C. 459; 21 M. L. J. 821; 107 P. R. 1908; 36 P. R. 1910, Dist.); 1923 Lah. 239 (2). Where there are a large number of outstandings due to the

estate of the deceased person, some of which are liable to be lost owing to the efflux of time, and the heir of the deceased is a lady and there is a *bona fide* dispute between the parties the Court is justified in appointing a receiver to recover the outstandings and to bring the proceeds into Court. 1923 Lah. 239 (2). Mahant—Disputes regarding title—Convenience. 69 I. C. 361. Court may make an order appointing a receiver *suo motu*. 1922 Lah. 444. The Court has jurisdiction to appoint a receiver to maintain the *status quo ante* pending a suit or appeal. (*Ibid.*) An order made in declaratory suit that certain widows were entitled only to maintenance, is illegal and improper. 11 I. C. 403=62 P. W. R. 1911. Appointment of receiver in a suit in which possession cannot be decreed to Plaintiff. 92 I. C. 599=1926 Mad. 155. Court has got power to appoint a receiver in a declaratory suit and an appellate court should not interfere with the discretion exercised by the Lower Court. 94 I. C. 39=27 Punj L. R. 138. Poverty of the defendant trustee is no ground for the appointment of a receiver unless there be in addition some danger to the estate. 29 M. L. J. 209=29 I. C. 485. The late production of accounts and documents by the manager is not sufficient to warrant the appointment of a receiver. 17 I. C. 261=(1912) M. W. N. 904. The mere fact that a Muhammadan widow is entitled to a lien for dower on her husband's estate is no ground for refusing the appointment of a receiver summarily without enquiry. 1923 Nag. 21. That a receiver has not been appointed at a prior stage of the suit is no ground for refusing the application at a later stage, when fresh grounds are made out. 1923 Nag. 21. A Court has no jurisdiction to appoint a receiver at the instance of a simple money-creditor unless he establishes a special equity in his favour. 61 I. C. 849=6 P. L. J. 366. A prior incumbrancer desiring to take possession is entitled to have the receiver obtained by a puisne incumbrancer, discharged, and a receiver of his own substituted. (*Ibid.*) The insolvency of an administrator is a good reason for appointing a receiver. 48 I. C. 152=11 Bur. L. T. 127.

SELECTION OF RECEIVER.—Ordinarily a party to a litigation should not be appointed a receiver unless very exceptional circumstances are established to justify such an appointment. 18 C. L. J. 638=18 C. W. N. 533. One of the parties to suit will not be appointed without the consent of the other. 19 I. C. 873=17 C. W. N. 974; 25 I. C. 602. When a non-resident is appointed receiver there must be adequate guarantee that he will be subject to the effective control of the Court. 19 I. C. 873=17 C. W. N. 974. That the receiver resides at a great distance from the property to be managed, is not an absolute disqualification, but is an important circumstance to be taken into consideration. 19 I. C. 873=17 C. W. N. 974. A person who is guardian of an incapacitated defendant in a suit is not always disqualified to be receiver. 35 I. C. 939=4 L. W. 285.

(a) appoint a receiver of any property, whether before or after decree ;

PRIMA FACIE CASE.—21 M.L.J. 821=11 I. C. 170 ; 3 Pat. L.T. 466 ; 43 I. C. 550.

REMUNERATION.—The Court has a discretion if it thinks fit to allow him remuneration at a fixed rate. 1923 Cal. 516=76 I. C. 583. The receiver's remuneration must come out of the estate of the insolvent and the legal representatives of the insolvent cannot be made personally liable for the same. (*Ibid.*) The appointment should be made for the protection of property or the prevention of injury according to legal principles. The words do not confer an arbitrary and non-regulated discretion on the Court. 34 I. C. 693=23 C. L. J. 567 ; 9 I. C. 285=13 C. L. J. 495 ; 5 Lah. L. J. 583=1923 Lah. 623. Discretion of Court in declaratory suit in respect of agricultural lands. 5 Lah. L. J. 583=1923 Lah. 623.

WASTE, WHAT IS.—A mere intention to transfer by a life tenant does not constitute danger to the reversionary interests and to protect them the Court may appoint a receiver. 44 Bom. 727=57 I. C. 553. Where it is clearly proved that an estate is so grossly mismanaged that the whole estate will be jeopardised, it is a clear case for the appointment of receiver. 25 I. C. 406=18 C. W. N. 537 ; 21 M. L. J. 821=11 I. C. 870.

EFFECT OF APPOINTMENT.—Property in the possession of a receiver is in the custody of the law and cannot be seized under a writ of attachment or execution. 47 Mad. 47=43 M. L. J. 211. The refusal to make the receiver party to the execution proceedings is a material irregularity justifying the interference of the High Court under S. 115. (*Ibid.*) Where a receiver is appointed, property vests in him only when the orders under O. 40, R. 1 (b), (c) and (d) are made. (*Ibid.*) ; 1923 Nag. 6. Effect of appointment does not bar execution. 6 Pat. L. J. 208=62 I. C. 469.

RIGHTS OF THIRD PARTIES.—See 17 L. W. 64=1923 M. 304. The rule that the possession of receiver may not be disturbed without leave, does not apply, so far as third persons are concerned until a receiver has been actually appointed, and is in possession. 23 C. W. N. 952=29 C. L. J. 424.

CONTEMPT BY RECEIVER.—22 C. 648 ; see also 30 C. 696.

CONTEMPT OF COURT.—Where a receiver is appointed to take possession of property the person in possession of property cannot interfere with the receiver, but should apply to the Court for redress. 18 C. W. N. 289=22 I. C. 417.

DISCHARGE OF RECEIVER.—23 C. L. J. 217=20 C. W. N. 789. A receiver appointed in a suit or proceedings by consent of parties, may be discharged, even before the termination of the suit or proceeding. 13 L.W. 367=61 I. C. 562. Neither the termination of the suit in decree nor the pendency of the appeal against that decree will put an end to the authority of the receiver appointed to collect rents. 33 I.C. 69 ; 5 Pat. L. J. 513=1 Pat. L. T. 643.

HIGH COURT, POWERS OF.—A High Court has no jurisdiction to examine the accounts in order to ascertain the liability of a receiver appointed by a Subordinate Court, he not being an officer of the High Court. 4 P.L.J. 636=54 I.

C. 207. The High Court has power to appoint a receiver in a testamentary suit. 17 B. 388.

SUIT AGAINST RECEIVER.—The omission to get leave of the Court to institute a suit against a receiver can be made good during the pendency of the proceedings. 61 I. C. 888 ; 63 I. C. 843. Where the receiver dies, further proceedings can be continued against his successor and no one else. 61 I. C. 888. Permission to conduct a suit implies permission to institute a suit. 63 I. C. 343. A permission granted by a Court to sue a receiver relates back to the time of the institution of the suit. (*Ibid.*) A receiver is an officer of Court—Suit against. 62 I. C. 768=26 C. W. N. 992. The necessity to obtain the sanction before the institution of a suit against the receiver is imposed by the Common Law, merely to enforce due respect towards Courts of Justice, and omission to do so does not affect the jurisdiction of the Courts. Per *Sadasiva Aiyar, J.*, in 70 I. C. 759=42 M. L. J. 339 ; 43 Mad. 793=59 I. C. 568. It is illegality which can be cured by obtaining it during the course of litigation. 43 Mad. 793=59 I. C. 568. It is clear law that as a Receiver is an officer of the Court he cannot be sued for acts done in his official capacity by a third party except with the leave of the Court. 1 R. 138=1923 Rang. 208 ; 102 I. C. 797=1927 Pat. 297=8 Pat. L. T. 629.

LEAVE OF COURT.—Proceedings cannot be instituted against a receiver without the permission of the Court and if so instituted they constitute a contempt of the Court. 19 C. L. J. 191=18 C. W. N. 546. To charge a receiver for the breach of the ordinary criminal law of the country sanction is not necessary. 15 I. C. 491=13 Cr. L. J. 491. It is not a general rule of law that sanction of Court appointing a receiver is not necessary in the case of criminal proceedings against him arising out of his office. 15 I. C. 489=13 Cr. L. J. 489. Leave of Court is necessary both for execution of a decree against the receiver of the property of the judgment-debtor as well as for prosecuting an application for rateable distribution against the receiver. 14 C. L. J. 55=15 C. W. N. 925. Such leave may be obtained at a subsequent stage of the proceedings. 14 C. L. J. 55=15 C. W. N. 925. A prohibitory order against the receiver is not equivalent to the grant of leave to execute the decree. (*Ibid.*)

LEAVE TO SUE.—A receiver appointed under the Code of Civil Procedure merely holds the estate on behalf of the Court. The estate does not vest in him, nor does he in any way represent it. Leave of the Court is necessary in order that by impleading him the estate may be bound. A receiver under the Insolvency Act holds a different capacity altogether. He is more than a mere officer of the Court ; the insolvent's estate vests in him. He alone, and no one else, represents the estate. No leave is accordingly necessary for suing him. 21 A. L. J. 737=46 All. 16. Grant of subsequent leave will cure the defect. 46 Cal. 352=23 C. W. N. 496 ; 56 I. C. 424=22 Bom. L. R. 319. A suit against a receiver without leave of Court should be dismissed and not remanded to lower Court for obtaining the necessary leave. 24 I. C. 622. In every case a receiver as such need not be sued but remedy can be

(b) remove any person from the possession or custody of the property ;

obtained by party, by application to Court. 10 I.C. 673=9 M. L. T. 300. There is no statutory provision which requires a party to obtain the leave of a Court to sue a receiver. The rule is based on public policy. 4 P. L. J. 20=47 I. C. 719; 51 I. C. 706. A Court should not refuse leave to sue ordinarily. 4 P. L. J. 20. A decree against a receiver without permission must be set aside. 17 I. C. 916=3 Bur. L. T. 163.

POWERS OF RECEIVER.—Where the receiver was given power to collect outstandings and do all things necessary for the realisation and preservation of the assets of firm, held the receiver had no authority to mortgage the property of the firm. 44 M. L. J. 602=50 Cal. 338=28 C. W. N. 1=1 Rang. 66=50 I. A. 77 (P. C.). A receiver in possession of the estate is entitled to require payment of rent. 58 I. C. 301. In a partition suit in which a receiver is authorised to sell properties there can be no difficulty in directing him to convey the properties. 43 Cal. 124=19 C. W. N. 817. Court may confer on a receiver all such powers for the realization of properties and the execution of the documents as the owner has. (*Ibid.*) Court can confer upon a receiver all such powers as to bringing and defending suits, as the owner himself has. 27 I. C. 459=19 C. W. N. 45. Plaintiff appointed receiver by Court cannot appropriate partnership moneys to his own use. 1025 P.C. 257=92 I.C. 274=23 L.W. 628 (P.C.). On the appointment of a receiver the estate vests in him and thereafter the receiver is the only person competent to prosecute suits and obtain decrees. 11 I. C. 102=15 C. L. J. 339. The general powers of the receiver who can sue and defend a suit with the express permission of the Court do not necessarily contain a power to sue and liability to be sued. 66 P. R. 1913=17 I. C. 751. A receiver appointed in execution can prosecute a cause of action outside the jurisdiction of the Court by which he was appointed receiver. (1921) M. W. N. 106=61 I. C. 753. A receiver appointed to collect outstandings can file suits in that behalf even though the suit in which he was appointed has terminated in a decree or an appeal is pending from that decree. 33 I. C. 69. Receiver's powers are entirely conditioned by terms of his appointment, subject to any subsequent change by the Court under which he holds the appointment. 32 I. C. 207=30 M. L. J. 456. Suit by receiver to recover property sold prior to his appointment. 35 Mad. 578. A receiver appointed by a Court can oust a mortgagee decree-holder put in possession of the lands subsequent to his mortgage decree. 6 P. L. J. 37=61 I. C. 67. O. 40, R. 1 does not permit of the appointment of a receiver in respect of properties not comprised in suit. 17 I. C. 16. Receiver can collect only such assets as become due to the estate after his appointment. Rents falling due prior to his appointment are not such assets. 42 I.C. 785=1917 Pat. 311.

DUTIES OF RECEIVER.—19 B. 660. Delegation of powers to receiver. See 65 I. C. 837=34 C. L. J. 123.

COSTS DUE TO RECEIVER.—19 B. 660; 30 C. 696.

REMEDY AGAINST RECEIVER.—26 M. 492. As to personal liability of receiver, see 1925

Pat. 602.

REMOVAL OF RECEIVER.—19 W. R. 66; 13 M. 330. When a receiver appointed under this rule is replaced by another receiver, the new receiver should be made a party to the proceedings. 28 M. 157. An order removing a receiver is one falling under O. 40, R. 1 (a) as the power of appointment includes also the power of removal and is appealable. 92 I. C. 940=53 Cal. 319=1926 Cal. 593.

APPEAL.—An order refusing to appoint a receiver is open to appeal. 30 I. C. 545=17 Bom L. R. 680. See also 17 Cal. 680; 10 Mad. 179 (F.B.). In such an appeal it is in expedient to go into the merits of the case pending in the lower court. 32 C. 741. An order refusing an application for removal of a receiver cannot be appealed from. 23 C. L. J. 217=20 C. W. N. 789; 24 I. C. 862. See also 40 Cal. 862. A Civil Court cannot appoint a receiver in respect of properties for which a Criminal Court has already appointed a receiver under S. 136, Cr. P. C., unless the Magistrate withdraws the attachment. 40 Cal. 862=17 C. W. N. 1070. A court of appeal will not, except in an extreme case, disturb an order as to the appointment of a receiver by a Court below. 5 Lah L. J. 533=1923 Lah. 623; 1927 Lah. 65. If appointment of receiver is not made on sound judicial lines Appellate Court should interfere. 96 I. C. 30=1926 Cal. 1092. The pronouncement by a Court that a receiver should be appointed without naming a specific person is appealable. 40 Mad. 18=32 M.L.J. 304, 1 P. 625=(1922) Pat. 250; 1 Pat. L. R. 161=4 P. L. T. 210. An order dismissing an objection to the appointment of a receiver of property of which the objector is in possession is appealable. 48 I. C. 133=3 Pat. L. J. 573.

APPEAL TO PRIVY COUNCIL.—R. 13 of O. 45 applies where an application for appointing a receiver is made after leave to appeal to P. C. is granted but the principle for appointing a receiver shall be the same as laid down in O. 40, R. 1. 12 I.C. 198=4 Bur. L. T. 241.

REVIEW.—An *ex parte* order passed under this rule is capable of being reviewed. 21 B. 328. Order appointing receiver is discretionary with the trial Court—Court of review is free to exercise its own discretion. 27 L. W. 333=1928 P. C. 49 (P.C.).

EXECUTION PROCEEDINGS.—O. 40, R. 1 is a general provision relating to appointment of receivers and receiver can be appointed in execution proceedings. 100 I.C. 298=1927 Lah. 190. A creditor is not generally debarred from proceeding to execution by appointment of receiver. 23 C. W. N. 952=29 C.L. J. 424. The fact that a judgment-debtor will be reduced to poverty if his properties are allowed to be sold is no ground for the appointment of a receiver. 28 I. C. 505. Right of a person to receive allowance charged on property is attachable but a receiver cannot be appointed to receive money month by month. 16 C.L.J. 354=17 C.W.N. 662. In execution of a decree against a Ghatwal though the Ghatwali property could not be attached a receiver of the rents and profits cannot be appointed so as to apply them in satisfaction of the decree. 39 Cal. 1010=16 C. W. N. 802.

(c) commit the same to the possession, custody or management of the receiver; and

Payment of Chowkidars, Sardars and Government dues in a Ghatwali estate do not belong to the Ghatwal, while the rents and profits belong to the Ghatwal. 5 P. L. T. 34 = 3 Pat. 339. If a decree is to be executed against him, these can be collected by a receiver appointed therefor. (*Ibid.*) A mere right to maintenance not being liable to attachment and sale, a court has no power to appoint a receiver to receive such maintenance and apply it in satisfaction of the decree. 40 Mad. 302 = 30 M. L. J. 361. When appointment of a receiver is the only way to recover the decretal amount and when the interest of both parties can be safeguarded, the appointment is neither unjust nor inconvenient. 13 I. C. 285 = 11 N. L. R. 113. A receiver can be appointed to receive rents and profits of non-attachable property. (*Ibid.*) Mere convenience on the part of the decree-holder would not justify the appointment of a receiver. 21 I. C. 283 = 16 O. C. 238.

MISCELLANEOUS PROCEEDINGS.—O. 40, R. 1 does not restrict the appointment of a receiver only in the case of suits. S. 141 extends the procedure to all proceedings. 43 C. 986 = 20 C. W. N. 1009.

SPECIAL CASES.—Receivers in partition suits. 36 All. 19 = 11 A. L. J. 973. Practice as to appointment of receiver in a partition suit relating to joint family property. 55 I. C. 827 = 22 Bom. L. R. 217; 1923 Lah. 48; 18 C. L. J. 638 = 22 I. C. 601 = 18 C. W. N. 533.

IN PARTNERSHIP SUIT.—The application of a receiver to take charge of the partnership assets does not transfer the ownership therein from the partners to the receiver. 36 I. C. 980 = 91 P. R. 1917; 12 C. L. J. 368 = 7 I. C. 75. Where a dissolution is inevitable and the partners are on bad terms the usual way of guarding their interests is by appointing a receiver and ordering the goodwill of the business and the stock-in-trade to be sold, the partners being at liberty to bid at the sale. 8 Bur. L. T. 57 = 29 I. C. 684; 45 I. C. 224; 11 S. L. R. 115. Guiding principles for appointment of receiver in partnership suit. 45 I. C. 224 = 11 S. L. R. 115.

IN MORTGAGE SUIT.—While the appeal from the preliminary decree is pending, the Court cannot appoint a receiver in a suit on simple mortgage. 43 I. C. 533. Whether the mortgagee is or is not entitled to possession, he may ask for a receiver, if the demands of justice require that the mortgagor should be deprived of possession. 31 C. L. J. 385 = 47 Cal. 418; 95 I. C. 632 = 1926 Cal. 1006. Mortgage—Floating charge—Appointment of receiver without going into evidence. 46 I. C. 389; 34 I. C. 405 = 23 C. L. J. 440; 17 I. C. 202 = 16 C. W. N. 997. The appointment of a receiver at the instance of a mortgagee will be made as a matter of course if interest payable under the security is in arrears. 17 I. C. 202 = 16 C. W. N. 997. Receiver can be appointed in a mortgage suit for sale, although a receiver has been appointed in a prior partition suit. 16 C. W. N. 126 = 14 C. L. J. 526; 102 I. C. 353 = 1927 Sindh 230 = 29 M. L. J. 457; 14 Bom. 431; 47 Cal. 418. A receiver need not be appointed if the mortgagee has obtained a decree for foreclosure,

and cannot recover even the costs of the litigation from the mortgagors personally. 16 C. W. N. 126 = 12 I. C. 165 = 14 C. L. J. 526. Receiver may be appointed even after sale of the mortgaged properties. 13 C. L. J. 487 = 15 C. W. N. 672; 95 I. C. 632 = 1926 Cal. 1006. Though ordinarily a receiver is not appointed when mortgagee is in possession yet when he is in possession through one of the mortgagors who became insolvent then the Court can appoint a receiver. 32 I. C. 691 = (1915) M. W. N. 864. A mortgagee decree-holder prevented from executing the decree is entitled to have a receiver appointed if the security is not sufficient to discharge the debt and the interest has not been paid. (6 M. L. T. 238, Foll.) Per *Oldfield, J.*, in 26 I. C. 986 = 29 M. L. J. 457; 102 I. C. 353 = 1927 Sindh 230. An order appointing a receiver in execution of a mortgage decree is not binding on a person not a party to the suit, and claiming to be in possession in his right as prior mortgagee. 4 P. L. W. 414 = 45 I. C. 177. Execution of mortgage decree.—Receiver cannot be appointed for other properties not connected in suit. 96 I. C. 194 = 23 L. W. 650 = 1926 Mad. 797.

PRIVATE RECEIVER.—A private receiver deriving his power from the appointment of a mortgagee is almost unknown to the Indian people. 40 I. C. 865.

POSSESSORY SUITS.—A *bona fide* possessor of property should not be superseded by a receiver except on equitable grounds. 21 M. L. J. 821 = 11 I. C. 870. The provisions of O. 40, R. 1 refer to the case of the removal of a person other than a party to the suit and the Court is not debarred from removing one of the parties from possession of the property. (18 C. W. N. 537; 24 M. L. J. 658, foll.) 1922 Lah. 444; 61 I. C. 605 = 12 L. W. 254. The words "any person" in O. 40, R. 1 (2) are not confined to persons who are not parties to the suit. A tenant could not be ousted to be replaced by a receiver in an interlocutory order. 61 I. C. 605 = 12 L. W. 254. The possession of the receiver although in a sense the possession of the Court is also the possession of all the parties to the suit according to their title. 49 I. C. 89 = 8 L. W. 551. Property in possession of persons with paramount title—Their rights not affected by appointment of receiver. 1927 Pat. 397 = 104 I. C. 295 = 8 Pat. L. T. 717. During the continuance of the receivership it is incompetent for the receiver to set up a title in himself adverse to that of the parties. (*Ibid.*) Even if the receiver is discharged he would still hold the property on behalf of the rightful owner. (*Ibid.*) The possession of the Court through its receiver does not suspend the operation of adverse possession, if the successful party is holding it by adverse possession. 21 M. L. T. 62 = 5 L. W. 690 = 40 I. C. 50 = 32 M. L. J. 85. A property not forming part of the pending litigation cannot be made over to a receiver appointed by the Court without jurisdiction. 5 P. L. J. 513 = 1 P. L. T. 653 = 58 I. C. 405 = 1920 Pat. 231. Where a person refuses to deliver possession to a receiver appointed by the Court appeal lies under O. 43, R. 1. 48 I. C. 779.

(d) confer upon the receiver all such powers, as to bringing and defending suits and for the realization, management, protection, preservation and improvement of the property, the collection of the rents and profits thereof, the application and disposal of such rents and profits, and the execution of documents as the owner himself has, or such of those powers as the Court thinks fit.

(2) Nothing in this rule shall authorize the Court to remove from the possession or custody of property any person whom any party to the suit has not a present right so to remove.

2. [Cf. S. 503, cl. (d).] The Court may by general or special order fix the amount to be paid as remuneration for the services of the receiver.

3. [S. 503, para. 2.] Every receiver so appointed shall—

(a) furnish such security (if any) as the Court thinks fit, duly to account for what he shall receive in respect of the property ;

(b) submit his accounts at such periods and in such form as the Court directs ;

(c) pay the amount due from him as the Court directs ; and

(d) be responsible for any loss occasioned to the property by his wilful default or gross negligence.

Enforcement of receiver's duties.

4. Where a receiver—

SCHEME SUIT.—O. 40, R. 1 (2) is intended to protect third persons and not parties to the suit and does not debar the Court from appointing a receiver in a scheme suit. 20 I. C. 767=24 M. L. J. 658 ; 41 M.L.J. 545=(1923) M.W.N. 75=16 L. W. 927=1923 Mad. 224.

TRUST PROPERTY.—As a trust property cannot be sold in execution of a decree against the trustee, the only method by which a judgment-debtor may be compelled to satisfy the claim of the execution creditor is by the appointment of a receiver. 57 I. C. 70=30 C. L. J. 231.

PROCEEDINGS UNDER TRUST ACT.—Receiver cannot be appointed in proceedings under S. 74 of the Trust Act. 1927 Sindh 237=103 I. C. 816 ; where the income of the mutt was not sufficient both to meet the expenses and to pay off debts contracted by its head, or receiver was directed to be appointed. 54 I. A. 228=50 Mad. 497=(1927) M. W. N. 507=26 L. W. 829=53 M. L. J. 196=1927 P.C. 131=101 I.C. 545 (P. C.).

PROCEEDINGS UNDER GUARDIANS AND WARDS ACT.—O. 40, R. 1 has no application to a petition under the Guardians and Wards Act. 36 Bom. 20=11 I. C. 554=13 Bom. L. R. 487.

O. 40, R. 2.—An order increasing remuneration to be paid to a receiver, is an order made under O. 40, R. 2 and not under cl. (d) of R. 1 and is not appealable, 22 I.C. 352. Remuneration must not exceed the income of the estate realised by receiver. 91 I. C. 54=1925 Nag. 462.

O. 40, R. 3.—Security not furnished by plaintiff receiver.—Suit if may be dismissed on that ground. 46 Cal. 70=22 C. W. N. 520. The liability of a surety for a receiver. 28 I. C. 31=20 C. L. J. 123. The surety is liable for the payment of interest on balances improperly retained by him as also costs of proceedings. (Ibid.) When the surety satisfies the claim of the plaintiff he will be entitled to stand in place of the receiver to the extent of the payment made by him and to reimburse himself from the sums to be paid to the receiver without derogation of his right to sue him. (Ibid.)

LIABILITY OF RECEIVER.—The receiver

advanced to an infant more than the amount sanctioned and it was not shown that it was applied for his benefit. *Held*, that a receipt by the infant for the amount was no valid discharge to the receiver. 28 I. C. 25=20 C. L. J. 113. A bribe to the Police officer to release the minor is unauthorised and the receiver cannot claim the amount against the payee. (Ibid.) The receiver is bound to furnish details of litigation expenses and he is not entitled to the salary of officers appointed without leave of Court. (Ibid.) A succeeding receiver cannot sue a former receiver for recovering funds which he should have realized and accounted for. 24 I. C. 768=41 Cal. 92. The receiver must keep his accounts and vouchers ready for examination at any time. At the time of adjustment of accounts the receiver and other interested parties have a right to be heard. 12 I. C. 780=14 C. L. J. 445. A receiver will not be permitted without Court's sanction to incur expenditure seriously diminishing the funds entrusted to him. If a receiver proves that a transaction made by him is beneficial to the parties interested, he must be allowed credit for such transaction. (Ibid.) A receiver should be allowed fees for legal assistance though not previously sanctioned by the Court. (Ibid.) The fees will not be allowed where no legal skill is required. (Ibid.) Receiver's account filed and vouched before an examiner can be re-opened on the discovery of errors though a Judge's certificate is attached, and the receiver may be surcharged though he has been discharged. (Ibid.) Accounts—Meine profits—Expenses of litigation when allowed. 22 M. L. J. 253=14 I. C. 396. If the receiver had failed to realize rents by taking proper proceedings he will not be exempt from liability. (Ibid.) Mistaken proceedings though taken in good faith will not absolve the receiver from liability for rent. (Ibid.) Court which has to pass receiver's accounts. 4 P. L. J. 636=54 I. C. 207.

O. 40, R. 4.—An order passing a receiver's account is one under O. 40, R. 4 and is appealable. 45 Bom. 99=22 Bom. L. R. 1126. Appeal from

(a) fails to submit his accounts at such periods and in such form as the Court directs, or

(b) fails to pay the amount due from him as the Court directs, or

(c) occasions loss to the property by his wilful default or gross negligence,

the Court may direct his property to be attached and may sell such property and may apply the proceeds to make good any amount found to be due from him or any loss occasioned by him, and shall pay the balance (if any) to the receiver.

5. [S. 504.] Where the property is land paying revenue to the Government, or land of which the revenue has been assigned or redeemed,

When Collector may be appointed receiver,

and the Court considers that the interests of those concerned will be promoted by the management of the Collector,

the Court may, with the consent of the Collector, appoint him to be receiver of such property.

ORDER XLI.

APPEALS FROM ORIGINAL DECREES.

1. [S. 541.] (1) Every appeal shall be preferred in the form of a memorandum signed by the appellant or his pleader and presented to the Court or to such officer as it appoints in this behalf.

Form of appeal.

What to accompany memorandum.

The memorandum shall be accompanied by a copy of the decree appealed from and (unless the Appellate Court dispenses therewith) of the judgment on which it is founded.

order for accounts is not competent 1924 Nag. 53. Order directing the receiver to pay money in Court is not appealable. (1921) M. W. N. 806 = 1922 Mad. 234. Receiver ordered to pay damages—If appealable. 92 I. C. 631 = 1925 Rang. 266. The proper procedure to bring to sale the properties of a deceased receiver in the hand of his legal representatives is by way of execution and not by a separate suit. 39 Mad. 584 = 30 I. C. 383. "Property" is synonymous with estate and covers income from the property. Cl. (c) applies to the case of misappropriation also. A receiver is not liable to account for any period other than that for which he is appointed. 5 Pat. L. J. 97 = 55 I. C. 15. A receiver who has given up possession of the estate must institute a separate suit for recovery of sums due to him in respect of salary, allowances, etc. (17 C. W. N. 16, Ref.); 4 P. L. J. 636 = 54 I. C. 207. An order declaring a receiver liable in respect of a sum of money is not appealable unless it is accompanied by order of attachment under O. 40, R. 4. (*Ibid.*) Procedure to be adopted in passing receiver's accounts. See 43 M. L. J. 707 = 16 L. W. 754; 100 I. C. 996 = 6 Bur. L. J. 15.

O. 41, R. 1. APPLICABILITY.—O. 41 has no application to appeals from the original side of a High Court. 48 Mad. 631 = 48 M. L. J. 384. O. 41 applies to an appeal under S. 476-B, Cr. P. C., against an order of civil court. 54 Cal. 355 = 100 I. C. 351 = 31 C. W. N. 281 = 1927 Cal. 284. O. 41 applicable to Letters Patent—Appeals. 40 M. L. J. 190 = 49 M. 291; 48 I. A. 76.

RIGHT OF APPEAL.—An order refusing to appoint a receiver during the pendency of a suit is appealable. 33 I. C. 735.

WHO CAN APPEAL.—Right of appeal is only to an aggrieved party. 45 I. C. 181 = 82 P. L. R. 1918.

WHO CANNOT APPEAL.—A party cannot appeal from a decree in his favour merely because of an adverse finding on an unnecessary issue. 120 P. L. R. 1911 = 9 I. C. 1030. An unconditional adoption and enjoyment of benefits under

an order bars the right of appeal. 37 I. C. 804 = 21 C. W. N. 232.

SEPARATE APPEALS.—If there are two distinct orders in two separate execution proceedings, there cannot be a joint appeal in respect of both. 24 I. C. 438. This is so even though they were decided in one judgment. 10 I. C. 415 = 15 C. W. N. 994. If two separate cases are decided in one judgment, two separate appeals should be filed. 56 I. C. 69 = 1 Lah. 368; 3 P. L. J. 96 = 44 I. C. 418; 96 I. C. 336.

PLEADER CAN FILE.—Presentation of appeal by a pleader not duly authorised is invalid. 62 I. C. 259. But a pleader with a power of attorney to present the same, can validly present it. 7 Lah. L. J. 29 = 86 I. C. 207. A presentation by vakil whose vakalat is not signed by the party at the time but the defect is subsequently rectified is valid. 21 I. C. 444 = 11 A. L. J. 779. A memorandum of appeal presented only by one of two vakils, who alone has accepted a joint vakalat, is validly presented. 16 M. 285. Vakalat not filled up—Presentation is not proper. 1926 All. 252 = 91 I. C. 865.

NECESSARY CONDITIONS OF A VALID FILING.—An appeal is barred if the vakalatnama is filed after limitation time. 11 I. C. 387 = 13 C. L. J. 544. An appeal by a legal representative without being recorded as such is not maintainable. 45 I. C. 541 = 16 A. L. J. 394.

SIGNING BY APPELLANT.—Memo. of appeal should be signed by the appellant or his agent. 83 I. C. 543 (1) = 1023 Lah. 484.

MEMO. OF APPEAL TO BE IN ENGLISH.—Even if an accompanying document is in the vernacular. 2 Lah. L. J. 507 = 55 I. C. 24. An appeal is preferred only when a copy of the decree is filed. Without it, it will be rejected as not validly presented. 16 A. 77; 30 I. C. 165 = 42 Cal. 433; 27 I. C. 447; 4 Lah. L. J. 193 = 1922 Lah. 191; 54 I. C. 36; 53 I. C. 137; 10 I. C. 866 = 7 N. L. R. 67; 1925 Nag. 52; 96 I. C. 336. There is no proper presentation without a copy of the

[Madras] (1) Add the following sentence to sub-rule (1) of R. 1 of O. 41 :—

"The copy of the judgment shall be a printed copy in every case in which the High Court has prescribed that the judgment shall be printed when a copy is applied for the purpose of appeal."

(2) Add the following as a proviso to sub-rule (1) of R. 1 of O. 41 :—

"Provided that in appeals from decrees or orders under any special or local Act to which the provisions of Parts II and III of the Limitation Act (IX of 1908) do not apply and in which certified copies of such decrees or orders have not been granted within the time prescribed for preferring an appeal, the Appellate Court may admit the Memorandum of Appeal subject to the production of the copy of the decree or order appealed from within such time as may be fixed by the court"

(2) The memorandum shall set forth, concisely and under distinct heads, the grounds of objection to the decree appealed from without

Contents of memorandum. any argument or narrative; and such grounds shall be numbered consecutively.

[Madras] (1) Add the following sentence to sub-rule (2) of R. 1 of O. 41 :—

"The memorandum shall also contain a statement of the valuation of the appeal for the purposes of the Court-fees Act."

(2) Add the following as sub-rule (3) of R. 1 of O. 41 :—

"(3) When an appeal is presented after the period of limitation prescribed therefor, it shall be accompanied by a petition supported by affidavit setting forth the facts on which the appellant relies to satisfy the Court that he had sufficient cause for not preferring the appeal within such period, and the Court shall not proceed to deal with the appeal in any way (otherwise than by

decree even when there is no decree in existence. 69 I.C. 895=1922 Lah. 170. When after filing an appeal a decree is amended and the amended copy is permitted to be attached to the appeal, the appeal becomes an appeal on the amended decree. 43 I.C. 772. An appeal from an amended decree must be accompanied by a copy of that decree and not the original decree. 11 I.C. 8. The non-filing of an award which is both judgment and decree along with a memorandum of appeal is fatal to the appeal. 7 Lah. 539=1927 Lah. 49=97 I.C. 187. Appeal from award under Land Acquisition Act—Copy of the award to be filed 94 I.C. 145=1925 Lah. 4183. Copy of decree in cross appeal not necessary. 95 I.C. 256=1926 Lah. 540=27 Punj. L. R. 745.

WHEN ORDER NOT DRAWN UP.—Copies of both order and judgment are to be filed unless the formal order had not been drawn up, in which case a copy of the judgment alone will do. 1924 All. 162; 17 I.C. 119=16 C. L. J. 133; 14 I.C. 1006=15 C. L. J. 498. But see *contra* in 1924 Lah. 352. The proper course is to adjourn the appeal till a copy of decree is obtained. 1924 Lah. 352; 49 I.C. 573=19 P.R. 1919. In a miscellaneous appeal a copy of the decree cannot be dispensed with. 40 All. 12=15 A. L. J. 801. Failure to file copy of order, which was a precise copy of the operative part of the judgment, matters little and will not affect the appeal. 21 A. L. J. 452=1923 All. 579. Copy of interim order on preliminary issues need not be filed. 103 I.C. 224=1927 Lah. 629. Filing a vernacular translation of the decree is invalid. 4 Lah. L. J. 381; 2 Lah. L. J. 728. A copy of the judgment too is necessary. If its filing after limitation is not duly explained, the appeal may be dismissed. 67 I.C. 670=3 Lah. L. J. 255; 63 I.C. 30=2 Lah. 227; 67 P.R. 1917=41 I.C. 918; 25 I.C. 28. Though an appeal is filed without a copy of the judgment, when notice is issued, it amounts to dispensing with the necessity of filing the same. 90 I.C. 135. Where several persons appeal from the same judgment, a copy of judgment should be filed with each memo.; but where one appellant files more than one appeal, he may file a copy with one of the many memos. of appeal. 1 P. 670=4 P. L. T.

290; 6 Lah. 218. Two judgments one on preliminary issue and the other on other issues, both must be filed. 9 L. L. J. 502. Defective memo. admitted—Objection to memo. at a later stage is barred. 1927 Lah. 451; see also 104 I.C. 545=1927 Lah. 449.

SECOND APPEALS.—Memorandum of appeal must be accompanied by a copy of the decree appealed against even in second appeals. 15 A. 123 (127). The provisions of this rule are imperative and presentation of memo. of second appeal without a copy of decree appealed against is invalid. But delay can be excused. An *ex parte* order excusing delay can be attacked by respondent. 44 M.L.J. 279=17 L. W. 352. When two decrees are passed in two appeals from the same decree, both of them should be filed in the second appeal. 3 Lah. 215=1922 Lah. 390. See also 33 I.C. 742=84 P. R. 1916. Memo. of appeal not accompanied by copies of judgments of lower courts such copies being on record of another appeal by opposite party is no good reason for dispensing with such copies. 104 I.C. 290 (1). A second appeal filed with a copy of the decree of the lower appellate court but not with the grounds of appeal in first court is a valid presentment. 80 P. R. 1918=48 I.C. 102. In a second appeal, a copy of the trial court's judgment need not be filed. 74 I.C. 330=(1923) Pat. 19. Omission to file judgment of first court with memorandum of appeal is fatal. 97 I.C. 80 (2)=1926 Lah. 638 (1)=8 Lah. L. J. 361; see also 1927 Lah. 423 (2)=101 I.C. 776. Presentation of appeal with unattested copy of judgment—Proper when attested copy is not available. 94 I.C. 2=1926 Lah. 404. Non-filing copy of interlocutory order of the Court below referred to in the judgment when filing second appeal, does not affect validity of presentation. 4 Lah. L. J. 20=1922 Lah. 93.

GROUND OF APPEAL.—In every appeal, the appellant must show some reason why the judgment should be disturbed. 17 N. L. R. 72=63 I.C. 808=25 C. W. N. 866 (P.C.).

RESTORATION.—The court has inherent power to restore to file an appeal dismissed for default, even though pleader could not adduce sufficient cause for default. 15 C. L. J. 334=39 C. 34.

dismissing it either under rule 11 of this order or on the ground that it is not satisfied as to the sufficiency of the reasons for extending the period of limitation) until notice has been given to the respondent and his objections, if any, to the Court acting under the provisions of section 5 of Act IX of 1908 have been heard."

[Bangoon] To O. 41, R. 1. the following shall be added as sub-rule (3) :—

"(3) The appellant shall present along with the petition of appeal, as many copies on plain paper of the grounds of appeal as there are respondents."

2. [S. 542.] The appellant shall not, except by leave of the Court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal; but the Appellate Court, in deciding the appeal, shall not be confined to the grounds of objection set forth in the memorandum of appeal or taken by leave of the Court under this rule :

Provided that the Court shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of contesting the case on that ground.

3. [S. 543.] (1) Where the memorandum of appeal is not drawn up in the manner hereinbefore prescribed, it may be rejected, or be returned to the appellant for the purpose of being amended within a time to be fixed by the Court or be amended then and there.

[Allahabad and Oudh] Substitute the following for R. 3 (1)—

"3. (1) Where the memorandum of appeal is not drawn up in the manner hereinbefore prescribed or accompanied by the copies mentioned in rule 1 (1), it may be rejected, or where the memorandum of appeal is not drawn up, in the manner prescribed, it may be returned to the appellant for the purposes of being amended within a time to be fixed by the Court or be amended then and there.

(2) Where the Court rejects any memorandum, it shall record the reasons for such rejection.

(3) Where a memorandum of appeal is amended, the Judge, or such officer as he appoints in this behalf, shall sign or initial the amendment.

[Bombay] After rule 3 of O. 41, the following rule shall be inserted, namely :—

"3-A. Where an appellant applies for delay to be excused, notice to show cause shall at once be issued to the respondent and the matter shall be finally decided before notice is issued to the Court from whose decree the appeal is preferred under rule 13.

In sub-rule (2) of rule 3 of Order 41, after the words "to show cause why the said certificate should not be granted" the following words shall be inserted, namely :—"unless it thinks fit to refuse the certificate."

O. 41, R. 2. TIME AND PLACE OF RECEIPT.—Appeal can be received by judge at his residence and out of court hours. 34 All. 482 = 9 A. L. J. 743. Plea not raised in trial court cannot be raised in appeal. 19 I. C. 48 = 6 Bur. L. T. 53; 68 I. C. 227 = 3 Lah. L. J. 392. A new case cannot be raised. 167 P. W. R. 1912 = 17 I. C. 247 = 190 P. L. R. 1912. Grounds not raised in memo. of appeal cannot be urged. 54 I. C. 531; 70 I. C. 653 = (1922) M. W. N. 481 = 1923 Mad. 11; especially, long after the period of limitation for filing appeal. 30 I. C. 22 = 7 P. R. 1916. Ground of attack raised in plaint and not in the memo. of appeal will not be allowed to be raised, being deemed to have been abandoned. 17 I. C. 247 = 217 P. L. R. 1912. In appeal new grounds can be traversed with permission of court, though not specified in the grounds of appeal. 57 P. L. R. 1916 = 20 I. C. 817. As to when courts will prevent it, see 57 I. C. 800 = 11 L. W. 611.

FILING OF ADDITIONAL GROUNDS.—Additional grounds should not be allowed to be filed

at a late stage. 49 P. R. 1914 = 25 I. C. 443. Where alternative grounds of appeal are raised an appellate Court is not debarred from going into questions which are admitted for the purpose of an alternative argument. 84 I. C. 1039; 5 Lah. L. J. 117. Plea of *res judicata* can be raised for first time in second appeal at its hearing though not in the memo. of appeal. 22 I. C. 12. A plaintiff accepting decision and not appealing cannot question in second appeal by means of cross-objections. 61 I. C. 48 = 19 A. L. J. 155.

O. 41, R. 3.—No duty on court to add proper parties when the appellant neglects. 18 I. C. 37 = 59 P. R. 1913. Wrong naming of respondent due to clerical error can be rectified and the mistake is not fatal. 21 C. W. N. 774 = 27 C. L. J. 129. Where an appeal is preferred against a dead person legal representatives cannot be added after limitation period. 21 I. C. 306. Rejection on account of limitation does not come under this rule but under R. 11. It amounts to a dismissal and is appealable. 60 I. C. 493.

4. [S. 544.] Where there are more plaintiffs or more defendants than one in a suit, and the decree appealed from proceeds on any ground common to all the plaintiffs or to all the defendants, any one of the plaintiffs or of the defendants may appeal from the whole decree, and thereupon the Appellate Court may reverse or vary the decree in favour of all the plaintiffs or defendants, as the case may be.

Stay of proceedings and of execution.

5. [S. 545.] (1) An appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the Appellate Court may order, nor shall execution of a decree be

Stay by appellate Court.

O. 41, R. 4. OBJECT AND SCOPE.—This rule gives the court ample powers to make appropriate order in the interests of justice. 30 C. L. J. 417 = 24 C. W. N. 110. Scope of, *see* 100 I. C. 346 = 1927 All. 311. Object of this rule enunciated in 20 I. C. 952 = 25 M. L. J. 248. One plaintiff may appeal for the benefit of other plaintiffs only if the co-plaintiffs are made parties to appeal. 106 I. C. 113 = 1928 Lah. 43 (1923 All. 211; 1924 A. 873; 53 I. C. 543, Rel. on). This rule prevents two contrary decisions in the same suit. 35 I. C. 547 = 1 P. L. J. 143. This rule confines itself to the case of appellants—Relief cannot be given against a person not impleaded as a respondent. 90 I. C. 986 = 30 C. W. N. 45. For the distinction between this rule and R. 33, *see* 30 I. C. 868 = 22 C. L. J. 61; *also* 42 Cal. 451 = 19 C. W. N. 233; 24 I. C. 924 = 1 L. W. 376. Appeal by some of the parties—Power of court to grant relief in its entirety. 99 I. C. 1041. *See also* 1927 Pat. 103 = 98 I. C. 846 = 8 Pat. L. T. 316; 106 I. C. 875 (2). The discretion exercised will not be interfered with in second appeal. 88 I. C. 535 = 1926 All. 64. Under this rule it is enough if the decree proceeds on any ground common to all the parties. Every ground need not be common. 42 Cal. 451 = 19 C. W. N. 233; 63 I. C. 973 = 13 Bur. L. T. 163. This rule applies where the interests of the appealing party are inseparable from those of the non-appealing parties. But where they are separable the case is different and the rule has no application. 44 I. C. 762 = 3 P. L. J. 166. This rule does not apply where there is no common ground of appeal. 40 I. C. 184 = 35 P. W. R. 1917; 8 L. L. J. 132 = 1926 Lah. 303 = 94 I. C. 557 (1). This rule does not apply to parties not appealing and who are made *pro forma* respondents. They cannot be heard supporting the appeal. 34 I. C. 714 (F. B.). Except under this rule no relief in respect of persons not parties to the appeal can be given. 44 I. C. 430. Under no provision of law can an appellate court interfere with a decree in a suit not appealed from. 53 I. C. 883 = 116 P. R. 1919; 1 L. W. 169 = 23 I. C. 620; 15 I. C. 409; 35 I. C. 547 = 1 P. L. J. 166; 84 I. C. 68 = 1925 Cal. 23. In an appeal by one unsuccessful defendant relief can be given to the non-appealing defendants as well, provided their defence was also the same. 40 Mad. 846 = 41 I. C. 546; 23 C. W. N. 372; 31 I. C. 886; 60 I. C. 460; 31 C. L. J. 75 = 24 C. W. N. 463. This is left to the discretion of court. 36 All. 510 = 24 I. C. 439 = 12 A. L. J. 883. But *see contra* 2 P. L. R. 1912 = 12 I. C. 605. Even in favour of a non-appealing heir of a deceased defendant. 35 I. C. 743 = 3 O. L. J. 279. Where one of two appellants died before hearing of appeal and the fact was not known

to counsel or court, a decree passed in favour of both is valid and the legal representative of the deceased appellant can be brought on record at the time of passing a final decree. 22 L. W. 142 = 48 M. L. J. 601 = 1925 M. 235.

WHERE RELIEF IN FAVOUR OF NON-APPEARING PARTY CANNOT BE GIVEN.—Where one of several joint plaintiffs appeals, the others must be made parties. 45 A. 286 = 21 A. L. J. 91; *also* 53 I. C. 548. But *see contra* 23 I. C. 91 = 63 P. R. 1914. Where a person is a necessary party to the suit, he is a necessary party to the appeal as well. Not bringing him as a party to the appeal, will entail a dismissal of the appeal. 3 P. L. T. 456 = 66 I. C. 780. When relief against non-appealing defendants have been granted in the first appeal, they form necessary parties to the second appeal. 22 I. C. 90 = 18 C. L. J. 621. Not bringing on record the legal representatives of deceased co-defendant, during pendency of appeal, only abates the appeal so far as the deceased alone is concerned and does not affect the appeal as a whole. 90 I. C. 986 = 30 C. W. N. 45; 10 I. C. 27; 26 I. C. 486 = 88 P. R. 1914. But *see* 70 I. C. 168 = 16 L. W. 330 = 1923 Mad. 58. Where in a suit against two defendants one of whom remained *ex parte* and a joint decree against both was passed, and the contesting defendant alone appealed, the whole suit cannot be dismissed even as against the *ex parte* non-appealing defendant. 24 I. C. 924 = 1 L. W. 376. But relief against non-appealing defendants as well cannot be given when the appeal is not on the entire decree, but only so far as it affects the appealing defendant. 63 I. C. 95. Where relief is claimed alternatively against A and B and decreed against B, in the appeal by B, cross-objections against A need not be raised. The rights can be settled by the Court. 42 I. C. 548.

O. 41, R. 5.—The policy underlying the rule, *see* 38 Cal. 754 = 15 C. W. N. 475.

SCOPE OF.—*See* 37 I. C. 752; 99 I. C. 763 (1.. The Registrar of Patna High Court has power to receive and dispose of applications for stay of execution proceedings. 59 I. C. 883 = 2 Pat. L. T. 70. In cases where the C. P. Code does not apply, the High Court has inherent jurisdiction as a Court of appeal to stay proceedings in a lower Court. 4 Pat. L. J. 371 = 52 I. C. 185. The High Court can suspend imprisonment under Sec. 43 of the Prov. Insl. Act, till the disposal of the appeal from the sentence. 44 Bom. 673 = 22 Bom. L. R. 322. Interim order if stay of execution by Appellate Court—Receipt of order by lower Court—Anything done in contravention of the order cannot become good by reason of the order of stay being ultimately vacated. 99 I. C. 989 = 1927 Mad. 450. But

stayed by reason only of an appeal having been preferred from the decree; but the Appellate Court may for sufficient cause order stay of execution of such decree.

(2) Where an application is made for stay of execution of an appealable decree

Stay by Court which passed the decree.

before the expiration of the time allowed for appealing therefrom, the Court which passed the decree may on sufficient cause being shown order the execution to be

stayed.

(3) No order for stay of execution shall be made under sub-rule (1) or sub-rule (2) unless the Court making it is satisfied—

(a) that substantial loss may result to the party applying for stay of execution unless the order is made;

(b) that the application has been made without unreasonable delay; and

(c) that security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him.

it is best to stay all further proceedings in suit until disposal of appeal from preliminary decree. 107 I. C. 486.

Proviso (c).—What is required is a mortgage bond, which, if property mortgaged exceeds Rs. 100 in value, must be registered. 84 I. C. 302=1925 Rang. 5. Proviso (c) does not contemplate a decree or order in a separate proceeding in future by the decree-holder. 22 M.L.J. 190=12 I. C. 692. Mere presentation of appeal or presentation followed by dismissal does not in any way affect the operation of the original decree. 46 Cal. 770=36 M. L. J. 557=23 C. W. N. 721=50 I. C. 444 (P. C.); also 63 I. C. 799.

POWERS OF TRIAL COURT.—An appeal having been filed the trial Court cannot oust the decree-holder who has been put in possession in execution and put the judgment-debtor in possession. 35 All. 119=17 I. C. 728. An appellant can before filing an appeal obtain an order for stay from the trial Court. 33 I. C. 685=23 C. L. J. 310.

FORUM.—An application for stay should be made in the executing Court though an appeal be pending. 11 I. C. 22. When stay of a decree on the original side pending an intended appeal is to be applied for in the original side, it should be made to the Judge who decided the case. 25 C. W. N. 928=48 C. 796. It is left to the discretion of the appellate Court to stay execution. An order passed by an appellate Court should not ordinarily be disturbed, unless it was passed without jurisdiction or with material irregularity or would occasion substantial loss. 1922 Lah. 185.

WHEN STAY CAN BE ORDERED.—Stay ought to be granted in appeal when the decree-holders have sufficient security in the property itself remaining under attachment. 75 I. C. 791=1923 Lah. 445 (2). Stay can be granted only on furnishing security. But no security is necessary, when the decree itself is secured on the property. 2 Lah. L. J. 330. Stay should be granted when the appellant could not recover properties sold in the event of his succeeding in the appeal. 15 I. C. 876=94 P. W. R. 1912. When execution is being taken for costs fixed, but the respondent is insolvent, the proper order is to grant stay on payment of costs to the respondent's pleaders on the latter's undertaking to return it if the appellant succeeds in the appeal. 16 L. W. 975=70 I. C. 784=1923 M. 229 (2). See also 4 P. L. J. 642=54 I. C. 222 (stay in case of directions given to receiver by lower Court). What constitutes

'substantial loss' within the meaning of O. 41, R. 5, cl. (3), see 1927 Lah. 169=99 I. C. 767.

WHEN STAY CANNOT BE GRANTED.—With out an appeal on the decree on file a stay order is *ultra vires* and a nullity. 43 All. 513=19 A.L. J. 462: 43 All. 198=18 A. L. J. 1121. Stay cannot be granted by lower Court when no execution application is pending. 63 I. C. 897=58 I. C. 302. Stay of execution to be granted in an appeal from a pre-emption decree. 9 Lah. L. J. 130=1927 Lah. 169=99 I. C. 767. A bare statement that the appellant will suffer substantial loss is not a sufficient ground for granting stay. 61 I. C. 77=2 Lah. 61. Stay cannot be granted on the ground that a claim by a prior mortgagee is pending. Only amount sufficient to satisfy claim should be retained out of the sale proceeds. 60 I. C. 378=57 P.W.R. 1920. On a mere vague speculation stay cannot be granted; failing to furnish security required, cannot give benefit of stay; stay after execution of decree cannot be granted. 58 I. C. 442. A decree for possession should not be stayed unless the three conditions of sub-rule (3) are satisfied. The crucial test is whether substantial loss will result if stay is not granted. 61 I. C. 827. Annoyance of feelings is not a sufficient ground for granting stay. 17 I. C. 219=23 M.L. J. 316. Stay of proceedings for taking accounts will not be allowed, unless irreparable injury will otherwise be caused. 61 I. C. 9. When an appeal against an order refusing to set aside an *ex parte* decree is pending the appellate Court has no power to stay execution, though the lower Court may. 33 I. C. 443. Sufficiency of security must be enquired into by the executing Court when High Court allowed execution on furnishing security. 44 I. C. 156=22 C. W. N. 657. Where after a decree for redemption the mortgagor deposited the decree amount and prayed for possession in execution, the deposit is a sufficient security for mesne profits in case the decree is reversed on appeal, and no additional security need be furnished. 11 M. L. T. 248=15 I. C. 383.

WHEN STAY ORDER TAKES EFFECT.—Stay order takes effect only after communication. So an attachment order by lower Court after passing of the stay order by the appellate Court, but before the communication is received, is valid. 33 M.L.J. 515=41 M. 151 (F.B.). But see 96 I. C. 137=1926 All. 457. But knowledge of the fact of stay order passed by appellate Court is sufficient to stop execution by lower Court, though the

(4) Notwithstanding anything contained in sub-rule (3), the Court may make an *ex parte* order for stay of execution pending the hearing of the application.

6. [S. 546.] (1) Where an order is made for the execution of a decree from which an appeal is pending, the Court which passed the decree shall, on sufficient cause being shown by the appellant, require security to be taken for the restitution of any property which may be or has been taken in execution of the decree or for the payment of the value of such property and for the due performance of the decree or order of the Appellate Court, or the Appellate Court may for like cause direct the Court which passed the decree to take such security.

Security in case of order for execution of decree appealed from.

(2) Where an order has been made for the sale of immoveable property in execution of a decree, and an appeal is pending from such decree, the sale shall, on the application of the judgment-debtor to the Court which made the order, be stayed on such terms as to giving security or otherwise as the Court thinks fit until the appeal is disposed of.

7. [S. 547.] No such security as is mentioned in rules 5 and 6 shall be required from the Secretary of State for India in Council or, where the Government has undertaken the defence of the suit, from any public officer sued in respect of an act alleged to be done by him in his official capacity.

No security to be required from the Government or a public officer in certain cases.

8. The powers conferred by rules 5 and 6 shall be exercisable where an appeal may be or has been preferred not from the decree but from an order made in execution of such decree.

Exercise of powers in appeal from order made in execution of decree.

Procedure on admission of appeal.

9. [S. 548.] (1) Where a memorandum of appeal is admitted, the Appellate Court or the proper officer of that Court shall endorse thereon the date of presentation, and shall register the appeal in a book to be kept for the purpose.

Registry of memorandum of appeal.

official communication had not been received. 38 Mad. 766=26 M. L. J. 275. An *ad interim* stay order operates from the time of its pronouncement and not when it is communicated. 41 I. C. 752=53 P. W. R. 1917; 96 I. C. 137=1926 All. 457.

SALE IN CONTRAVENTION OF STAY ORDER.—A sale held between the time when an *ex parte* order for stay was passed and the time when the order was set aside, is not void. 43 I. C. 656 (1)=16 A. L. J. 46. Interim stay of sale ordered by appellate court—Sale held in ignorance of order—Sale not a nullity. 1927 All. 401=102 I. C. 665=25 A. L. J. 530 (F. B.)=50 A. 41.

REALISATION OF SECURITY.—When immoveable property is given as security, it can be realised by execution and no need for a separate suit for its realisation. 41 Mad. 327=34 M. L. J. 84.

APPEAL.—No appeal lies from an interlocutory order for furnishing security. 75 I. C. 793=1923 Lah. 446; or from order accepting security as sufficient. 3 Rang. 255=1925 Rang. 225.

O. 41, R. 6. SCOPE.—The inherent powers given to Appellate Courts under R. 5 regarding stay of execution are not restricted or cut down by the special and emergent powers given to executing Courts under sub-rule (2). 41 Mad. 813=34 M. L. J. 470 (dissenting from 17 I. C. 763=23 M. L. J. 677).

Sub-rule (3). OBLIGATORY.—When an appeal is pending the executing Court to stay the sale, though the Court can make it a condition

of the order that the decree amount should be deposited in cash. 9 I. C. 323=15 C. W. N. 432. But such an order is against the spirit of the rule. 1925 Lah. 69.

APPLICABILITY.—This rule applies only to cases where the appeal is against the decree which is to be executed. So it has no application in case where an appeal is preferred on a decree in claim suit. In this case the remedy is an injunction under O. 39. 4 Lah. L. J. 188=1922 Lah. 58. Where after a decree in High Court in appeal, there was an appeal to the Privy Council, the proper Court which could demand security from the decree-holder who had taken possession is not the trial Court under this rule, but the High Court has to be moved under R. 13. 3 Rang. 158=4 Bur. L. J. 50. A surety under this rule is not discharged on the death of the judgment-debtor. 32 I. C. 807. No arrangement between the decree-holder and surety can bind the judgment-debtor's interest on reversal of decree. 32 I. C. 807. An order under O. 41, R. 6 directing stay of sale of immoveable property does not bar the decree-holder from proceeding against the moveables of the judgment-debtor. 93 I. C. 897 (2)=1926 Lah. 463.

REVISION.—An order for security to stay sale pending appeal passed without enquiry as to value can be set aside in revision. 6 Lah. L. J. 510=1925 Lah. 256.

APPEAL.—Order under O. 41 is appealable—S. 47, C. P. C., applies. 102 I. C. 25=9 Lah. L. J. 189=28 Punj. L. R. 617.

(2) Such book shall be called the Register of Appeals.

[Madras.] Substitute the following for O. XLI, R. 9 (2):—

Registers in accordance with Forms Nos. 22, 23, 24 and 25 in Appendix H are prescribed for use in all Civil Courts having jurisdiction over the classes of suits specified therein.

10. [S. 549.] (1) The Appellate Court may in its discretion, either before the respondent is called upon to appear and answer or afterwards on the application of the respondent, demand from the appellant security for the costs of the appeal, or of the original suit, or of both :

Appellate Court may require appellant to furnish security for costs.

Provided that the Court shall demand such security in all cases in which the appellant is residing out of British India, and is not possessed of any sufficient immoveable property within

Where appellant resides out of British India.

British India other than the property (if any) to which

the appeal relates.

[Allahabad.] Add this as a proviso to Order XLI, Rule 10 (1):—“ Provided also that in case of every appeal from any decree or order passed in appeal by any Court subordinate to the High Court confirming the decree or order of the Court below or modifying it only in favour of the appellant or in respect of costs, the appellant shall, with the memorandum of appeal, or within such time as the Court may for special reasons allow, deposit in the appellate Court security for the costs of the appeal and for all costs ordered by the Courts below to be paid by him, which remain unpaid.”

(2) Where such security is not furnished within such time as the Court orders, the Court shall reject the appeal.

11. [S. 551.] (1) The Appellate Court, after sending for the record if it thinks

Power to dismiss appeal without sending notice to Lower Court.

fit so to do, and after fixing a day for hearing the appellant or his pleader and hearing him accordingly if he appears on that day, may dismiss the appeal without sending notice to the Court from whose decree the appeal is preferred and without serving notice on the respondent or his pleader.

O. 41, R. 10. SCOPE.—The rule applies to Letters Patent Appeal. The provision regarding rejection is mandatory. 48 Cal. 481=48 I.A. 70=40 M.L.J. 308 (P.C.). Also 25 Bom. L.R. 468=73 I.C. 474; 68 I.C. 306=2 Lah. L. J. 391. O. 41, R. 10, C. P. C. is concerned with costs incurred up to and in the Appellate Court and has no bearing whatever in costs which may be dependent upon something occurring in the Privy Council. 101 I.C. 551=1927 All. 522 (2). This rule applies to appeals from the Original Side of the High Court 21 L.W. 662=1925 Mad. 1132. The rule applies to appeals from an order of the High Court in its insolvency jurisdiction. 43 Cal. 243=20 C.W.N. 140. This rule does not apply to pauper appeals, and security cannot be demanded of a pauper appellant. 42 Bom. 5=19 Bom. L.R. 771; 48 I.C. 971; 3 Lah. 30=67 I.C. 256. But see *contra* 43 Mad. 902=58 I.C. 794. Security for costs of guardian *ad litem* of a minor respondent can be demanded under this rule. 47 I.C. 928. Applications for security for costs should be made promptly without delay. 20 P. L. R. 1918=44 I.C. 23. Application for correcting clerical error in security bond filed, should be allowed. 86 I. C. 752=1925 Oudh 402.

SECURITY FOR COSTS OF APPEAL.—Security bond not properly executed—Dismissal of appeal forthwith—Propriety. 47 C. L. J. 328=107 I.C. 349 (2) (P.C.).

WHEN TO BE ORDERED.—The power to demand security must be exercised according to well-known principles for which see 25 Bom. L.

R. 468=73 I.C. 474. The Court has a discretion in demanding security—Poverty of the appellant is not sufficient—Each case stands on its own facts—In many cases at least security for costs of appeal alone, may be justly ordered. 25 Bom. L.R. 195=1923 Bom. 264; 17 L.W. 26=70 I.C. 586; 1 P. L. T. 114=55 I. C. 835. If appeal is not vexatious, poverty of appellant and existence of relations who can pay is not a sufficient ground. 28 I. C. 598=19 C. W. N. 446. Even though the appellant is a public servant who is defended by Government security from the Secretary of State can be ordered when the amount of costs is very high. 13 I.C. 335=16 C. W. N. 119. No extension of time can be granted after the dismissal of the appeal. 67 I.C. 883=1923 Cal. 317. But see 42 All. 626=18 A.L.J. 838.

REVISION.—A rejected appeal under sub-rule (2) can be restored and further time for furnishing security may be given in revision though there is no explicit provision to that effect. 42 All. 626=18 A.L.J. 838; 3 Lah. 30; 40 I.C. 234=28 O.L.J. 163. Notice to the respondent is necessary when re-admitting a rejected appeal. 40 I.C. 234. No appeal lies from an order under this rule. 62 I.C. 751; 3 Lah. 30. No appeal or revision lies from an order setting aside an order rejecting an appeal under sub-rule (2). 42 All. 626=18 A.L.J. 838. Sureties are discharged when the appeal is allowed and cannot again be made liable, when the appellate order is reversed. 38 C.L.J. 190=76 I.C. 510.

O. 41, R. 11. SCOPE.—A dismissal of an appeal under this rule is not equivalent to con-

(2) If on the day fixed or any other day to which the hearing may be adjourned the appellant does not appear when the appeal is called on for hearing, the Court may make an order that the appeal be dismissed.

(3) The dismissal of an appeal under this rule shall be notified to the Court from whose decree the appeal is preferred.

Day for hearing appeal.

12. [S. 552.] (1) Unless the Appellate Court dismisses the appeal under rule 11, it shall fix a day for hearing the appeal.

(2) Such day shall be fixed with reference to the current business of the Court, the place of residence of the respondent, and the time necessary for the service of the notice of appeal, so as to allow the respondent sufficient time to appear and answer the appeal on such day.

Appellate Court to give notice to Court whose decree appealed from.

13. [S. 550.] (1) Where the appeal is not dismissed under rule 11, the Appellate Court shall send notice of the appeal to the Court from whose decree the appeal is preferred.

Transmission of papers to Appellate Court.

(2) Where the appeal is from the decree of a Court, the records of which are not deposited in the Appellate Court, the Court receiving such notice shall send with all practicable despatch all material papers in the suit, or such papers as may be specially called for by the Appellate Court.

Copies of exhibits in Court whose decree appealed from.

(3) Either party may apply in writing to the Court from whose decree the appeal is preferred, specifying any of the papers in such Court of which he requires copies to be made; and copies of such papers shall be made at the expense of, and given to, the applicant.

14. [S. 553.] (1) Notice of the day fixed under rule 12 shall be affixed in the Appellate Court-house, and a like notice shall be sent by the Appellate Court to the Court from whose decree the appeal is preferred, and shall be served on the respondent or on his pleader in the Appellate Court in the manner provided for the service on a defendant of a summons to appear and answer; and all the provisions applicable to such summons, and to proceedings with reference to the service thereof, shall apply to the service of such notice.

firmation of decree under Rule 32. When the appeal is against a mortgage decree the dismissal of appeal under this rule does not extend time for payment fixed in the decree. 47 Bom. 950 = 25 Bom. L.R. 990. See also 24 C.L.J. 517 = 21 C.W.N. 430.

JUDGMENT NECESSARY.—The Court must write a formal judgment in dismissing the appeal. 37 Bom. 610 = 15 Bom. L. R. 765 (Overruling 36 Bom. 116 = 12 I. C. 564 = 13 Bom. L. R. 1002); 27 C. W. N. 501 = 1923 Cal. 558. Appellate Court dismissing appeal should record reasons and must write judgment according to O. 41, R. 31. 4 R. 66 = 6 Bur. L.J. 82 = 1927 Rang. 208 = 103 I.C. 766; 4 Rang. 18 = 95 I.C. 521 = 1926 Rang. 129 (67 I.C. 479, approved). See also 1926 Cal. 992 = 96 I.C. 136 = 43 C.L.J. 499. The dismissal of an appeal under O. 41, R. 11 is a decree and the expression of opinion dismissing the appeal is a judgment. 30 C. W. N. 334 = 1926 Cal. 638 = 93 I.C. 909 (2). The discretion given by this rule is not an arbitrary discretion but a judicial discretion. 33 I.C. 666. When the appeal is against a condition fixing period of payment, and the period elapsed during pendency of appeal, the appeal ought not to be dismissed on the ground that the payment was not made with-

in the period fixed. 17 I.C. 868 = 10 A.L.J. 421.

RE-ADMISSION.—Any order restricting grounds of appeal to be heard, at the time of re-admission, is *ultra vires*. 15 C.W.N. 921 = 14 C.L.J. 146. No review when a second appeal is dismissed under this rule. Discovery of new evidence is not a sufficient ground for review. 50 I.C. 431; 27 C. W. N. 918. When once admitted on review without notice to respondents, succeeding Judge cannot question the order subsequently. 50 I.C. 431.

APPEAL AND REVISION.—An order under sub-rule (1) is a "decree" and therefore appealable. But if no decree is drawn up, the appeal may be treated as an application for revision, 191 P.L.R. 1014 = 23 I.C. 90.

O. 41, R. 14.—A Judge cannot decide an appeal *ex parte* when notice of appeal does not specify the date of hearing of appeal. 31 I.C. 624. The duty of furnishing correct address of respondent lies on the appellant, and not on the respondent. When notice has not been duly served, presumption of knowledge of date of hearing could not be raised. 41 I.C. 889 = 136 P.L.R. 1917. Where a minor is represented by a guardian *ad litem* notice need not be served on the minor himself. 1926 Cal. 1106 = 30 C.W.N. 949 = 97 I.C. 614.

(2) Instead of sending the notice to the Court from whose decree the appeal

Appellate Court may itself cause notice to be served,

is preferred, the Appellate Court may itself cause the notice to be served on the respondent or his pleader under the provisions above referred to.

[Allahabad.]—(3) Notwithstanding anything in sub rule (1) it shall not be necessary to serve notice of any proceeding incidental to an appeal on any respondent, other than a person impleaded for the first time in the Appellate Court, unless he has appeared and filed an address for service either in the trial Court or in the case of a second appeal, in the lower appellate court or has appeared in the appeal."

[Oudh.] (3) " Provided that in a case where a respondent has not appeared either during the hearing of the case in the Court from whose decree or order the appeal is preferred or at any proceeding subsequent to that decree, it shall only be necessary for the Court to make one attempt to effect personal service on such respondent or, if such respondent is dead, on his legal representative; and, thereafter service may be effected by affixing a notice in some conspicuous place in the Court-house of the District Judge within whose jurisdiction the suit or proceeding was instituted along with one or other of the following methods, namely, publishing the notice in a newspaper or affixing to the wall or door of the chaupal of the village where the respondent last resided or any other method as the Court may direct."

[Patna.] Add the following as Rule 14-A in Order XLI:—

14-A. The Appellate Court may, in its discretion, dispense with the service of notice hereinbefore required on a respondent, or on the legal representative of a deceased respondent, in a case where such respondent did not appear, either at any stage of the proceedings in the Court whose decree is appealed from or in any proceedings subsequent to the decree of that Court and no relief is claimed against such opposite party or respondent or his legal representative either in the original case or appeal.

15. [S. 554.] The notice to the respondent shall declare that, if he does not appear in the Appellate Court on the day so fixed, the appeal will be heard *ex parte*.

Contents of notice.

Procedure on hearing.

16. [S. 555.] (1) On the day fixed, or on any other day to which the hearing may be adjourned, the appellant shall be heard in support of the appeal.

Right to begin.

(2) The Court shall then, if it does not dismiss the appeal at once, hear the respondent against the appeal, and in such case the appellant shall be entitled to reply.

17. [S. 556.] (1) Where on the day fixed, or on any other day to which the hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, the Court may make an order that the appeal be dismissed.

Dismissal of appeal for appellant's default.

O. 41, R. 16.—Counsel for one party could not be heard after the case had been closed and in the absence of the Counsel for the other party, and a judgment based on such hearing is not valid. 63 I.C. 945. Right of respondent to put in appearance on date of hearing. See 96 I. C. 326 = 1926 Bom. 424 = 28 Bom. L. R. 738.

O 41, R. 17. SCOPE.—O. 41, Rr 17 and 19 are exhaustive in respect of cases where the appellant makes default in appearance in the appeal. 23 Punj. L.R. 554 = 103 I.C. 425 = A. I. R. 1927 Lah. 622. The cross-objections cannot be adjudicated upon when the appeal is dismissed under this rule. 25 I.C. 916 = 1 O. L. J. 485. If the discretion to dismiss is not exercised, the appeal must be adjourned and cannot be disposed of on merits. 1925 Rang. 96. An order dismissing an appeal for default is not a decree, and the lower Court's decree is not superseded. Therefore the first Court can set aside *ex parte* decree. 39 All. 393 = 15 A. L. J. 289.

DEFAULT—WHAT IS ?—Where materials essential for progress of suit or wanting owing to appellant's default, an appeal may be dismissed, for default. 47 I.C. 691. When the appellant is present in Court and states that his pleader is

engaged elsewhere the mere presence of the appellant is not an appearance within this rule. 5 Pat. L.J. 17 = 54 I.C. 715. Appearance by pleader who is instructed only to apply for adjournment is no appearance. 62 I.C. 57. Appearance of appellant at Court to ask time to get pleader is not an appearance within the meaning of the Code. 30 I. C 878 = 22 C.L.J. 72; 51 M.L.J. 654. When appellant was not present, and the pleader asked for adjournment and when it was refused reported no instructions, this amounts to default, and the appeal should not have been disposed of on the merits, but dismissed for default. 28 O. C. 166 = 1925 Oudh 549; 43 M.L.J. 317 = 45 Mad. 882; 74 I.C. 947; 51 I.C. 46. See *contra* 83 I. C. 257 = 1925 Nag. 236 (1) Remand for further enquiry and report on a fixed date—Appellant absenting on date fixed for enquiry—Appeal cannot be dismissed for default before date fixed for report. 96 I.C. 308 = 1926 Lah 574.

DEFAULT—WHAT IS NOT.—When the appellant alone is present without the pleader and could not argue the appeal, the appeal should be decided on the merits considering the grounds of appeal. 35 All. 105 = 11 A. L. J. 18. There is no default when the pleader is present but is pre-

Hearing appeal *ex parte*.

(2) Where the appellant appears and the respondent does not appear, the appeal shall be heard *ex parte*.

18. [S. 557.] Where on the day fixed, or on any other day to which the hearing may be adjourned, it is found that the notice to the respondent has not been served in consequence of the failure of the appellant to deposit, within the period fixed, the sum required to defray the cost of serving the notice, the Court may make an order that the appeal be dismissed :

Dismissal of appeal where notice not served in consequence of appellant's failure to deposit costs.

Provided that no such order shall be made although the notice has not been served upon the respondent, if on any such day the respondent appears when the appeal is called on for hearing.

[Madras.] In O. XLI, rule 18, after the words "cost of serving the notice" insert the words "or if the notice is returned unserved, to deposit within any subsequent period fixed the sum required to defray the cost of any further attempt to serve the notice."

19. [S. 558.] Where an appeal is dismissed under rule 11, sub-rule (2), or rule 17, or rule 18, the appellant may apply to the Appellate Court for the re-admission of the appeal ; and, where it is proved that he was prevented by any sufficient cause

Re-admission of appeal dismissed for default.

vented from physical disability from arguing. 9 I. C. 857.

RESTORATION.—The Court has an inherent power of restoration of an appeal dismissed for default. 47 Mad. 171 = 45 M.L.J. 813. Non appearance, because no date of hearing was fixed is not default; a dismissal for default is without jurisdiction. 69 I. C. 618 = 1924 Lah. 279. There is sufficient cause for restoration when due to want of notice of the fact of transfer of appeal from one Sub-Court to another, the appellant was not present at the latter Court. 46 I.C. 881. When within a month from date of dismissal for default, both parties apply for restoration and file a petition of compromise, it ought to be restored and the compromise decree passed. 68 I. C. 448 = 1923 Cal. 319. An appeal dismissed for default when the appellant was present to ask time to get his pleader should generally be restored. 30 I. C. 878 = 22 C. L. J. 72. Appeal may be restored when the appellant himself has shown all possible diligence towards causing appearance to be made, but there was default due to negligence of pleader 14 I. C. 823 = 22 M.L.J. 284. Restoration should be refused when the vakil's conduct amounts to gross negligence. 35 I. C. 429 = 1 Pat. L. J. 65. Summary rejection of application for restoration of appeal dismissed for default is invalid. 104 I. C. 347 (2) = 1927 Cal. 888.

APPEAL AND REVISION.—Against an order of dismissal for default, when it should have been disposed of on merits no appeal lies but it is revisable. 83 I. C. 257 = 1925 Nag. 236 (1); 28 O. C. 166 = 1925 Oudh 549. See also 53 Cal. 827 = 1927 Cal. 98 = 99 I. C. 124.

O. 41, R. 18.—Applicability. 52 I. C. 179 = 169 P. R. 1919. The appeal cannot be dismissed, because the appellant failed to provide a person to identify the respondent. 65 I. C. 49 = 3 Pat. L. T. 498. A dismissal under this rule is wrong, when the *Talabnama* has been deposited but notice to the respondent for the issue of process has not been filed. 15 C.L.J. 683 = 13 I. C. 694 = 16 C.W. N. 498. No appeal lies from an order under this rule. 52 I.C. 179 = 169 P.R. 1919.

O. 41, R. 19. **SCOPE.**—The rule is not exhaustive of the power of Appellate Court in the matter of restoration. 20 Bom. L.R. 110 = 45 Bom. 648.

But see 103 I. C. 425 = 1927 Lah. 622. The rule does not take away other remedies of the appellant if any. 2 Pat. 739 = 4 Pat. L. T. 405. Dismissal of appeal in the absence of appellant permits only restoration. 1925 Rang. 96. Dismissal of appeal for not depositing printing charges—remedy 4. P. 704.

WRONG DISMISSAL.—It is wrong to dismiss an appeal when the appellants have not been served and though the pleaders are present, they have no instructions. 30 I.C. 199 = 2 O.L.J. 198. Notice of the date fixed for hearing should be sent to the next friend of minor appellants. Otherwise dismissal for default could not be sustained. 53 I.C. 333.

SUFFICIENT CAUSE.—Applicant should be given an opportunity to prove sufficient cause for default. 57 I.C. 762; 52 I. C. 920 = 69 P. L. R. 1919; 1925 Cal. 269. There is sufficient cause for restoration when the order of postponement of the appeal was not communicated to the parties, resulting in non-appearance of appellant. 32 I.C. 936. Proof that appellant had no knowledge of the date fixed for hearing of the appeal is sufficient cause under O. 41, R. 19, C.P.C. 101 I.C. 203 = 1927 Lah. 365; 97 I. C. 687 = 1926 Mad. 1210. There is good cause for non-appearance when no notice of transfer of case from one Court to another was given. 3 Pat. L. J. 218 = 43 I. C. 925 (F. B.); 1925 Cal. 500. Laches of an advocate or careless mistake of his clerk is not a sufficient cause. 3 Rang. 488; 1926 Rang. 50. Pleader's mistake in noting a wrong date though not a sufficient cause, yet being a *bona fide* and unintentional error, appeal may be restored. 51 I. C. 607 = 53 P. R. 1919. Absence of pleader for an hour, because five appeals above his could not be expected to be disposed of in an hour is a sufficient cause. 89 I. C. 795 = 1925 Lah. 617; 4 Rang. 18 = 95 I. C. 521 = 1926 Rang. 109. Non appearance of pleader due to engagement in another Court is not sufficient cause. 24 I. C. 826; 68 I. C. 785 = 1923 Lah. 97 (1); 1925 Oudh 234; 96 I. C. 377 (1) = 1926 Cal. 1152; 1926 Cal. 1231 = 07 I. C. 573. Whether restoration may be ordered when pleader's absence was unintentional, See 5 Lah. L. J. 80. Want of notice to the appellant counsel when the case is put down lower in the list is not sufficient cause. No notice

from appearing when the appeal was called on for hearing or from depositing the sum so required, the Court shall re-admit the appeal on such terms as to costs or otherwise as it thinks fit.

[Madras.] Re-number rule 19 in O. 41 as R. 19 (1) and add the following as (2) :—The provisions of section 5, Limitation Act, 1908, shall apply to applications under sub-rule (1).

20. [S. 559.] Where it appears to the Court at the hearing that any person who was a party to the suit in the Court from whose decree the appeal is preferred, but who has not been made a party to the appeal, is interested in the result of the appeal, the Court may adjourn the hearing to a future day to be fixed by the Court and direct that such person be made a respondent.

21. [S. 560.] Where an appeal is heard *ex parte* and judgment is pronounced against the respondent, he may apply to the Appellate Court to re-hear the appeal; and, if he satisfies the Court that the notice was not duly served or that he was prevented by sufficient cause from appearing when the appeal was called on for hearing, the Court shall re-hear the appeal on such terms as to costs or otherwise as it thinks fit to impose upon him.

is necessary. 71 I. C. 813=1924 Lah. 189. No notice is necessary for restoring when dismissal was occasioned by the absence of both parties. 17 I. C. 292=10 A. L. J. 399. Notice before restoration must issue when default in not making good the stamp in sufficient time; the opposite party has the right to a hearing even in second appeal. 63 I. C. 99=1921 Pat. 337.

O. 41, R. 20. SCOPE.—O. 41, R. 20, C. P. C., is not intended to override the provisions of O. 22, 5 P. 755=1927 Pat. 23; 105 I. C. 569=28 Punj. L. R. 468. It is left to the discretion of the Court to add a party as respondent even after appeal time has expired. But an application to enforce judgment within the meaning of Art. 183 of Lim. Act. against a new party must be in time. 66 I. C. 365; 25 I. C. 480=3 P. R. 1915; 38 Cal. 613=16 C. W. N. 49; 27 I. C. 609=18 O. C. 90; 75 I. C. 90=1923 Lah. 503; 16 I. C. 771; 54 Cal. 430=1927 Cal. 394. *See contra* 79 P. R. 1914=25 I. C. 549; 2 Rang. 541=3 Bur. L. J. 259. The Law of Limitation has no application when action is taken under O. 41, R. 20. 97 I. C. 174=1926 Lah. 679 (25 I. C. 549; 25 I. C. 480, Foll.); 105 I. C. 569; 103 I. C. 223. S. 151 is circumscribed by this rule and in exceptional cases only should S. 151 be resorted to. 73 I. C. 136=1923 Lah. 490. Only parties to the suit and not strangers can be made parties in appeal. 73 I. C. 136=1923 Lah. 490; (Ref. 18 All. 133); 47 All. 853=23 A. L. J. 757=1925 All. 768; 105 I. C. 569=28 Punj. L. R. 468. 'Party to the suit' includes legal representatives of a party. 29 J. C. 490. Persons who were parties to the suit but not to the first appeal can be made parties in second appeal. 59 I. C. 798. But *see* 1926 Lah. 499=97 I. C. 338. The appellate Court can even add parties who were struck off in the suit before decree. 27 I. C. 423. Under this rule an unnecessary party cannot be added and cross objections raised against him. 11 M. L. T. 157=13 I. C. 906; 53 Cal. 270=91 I. C. 649=1926 Cal. 533. A formal defendant need not be added as a party in appeal. 1925 Lah. 87.

The assignee of a decree is not a necessary party who will be bound by the decree in appeal by the judgment-debtor. 38 Mad. 36=23 M. L. J. 513.

APPLICATION OF THE RULE.—The Court can add the defendants whose names were omitted by mistake in the appeal. 63 I. C. 352. *See also* 8 Lah. L. J. 473=97 I. C. 223=1926 Lah. 689 (2); 104 I. C. 400 (1); 1928 Lah. 43=106 I. C. 313. Under certain circumstances the Court may well refuse to add representatives of a deceased respondent, when the appellant has not done so in time, which he might have. 90 I. C. 986=30 C. W. N. 45; 24 C. W. N. 44=30 C. L. J. 217. The power to add parties will not be exercised in cases of extreme negligence. 79 P. R. 1914=25 I. C. 549. A third party cannot appeal on behalf of co-sharers who are interested in the appeal against a co-sharer. If they are not made parties in time, the appeal will be dismissed. 75 I. C. 90=1923 Lah. 503. If the plaintiff in second appeal failed to implead necessary respondent, the power to add him could not be exercised. The case being on a joint footing against all respondents the appeal abated *in toto*. 57 I. C. 259=2 Lah. L. J. 5. A respondent can make another a co-respondent and proceed against him by way of cross-objections. 56 I. C. 612=11 J. W. 602. A defendant not joined in appeal against other defendants is not interested in the result of the appeal. 1927 P. C. 252=54 M. L. J. 88=6 Rang. 29=107 I. C. 237=55 I. A. 7=27 L. W. (1) (P. C.).

O. 41, R. 21. SCOPE.—A second appeal by a co-respondent dismissed under R. 11 does not take away the jurisdiction of the first appellate Court, when it had been moved by an absent respondent under this rule. 14 C. L. J. 42=15 C. W. N. 798; 43 I. C. 902=14 N. L. R. 30. What is sufficient cause must depend on the facts of each case. 63 I. C. 737=19 A. L. J. 54. A principal will be bound by his agent's default. Agent's negligence is not sufficient cause. 15 A. L. J. 413=39 I. C. 636=39 All. 388. On this rule, *see also* 26 Punj. L. R. 314 (withdrawal of application by guardian).

22. [S. 561.] (1) Any respondent, though he may not have appealed from any part of the decree, may not only support the decree on any of the grounds decided against him in the Court below, but take any cross-objection to the decree which he could have taken by way of appeal, provided he has filed such

Upon hearing respondent may object to decree as if he had preferred separate appeal.

O. 41, R. 22.—(O. 41, R. 22 apply to appeals from the original side of the High Court and in such appeals it is competent for a respondent to file a memo of objections. 49 Mad. 291=93 I.C. 293=50 M. L. J. 190 (F.B.). The object of the rule is to allow a respondent content with a decree in his favour an opportunity of contesting findings against him in case his opponent appeals. 5 P.L.J. 328=56 I.C. 262. The word 'Decree' in O. 41, R. 22 means the decision by the Court below. 50 Mad. 866=53 M. L. J. 189=104 I.C. 472=1927 Mad. 801. As to meaning of the word 'Respondent', see 107 I.C. 569.

SCOPE.—This rule does not control R. 33. 62 I. C. 623. A respondent is entitled to support a decree under the provisions of this rule. 41 C.L.J. 31=86 I. C. 6. Objection not put as cross-objection cannot be taken if it is not in support of the decree. 84 I. C. 124=1925 Cal. 94. Trial Court's decree in favour of the appellant should not be interfered with under rule 33 in the absence of cross-objections by the respondent. 45 I. C. 142=22 C. W. N. 526; 57 I. C. 555=23 O. C. 110. Where only one plaintiff respondent claims a particular relief in his memo. of objections, the relief could be granted to all the respondents when the basis of the claim is common to all of them. 15 I.C. 409. The rule does not apply to Letters Patent Appeals. 1922 All. 55; L. R. 3 A. 198; 32 C. L. J. 48=24 C.W.N. 1016.

RIGHT TO SUPPORT DECREE.—A decree can be supported without filing cross-objections by traversing any ground which that Court may have found against him. 41 C. L. J. 31=86 I.C. 62; 4 I.C. 68; 45 I.C. 232=125 P.L.R. 1918; 103 P.L.R. 1917=40 I.C. 237; 39 I.C. 153=4 O.L.J. 101; 50 M. 866=26 L.W. 125=53 M. L.J. 189; 51 I. C. 981=1919 Pat. 393; 12 I.C. 20=4 Bur. L. T. 209. Where a suit is dismissed on one finding it cannot be reversed in appeal without considering the defendant's objections to other findings. 11 I.C. 41=202 P. L. R. 1911. A decree cannot be supported on an entirely new ground, not decided against respondent, not in issue and not made subject of adjudication. 5 Pat. L. J. 239=55 I. C. 214; 38 I. C. 536=21 C. W. N. 423. But see *contra* in 31 I.C. 740=45 P.R. 1916.

CROSS-OBJECTION—WHEN CAN BE RAISED.—Petition to support decree on other grounds does not amount to cross-objections. 68 I.C. 861=44 A. 577. Time expired appeal may be treated as memorandum of objections. 67 I. C. 478=1922 Lah. 423; 1925 Lah. 57. A defendant who has been placed *ex parte* can impugn the decree in appeal by way of cross-objections on the ground that he was wrongly made *ex parte*, provided he has not moved the trial Court under O. 9, R. 13. 45 M. L. J. 805=1924 Mad. 107. Cross-objections could be entertained only against a party to the appeal. 54 I. C. 971. See also 39 I. C. 662=2 P. L. J. 162; 53 Cal. 270=91 I. C. 649=1926 Cal. 533. As to whether an exonerated defendant can be made a party to the memo. of objections when not a party to the appeal see 31 I. C. 978. A memo. of objec-

tions may be filed against the whole or any part of a decree, even though that part may not be the subject-matter of the appeal. 35 M. L. J. 83=48 I. C. 1003. See *contra* 39 Mad. 365=28 M. L. J. 285. Cross-objection must relate to decree appealed against and not any other although arising out of the single decree of the trial court. 96 I. C. 67=1926 All. 582. *Pro forma* respondent's right to prefer cross objection. See 107 I. C. 569.

WHEN CANNOT BE RAISED.—Respondents in revision petition cannot file cross-objections. 14 I. C. 562=160 P. L. R. 1912. Respondent having appealed cannot file cross-objections. 1925 Lah. 2. Cross-objections as to costs in the Courts below cannot be considered on second appeal. 5 Lah. L.J. 108. Cross-objections regarding want of jurisdiction to attach in executing Court, cannot be taken when the appeal is against an order refusing to set aside a prohibitory order. 75 I. C. 419=1923 Lah. 514. Cross-objection which tends to obtain a distinct relief which could have been granted by the lower Court if asked for, or by the appellate Court if a claim was raised in appeal, should not be allowed. 34 I.C. 916=24 P. R. 1916. It should not be allowed where the question raised thereby is entirely distinct from and in no way related to the question in controversy in appeal. 48 I.C. 78=28 C. L. J. 123. Cross objections cannot be filed after withdrawal of appeal. Pendency of appeal is a condition precedent to the filing of cross-objections. 39 I.C. 947. New grounds not set forth in objections cannot be raised at the time of hearing. 19 I. C. 98=15 Bom. L. R. 130.

CROSS-OBJECTIONS AGAINST CO-RESPONDENT—WHEN ALLOWED.—A cross-objection can be entertained at the discretion of the Court by one respondent against co-respondents. 16 A. L. J. 587=40 All. 536; 12 A. L. J. 892=36 All. 505; 15 C.L.J. 61=16 C.W.N. 612; 5 Lah. L. J. 92=69 I. C. 330; 38 Mad. 705=27 I. C. 223=27 M. L. J. 740 (F. B.). Only in exceptional cases could cross-objections against a co-respondent be raised. 25 O. C. 280=70 I. C. 70=1923 Oudh 108; 37 Bom. 511=15 Bom. L. R. 781; 23 C. L. J. 26=20 C. W. N. 370=43 Cal. 790. Also 29 I. C. 610=(1915) 2 U. B. R. 58. Where the appeal of some of the parties opens out questions which cannot be disposed of completely without matters being allowed to be opened as between co-respondents, is an exceptional case, which may be allowed under special circumstances. 56 I. C. 469=2 Lah. L. J. 747; 5 Pat. L. J. 328=50 I. C. 252. It can be allowed when the Court cannot do complete justice between the parties without opening the whole case. 53 I. C. 659=6 O.L.J. 495. Plaintiff-respondent can raise cross-objections against a defendant who is not an appellant. 38 I. C. 641. It can be raised in a case where the interest of the objector was really adverse to that of the appellant and other co-respondents and though the appellant took the same objections

objection in the Appellate Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal or within such further time as the Appellate Court may see fit to allow.

Form of objection and provisions applicable thereto.

(2) Such cross-objection shall be in the form of a memorandum, and the provisions of rule 1, so far as they relate to the form and contents of the memorandum of appeal, shall apply thereto.

(3) Unless the respondent files with the objection a written acknowledgment from the party who may be affected by such objection or his pleader of having received a copy thereof, the Appellate Court shall cause a copy to be served, as soon as may be after the filing of the objection, on such party or his pleader at the expense of the respondent.

(4) Where, in any case in which any respondent has under this rule filed a memorandum of objection, the original appeal is withdrawn or is dismissed for default, the objection so filed may nevertheless be heard and determined after such notice to the other parties as the Court thinks fit.

(5) The provisions relating to pauper appeals shall, so far as they can be made applicable, apply to an objection under this rule.

23. [S. 562.] Where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the Appellate Court may, if it thinks fit, by order remand the case, and may further direct what

Remand of case by Appellate Court.

unnecessarily in his ground of appeal. 29 C. W. N. 784=88 I. C. 866=1925 Cal. 973.

WHEN NOT TO BE ALLOWED.—Cross-objections by one correspondent against another should not be permitted when they could be raised by an appeal. 37 Bom. 511=15 Bom. L. R. 781. It should not be allowed when he has allowed the period of appealing to elapse. 66 I. C. 642=8 O. L. J. 358. But see 5 Pat. L. J. 328=56 I. C. 253. No Court-fee is payable when the decree of the lower Court is supported in cross-objections. 68 I. C. 861=44 All. 577; 39 I. C. 176=15 A. L. J. 325. As to valuation of cross-objections, see 25 O. C. 275=70 I. C. 286=1923 Oudh 44 (1); 52 I. C. 1002.

LIMIT OF ONE MONTH.—The principle of calculation of a month is that it shall be taken to extend up to and including the day before the corresponding date of the next month, and there is no authority for any special rule as regards February—March. 30 I. C. 832 (1)=29 M. L. J. 182. He can claim 30 days from the date of serving of notice for hearing. The 30 days is not 30 days from the date of serving of notice of appearance. 22 L. W. 792. Cross-objections, if can be received even after a month, even during the argument of the appeal. 66 I. C. 217=1922 Nag. 213. It is not necessary that further time ought to have been granted before objections are actually filed. 39 I. C. 125. Hearing of appeal ought not to be advanced so as to deprive respondent the benefit of filing objections in a month. 38 I. C. 522=1917 Pat. 103.

SUB-RULE (4).—The right to be heard provided for by sub-rule (4) is not available when the appeal abates. 44 Mad. 828=41 M. L. J. 304=13 L. W. 705=62 I. C. 757=(1921) M. W. N. 438. Cross-objections cannot be proceeded with when the appeal is dismissed under R. 10 in the presence of the respondent without any objection on his part. 25 O. C. 280=70 I. C. 79. But see *contra* 50 I. C. 729=4 Pat. L. J. 164. Rejection

of appeal as insufficiently stamped is not a dismissal for default, and cross-objections cannot be heard when the appeal is rejected. 59 I. C. 795=46 P. W. R. 1921. See also 10 I. C. 207=11 P. R. 1912. Objections can be dealt with even though appeal is dismissed for default. 9 I. C. 572=9 M. L. T. 217; 48 Mad. 631=48 M. L. J. 384. Cross objections may be filed even when appeal is unsustainable. 34 All. 140=13 I. C. 19=8 A. L. J. 1297. Cross-objections can be heard even when the appellant admits the appeal to be incompetent and is dismissed. 54 I. C. 506=10 L. W. 605. Objections filed in an appeal which is dismissed as out of time cannot be heard. The right of filing objection stands or falls with the right of appeal. 4 Lah. 140=5 Lah. L. J. 345; 41 Mad. 904=35 M. L. J. 236 (F. B.) *Cf.* 39 I. C. 947. But see *contra* 3 L. W. 109=32 I. C. 579=19 M. L. T. 86; also 30 I. C. 832=(1915) M. W. N. 792.

O. 41, R. 23. SCOPE.—The appellate Court has inherent powers to remand a case irrespective of the provisions of this rule. 25 L. W. 198=1927 M. 335=52 M. L. J. 90=100 I. C. 135; 37 C. L. J. 491=1923 Cal. 606; 73 I. C. 915=1924 Lah. 245; 1922 Cal. 279; 64 I. C. 436; 44 Cal. 929=21 C. W. N. 877 (F. B.); 43 Cal. 1001=20 C. W. N. 1192; 74 I. C. 497=1924 Lah. 36; 76 I. C. 496=5 Lah. L. J. 384=1924 Lah. 362; 37 M. L. J. 536=53 I. C. 417; 32 C. W. N. 101; 9 I. C. 790=9 M. L. T. 373; 101 I. C. 281=1927 Nag. 192. See *contra* 38 I. C. 196; 33 I. C. 329=43 Cal. 148; 41 Cal. 108=20 I. C. 39=18 C. L. J. 613. Inherent power should be invoked only if necessary for ends of justice and must be exercised with care. 46 I. C. 333=27 C. L. J. 596; 44 Cal. 929=21 C. W. N. 877=41 I. C. 598=26 C. L. J. 49 (F. B.); 64 I. C. 599; 3 Pat. L. J. 253=43 I. C. 959=4 Pat. L. W. 450. 'Remand' made in an appeal from an order returning a plaint for presentation to proper Court

issue or issues shall be tried in the case so remanded, and shall send a copy of its

is without jurisdiction as such an order is not a decree within S. 2, 87 I. C. 172=1925 Oudh 393. Remand means return for decision and not for finding. 92 I. C. 370=4 Bur. L. J. 135=1925 Rang. 303. The appellate Court can pass an order of remand by consent of parties in excess of its powers under the Code. 22 I. C. 41= (1914) M. W. N. 50. When an order of remand is made, the presumption is that it is made under this rule. 20 A. L. J. 321; 44 A. 492. As for distinction between this rule and R. 25, see 25 O. C. 189=69 I. C. 730; 45 C. L. J. 194=102 I. C. 384=1927 Cal. 401. The rule applies where the whole suit is disposed of on a preliminary point only. 57 I. C. 800=11 L. W. 611; also 26 O. C. 10=73 I. C. 591=1923 Oudh 177; 101 I. C. 89 (1). As to meaning of preliminary point, see 13 L. W. 54=61 I. C. 829; 99 I. C. 974; (1928) M. W. N. 164. This rule does not contemplate a case decided upon the whole evidence and upon all the issues raised. 55 I. C. 484=1 P. L. T. 509=92 I. C. 1045=(1926) M. W. N. 48; 91 I. C. 351=1926 Lah. 184; 6 P. 381; 96 I. C. 786; 103 I. C. 537=1927 Lah. 618; 1927 Lah. 42=98 I. C. 906. This rule will not apply where an order is not on a preliminary point. 73 I. C. 915=1924 Lah. 245; 101 I. C. 89 (1); 1927 Lah. 618=103 I. C. 537; 6 P. 381=103 I. C. 722=1927 Pat. 296. Except under this rule no case shall be remanded for a second decision which can be disposed of finally by the first appellate Court. 36 I. C. 241=12 N. L. R. 126.

WHAT IS DISPOSAL ON A PRELIMINARY POINT.—39 All. 165=37 I. C. 383=15 A. L. J. 30. Where in a redemption suit, defendant pleaded that in foreclosure proceedings there was a sale in his favour, a disposal on this contention is a disposal on a preliminary point. 57 P. L. R. 1916=30 I. C. 817. Where certain evidence was considered irrelevant by trial Court, and the appellate Court considered, the excluded evidence as relevant, held the reversal was on a preliminary point. Also as to instances of preliminary point see 43 M. L. J. 354=45 Mad. 900 (F. B.). Where Court goes into evidence and records findings on all issues but dismisses the suit as not maintainable, the disposal is on a preliminary point. 4 P. L. J. 645=52 I. C. 125.

WHAT IS NOT DISPOSAL ON A PRELIMINARY POINT.—'The decision on a preliminary point' means a determination not affecting the merits of the case. A reversal of a judgment with a direction to admit evidence said to have been excluded is not a disposal on a preliminary point. 37 M. L. J. 536=53 I. C. 417=10 L. W. 359. Disposal on an important issue relative to the merits of the case is not a disposal on a preliminary point. 9 M. L. T. 373=9 I. C. 790. When the appellate Court decides the main point and remands for disposal of the remaining issues the decision is not on a preliminary point. 60 I. C. 609=12 L. W. 667. An order setting aside the rejection of the plaintiff and remanding for trial on merits is not an order under this rule. 133 P. L. R. 1915=26 I. C. 519. An order of remand for re-hearing after amending the plaint is not an order under this rule. 73 I. C. 915=1924 Lah. 245. Dismissal for default is not a disposal on a preliminary point. 14 A. L. J. 347=38 All. 357. Where the appellate Court decides some issues and leaves the others to be determined by the

trial Court, a remand order is not under this rule but under R. 25. 40 I. C. 58. See also 9 I. C. 224=15 C. W. N. 575. Appellate Court framing additional issue and remanding the case reversing the decree instead of calling for a finding retaining the case on its file. Order of remand is not appealable either under O. 43, R. 1 (a) or under S. 100 as it is not a decree within C. P. C., S. 2. See also 103 I. C. 119=55 Cal. 219; 103 I. C. 864=1927 Cal. 850 (1925) Cal. 1256, Dist.).

WHERE REMAND SHOULD NOT BE ORDERED—**SUFFICIENT EVIDENCE ON RECORD.**—The appellate Court should dispose of the case if there is sufficient evidence and should not put the parties to unnecessary expense. 37 Bom. 289=14 Bom. L. R. 1154; 41 I. C. 735. It is unusual to remand a case after argument in appeal, which ought *prima facie* be decided upon materials on record. 34 M. L. J. 545=22 C. W. N. 697=45 Cal. 748=45 I. A. 94 (P. C.). Remand for findings on fresh additional issues cannot be made when they were covered by the issues determined. 43 I. C. 815. A case can be decided on the evidence on record after excluding irrelevant and unsatisfactory portions, without a remand. 50 I. C. 301. An order of remand cannot be made under O. 41, R. 23, C.P.C., where the decision of the trial Court is not based in any sense on a preliminary point. 1927 Bom. 111=100 I. C. 578=29 Bom. L. R. 56; 96 I. C. 44. No remand can be made when materials on record are sufficient to decide the case. 180 P. L. R. 1912=16 I. C. 847. See also 45 Mad. 449=42 M. L. J. 372. Nor where the appellate Court comes to a different conclusion on some portion. 20 A. L. J. 258=66 I. C. 866=1922 A. 102.

COMPLETE EVIDENCE ON RECORD.—When the lower Court has decided all the issues it is not proper to remand for trial on merits. 35 I. C. 239; 27 C. W. N. 1025=1924 Cal. 148; 50 I. C. 984. When the appellate Court comes to a different conclusion on the merits and on the evidence on record, no remand could be ordered on the ground that the evidence was not properly directed. 70 I. C. 655=1923 M. 113. Because there was a finding on evidence recorded, but without an issue raised, a remand cannot be made. 46 I. C. 659=137 P. W. R. 1918. No remand in second appeal for rehearing upon an issue raised and determined by Courts below. 67 I. C. 494=1922 P. 575. When full trial has taken place though the case has been disposed of on a preliminary point a remand ought not to be ordered. 66 I. C. 922=1923 Cal. 323; 29 C. W. N. 614=52 Cal. 783.

INSUFFICIENT EVIDENCE.—A case cannot be remanded for fresh evidence. 2 Pat. L. J. 61=38 I. C. 797. A case should not be remanded for local investigation, when it had not been asked for in the first Court. 43 I. C. 815. Case should not be remanded for additional evidence on the ground that evidence adduced by defendant was not satisfactory and sufficient. 39 I. C. 886=25 C. L. J. 473; 46 I. C. 659=137 P. W. R. 1918. Case cannot be remanded because necessary evidence was not let in by oversight. 53 I. C. 562. A remand in order to enable plaintiff-appellant to ascertain whether or not a demand was made within three years of the institution of the suit which would save

judgment and order to the Court from whose decree the appeal is preferred, with direc-

limitation, was refused. 1923 Lah. 645. Remand of the case could not be ordered because the appellate Court considered the appointment of an experienced Commissioner essential to value the property. 46 I.C. 750. An appeal against an *ex parte* order without seeking to set it aside should be disposed of on merits and there should be no remand for re-trial. 24 P. L. R. 1917=39 I. C. 749. See *contra* 26 O. C. 10=73 I. C. 591 (foll.); 30 Mad. 64 (F. B.). See also 56 I. C. 255=(1919) 3 U. B. R. 198.

CASE OF EXCLUSION OF EVIDENCE.—When evidence which ought to have been taken was refused to be recorded the suit cannot be remanded for trial *ab initio* but additional evidence can be directed to be recorded. 45 I. C. 832=5 O. L. J. 139. The case need not be remanded because the lower Court based its decision on inadmissible evidence, when there is sufficient evidence on record to support the decision. 71 I. C. 300=1924 Cal. 370; but see 41 I. C. 71. Remand should not be made when necessities of the case are specifically provided for by the Code. 1925 Cal. 274.

WHEN IT SHOULD BE UNDER R. 25.—When all evidence was taken but certain issues were not decided, the proper order is to call for findings under R. 25. 38 All. 520=14 A. L. J. 754; 7 Lah. L. J. 351=1925 Lah. 480; 1925 Mad. 171; 100 I. C. 578=1927 Bom. 111; 1927 Lah. 618=103 I. C. 537. In a suit for possession and damages where the appellate Court differed from the trial Court, the whole suit cannot be remanded but only so far as the issue on damages was concerned. 45 A. 565=21 A.L. J. 538. Where the lower appellate Court reversed the decree of the Court below, modified one of the issues, and remanded the case for a *de novo* trial on the modified issue, held the procedure was wrong. 35 C. L. J. 345=70 I. C. 547. Where the appellate court thinks that the investigation is wrong, and that further investigation and evidence is necessary, such may be ordered retaining the appeal on file and remand ought not to be ordered. 24 C. W. N. 708=31 C. L. J. 300. In case of defective pleadings and a finding on evidence which was sufficient, and which the appellant had not the opportunity of meeting, the proper course would be to remit an issue on the point. 15 I. C. 3. When an important issue was not raised, the case should be remanded only for a finding on that issue and the decree could not be set aside entirely and the whole case remanded for re-trial. 38 I. C. 641; 23 A.L.J. 880=1926 All. 65; 1925 Mad. 169.

NEW PLEA—NO REMAND—Only in exceptional cases and on good cause shown should a case be remanded for re-hearing on a new plea not raised in pleadings nor even suggested. 43 Cal. 1104=43 I. A. 172=31 M.L.J. 745 (P. C.). Where a remand would involve taking of fresh evidence on a point not raised before, it would not be granted. 11 I. C. 84; 2 P. L. J. 8=38 I. C. 509. When a claim for a right of way was originally based on immemorial usage, he cannot obtain a remand for re-trial on issues of implied grant or easement of necessity. 55 I. C. 435. A remand ought not to be ordered permitting plaintiff to supplement his case, when at the time he came

to Court he was unequipped. 71 I. C. 28=1914 Cal. 396. A party is not entitled to remand on a new case set up in appeal when he failed to establish the case he set up on trial. 54 I. C. 645.

WHEN REMAND COULD BE ORDERED.—Powers of remand are much wider in the new Code than in the old. Remand can be ordered though the case had not been disposed of on a preliminary point. Want of proper trial, disallowance of important questions, not giving opportunity to parties to adduce proper evidence are sufficient reasons for remand. 12 I. C. 684=15 C. L. J. 258; 36 Mad. 492=24 M. L. J. 512. An appellate Court adding a new party can remand for re-trial. 31 I. C. 263=2 L. W. 1034. When the plaint is amended in appeal under O. 6, Rr. 17 and 18 and a defendant desires to traverse the facts stated in the amendment, the case can be remanded. 32 I. C. 906; 43 Cal. 938=32 I. C. 791=20 C. W. N. 547; 1927 Mad. 859=103 I. C. 670; 48 M. 713; 1927 Lah. 196=100 I. C. 49. Where inadmissible evidence was admitted, the case should not be remanded, for a fresh adjudication excluding that evidence. 55 I. C. 922=1 P. L. T. 224. An order of remand can be made when the ground on which the appellate Court declares a document inadmissible, has arisen subsequent to the disposal of the suit by the lower court. 10 I. C. 675=9 M. L. T. 317. Where an appeal was decided on the basis of an inadmissible document, the appeal can be remanded in second appeal. 57 I. C. 561=5 Pat. L. J. 410. A case could be remanded when decision was based on a report of a commissioner who was superseded, and whose report therefore could not be admitted in evidence. 39 I. C. 951.

FRESH EVIDENCE.—Where the decision is on pleadings and not on evidence, there ought to be a remand for taking evidence. 67 I. C. 710=1923 P. 174. Case can be remanded when the trial court refused to grant time for production of certified copies of material documents and decided with materials on record only. 43 I. C. 57. Remand could be ordered where the appellate court is satisfied that but for some grave error on the part of the pleader, necessary evidence could have been adduced in the lower court. 39 Bom. 352=17 Bom. L. R. 187. A case is to be remanded where tenancy rights were pleaded as bar to a suit for possession and was not adjudicated upon. 42 I. C. 550. Where an important issue was not raised by the trial court, the case can be remanded with the issue raised. 51 I. C. 712=64 P. R. 1919; 223 P. L. R. 1911=12 I. C. 53. When a case was decided on a piece of evidence not placed on record, it could be remanded for taking of such evidence. 36 Mad. 492=24 M. L. J. 512. Where the first appellate court decides only on technical grounds, the second appellate court can remand it for disposal on merits. 32 I. C. 380=2 O. L. J. 562. Where a book was used by the lower court to establish certain facts which a party had no opportunity of meeting and which he desired to rebut, the admission of the book in the appellate court, might involve a remand. 66 I. C. 287=34 C. L. J. 205. Appellate court can remand for determination of question of title,

tions to re-admit the suit under its original number in the register of civil suits, and

when the tenant had pleaded title of a third person, in a rent suit. 11 I. C. 183=15 C.L.J. 6.

ERROR OF JUDGMENT.—In an appeal from an order of remand, findings of fact cannot be examined by the second appellate court. But it could remand the case to the lower appellate court for rehearing when there has been a misappreciation of the true controversy between the parties. 73 I. C. 756=1923 Lah. 206; 87 I. C. 950=1925 Oudh 692. An appellant is entitled to have the opinion of the appellate court on an issue of fact, and if such court fails to determine the point, the High Court will remand the case for a re-decision of the appeal. 55 I. C. 233. A case can be remanded where the lower court overlooked a provision of law. 35 All. 533=35 I. C. 41=14 A. L. J. 734. Where the effect of an admission by a pleader was not realised, the appeal might be remanded to the lower appellate court for a fresh hearing on the footing that the admission was in fact made. 44 I. C. 18. If a case is decided on a wrong view of burden of proof, it should be remanded as a case of wrong disposal on a preliminary point. 57 I. C. 525=22 Bom. L.R. 771; cf. 40 Mad. 654=30 M. L. J. 514. But see *contra* 34 All. 612=10 A. L. J. 190; 58 I. C. 982=1 Lah. 429.

EFFECT OF ORDER.—The policy of legislature is in favour of finality of orders of remand. A remand order made on second appeal is, unless a review of it be obtained, a conclusive determination of the points of law involved in it and cannot be questioned in a subsequent second appeal. 72 I. C. 588=1923 Cal. 385; also 4 P.L.J. 645=52 I. C. 125. Where the High Court in second appeal differs from the lower court on an issue of law and remands the case to the court below, the order is binding upon that court and cannot be questioned in an appeal from the final decree after remand. 4 P. L. T. 35=1923 P. 226. Jurisdiction to try a remanded case depends on the order of the appellate court. 44 M. L. J. 238=1923 Mad. 351. A remand order to find whether a person has title includes enquiry as to whether he has lost it or is barred from relying upon it. 31 I. C. 987=20 C. W. N. 149. In the absence of any limitation put by the High Court, the whole case on remand is open for decision of the lower appellate court and is bound to hear the appeal upon the judgment of the court of first instance. 32 I. C. 240=20 C. W. N. 584. When in an appeal by some defendants who did not join in a reference to arbitration, the case was remanded on the ground that the award did not bind them, the whole case is re-opened, even in respect of those who did not appeal. 52 I. C. 569=37 M. L. J. 100. A court can come to a different and contrary conclusion after remand. 56 I. C. 1001; 13 I. C. 813=14 O. C. 321. The lower appellate court after remand cannot consider arguments abandoned or not raised in second appeal or come to fresh findings on points decided by the order of remand. 61 I. C. 575; 35 I. C. 571. As to validity of proceedings taken under a remand order, when the remand order is held to be wrong, see 44 A. 211=20 A. L. J. 44. Another Judge or Bench differently constituted may consider the propriety of the issues framed by its predecessor and remitted to the lower court, and if of differ-

ent opinion may ignore the findings. 43 All. 377=19 A. L. J. 139.

FINALITY OF ORDER.—An order of remand is interlocutory; it can be final if it decides some cardinal point in the suit. But an order of remand which merely decides that the suit is maintainable in the form in which it is brought is not final. 60 I. C. 522=2 I. ah. 106. An adjudication by a remanding judge would bind him and his successor at the final hearing, when it amounts to a preliminary decree, until it is duly set aside or amended. 32 I. C. 866=20 C. W. N. 43; 53 I. C. 677=(1919) M. W. N. 662; 1 P. 246=65 I. C. 175. Issues decided by order of remand cannot be re-opened at any subsequent stage of the litigation. 25 O. C. 245=70 I. C. 983.

REMAND TO ANOTHER COURT.—A case can be remanded to another court; only when the appellate court has power to transfer a case from one court to another. 66 I. C. 113=1922 Lah. 239; 158 P. W. R. 1913=20 I. C. 788. A case may be remanded to another court for hearing, when the appellate court illegally received document very late without assigning any reasons. 35 I. C. 698=24 C. L. J. 457. Where the chief court remanded a case to lower appellate court for further enquiry, it does not mean that the lower appellate court cannot direct the trial court for recording any additional evidence if necessary. 44 I. C. 907=147 P.L.R. 1917.

COSTS.—Respondent must be paid the costs of appeal when the appeal and remand were consequent on the appellants not setting forth his case properly. 18 M.L.T. 247=30 I.C. 785.

NOTICE.—No notice of remand is given in C. P. 1925 Nag. 31.

WHEN APPEAL LIES.—An appeal lies against an order under this rule. 44 All. 176=19 A. L. J. 971; 20 A. L. J. 321=44 A. 492; 24 C. W. N. 708=56 I. C. 516=31 C. L. J. 360; 42 C. L. J. 22=30 C. W. N. 41; 51 Bom. 43=100 I. C. 1004 (2)=1927 Bom. 129=29 Bom. L. R. 97 (32 B. 440, F.). The right of appeal is determined by what the court purports to do and not by what the court should have done—Where a court purports to pass a remand order under O. 41, R. 23 though really the remand is under S. 151, the order of remand is appealable. 107 I.C. 284 (1). Order of remand by appellate court without stating provision of law—The remand should be deemed to have been under O. 41, R. 23 and not under S. 151, C. P. C. 106 I. C. 842=9 Lah. L. J. 543. An appeal can be filed and heard even if remand order is carried out by first court. 15 I. C. 191=15 O. C. 43. An appeal lies against an order ordering re-trial on merits because it was held that the suit was not barred by reason of *res judicata*. 21 L. W. 318=48 M. L. J. 100. An appeal lies on all orders of remand even though the suit has not been disposed of on a preliminary point. 1922 Cal. 279. See *contra* 4 Bur. L. J. 159=3 Rang. 490=1925 Rang. 320.

WHEN NO APPEAL LIES.—When the order of remand is not under this rule no appeal lies. 1927 M. 335=52 M.L.J. 90; 48 M. 713=47 M. L. J. 552; 3 Pat. L. J. 253=43 I. C. 959; 37 M. L. J. 536=53 I. C. 417; 31 M. L. T. 182=69 I. C. 826; 73 I. C. 915=1924 Lah. 245=Cf. 4 Lah. L. J. 359=3 Lah. 218; 97 I. C. 1=1926

proceed to determine the suit ; and the evidence (if any) recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand.

24. [S. 565.] Where the evidence upon the record is sufficient to enable the

Where evidence on record sufficient, Appellate Court may determine case finally.

Appellate Court to pronounce judgment, the Appellate Court may, after resettling the issues, if necessary, finally determine the suit, notwithstanding that the judgment of

the Court from whose decree the appeal is preferred has proceeded wholly upon some ground other than that on which the Appellate Court proceeds.

25. [S. 566.] Where the Court from whose decree the appeal is preferred has

Where Appellate Court may frame issues and refer them for trial to Court whose decree appealed from.

omitted to frame or try any issue, or to determine any question of fact, which appears to the Appellate Court essential to the right decision of the suit upon the merits, the Appellate Court may, if necessary, frame issues, and

Pat. 514 ; 96 I. C. 440 (1) = 1926 Pat. 516 ; 31 C. W. N. 878 = 1927 Cal. 642 = 104 I. C. 422 ; (1928, M. W. N. 164 ; 26 I. C. 519 = 85 P. W. R. 1915 ; 60 I. C. 609 = 12 L. W. 667 ; 15 I. C. 367 = 22 M. L. J. 409. There can be no appeal from an order of remand where the question involved is one of custom. 5 Lah. L. J. 392 = 73 I. C. 650. No appeal lies against an order of remand passed by the first appellate court in a suit of a nature cognizable by a court of Small Causes. 36 I. C. 396. Under the Agra Tenancy Act an order of remand under this rule is not appealable. 14 I. C. 176 ; 35 I. C. 105.

REVISION.—An order of remand not appealable is not open to revision either. 13 I. C. 855 = 140 P. L. R. 1912. A remand order passed by an appellate court which it was not competent to pass can be set aside in revision. 1925 Mad. 171. See also 52 M. L. J. 90.

O. 41, R. 24.—When it is not a question of "resettling" issues but framing new issues requiring additional evidence, the court should act under the next rule and not under the present one. 40 I. C. 411 = 25 C. L. J. 527. Absence of specific issue does not debar decision and disposal on a point raised in pleadings, provided it does not prejudice the other side. 6 Bur. L. T. 174 = 20 I. C. 674. When an alternative case is pleaded in the appellate court, it will not act under this rule, unless the case arises on the facts stated in the plaint and the defendant is not taken by surprise. 36 I. C. 890 = 20 C. W. N. 773. Where a plaint was returned for presentation to the proper court and an appeal was filed against the order returning the plaint, it was held that the appellate court has no power to decide the case on the merits. 102 I. C. 467 = 1927 Oudh 218. The appellate court can on evidence on record decide any issue left undetermined by the lower court. 10 I. C. 225. High Court in second appeal has jurisdiction to record its finding on a question of fact left undetermined though it arises from admitted facts. 36 Bom. 183 = 13 Bom. L. R. 1183. When judgment is reversed in second appeal on a point of law, the High Court is competent to decide the case on the merits. 108 P. W. R. 1914 = 25 I. C. 144.

O. 41, R. 25. SCOPE.—Rule does not contemplate an order for trial of issues already tried and decided upon. 48 I. C. 959 ; 22 I. C. 128. Unless issue is material, remand should not be ordered. 1925 Oudh 97.

TRANSFER OF APPEAL.—An appeal cannot

be transferred by the District Judge from one to his subordinate, after a remand order, but before receipt of findings. 15 I. C. 862 = 10 A. L. J. 89.

EFFECT OF ORDER OF REMAND.—An order under this rule is not a final order. The court before which the case ultimately comes up can disregard the remand order and the findings under it. The responsibility for the final decree rests mainly with the court which passes it. 74 I. C. 1014 = 1923 A. 384 ; cf. 37 C. L. J. 122 = 74 I. C. 392 = 1923 Cal. 521. The appellate court is not bound to reconsider any opinion definitely expressed before remand, neither is he bound by the opinion expressed before or in remand order. 15 I. C. 39 = 17 C. W. N. 462 ; 46 I. C. 922 ; 25 O. C. 41 = 68 I. C. 242. When only one of the defendants appealed and the appellate court remanded the case for fresh disposal as regards the appellant, the decree against the non-appealing defendants is not affected. 22 P. L. R. 1918 = 44 I. C. 135 = 4 P. W. R. 1918.

POWER AND DUTY OF APPELLATE COURT.—Even after the return of the findings, the entire appeal is open for consideration at the final hearing. 24 C. W. N. 145 = 30 C. L. J. 428 ; 21 I. C. 760 = 18 C. L. J. 181. Findings on issues sent to trial court, ought to be scrutinized by the appellate court, before deciding the appeal, even though objections have not been preferred on those findings by the party affected. 71 I. C. 444 = 1923 A. 417 (1) ; 37 C. L. J. 122 = 74 I. C. 392 ; 21 I. C. 79 = 18 C. L. J. 354 ; 28 I. C. 597. Appellate court finding certain additional issue necessary—Proper course is to frame the issue and refer it for trial to lower court. 95 I. C. 123 (2) = 1926 Cal. 954 ; 44 C. L. J. 101 = 95 I. C. 203 = 1926 Cal. 976 ; 95 I. C. 170 (1) = 1926 Cal. 912.

POWER OF SECOND APPELLATE COURT.—High court in second appeal cannot interfere with findings of fact by the lower appellate court. 40 I. C. 128 ; 85 I. C. 92. Finding of the lower appellate court on a question of fact not put in issue can be contested even in second appeal. 5 Lah. L. J. 49. The High Court can frame necessary issues and remit them for trial, when the lower appellate court has failed to do so. 38 M. L. J. 476 = 43 Mad. 567 = 47 I. A. 76 (P. C.). High Court can remand even on a point not taken in grounds of appeal. 5 Lah. L. J. 49.

REMAND.—New issue when can be raised by High Court. 1926 Bom. 577 = 95 I. C. 297 ;

refer the same for trial to the Court from whose decree the appeal is preferred, and in such case shall direct such Court to take the additional evidence required ; and such Court shall proceed to try such issues, and shall return the evidence to the Appellate Court together with its findings thereon and the reasons therefor.

Findings and evidence to be put on record. Objections to finding.

26. [S. 567.] (1) Such evidence and findings shall form part of the record in the suit ; and either party may, within a time to be fixed by the Appellate Court, present a memorandum of objections to any finding.

(2) After the expiration of the period so fixed for presenting such memorandum the Appellate Court shall proceed to determine the appeal.

Determination of appeal.

Production of additional evidence in Appellate Court.

27. [S. 568.] (1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if—

(1926) M. W. N. 921 ; 1927 Mad. 85 ; 28 Bom. L. R. 1090.

APPLICATION OF THE RULE—ADDITIONAL EVIDENCE.—When a case is remanded it is discretionary with the appellate court not to direct the lower court to take further evidence. 15 I. C. 670. To assume that the order of remand does not contemplate taking additional evidence is not wrong. When there are sufficient materials on record, it would be wrong to take more evidence. 20 I. C. 35. An appellate court cannot define the particular kind of evidence required for the determination of a remanded issue. 22 I. C. 128. Opportunity must, in a proper case, be given to both parties for adducing evidence on a remanded issue. 19 A. L. J. 79—62 I. C. 447. A second appeal cannot be remanded for hearing in order that record of right published after the decision of the first court may be taken into consideration. 43 I. C. 750=2 P. L. J. 564. An appellate court should not ordinarily frame an issue not raised in the pleadings or even suggested in the trial court. It ought to be done only in exceptional cases after good cause shown and on payment of costs. 66 I. C. 640=34 C. L. J. 319 ; 28 Bom. L. R. 1090. Fresh opportunity cannot be given to prove one's case by an order of remand. 50 I. C. 933=29 Bom. L. R. 147=100 I. C. 993(2)=1927 B. 125. Where a definite case was set up in pleadings but no issue was raised or evidence taken, appellate court should frame the issue and decide it before disposal of appeal, when it is material. 49 I. C. 475. Case can be remanded for findings on issues framed on points though not raised in the pleadings, yet had governed the case from the first. 10 I. C. 922=4 Bur. L. T. 118. New issues can be raised and the case remanded for trial, when the parties failed to grasp the essential questions arising in the case and to adduce proper evidence. 66 I. C. 833.

DELEGATION OF POWER.—When certain issues were remanded to lower appellate court for trial, they cannot be sent to the trial court for taking evidence. Delegation of duties is wrong. 71 I. C. 896=1924 Lah. 354 ; 102 I. C. 273 (1) ; 19 I. C. 970=105 P. R. 1913. But see 32 I. C. 634=9 S. L. R. 148 (It may be sent to trial court for recording evidence, but the finding must be by first appellate court).

APPEAL.—No appeal against an order under this rule. 76 I. C. 816=1924 Rang. 131. See also 34 C. L. J. 319 ; 35 C. L. J. 345. Order calling

for a finding, if appealable under cl. 13 of Letters Patent. 25 L. W. 95.

REVISION.—Powers of revision should be exercised only in exceptional cases on orders under this rule. 67 I. C. 269=2 Lah. L. J. 662.

O. 41, R. 26.—The Court can go behind findings even though no objections are filed. 28 I. C. 597 ; 40 I. C. 405. Omission to fix a time for filing of objections is a mere irregularity and may be ignored if no party is affected. 26 I. C. 736=1 O. L. J. 681. Where no objections to a finding are filed, the Court may refuse to hear them at the time of hearing. 67 I. C. 846=3 Lah. L. J. 230. A memorandum of objections under O. 41, R. 26 does not require any Court-fee 105 I. C. 108.

O. 41, R. 27. ADMISSION OF EVIDENCE—DISCRETIONARY.—Admission of evidence in appeal is a matter of discretion within certain limits prescribed by this rule. 75 I. C. 331=26 O. C. 66 ; 38 I. C. 669=15 A. L. J. 21 ; 85 I. C. 459=1925 Pat. 504 ; 98 I. C. 129=1927 Cal. 140. It is not a matter of right. 8 A. L. J. 175=33 All. 379 ; 1923 Cal. 285. The appellate court should sparingly use the discretion. 50 C. 276=36 C. L. J. 345=102 I. C. 27. Additional evidence can be admitted not only when the court finds a *lacuna* but also on the application of parties. 89 I. C. 721 ; 89 I. C. 997 (1) ; 20 L. W. 840=85 I. C. 385=1925 Mad. 181=48 M. L. J. 32. A court of second appeal should not interfere with discretion exercised by the lower appellate court. 75 I. C. 331=26 O. C. 66 ; 27 I. C. 827 ; 1923 Lah. 30 ; 42 Mad. 737=37 M. L. J. 125 ; 20 L. W. 840=48 M. L. J. 32. Unless it were improperly exercised. 129 P. R. 1916=36 I. C. 282.

OBJECT OF RULE.—The rule is intended to supply defect in existing evidence and not to give an opportunity to prove a case over again. 13 I. C. 131=9 A. L. J. 59. Rule not intended to enable an appellate court to re-examine before it witnesses already examined and cross-examined in the Court of first instance. 38 All. 191=14 A. L. J. 121. The rule is not to be used with a view to supply defects and loop-holes that a vigilant litigant is required to guard against. 49 I. C. 868. Procedure prescribed in this rule must be strictly followed, especially that in the cl. (2) regarding record of reasons. 31 I. C. 873. The provisions of this rule are mandatory. 47 I. C. 12=150 P. W. R. 1918. See *contra* 64 I. C.

(a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

238 A preliminary application to admit fresh evidence before the appeal is heard is not warranted by this rule. 42 Cal. 675=19 C. W. N. 401. Oral evidence to prove documents should be allowed when the latter are admitted. 20 I. C. 542.

PROCEDURE.—When additional evidence is admitted, sufficient opportunity must be given to tender rebutting evidence. 36 I. C. 955; 1923 Cal. 300; 25 P. L. R. 1915=28 I. C. 14; 43 I. C. 320=1917 Pat. 269; 20 L. W. 840=48 M. L. J. 32; 41 C. L. J. 191=1925 Cal. 671; 98 I. C. 129=1927 Cal. 140. When appellant raises a new plea, not pressed in courts below, the other side should be allowed to meet it by additional evidence. 72 I. C. 239=2 Pat. 607. When documents are admitted opportunity must be given for objections to its admissibility. 1924 Cal. 403. Additional evidence which impeaches the testimony of a witness examined in the court below, should not be allowed, at least without that witness being called and given an opportunity to contradict the additional evidence. 36 All. 93=41 I. A. 76=26 M. L. J. 153=18 C. W. N. 521 (P. C.).

RECORD OF REASONS.—Reason for admitting additional evidence should be recorded. 38 Bom. 665=16 Bom. L. R. 641; 68 I. C. 719; 19 I. C. 572; 50 I. C. 805; 15 I. C. 250=15 O. C. 253; 41 C. L. J. 194=86 I. C. 646=1925 Cal. 671. Omission to record reasons renders the order without jurisdiction and the consent of the parties cannot validate such an order. 49 I. C. 510 *See contra* 51 I. C. 50; 64 I. C. 38; 90 I. C. 756. Admission without recording reasons is illegal. 32 I. C. 826=3 L. W. 163; 71 I. C. 289=1924 A. 303. Reasons for admission could be recorded in the judgment. 85 I. C. 676 (2)=1925 All. 752. When the reasons are apparent in the judgment, they need not be separately recorded. 22 M. L. J. 14=12 I. C. 673. Non-record of reasons is an irregularity and a fresh trial may be ordered in certain circumstances. 1922 Cal. 148=77 I. C. 556. But *see* 98 I. C. 137=1927 Cal. 126. No reasons given—Objections not raised—Effect. 90 I. C. 756=1926 Cal. 369. When the appellate court issued a commission and on the report of the Commissioner gave a finding, without recording reasons for admitting additional evidence, the finding is not binding being based on the report of the commission which is inadmissible without record of reasons. 1923 A. 413; 1 L. W. 771=28 I. C. 11; 1927 A. 175. *See contra* 48 I. C. 137=111 P. W. R. 1918. 'The peculiar circumstances of the case' is no reason. 19 J. C. 572.

SUBSTANTIAL CAUSE—WHAT IS.—Additional evidence may be taken on substantial causes, other than those particularly specified and necessary to meet ends of justice. 2 Pat. 676=50 I. A. 186=45 M. L. J. 578 (P. C.); 1923 Lah. 584; 30 I. C. 402=38 Mad. 414; 22 M. L. J. 14=12 I. C. 673; 14 I. C. 140=36 Mad. 477. What is substantial cause will depend on the facts of each case. 32 I. C. 908. Discovery of fresh evidence and inability to produce it through no fault or negligence of the party is substantial cause. 28 I. C. 694=28 M. L. J. 334; 47 All. 412=23 A. L. J.

193. *See contra* 86 I. C. 505=1925 Nag. 284. Discovery of fresh evidence under such circumstances as would warrant an application for review under O. 47, R. 1 may be brought under "any other substantial cause." 88 I. C. 586=1925 All. 808. *See contra* 84 I. C. 74 (2)=1924 Bom. 227. Additional evidence can be allowed when there has been a wrongful refusal to grant an adjournment by the lower court. 23 Bom. L. R. 769=46 Bom. 184. An appellate court can examine any parties if for the sake of doing justice and for the purpose of making sure of facts, it is considered necessary. 42 All. 48=17 A. L. J. 945. Further evidence can be advanced in appeal when a party has been prevented by the action of the trial court from adducing all the evidence he could. 37 Mad. 455=22 M. L. J. 217; 90 I. C. 630. Additional evidence can be allowed if there has been failure of justice by reason of absence of proof on a technical aspect of the case. 21 L. W. 210=86 I. C. 576=1925 Mad. 444.

SUBSTANTIAL CAUSE—WHAT IS NOT.—That evidence already adduced is unsatisfactory and insufficient, is not a substantial cause. 39 I. C. 886=25 C. L. J. 473. Nor the mere fact that a litigant was not aware of the existence of documentary evidence at the time of trial. 68 I. C. 334. There is no sufficient cause to admit additional evidence when a point is sufficiently covered by an issue and the parties had every opportunity of producing evidence on it. 49 I. C. 115=5 O. L. J. 768; 102 I. C. 27.

TIME OF ADMISSION.—The legitimate occasion for admitting additional evidence is when on examining records there is an inherent defect. 40 Cal. 402=17 C. W. N. 615; 10 I. C. 332; 31 Bom. 381 (P. C.); 66 I. C. 370; 31 Mad. 114; 42 Cal. 675=19 C. W. N. 401; 4 Pat. L. T. 418=71 I. C. 881; 53 I. C. 567; 55 I. C. 226. An appellate court cannot admit documents after arguments are closed without recording reasons therefor. 63 I. C. 423=19 A. L. J. 402; 1924 Cal. 403; 35 I. C. 698=24 C. L. J. 457.

WHEN ADDITIONAL EVIDENCE COULD BE ADMITTED—ILLUSTRATIVE CASES.—Admitting fresh evidence is not confined to cases where the court *suo motu* desires to call for fresh evidence. 12 I. C. 332=14 O. C. 327. Whether additional evidence should be admitted should be decided when appeal is actually heard. 98 I. C. 129=1927 Cal. 140. Additional evidence can be admitted when party through no fault of his was unable to produce it at the trial. 12 I. C. 332=14 O. C. 327. An appellate court can issue a commission for examining accounts and remedying mistakes and omissions made by the previous Commissioner. 3 Lah. 382=1923 Lah. 115. An appellate court can refer to statements not on record but referred to by trial court and contained in the record of a connected case. 32 I. C. 312=193 P. L. R. 1915. Admission is not to be with a view to enable the Court to pass judgment in favour of one party, but it is to be only when the original one is defective. 57 I. C. 843; 47 I. C. 141. Fresh evidence on question of fact not admissible. 95 I. C. 300 (2)=1926 Cal. 941.

(b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the Appellate Court may allow such evidence or document to be produced, or witness to be examined.

(2) Wherever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission.

28. [S. 569.] Wherever additional evidence is allowed to be produced, the Appellate Court may either take such evidence, or direct the Court from whose decree the appeal is preferred, or any other subordinate Court, to take such evidence and to send it when taken to the Appellate Court.

DISCOVERY OF EVIDENCE.—Original document which was supposed to be lost, of which secondary evidence was given, could be admitted in appeal. 32 I.C. 711. When fresh evidence was available only long after disposal of suit, it can be admitted in appeal. 71 I.C. 453=37 C.L.J. 491. *See contra* 53 I.C. 567. Discovery of fresh evidence is no ground for admission of it. 97 I.C. 369=1927 Lah. 11 (34 I.A. 115, F.).

EXCLUDED EVIDENCE.—Evidence improperly excluded by the trial court, can be admitted in appeal. 34 C.L.J. 160=26 C.W.N. 1022; 27 I.C. 516. This does not amount to taking additional evidence. 52 I.C. 327. Additional evidence can be admitted when the omission was due to inadvertence or mistake, especially when it consists of documents, the genuineness of which cannot be impeached. 14 P.R. 1916=33 I.C. 813.

SUBSEQUENT EVENTS.—Where pending an appeal from a decree in a rent suit, a decree is passed in favour of the appellant in a title suit, the latter should be admitted in evidence. 64 I.C. 721. *See also* 88 I.C. 553=1925 Pat. 612. When subsequent events make the reliefs granted inappropriate, additional evidence can be taken. 48 I.C. 137=111 P.W.R. 1918. Public documents coming into existence after the filing of second appeals may be admitted by the High Court. 4 Pat. L.J. 312=50 I.C. 857. Statements of witness in proceedings under Lunacy Act commenced after dismissal of suit between same parties were admitted at appellate stage. 1927 P.C. 123=101 I.C. 363 (2)=26 L.W. 94 (P.C.).

WAIVER OF OBJECTION.—A party cannot object to a portion of evidence admitted on appeal and at the same time rely on another portion. 1922 Nag. 119.

WHAT COULD NOT BE ADMITTED.—Evidence tendered at the time of argument in trial court and rejected should not be admitted in appeal. 4 Lah. L.J. 371. An appellate court should not examine an attesting witness who by inadvertence had not been called in first court. 5 P.L.J. 263=56 I.C. 983; for an exceptional case, *see* 11 A.L.J. 371=21 I.C. 619=35 All. 353.

NEGLIGENCE.—A litigant is not entitled to indulgence of being allowed to adduce additional evidence if he was negligent in the courts below. 47 Cal. 662=47 I.A. 11=38 M.L.J. 424 (P.C.); 56 I.C. 983=1 Pat. L.T. 701. Additional evidence cannot be allowed when the party had deliberately declared in the lower court that he has no evidence. 25 I.C. 587=16 M.L.T. 301.

DISCOVERY OF EVIDENCE.—Evidence could not be admitted in appeal on the ground that it

was discovered after the filing of the appeal. 9 I.C. 251=9 M.L.T. 323; 1926 Oudh 74.

PUBLIC DOCUMENTS.—It is not proper to admit a judgment which is not *inter partes* nor conclusive, and is simply an addition of a disputable point to the already existing evidence. 50 I.C. 119=23 C.W.N. 242. Settlement papers cannot be admitted after the first Court's decision. 29 I.C. 219. Documents in possession of a party cannot be allowed in evidence in second appeal. 103 I.C. 215=1927 Lah. 574.

EXPERT EVIDENCE.—Where in a suit on a promissory note the appellate court being unable to believe evidence on either side acted upon the report of the thumb impression bureau, to whom it sent the document, held that the procedure was unwarranted by law. 28 I.C. 721. When no application was made to the appellate court to admit a document excluded by the trial court, the appellate court might refuse to consider the document. 28 I.C. 378=28 M.L.J. 115.

SECOND APPEAL.—High Court in second appeal can admit fresh evidence, if necessary, for the disposal of the appeal. 52 I.C. 625=(1919) M.W.N. 455. Evidence improperly admitted in appeal will not be considered in second appeal. 40 Cal. 402=17 C.W.N. 615; 129 P.R. 1916=36 I.C. 382. *See also* 81 I.C. 999=31 C.L.J. 261=1925 Cal. 98. Waiver of objection, what amounts to. 55 I.C. 246. Effect of waiver of objection to admit evidence. 36 C. 833=13 C.W.N. 830 (P.C.). When the judgment of an appellate court was delivered in ignorance of the judgment of the High Court delivered the prior day in a connected suit, the judgment of the High Court could not be admitted in second appeal, but the proper course would be to apply for review or revision. 51 I.C. 652=29 C.L.J. 313. *See contra* 52 I.C. 625=(1919) M.W.N. 455.

REVIEW.—The ordinary way of bringing new and important matter to the notice of the Court which was not within knowledge at the time of decree, is by way of review. 47 Bom. 674=25 Bom. L.R. 310. *See also* 51 I.C. 652=29 C.L.J. 313; 52 I.C. 625=(1919) M.W.N. 455.

O. 41, R. 28.—Documents should be exhibited, 38 B. 665. On remand lower appellate court can appoint Commissioner to examine witnesses. 1925 Lah. 39. Lower appellate court calling for revised findings on the ground of evidence being shut out—Trial Court's decree set aside—Validity of order. 39 M.L.T. 399=1927 Mad. 1065.

- 29. [S. 570.]** Where additional evidence is directed or allowed to be taken, the Appellate Court shall specify the points to which the evidence is to be confined, and record on its proceedings the points so specified.

Points to be defined and recorded.

Judgment in appeal.

- 30. [S. 571.]** The Appellate Court, after hearing the parties or their pleaders and referring to any part of the proceedings, whether on appeal or in the Court from whose decree the appeal is preferred to which reference may be considered necessary, shall pronounce judgment in open Court, either at once or on some future day of which notice shall be given to the parties or their pleaders.

Contents, date and signature of judgment.

- 31. [S. 574.]** The judgment of the Appellate Court shall be in writing and shall state—

O. 41, R. 30.—Judgment was not pronounced in open Court and a party had no notice of the date of its pronouncement—Limitation for appeal. See 51 I. C. 239=27 P. R. 1919.

O. 41, R. 31. SCOPE.—An appellate court must conform strictly to the provisions of this rule. 31 I. C. 896=9 Bur. L. T. 59; 95 I. C. 925=1927 Oudh 95=1 Luck. 458. The provisions of this rule are mandatory. 9 I. C. 804; 21 A. L. J. 567=1924 A. 100. But see 59 I. C. 673=14 S. L. R. 132. Appellate court need not examine trial court's finding of fact not objected to. 23 A. L. J. 653=89 I. C. 374=1925 All. 585. A suit contesting an alienation ought not to be dismissed on the ground that it referred to a small plot of useless land. 87 P. L. R. 1917=42 J. C. 244.

CONTENTS OF JUDGMENT.—A judgment in appeal must set out the evidence on which it is based. 63 I. C. 436. Appealable judgments must contain findings on all important points. 1925 Cal. 316. The matters in dispute between the parties must be fully set forth with the findings in the judgment. 35 I. C. 237; 65 I. C. 479; 11 I. C. 915=4 Bur. L. T. 201. Judgment must state reasons for decision on all the points for determination, and on independent consideration, and must show that the judge did not rely *en-bloc* on the reasoning of the trial court. 46 I. C. 161=20 Bom. L. R. 461; 28 I. C. 354; 1923 Lah. 658. An appellate judgment should contain a statement of the case as would show that the Court has understood the real issues, tried them and considered the evidence. 25 I. C. 596=1 O. L. J. 334. All points raised in first Court and not abandoned in second Court must be considered. 36 Bom. 379=14 Bom. L. R. 418; 42 I. C. 838=3 P. L. J. 701. In a suit for confirmation of possession and declaration of title, the appellate Court's finding merely that title was not proved, is a partial view of the case. 46 I. C. 328. A cursory judgment, not showing that the evidence on record has been fully weighed is liable to be set aside. 27 I. C. 561=36 P. L. R. 1915. But see L. R. 3 A. 454. A judgment based on an indefinite conclusion "there is much force in the contention" is not in accordance with law. 54 I. C. 672=1 P. L. T. 27. Lower appellate Court's judgment containing no points nor decision thereon and no reasons—It is not a valid judgment. A. I. R. 1928 Mad. 16.

CONTENTS OF AFFIRMING JUDGMENT.—An affirming judgment must show that the mind of the appellate court has been brought to bear

sufficiently upon the aspects of the case requiring his decision. 49 I. C. 504=1919 Pat. 88. Where the lower Court's judgment is well written and exhaustive, an appellate Court may simply express concurrence, but there should be enough to show that the Court of appeal has considered it fully and formed its own opinion. 13 I. C. 194; 97 I. C. 760=1927 Cal. 323. Full reasons must be given when affirming lower Court's decree. 84 I. C. 946=1925 Lah. 246. Where the judgment of the first Court was full, and the appellate Court appreciated the main facts but has dismissed the appeal in a short judgment, it is not irregular. 1923 C. 113, 91 I. C. 478=1926 Cal. 545. A general statement that the records were carefully considered, and no reason was found to interfere with trial Court's conclusion is not a judgment. 46 I. C. 56=21 O. C. 309; 51 I. C. 46; 38 I. C. 509=2 P. L. J. 8; 95 I. C. 925. Where the judgment stated that the findings of the lower Court were accepted but without dealing with or stating certain objections against the findings, *held* it is not a judgment. 16 I. C. 354 and 382; 6 Bur. L. J. 82.

CONTENTS OF REVERSING JUDGMENT.—Law imposes on the Court of appeal an imperative duty and obligation of giving an adequate and satisfactory judgment when reversing a judgment. 43 I. C. 973. Full reasons for reversing a judgment should be given. 56 I. C. 816; 1926 Nag. 435. The aggrieved party can demand a consideration of the points on which the lower Court relied, when a judgment is one of reversal. 34 I. C. 185.

CONSIDERATION OF EVIDENCE ON RECORD.—It is the duty of the appellate Court to consider the evidence on record. 51 I. C. 751. The judgment must show that the evidence on record and the grounds of appeal have been considered. 108 P. L. R. 1916=36 I. C. 6; 38 I. C. 814=1 P. L. W. 193. Failure to weigh all evidence before the appellate Court, vitiates its judgment. 51 I. C. 11; 17 I. C. 895=5 Bur. L. T. 269. Omission to consider an important piece of evidence, vitiates the judgment. 49 I. C. 832. Non-mention of an obviously important document in judgment of an appellate Court is proof that it was not considered. 22 O. C. 312=54 I. C. 353. A judge should not quote the judgment of another Court as his own, but should show his own appreciation of the evidence on record giving reasons for his findings. 37 I. C. 435=3 O. L. J. 620; 49 I. C. 733.

(a) the points for determination ;
 (b) the decision thereon ;
 (c) the reasons for the decision ; and
 (d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled ;
 and shall at the time that it is pronounced be signed and dated by the Judge or by the Judges concurring therein.

[Madras] Substitute the following for O. 41, R. 31 :—

"31. The judgment of the Appellate Court shall be in writing and shall state—(a) the points for determination ; (b) the decision thereon ; (c) the reasons for the decision ; and (d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled ; and shall bear the date on which it is pronounced and shall be signed by the Judge or the Judges concerning therein : Provided that where the presiding Judge is specially empowered by the High Court to pronounce his judgment by dictation to a shorthand-writer in open Court, the transcript of the judgment so pronounced shall, after such revision as may be deemed necessary, be signed by the Judge."

32. [S. 577.] The judgment may be for confirming, varying or reversing the decree from which the appeal is preferred, or, if the parties What judgment may direct. to the appeal agree as to the form which the decree in appeal shall take, or as to the order to be made in appeal, the Appellate Court may pass a decree or make an order accordingly.

33. The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or Power of Court of Appeal. make such further or other decree or order as the case

OBJECT OF RULE.—The object of this rule is, speaking generally to enable the appellate Court where its decision interferes with, modifies or extends the decision of the lower Court to give effect to that decision by interfering, if necessary, even with the rights and liabilities of those who are not in fact appealing from the decision of the trial Court. 4 Pat. 37=A.I.R. 1925 Pat. 285 ; 97 I.C. 65 ; 1928 A. 77. Power to set matters right. 91 I. C. 519=1926 Mad. 631.

SCOPE OF.—34 A. 32 ; 24 I. C. 208, 14 N.L.R. 56 ; 50 M. 614=52 M. L. J. 612=1927 M. 620 ; 105 I. C. 600=1927 Cal. 831 ; 1926 Cal. 1042=96 I.C. 474 ; 97 I.C. 346=1927 Mad. 974 ; (1928) M. W. N. 74 ; 1928 A. 77.

APPLICABILITY.—It is applicable to all cases where an appeal is heard under the Act. 34 A. 32 ; 40 M. 846 ; 34 M. L. J. 361. Rule applies to all classes of suits including a suit for partition. 49 C. 379=69 I. C. 981. The provision of this rule should be cautiously applied and only to cases where but for recourse to it the ends of justice would be defeated. 89 I. C. 24. See also 34 A. 32. Court will not apply, without strong reasons, this rule in favour of party who has appealed or lodged cross-objections and failed. A. I. R. 1925 Lah. 2. Appeal from part and by some parties only enables the Court to exercise its power under this rule. A.I.R. 1925 Pat. 40. Appellate Court can in appeal against portion of decree set aside whole decree in absence of cross-appeal or objections by respondents due to sufficient reasons. 85 I. C. 312=1925 Mad. 266.

COURT'S POWER.—The Court may make any order to meet ends of justice. 38 C. 721. Even in the absence of a respondent an appellate Court has the power to vary the decree in his favour. 101 I.C. 255=1926 Nag. 196 ; 94 I. C. 315=1926 All. 425.

POWER OF COURT.—This rule gives the Court power to pass a decree in favour of a person who is not a party before it, but was a party in the

lower court. 12 O.L.J. 571. See also 8 M. L. T. 377 ; 8 I.C. 377 ; 25 I.C. 273 ; 91 I.C. 533. The Court can give decree in favour of all plaintiffs when only one of them has appealed. 34 P.L.R. 1912=36 P.W.R. 1912. Appellate Court's power to pass decree in favour of those not made parties to the appeal—Adjustment of shares See 20 C.W.N. 872. Where a certain defendants were not parties to an appeal modification of the decree in their favour is not authorised by this rule. 88 I.C. 803. The discretion allowed to the Judge by O. 7, R. 7 and this rule is wide and covers the granting of a declaratory decree in a suit for possession where alternative relief is claimed. 85 I. C. 94=1923 Lah. 422. Joint decree for possession—Appeal therefrom—Death of one of the plaintiffs—Respondent's legal representatives were not brought on record in time—Whether they can be brought on record as parties. 90 I. C. 986=30 C.W.N. 45 ; 1926 Lah. 564 ; 1926 Cal. 335 ; 1927 P. C. 252 (P. C.). On reversal of decree for one relief alternative relief should be granted if justice requires it. 1925 Lah. 155. Suit against a number of co-sharers—Decree against one only—Appeal by the defendant—If decree can be passed against all. See 23 A.L.J. 501=47 A. 597 ; 52 M.L.J. 135=1927 Mad. 349 ; 48 A. 551=24 A. L. J. 586=94 I. C. 347 ; 6 R. 29=27 L. W. 1=54 M. L. J. 88=107 I.C. 237. Where a decree is confirmed on appeal any order to amend the decree so as to make it agree with the judgment should be passed by the appellate Court. Omission on the part of party to file a memo. of objections praying for the amendment of the decree when appellate Court has cognizance of the case, will not have the effect of taking away the parties, inherent right to have a decree in accordance with the judgment passed in his favour. 1925 Mad. 735=49 M.L.J. 385. See also 22 L. W. 376=48 M.L.J. 577. Plaintiff's claim decreed in part only—Appeal by defendant only—Plaintiff's suit

may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection :

[Provided that the Appellate Court shall not make any order under section 35-A in pursuance of any objection on which the Court from whose decree the appeal is preferred has omitted or refused to make such order.]¹

Illustration.

A claims a sum of money as due to him from X or Y and in a suit against both obtains a decree against X. X appeals and A and Y are respondents. The Appellate Court decides in favour of X. It has power to pass a decree against Y.

34. [S. 576.] Where the appeal is heard by more Judges than one, any Judge dissenting from the judgment of the Court shall state in

Dissent to be recorded, writing the decision or order which he thinks should be passed on the appeal, and he may state his reasons for the same.

Decree in appeal.

35. [S. 579.] (1) The decree of the Appellate Court

Date and contents of decree. shall bear date the day on which the judgment was pronounced.

(2) The decree shall contain the number of the appeal, the names and descriptions of the appellant and respondent, and clear specification of the relief granted or other adjudication made.

(3) The decree shall also state the amount of costs incurred, in the appeal, and by whom, or out of what property, and in what proportions such costs and the costs in the suit are to be paid.

(4) The decree shall be signed and dated by the Judge or Judges who passed it :

Provided that where there are more Judges than one and there is a difference

Judge dissenting from judgment need not sign decree. of opinion among them, it shall not be necessary for any Judge dissenting from the judgment of the Court to sign the decree.

[Lahore] Add the following as a proviso to O. 41, R. 35 (4) :—

" Provided also in the case of the High Court, that in the absence of a Judge who passed a decree, or one or more of the Judges who passed a decree, either the Registrar or the Deputy Registrar of the Court shall sign the decree on behalf of such absent Judge or Judges, but that neither the Registrar nor the Deputy Registrar shall sign such decree on behalf of a Judge who dissented from the judgment of the Court."

36. [S. 580.] Certified copies of the judgment and of the decree in appeal shall be furnished to the parties on application to the Appellate Court and at their expense.

Copies of judgment and decree to be furnished to parties.

37. [S. 581.] A copy of the judgment and of the decree, certified by the Appellate Court or such officer as it appoints in this behalf,

Certified copy of decree to be sent to Court whose decree appealed from. shall be sent to the Court which passed the decree appealed from and shall be filed with the original proceedings in the suit, and an entry of the judgment of the

Appellate Court shall be made in the register of civil suits.

[Allahabad and Oudh] Add the following rule to O. 41 :—

" **38.** (1) An address for service filed under Order 7, Rule 19, or Order 8 Rule 11, or subsequently altered under Order 7, Rule 24 (in Oudh read 26 for 24) or Order 8, Rule 12, shall hold good during all appellate proceedings arising out of the original suit or petition.

dismissed *in toto*—Appeal by plaintiff for whole claim sustainable. 4 R. 110=1926 Rang. 172. See also 49 M. 435=94 I.C. 767=51 M. L. J. 570 (P. C.). Appellate Court can give relief to respondent although no cross-objections filed.

49 A. 224=1927 All. 453=97 I. C. 65 (34 A. 32, F.); 1927 Bom. 128=28 Bom. L. R. 627.

O. 41, R. 38.—¹ This Proviso was added by Act IX of 1922, S. 4.

(2) Every memorandum of appeal shall state the addresses for service given by the opposite parties in the Court below, and notices and processes shall issue from the appellate Court to such addresses.

(3) Rules 21, 22, 23 and 24 of Order 7 shall apply so far as may be, to appellate proceedings."

[Madras] Order XLI-A.

Appeals to the High Court from original decrees of subordinate Courts.

1. The rules contained in O. 41 shall apply to appeals in the High Court of Judicature at Madras with the modifications contained in this order.

2. (1) The memorandum of appeal shall be accompanied by the prescribed fees for service of notice of appeal and receipt of the accountant of the Court for the sum prescribed by the rules of Court.

(2) Notwithstanding anything contained in Rule 22 of Order 41 the period prescribed for entry of appearance by the respondent and filing by him of Memorandum of Cross-Objections, if any, shall, unless otherwise ordered, be thirty days from the service of notice upon him.

3. (1) If the respondent intends to appear and defend the appeal he shall, within the period specified in the notice of appeal, enter an appearance by filing in Court a memorandum of appearance.

(2) If a respondent fails to enter an appearance within the time and in the manner provided by the sub-rule above, he shall not be allowed to translate or print any part of the record.

Provided that a respondent may apply by petition for further time, and the Court may thereupon make such order as it thinks fit. The application shall be supported by evidence to be given on affidavit as to the reason for the applicant's default, and notice thereof shall be given to the appellant and all parties who have entered an appearance. Unless otherwise ordered the applicant shall pay the costs of all parties appearing upon the application.

4. (1) The memorandum of appeal and memorandum of appearance shall state an address for service within the city of Madras at which service of any notice, order or process may be made on the party filing such memorandum.

(2) If a party appears in person, the address for service may be within the local limits of the jurisdiction of the Court from whose decree the appeal is preferred: Provided that if such party subsequently appears by a pleader he shall state in the Vakalat an address for service within the city of Madras, and shall give notice thereof to each party who has appeared.

(3) If a party appears by a pleader, his address for service shall be that of his pleader, and all notices to the party shall be served on his pleader at that address.

5. The Court may direct that service of a notice of appeal or other notice or process shall be made by sending the same in a registered cover prepaid for acknowledgment and addresses to the address for service of the party to be served which has been filed by him in the lower Court: Provided that, after a party has given notice of an address for service in accordance with Rule 4, service of any notice or process shall be made at such address.

6. All notices and process, other than a notice of appeal, shall be sufficiently served left by a party or his pleader, or by a person employed by the pleader, or by an officer of the Court, between the hours of 11 a.m. and 5 p.m. at the address for service of the party to be served.

7. Notices which may be served by a party or his pleader under Rule 6, or which are sent from the office of the Registrar may, unless the Court otherwise directs, be sent by registered post, and the time at which the notice so posted would be delivered in the ordinary course of post shall be considered as the time of service thereof and the posting thereof shall be a sufficient service.

8. If there are several respondents, and all do not appear by the same pleader, they shall give notice of appearance to such of the other respondents as appear separately.

9. A list of all cases in which notice is to be issued to the respondent shall be affixed to the Court notice-board after the case has been registered.

10. (1) If upon a case being called on for hearing by the Court, it appears that the record has not been translated and printed in accordance with the rules of Court, the Court may hear the appeal or dismiss it, or may adjourn the hearing and direct the party in default to pay costs, or may make such orders as it thinks fit.

(2) If the Court proceeds to hear the appeal, it may refuse to read or refer to any part of the record which is not included in the printed papers.

11. When costs are awarded, unless the Court otherwise orders, the costs of a party appearing upon any application before the Registrar or the Court shall be Rs. 15 and the costs of appearing when the appeal is in the daily cause-list for final hearing and is adjourned shall be Rs. 30. At the request of any party the Registrar shall cause the order to be drawn up and the said costs to be inserted therein.

Memorandum of Objections.

12. (1) If the acknowledgment mentioned in Rule 22 (3) of O. 41 is not filed, the respondent shall together with the memorandum of objections file so many copies thereof as there are parties affected thereby.

(2) The prescribed fees for service shall be presented together with the memorandum to the Registrar.

13. If any party or the pleader of any party to whom a memorandum of objections has been tendered has refused or neglected for three days from the date of tender to give the acknowledgment

mentioned in Rule 22 (3) of O. 41, the respondent may file an affidavit stating the facts and the Registrar may dispense with the service of the copies mentioned in Rule 12 (1).

14. Rule 31 of O. 41 shall not apply to the High Court. If judgment is given orally a shorthand note thereof shall be taken by an officer of the Court and transcript made by him shall be signed or initialled by the Judge or Judges concurring therein after making such corrections as may be considered necessary.

Order XLI-B.

1. The rules of Order 41-A shall apply, so far as may be, to appeals to the High Court of Madras under clause 15 of the Letters Patent of the said Court.

Provided that it shall not be necessary to file copies of the judgment and decree appealed from.

2. Notice of the appeal shall be given in manner prescribed by O. 41-A, Rule 6, or if the party to be served has appeared in person, in manner prescribed by Rule 5 of the said order.

ORDER XLII.

APPEALS FROM APPELLATE DECREES.

1. [S. 587.] The rules of Order 41 shall apply, so far as may be, to appeals from appellate decrees.

Procedure.

[Madras] Substitute the following for the existing Order 42 :—

Appeals from Appellate Decrees.

1. The rules of O. XLI and O. XLI-A shall apply so far as may be, to appeals to the High Court of Judicature at Madras from appellate decrees with the modifications contained in this order.

2. (1) The memorandum of appeal shall be printed or typewritten and shall be accompanied by the following papers :—

A copy thereof ; one certified copy and one plain printed or typewritten copy of the decrees of Court of first instance and of the appellate Court ; four printed copies of each of the judgments of the said Courts, one copy of each judgment being a certified copy ; and the receipt of the accountant of the Court for the sum prescribed by the rules of Court.

(2) If any ground of appeal is based upon the construction of a document, a printed or typewritten copy of such document shall be presented with the memorandum of appeal : Provided that if such document is not in the English language and the appellant appears by a pleader, an English translation of the document certified by the pleader, to be a correct translation shall be presented.

(3) If the appellant fails to comply with this rule, the appeal may be dismissed.

[Allahabad] Revised Rule 1 in O. 42 :—

1. The rules of Order 41 shall apply, so far as may be, to appeals from appellate decrees, subject to the following provision :—“ Every memorandum of

Procedure.

appeal from an appellate decree shall be accompanied by a copy of the decree appealed from and also (unless the Court sees fit to dispense with either or both) by copies of the judgment on which the said decree is founded, and of the judgment of the Court of first instance.”

[Lahore] Add the following as rule 2 :—

“2. In addition to the copies specified in Order 41, Rule 1, the memorandum of appeal shall be accompanied by a copy of the Court of first instance.”

ORDER XLIII.

APPEALS FROM ORDERS.

Appeals from Orders.

1. [S. 588.] An appeal shall lie from the following orders under the provisions of section 104, namely :—

(a) an order under rule 10 of Order VII returning a plaint to be presented to the proper Court ;

O. 42, R. 1.—Where the High Court in second appeal transposes parties from the category of appellant to that of respondent no question of limitation for presenting the appeal arises. 24 L. W. 826=99 I.C. 687=52 M. L. J. 33=1927 Mad. 204. Under O. 42, R. 1, C. P. C., every second appeal must be accompanied by a copy of the decree of the lower appellate Court. 100 I.C. 810. Failure to file copy of first Court judgment along with memorandum of second appeal is fatal. But the delay in filing copies of trial court judgment because copies were supplied only late should be excused under S. 5 of Lim. Act. 7 Lah. 447=1926 Lah. 458 ; 97 I. C. 773=1926 Lah. 626; 105 I.C. 689 (1). Where the trial Court

gave a preliminary judgment on the legal issues and the final judgment subsequently it is enough if the copy of the final judgment was filed in second appeal. 103 I. C. 73=1927 Lah. 640.

O. 43, R. 1.—Orders appealable under O. 43, R. 1 are not decrees, though coming under S. 47 or the definition of decree in S. 2. 17 I. C. 884=8 N. L. R. 177. Appeal—Formalities of—Revenue Court. 34 I. C. 706=3 O. L. J. 209. Decree for specific performance—Power of Courts to extend time—Order extending time whether appealable. 6 Bur. L. J. 216.

Cl. (a).—An order of appellate Court returning a plaint for want of jurisdiction in the Court in which the suit is brought is appealable. 19

- (b) an order under rule 10 of Order VIII pronouncing judgment against a party ;
- (c) an order under rule 9 of Order IX rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit ;
- (d) an order under rule 13 of Order IX rejecting an application (in a case open to appeal) for an order to set aside a decree passed *ex parte* ;
- (e) an order under rule 4 of Order X pronouncing judgment against a party ;
- (f) an order under rule 21 of Order XI ;
- (g) an order under rule 10 of Order XVI for the attachment of property ;
- (h) an order under rule 20 of Order XVI pronouncing judgment against a party ;
- (i) an order under rule 34 of Order XXI on an objection to the draft of a document or of an endorsement ;
- (j) an order under rule 72 or rule 92 of Order XXI setting aside or refusing to set aside a sale ;

A. L. J. 305=62 I. C. 399. See also 12 A. L. J. 21=36 All. 58 ; 52 I. C. 801=46 Cal. 738. No appeal lies against the order of an appellate Court returning a memo. of appeal to be presented to the proper Court. 16 A. L. J. 630=40 All. 659. But see also 56 I. C. 865=2 Lah. L. J. 366. Nor against an appellate order confirming the order of the trial Court returning a plaint for presentation to the proper Court. 46 I. C. 99=16 A. L. J. 535 ; 27 Bom. L. R. 635=1925 Bom. 431. The fact that in the exercise of his jurisdiction, the Judge commits an error does not give any right of revision of the order. 46 I. C. 99.

The word "plaint" in R. 1 (a) does not include a memo. of appeal. 56 I. C. 865=2 Lah. L. J. 366. Plaintiff does not lose his right to appeal against order of a Munsiff returning the plaint, by electing to file the plaint in the Court to which he is directed. 34 M. L. J. 397=41 Mad. 721 ; 53 I. C. 1001=23 C. W. N. 942. An order rejecting a plaint under O. 7, R. 11 is not appealable when such order is based on a question of valuation pure and simple. 49 I. C. 442=4 P. L. J. 57.

Cl. (c). CASES WHERE APPEAL LIES.—Appeal lies from order of dismissal of application under O. 9, R. 9 on ground of previous dismissal under O. 17, R. 3. 4 P. L. T. 46=73 I. C. 373=1923 P. 223. See also 20 C. W. N. 1203 ; 20 C. W. N. 594=43 C. 857. An appeal lies against an order of dismissal of an application for restoration of the application dismissed in default. 19 N. L. R. 119=75 I. C. 589. A dismissal of suit for default is under O. 9, R. 8 and the dismissal of application for restoration is appealable under O. 43, R. 1 (c). 57 I. C. 245. Where an application for restoration is returned for presentation to proper Court owing to want of jurisdiction, the order is one rejecting the application and is appealable. 16 I. C. 34=10 A. L. J. 41. An order setting aside an *ex parte* decree passed in a resumption suit, although not appealable under O. 43, R. 1 of the C. P. C. is however appealable in view of the provisions of the Oudh Rent Act. 3 O. L. J. 229=34 I. C. 702.

CASES WHERE NO APPEAL LIES.—Where the Court dismissed an application for execution for want of prosecution and subsequently refused to restore the application there is no appeal from the order refusing to restore the application. 45 A. 148=21 A. L. J. 135 ; 100 I. C. 343=45 C. L. J. 60 ; 31 C. 207. An order of the

appellate Court setting aside the order of the first Court dismissing the suit for default of appearance of parties is not appealable. 11 A. L. J. 615=35 All. 427. Application to set aside dismissal for default—Dismissal of that application for default—No appeal lies. 36 C. L. J. 184=1922 C. 572 ; 43 I. C. 54=2 P. L. J. 720. No appeal lies from an order rejecting an application to restore a suit dismissed for default of both parties. 19 I. C. 97=9 N. L. R. 33. No appeal lies against an order dismissing for default an application under O. 21, R. 90, C. P. C. 97 I. C. 704=45 C. L. J. 557.

Cl. (d).—Order granting an application under O. 9, R. 13 of the C. P. C. is not appealable. 52 I. C. 901=17 A. L. J. 1052 ; 14 A. L. J. 332=38 A. 297. No appeal lies from an order purporting to be made under O. 9, R. 13 dismissing an application for restoration of an application to set aside an *ex parte* decree. 49 I. C. 745 ; 48 All. 175=A. I. R. 1925 All. 610. But see 6 Pat. 474=101 I. C. 753=1927 Pat. 240. An order dismissing for default an application to set aside an *ex parte* decree is appealable. 30 I. C. 798 ; 30 I. C. 45=21 C. L. J. 628. The words "rejecting an application" signify an immediate rejection and not a conditional or prospective rejection. 6 L. W. 757=43 I. C. 1. No appeal lies against an order refusing to set aside a dismissal of a suit under O. 9, R. 4. 43 I. C. 374=27 C. L. J. 117. No appeal lies against an order rejecting an application under O. 9, R. 9 for revival of an application for reversal of a sale, which had been dismissed for default of appearance of the judgment-debtor. 27 I. C. 492=19 C. W. N. 25. Order dismissing application to set aside *ex parte* decree because the conditions which were lawfully imposed on the defendants were not complied with—Appeal lies. 1927 Bom. 1=28 Bom. L. R. 1246 ; 51 Bom. 67=96 I. C. 321. But see 28 Bom. L. R. 578=50 Bom. 326.

Cl. (j).—An order refusing leave to a decree-holder to bid under O. 21, R. 72 is not appealable. 38 C. 717=15 C. W. N. 862 (P. C.). If an order is itself appealable, an appeal will lie from that part of the order which relates to costs. 44 All. 209=20 A. L. J. 11 [8 C. 91 ; 12 Cal. 271 ; 16 B. 241 (Ref.)]. An appeal lies against an order on an application under O. 21, R. 90 to set aside a sale, which is dismissed for default. 38 I. C. 598=25 C. L. J. 163 ; 104 I. C. 759. But no appeal lies against an order under S. 90 dismissing an application to set aside the dismissal. (*Ibid.*),

- (k) an order under rule 9 of Order XXII refusing to set aside the abatement or dismissal of a suit ;
- (l) an order under rule 10 of Order XXII giving or refusing to give leave ;
- (m) an order under rule 3 of Order XXIII recording or refusing to record an agreement, compromise or satisfaction ;
- (n) an order under rule 2 of Order XXV rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit ;
- (o) an order under rule 3 or rule 8 of Order XXXIV refusing to extend the time for the payment of mortgage-money ;
- (p) orders in interpleader-suits under rule 3, rule 4 or rule 6 of Order XXXV ;
- (q) an order under rule 2, rule 3 or rule 6 of Order XXXVIII ;
- (r) an order under rule 1, rule 2, rule 4 or rule 10 of Order XXXIX ;
- (s) an order under rule 1 or rule 4 of Order XL ;

But see 38 I. C. 63. An auction-purchaser can appeal against an order setting aside the sale on the ground of irregularity even if the decree-holder has compromised his claim with the judgment-debtor. 13 C.L.J. 535=15 C.W.N. 685. As to second appeal, see 3 Lah. L. J. 463. There is no second appeal against an order setting aside a sale on the ground of fraud under O. 21, R. 92. 168 P. R. 1919=54 I.C. 941. An appeal lies against an order passed by an executing Court refusing to receive the amount of decree and costs from a mortgagee under O. 21, R. 89. 12 I. C. 733=178 P. W. R. 1911. An appeal lies for order in execution of small cause decree transferred to the original side for execution. 10 L. W. 556=(1920) M. W. N. 151=53 I. C. 958. An appeal lies from an order refusing to set aside a sale under O. 21, R. 89 whether the purchaser is the decree-holder or stranger. (8 I. C. 855, F.); 14 I. C. 326=(1912) M. W. N. 756.

Cl. (k).—When no application to bring the representatives of a deceased plaintiff is made within time the suit abates ; and an application for substitution made afterwards ought necessarily to be considered on an application under O. 22, R. 9 (2), C. P. C., to set aside the abatement. 74 I. C. 17=1924 Lah. 424. No appeal lies if there has been no application to set aside an abatement. An order of abatement cannot be interfered with in revision if a person fails to set it aside. 95 P.R. 1911=13 I.C. 963. No appeal lies from an order adding legal representative. 39 M. 488=28 M. L. J. 491. An order under O. 22, R. 3 is not open to appeal. 73 I. C. 230=1924 Oudh 114 ; 44 I. C. 145. Refusal to set aside abatement of appeal—Appealable. 1925 P. 162=85 I. C. 1010.

Cl. (m).—The remedy of a party dissatisfied with the order of a Court refusing to record a petition of compromise is to appeal from the order so refusing, not from the judgment given by the Court on the merits. 42 I. C. 192 ; 104 I. C. 561. Order refusing to record compromise on the ground of its invalidity is appealable. 103 I. C. 30=1927 Lah. 546 (2). A consent decree passed without order for recording a compromise is liable to be set aside on appeal notwithstanding the bar under S. 96 (3). 33 I. C. 769=43 C. 85. Order holding no compromise has been proved is not appealable. 73 I. C. 177=1924 Lah. 248.

Cl. (q).—When an application for attachment before judgment is dismissed by the Court of first instance after hearing the defendants, no appeal lies against that order. 33 I. C. 689=23 C. L. J. 392. Application for attachment before judg-

ment—Court ordering application closed on respondent undertaking not to alienate properties—Order is one under O. 38, R. 6—Appealability from the order. (1928) M.W.N. 125. An order under R. 5 of O. 38 is not appealable while an order under R. 6 is appealable. Where the court passed an unconditional order of attachment before judgment purporting to act under R. 5 of O. 38 the order is appealable. 107 I. C. 276 (1) (Lah).

Cl. (r).—An appeal lies from an order granting as well as from an order refusing to grant an injunction under O. 30, R. 1. 11 A. L. J. 613=35 A. 425. An order for the issue of an injunction subject to a condition is appealable, but there is only one appeal against it. 66 I. C. 509=1922 All. 441. An order of Court refusing to attach property for disobedience of an interim injunction is open to appeal. (27 I. C. 131, F.) ; 66 I. C. 9=1922 Lah. 347. The appellate Court has jurisdiction to pass an order of imprisonment in appeal. 27 I. C. 131. Disobedience of an injunction order is an act independent of the suit and calls for a separate punishment. 27 I. C. 131.

Cl. (s).—An order for the appointment of a receiver without actually appointing any one to that office is not appealable. 18 A. L. J. 212=44 A. 227 (40 M. 18, Diss. ; 13 A. L. J. 79 ; 13 C. L. J. 157 ; 17 Bom. L. R. 510, F.). Order appointing receiver provisionally if open to appeal. 27 I. C. 646=13 A.L.J. 79. Order declaring that receiver should be appointed is open to appeal. 69 I. C. 929=1 P. 625=4 P. L. T. 210. An order removing a receiver is one falling under O. 40, R. 1 (a) and is appealable. 92 I. C. 940=53 Cal. 319=1926 Cal. 593. An order refusing to appoint a receiver is an order under O. 40 and is appealable. 1926 Cal. 1006=95 I.C. 632. An interlocutory order for the appointment of a receiver in the terms "the property in suit will be better managed if a receiver is appointed" is not appealable. It is only the final order that is appealable. 9 I. C. 582=13 C. L. J. 157. Order appointing receiver subject to security being furnished—Security not furnished—Appeal does not lie till security is furnished and appointment finally approved. 100 I. C. 140=1927 Cal. 253. But see also 40 Mad. 18. An order merely directing that a proper person should be appointed as a receiver is not appealable. (9 I.C. 582, F.) ; 29 I. C. 504=17 Bom. L. R. 510. Orders of Court in passing receiver's accounts are not appealable. 12 I. C. 780=14 C. L. J. 445. See also 69 I. C. 203=43 M. L. J. 707. An order of Court directing receiver appointed in the suit to pay money

(z) an order of refusal under rule 19 of Order XLI to re-admit, or under rule 21 of Order XLI to re-hear, an appeal ;

(u) an order under rule 23 of Order XLI remanding a case, where an appeal would lie from the decree of the appellate Court ;

[Allahabad and Oudh] Read (u) any order remanding a case where an appeal would lie from the decree of the appellate Court.

to a person pending disposal of the suit is appealable. 14 I. C. 277=11 M. L. T. 383. Receiver ordered to pay damages—No appeal lies from such order. 92 I. C. 631=1925 Rang. 266. Order granting leave to sue a receiver is not appealable. 22 Bom. L. R. 1126=45 Bom. 99. Disposition by receiver of a third party—Appeal lies. 16 L. W. 833=69 I. C. 393. Where a receiver is appointed in execution of a mortgage decree overruling the objections of a third party, the latter has no right of appeal but he can prefer a revision to the High Court. 4 P. L. W. 414=45 I. C. 177=1918 Pat. 138. An order construing an order of appointment does not fall under either R. 1 or R. 4 of O. 40 and is not appealable. 5 P. L. J. 97=1920 Pat. 121.

Cl. (t).—An appeal does not lie against order refusing to restore application to set aside an appellate decree dismissed for default. But where there has been a serious miscarriage of justice, revision lies. 40 I. C. 336. An appeal lies to the High Court from an order refusing to re-hear an appeal dismissed for default. 28 C. L. J. 155=45 Cal. 638. "Suit" includes the appellate stage and also includes the execution proceedings and an application to re-hear an appeal heard *ex parte* is an application in the suit. 19 C. L. J. 310=19 C. W. N. 359. An order of the lower appellate Court rejecting an application for review of an appeal dismissed for default and a memo. of cross-objections allowed *ex parte*, is not appealable. 53 I. C. 333. An order rejecting an appeal for failure to furnish security for costs is not appealable. (18 A. 101 and 13 O. C. 5, Ref.) ; 9 I. C. 748=14 O. C. 40.

Ol. (u). GENERAL.—When an appeal is remanded without any provision of law being stated the presumption is that the order is made under O. 41, R. 23. 20 A. L. J. 321=44 A. 492 ; 87 I. C. 575=1925 Cal. 1157. The power of remand should be exercised with very great caution. 3 P. L. J. 253=43 I. C. 959 ; 12 L. W. 667=39 M. L. J. 536. An appeal under R. 1 is one from the order granting an application for review and not one from the final decree in the suit. 3 Lah. L. J. 100=60 I. C. 259.

CASES WHERE APPEAL LIES.—An appeal to the Chief Court against the order of remand is competent under O. 43, R. 1 (u) if it involves point of law. 8 P. R. 1915=28 I. C. 441. An appeal lies from an order of remand in a case where if the appellate Court which passed that order, had passed instead a decree reversing that of the lower Court, an appeal would lie from such decree. 23 I. C. 817=85 P. R. 1914 ; 3 Lah. 218=4 Lah. L. J. 359=1922 Lah. 178 (F. B.) ; 2 Lah. L. J. 587. Where a question affecting the final result of the case has been decided against a party and the suit is remanded, the order of remand is appealable. 20 I. C. 788=279 P. L. R. 1913. An order of remand passed initially under O. 41, R. 23 but by a clerical mistake

purporting to be under O. 41, R. 25 is appealable. 9 I. C. 431.

CASES WHERE NO APPEAL LIES.—No appeal lies against an order passed by an appellate Court remanding a case otherwise than under O. 41, R. 23. 31 C. L. J. 357=23 C. W. N. 1049. See also 59 I. C. 909 ; 6 P. 381 ; 31 C. W. N. 878 ; 1925 Rang. 320 ; 25 L. W. 198=100 I. C. 135=1927 Mad. 335=52 M. L. J. 90 ; 103 I. C. 670 ; 6 Pat. 160. There is no appeal against an order of remand passed by a special Judge under the provisions of the Bengal Tenancy Act. 72 I. C. 1013=37 C. L. J. 314. There is no appeal for an order of remand under the inherent powers of an appellate court, and not falling under O. 41, R. 23, and under O. 43, R. 1 (a). 31 M. L. T. 182 (H. C.)=69 I. C. 826=16 L. W. 515 ; 97 I. C. 105=1926 P. 457. Remand for fresh trial with the addition of a necessary party—No appeal lies against the order. 3 Rang. 490. O. 41, R. 23, C. P. C., does not contemplate a case decided upon the whole evidence and upon all the issues which were raised. 55 I. C. 484=1 Pat. L. T. 500. Where the appellate Court decides the main point in a case and remands the case for disposal of remaining issues, the order is not appealable. 60 I. C. 609 (44 C. 929, F.). A general order of remand by the lower appellate Court on the ground of mishandling of the trial in the First Court is not appealable. 63 I. C. 858 ; 1927 Mad. 385. An appellate Court has inherent power under S. 151 to remand a case for re-trial. No appeal lies against such an order. 3 P. L. J. 253=43 I. C. 959 ; 39 M. L. J. 536=12 L. W. 667. See also 44 A. 176=19 A. L. J. 971 ; 25 L. W. 198=52 M. L. J. 90. An order of remand made on an appeal from an order setting aside or refusing to set aside an execution sale is final under section 104 and no appeal lies therefrom. 50 I. C. 610=29 P. L. R. 1919. Findings of fact cannot be disturbed in an appeal against an order remanding a case under O. 41, R. 23. 48 I. C. 379=100 P. R. 1918.

SECOND APPEAL.—Where there is no second appeal from the decree of the appellate Court, there is also no second appeal from the order of remand. 19 A. L. J. 72=43 All. 403. There is no second appeal in a suit of a small cause nature of the value below Rs. 500 and an order of remand in such a suit is not open to appeal. 18 A. L. J. 167=42 A. 200 ; 21 I. C. 638=11 A. L. J. 599.

PRACTICE AND PROCEDURE.—On an appeal from an order of remand, the High Court is bound by the finding of fact of the lower appellate Court. (20 All. 42, ref.) ; 65 I. C. 376=8 O. L. J. 624 ; 2 Lah. 25=59 I. C. 715=31 P. W. R. 1921.

COURT-FEE.—An appeal against the order of remand by the lower appellate Court not made under O. 41, R. 23 is a second appeal and *ad valorem* Court-fee should be paid thereon. 50 I. C. 367.

(v) an order made by any Court other than a High Court refusing the grant of a certificate under rule 6 of Order XLV ;

(w) an order under rule 4 of Order XLVII granting an application for review.

2. [S. 590.] The rules of Order XLI shall apply, so far as may be, to appeals from orders.

[Madras] In O. XLIII, substitute the following for R. 2 :—

"2. The rules of O. XLI and of O. XLI-A shall apply, so far as may be, to appeals from the orders specified in Rule 1 and other orders of any Civil Court from which an appeal to the High Court is allowed under any provision of law :

Provided that in the case of appeals against interlocutory orders made prior to decree, the Court which passed the order appealed from shall not send the records of the case unless an order has been made for stay of further proceedings in that Court."

Add the following as R. 3 of O. XLIII :—

"3. A memorandum of appeal from an appellate order shall be accompanied by a printed or typed copy of the memorandum or application and of any papers filed therewith."

[Allahabad and Oudh] Add the following as R. 3 of O. XLIII :—

"3. In every appeal under rule 1, in every miscellaneous case, and in every suit dismissed for default, a formal order shall be drawn up stating clearly the determination of the appeal or case, the costs incurred, and the parties, if any, by whom such costs are to be paid."

[Bombay] Clause (w) of rule 1 of Order XLIII shall be deleted.

ORDER XLIV.

PAUPER APPEALS.

1. [S. 592.] Any person entitled to prefer an appeal, who is unable to pay the fee required for the memorandum of appeal, may present

Who may appeal as pauper.

an application accompanied by a memorandum of appeal, and may be allowed to appeal as a pauper, subject, in all matters, including the presentation of such application, to the provisions relating to suits by paupers, in so far as those provisions are applicable :

CL. (w).—Clause (w) of O. 43 (1) has to be read along with O. 47, R. 7, 8 Lah. 617=1927 Lah. 435 (2). Appeal lies from order granting review. 41 I.C. 886=15 A.L.J. 505 ; 66 I. C. 909 =25 C.W.N. 884 ; 52 I.C. 29=30 C.L.J. 250 ; 47 I.C. 850. See also 9 I.C. 238=250 P.W.R. 1911 ; 94 I. C. 591=1926 B. 121. A right of appeal against an order granting a review is restricted in its scope by O. 47, R. 7, 45 Cal. 60=21 C. W. N. 1076 ; 25 I.C. 903=41 Cal. 746 ; 22 I.C. 773 ; 49 I.C. 57 ; 31 M.L.J. 827=38 I.C. 373 ; 37 I. C. 229 =21 M.L.T. 297 ; 24 M.L.J. 93=18 I.C. 549 ; 42 A. 626=18 A.L.J. 838 ; 47 A. 881. An appeal against a decree passed on an application for review of judgment is appealable on the ground that the Court which admitted the application for review had no jurisdiction to do so, 11 I.C. 343=14 O. C. 108. There can be no appeal against an order granting a review merely for sufficient grounds. 35 I. C. 15=1 P. L. J. 193. There is no second appeal against an order granting a review. 64 I.C. 568=1922 Bom. 292. No appeal lies to the Dt. Court against the order of a Revenue Court granting a review in a summary suit. (41 C. 74 ; 24 M. L. J. 93, Foll.) ; 26 I. C. 831=2 L. W. 62. Effect of deletion of clause in Bom. H.C. Rules. 29 Bom. L. R. 1355.

O. 43, R. 2.—Second appeal—Order on preliminary issues not filed along with main judgment—No valid presentation. 105 I. C. 593 (1)=28 Panj. L. R. 537.

O. 44, R. 1.—Leave to appeal in *forma pauperis*—Refusal of—Applicant if entitled to prosecute

appeal on payment of Court-fee. 40 All. 381=16 A.L.J. 309. Appeal in *forma pauperis*—Limitation Act, Art. 170. See 29 I. C. 1003=13 A.L.J. 635. The High Court cannot grant leave to prosecute an appeal to the Privy Council in *forma pauperis*. The petitioner must apply in England. 18 I. C. 129=17 C.L.J. 381 ; 42 Mad. 32=35 M. L. J. 258. (See also 44 I. C. 731=3 Pat. L.J. 179, Foll.) When the subject-matter is of the value of Rs. 10,000 or upwards, it is advisable to apply for leave to appeal as a pauper to Bench of two Judges under S. 8 (c) of the Oudh Courts Act. 38 I. C. 541. Leave to appeal in *forma pauperis*—Dismissal of application does not involve dismissal of appeal. 3 Lah. 35=65 I. C. 741. Appeal when to be continued in *forma pauperis*. 38 M.L.J. 146=54 I. C. 761. Dismissal of application for leave to appeal as pauper—Effect on memorandum of appeal. 31 M.L.J. 269=40 Mad. 687 ; 1926 Oudh 13. An applicant applying for permission to appeal as a pauper is not entitled as of right to be heard either in person or by pleader before the Court exercises its power to allow or reject the application. 28 I.C. 957. Application for leave to appeal in *forma pauperis*—Notice ordered—Effect. 1924 Pat. 791=8 Pat.L.T. 119.

PROVISO.—See 4 Pat. 67 ; 7 Lah. L. J. 214=1925 Lah. 395.

REVISION.—Unless a Lower Appellate Court acts with illegality or irregularity, its order rejecting an application for leave to appeal as a pauper cannot be revised by the High Court. 30 I.C. 86.

Provided that the Court shall reject the application unless, upon a perusal thereof and of the judgment and decree appealed from, it sees reason to think that the decree is contrary to law or to some usage having the force of law, or is otherwise

Procedure on application for admission of appeal.

erroneous or unjust.

2. [S. 593.] The inquiry into the pauperism of the applicant may be made either by the Appellate Court or under the orders of the Appellate Court by the Court from whose decision the

Inquiry into pauperism.

appeal is preferred :

Provided that, if the applicant was allowed to sue or appeal as a pauper in the Court from whose decree the appeal is preferred, no further inquiry in respect of his pauperism shall be necessary, unless the Appellate Court sees cause to direct such inquiry.

ORDER XLV.

APPEALS TO THE KING IN COUNCIL.

1. [S. 594.] In this Order, unless there is something repugnant in the subject or context, the expression "decree" shall include a final order.

"Decree" defined.

2. [S. 598.] Whoever desires to appeal to His Majesty in Council shall apply by petition to the Court whose decree is complained of.

Application to Court whose decree complained of.

3. [S. 600.] (1) Every petition shall state the grounds of appeal and pray for a certificate either that, as regards amount or value and nature, the case fulfils the requirements of section 110, or that it is otherwise a fit one for appeal to His Majesty in Council.

Certificate as to value or fitness.

(2) Upon receipt of such petition, the Court shall direct notice to be served on the opposite party to show cause why the said certificate should not be granted.

[Bombay] In sub-rule (2) of Rule 3 of Order 45, after the words "to show cause why the said certificate should not be granted" the following words shall be inserted, namely:—"unless it thinks fit to refuse the certificate."

4. For the purposes of pecuniary valuation, suits involving substantially the same questions for determination and decided by the same judgment may be consolidated; but suits decided

Consolidation of suits.

by separate judgments shall not be consolidated, notwithstanding that they involve substantially the same questions for determination.

5. In the event of any dispute arising between the parties as to the amount or value of the subject-matter of the suit in the Court of first instance, or as to the amount or value of the subject-matter in dispute on appeal to His Majesty in Council,

Remission of dispute to Court of first instance.

O. 44, B. 2.—The appeal is said to be filed on the day on which the application for leave to appeal as pauper is made though the Court-fee is paid before the end of inquiry. 2 A. 241 (P.C.), Foll.; 32 I. C. 630 = 9 Bur. L. T. 69.

O. 45, B. 1.—High Court has no power under O. 45 to add parties pending appeal to the Privy Council. 3 Rang. 474; 92 I. C. 125 = 1926 Rang. 9. Application for leave to appeal to Privy Council—Review petition successful—Reversal in appeal—Effect on original application. 4 Lah. 445 = 77 I. C. 869.

O. 45, B. 3.—A certificate issued under O. 45 must clearly show whether it fulfils the conditions of S. 110 or is otherwise a case fit for appeal to Privy Council under S. 109. 44 Mad. 293 = 19 A. L. J. 161 = 48 I. A. 31 = 40 M. L. J. 229 (P. C.). Where many important and wide-reaching questions of law are involved in a decision sought to

be appealed against, the case is "otherwise a fit one for appeal to His Majesty in Council" within R. 3. 22 I. C. 390; (1914) M. W. N. 162.

O. 45, B. 4.—Under O. 45, R. 4 consolidation for purposes of valuation for leave to appeal to the Privy Council is admissible only when the suits in question involve substantially the same questions for determination and have been decided by the same judgment. 44 M. L. J. 424 = 1923 M. 602. O. 45, R. 4 allows consolidation but only to make good a defect of pecuniary valuation and not a defect of any other kind. 69 I. C. 525 = 1923 Nag. 198; 70 I. C. 782; 69 I. C. 525 = 1923 Nag. 198; 6 P. L. J. 97 = 2 P. L. T. 157; 3 P. L. J. 446 = 45 I. C. 551; 50 B. 753.

O. 45, B. 5.—A defendant who had consistently acquiesced in a finding as to valuation and Court-fee cannot reopen it to enable him to prefer an appeal to His Majesty in Council. 42 Bom. 609 =

the Court to which a petition for a certificate is made under rule 2 may, if it thinks fit, refer such dispute for report to the Court of first instance, which last-mentioned Court shall proceed to determine such amount or value and shall return its report together with the evidence to the Court by which the reference was made.

Effect of refusal of certificate.

6. [S. 601.] Where such certificate is refused, the petition shall be dismissed.

7. [S. 602.] (1) Where the certificate is granted, the applicant shall, within [ninety days or such further period not exceeding sixty days, as the Court may upon cause shown allow]¹ from the date of the decree complained of, or within six weeks from the date of the grant of the certificate, whichever is the later date,—

(a) furnish security [in cash or in Government securities]² for the costs of the respondent, and

(b) deposit the amount required to defray the expense of translating, transcribing, indexing and transmitting to His Majesty in Council a correct copy of the whole record of the suit, except—

(i) formal documents directed to be excluded by any order of His Majesty in Council in force for the time being;

(ii) papers which the parties agree to exclude;

(iii) accounts, or portions of accounts, which the officer empowered by the court for that purpose considers unnecessary, and which the parties have not specifically asked to be included; and

(iv) such other documents as the High Court may direct to be excluded.

3[Provided that the Court at the time of granting the certificate may, after hearing any opposite party who appears, order on the ground of special hardship that some other form of security may be furnished:]

Provided further, that no adjournment shall be granted to an opposite party to contest the nature of such security.]

(2) Where the applicant prefers to print in India the copy of the record except as aforesaid, he shall also within the time mentioned in sub-rule (1) deposit the amount required to defray the expense of printing such copy.

[Bombay.] After Rule 7 of Order XLV the following rule shall be inserted, namely:—

7-A. No such security as is mentioned in rule 7 (1), clause (a), shall be required from the Secretary of State for India in Council or, where the local Government has undertaken the defence of the suit, from any public officer sued in respect of an act alleged to be done by him in his official capacity.

20 Bom. L. R. 418; 30 I.C. 204=2 O. L. J. 208. When a reference is made under this order to a Court of first instance, the Court must carry it out itself; it should not remit the investigation to some other officer. 34 I.C. 203=43 C. 225.

O. 45, R. 7.—¹ For the words "six months" the words "ninety days... allow" were substituted by Act XXVI of 1920, S. 3.

Time for furnishing security and deposit cannot be extended by more than six weeks, 44 A. 210=20 A. L. J. 13; 44 A. 242=20 A. L. J. 51; 4 R. 216=1927 Rang 20. Period of six weeks from date of certificate cannot be extended. 105 I.C. 585=1927 Pat. 330. Decree amended on review—Leave to appeal to Privy Council—Limitation. 4 Lah. 185=75 I. C. 520. The High Court has no power to extend time or excuse delay in the matter of furnishing security for the costs of the respondents in an appeal to His Majesty in Council beyond the period given by S. 1 of Act XXVI of 1920. 18 L. W. 29=74 I. C. 703 (1)=1924 Mad. 44; 70 I.C. 937=25 O. C. 254. But see next case *contra*. The High Court can

extend time for furnishing security, but it should not do so without cogent reasons. 6 O. L. J. 149=50 I. C. 907; 65 I. C. 450; 49 I. C. 892=4 P. L. R. 521; 10 Cal. 67; 1926 Rang. 44=94 I. C. 590; 103 I. C. 213 (1)=1927 Pat. 332; 51 Bom. 430=1927 Bom. 217 (P.C.). When two appeals are consolidated for valuation, and a joint certificate is granted, both the appeals will be stayed if security for costs is not deposited in any of them. Security has to be furnished in respect of each appeal though consolidated. 4 P. L. J. 198=1919 Pat. 139. Security must be in cash or Government security. 66 I. C. 548. An application that immoveable property may be accepted as security should be made at or before the making of an order granting the certificate. 48 M. 559=48 M. L. J. 134.

² After the word "Security" the words "in cash... securities" were added by Act XXVI of 1920, S. 3.

³ At the end of sub-rules the proviso was added by Act XXVI of 1920, S. 3.

Admission of appeal and procedure thereon.

8. [S. 603.] Where such security has been furnished and deposit made to the satisfaction of the Court, the Court shall—

- (a) declare the appeal admitted,
- (b) give notice thereof to the respondent,
- (c) transmit to His Majesty in Council under the seal of the Court a correct copy of the said record, except as aforesaid, and
- (d) give to either party one or more authenticated copies of any of the papers in the suit on his applying therefor and paying the reasonable expenses incurred in preparing them.

Revocation of acceptance of security.

9. [S. 604.] At any time before the admission of the appeal the Court may, upon cause shown, revoke the acceptance of any such security, and make further directions thereon.

1 [9-A.] Nothing in these rules requiring any notice to be served on or given to an opposite party or respondent shall be deemed to require any notice to be served on or given to the legal representative of any deceased opposite party or deceased respondent in a case, where such opposite party or respondent did not appear either at the hearing in the Court whose decree is complained of or at any proceedings subsequent to the decree of that Court:

Power to dispense with notices in case of deceased parties.

Provided that notices under sub-rule (2) of rule 3 and under rule 8 shall be given by affixing the same in some conspicuous place in the Court-house of the Judge of the District in which the suit was originally brought, and by publication in such newspapers as the Court may direct.]

10. [S. 605.] Where at any time after the admission of an appeal but before the transmission of the copy of the record, except as aforesaid, to His Majesty in Council, such security appears inadequate,

Power to order further security or payment.

or further payment is required for the purpose of translating, transcribing, printing indexing, or transmitting the copy of the record, except as aforesaid, the Court may order the appellant to furnish, within a time to be fixed by the Court, other and sufficient security, or to make, within like time the required payment.

Effect of failure to comply with order.

11. [S. 606.] Where the appellant fails to comply with such order, the proceeding shall be stayed,

and the appeal shall not proceed without an order in this behalf of His Majesty in Council,

and in the meantime execution of the decree appealed from shall not be stayed.

12. [S. 607.] When the copy of the record, except as aforesaid, has been transmitted to His Majesty in Council, the appellant may obtain a refund of the balance (if any) of the amount which he has deposited under rule 7.

Refund of balance deposit.

13. [S. 608.] (1) Notwithstanding the grant of a certificate for the admission of any appeal, the decree appealed from shall be unconditionally executed, unless

Powers of Court pending appeal.

the Court otherwise directs.

O. 45, R. 8.—A deposit made out of time is not one made to the satisfaction of Court within O. 45, R. 8. The periods both for security and deposit are identical. (20 A. L. J. 13, foll.) L. R. 5 A. 40=1923 All. 572. The omission to give notice to the respondents of the admission of an appeal to the Privy Council is no sufficient ground for re-hearing provided the respondents in fact knew of the admission. 22 Bom. L. R. 550=59 I. C. 7 (P.C.).

O. 45, Rr. 9 and 10.—An application for the enhancement of the amount of security for costs furnished by an appellant to the Privy Council can, after the admission of the appeal be made under O. 45, R. 10 only and not under R. 9. 49 I. C. 893.

¹ O. 45, R. 9-A was inserted by Act XXVI of 1920, S. 4.

O. 45, R. 13.—The High Court has power to stay execution of a decree notwithstanding that an

(2) The Court may, if it thinks fit, on special cause shown by any party interested in the suit, or otherwise appearing to the Court,—

(a) impound any moveable property in dispute or any part thereof, or

(b) allow the decree appealed from to be executed, taking such security from the respondent as the Court thinks fit for the due performance of any order which His Majesty in Council may make on the appeal, or

(c) stay the execution of the decree appealed from, taking such security from the appellant as the Court thinks fit for the due performance of the decree appealed from, or of any order which His Majesty in Council may make on the appeal, or

(d) place any party seeking the assistance of the Court under such conditions or give such other direction respecting the subject-matter of the appeal, as it thinks fit by the appointment of a receiver or otherwise.

14. [S. 609.] (1) Where at any time during the pendency of the appeal the security furnished by either party appears inadequate, the Court may, on the application of the other party, require further security.

Increase of security found inadequate.

(2) In default of such further security being furnished as required by the Court,—

(a) if the original security was furnished by the appellant, the Court may, on the application of the respondent, execute the decree appealed from as if the appellant had furnished no such security ;

(b) if the original security was furnished by the respondent, the Court, shall, so far as may be practicable, stay the further execution of the decree, and restore the parties to the position in which they respectively were when the security which appears inadequate was furnished, or give such direction respecting the subject-matter of the appeal as it thinks fit.

15. [S. 610.] (1) Whoever desires to obtain execution of any order of his Majesty in Council shall apply by petition, accompanied by a certified copy of the decree passed or order made in appeal and sought to be executed, to the Court from which the

Procedure to enforce orders of King in Council.

appeal to His Majesty was preferred.

appeal from such decree has been admitted by special leave of His Majesty in Council. 38 Cal. 335 = 13 C. L. J. 529 = 38 I. A. 74 (P. C.) ; 57 I. C. 382 = 24 C. W. N. 265. The High Court has inherent power to stay execution in view of an intended appeal to Privy Council. 40 Cal. 955 = 16 C. L. J. 508. Stay of execution—Grounds for 15 I. C. 187 = 234 P. L. R. 1912. A subordinate Judge has no jurisdiction to stay execution of a decree of the High Court. The only Court which can stay execution is the High Court. 3 P. L. J. 40 = 42 I. C. 835. Decree of High Court executed—Appeal thereafter to Privy Council—High Court has power to demand security from the respondent. 28 Bom. L. R. 659 = 96 I. C. 245 (2) = 50 Bom. 453 = 1925 Bom. 425. The word "Court" in the first para. of R. 13 of O. 45 means a High Court. (*Ibid.*) An application for stay of execution under O. 45, R. 13 cannot be entertained by the Court till the certificate for appeal to the Privy Council is granted. The presentation of a petition under O. 45, R. 2 and 3 is not an appeal. 16 I. C. 845 ; 18 A. L. J. 142 = 54 I. C. 561 = 42 A. 170.

O. 45, R. 13, Sub-R. (2), cl. (d).—It is competent to the High Court to appoint a Receiver to an estate which is the subject matter of an appeal for which special leave has been granted by the Privy Council (38 Cal. 335, Foll. = 10 C. L. J. 326 and 27 C. 1, Ref.) 52 I. C. 407 = 4 P. L. J. 482. Suit for enhancement of maintenance—Trial court

holding suit to be maintainable—Appellate court refusing to entertain appeal—Appeal to Privy Council—stay of suit refused. 30 Bom. L. R. 126.

O. 45, R. 15.—"Execution" meaning of 37 A. 567 = 13 A. L. J. 769 ; 64 I. C. 152. Right of person not a party to Privy Council appeal to apply for restitution. 32 M. L. T. 249 (H.C.) ; 75 I. C. 219 = 1924 Mad. 95. R. 15 should not be construed as restricting the only possible evidence of an order in Council to the certified copy. It is intended to ensure that proper information on the subject of an order in council should be supplied to the Courts in India. (9 C. 482, Foll. ; 37 A. 567, Dist.) (1917) M. W. N. 587 = 33 M. L. J. 300 = 41 I. C. 629. Order of His Majesty in Council—Transmission of—Power to impose conditions. 66 I. C. 982 = 1922 Oudh 34. Under O. 21, R. 15 some of the decree-holders who have obtained permission under O. 45, R. 15 can execute the Privy Council decree on behalf of all the decree holders though some were dead at the time of the Privy Council decree. 58 I. C. 212 = 1 P. L. T. 426. The High Court at Patna has no jurisdiction to execute an order in Council passed in an appeal from the Calcutta High Court on appeal from a Subordinate Court in Behar. An application for the execution of such an order should be to the High Court at Calcutta. 2 P. L. J. 684 = 43 I. C. 457. Where party with order in council is delaying or refusing to lodge the order opponent can move High Court with certi-

(2) Such Court shall transmit the order of His Majesty in Council to the Court which passed the first decree appealed from, or to such other Court as His Majesty in Council by such order may direct, and shall (upon the application of either party) give such directions as may be required for the execution of the same; and the Court to which the said order is so transmitted shall execute it accordingly, in the manner and according to the provisions applicable to the execution of its original decrees.

(3) When any monies expressed to be payable in British currency are payable in India under such order, the amount so payable shall be estimated according to the rate of exchange for the time being fixed at the date of the making of the order by the Secretary of State for India in Council with the concurrence of the Lords Commissioners of His Majesty's Treasury for the adjustment of financial transactions between the Imperial and the Indian Governments.

[(4) Unless His Majesty in Council is pleased otherwise to direct, no order of His Majesty in Council shall be inoperative on the ground that no notice has been served on or given to the legal representative of any deceased opposite party or deceased respondent in a case, where such opposite party or respondent did not appear either at the hearing in the Court whose decree was complained of or at any proceedings subsequent to the decree of that Court, but such order shall have the same force and effect as if it had been made before the death took place.]¹

16. [S. 611.] The orders made by the Court which executes the order of His Majesty in Council, relating to such execution, shall be appealable in the same manner and subject to the same rules as the orders of such Court relating to the execution of its own decrees.

ORDER XLVI.

REFERENCE.

1. [S. 617.] Where, before or on the hearing of a suit or on appeal in which the decree is not subject to appeal, or where, in the execution of any such decree, any question of law or usage having the force of law arises, on which the Court trying the suit or appeal, or executing the decree, entertains reasonable doubt, the Court may, either of its own motion or on the application of any of the parties, draw up a statement of the facts of the case and the point on which doubt is entertained, and refer such statement with its own opinion on the point for the decision of the High Court.

2. [S. 618.] The Court may either stay the proceedings or proceed in the case notwithstanding such reference, and may pass a decree or make an order contingent upon the decision of the High Court on the point referred;

fixed copy. 5 Pat. 461 = 94 I. C. 813 = 51 M. L. J. 586 = 1926 P. C. 31 (P. C.). Applicability of rule to proceedings under S. 144, C. P. C. See 6 P. 252.

¹ O. 45, R. 15, Sub-rule (4) was added by Act XXVI of 1930, S. 5.

O. 46, R. 1. —No reference lies to the High Court of the N. W. Provinces where the question involved is one of fact and not of law. 11 I. C. 671. S. 113 read with O. 46, R. 1 permits reference to the High Court of only such cases as do not admit of further appeal. 130 P. R. 1916 = 37 I. C. 227. Subordinate Courts in the Punjab are bound to follow the decisions of the Chief Court and cannot make a reference on a question of law, already decided by the Chief Court, unless such decision is questioned by a judgment of the Privy Council. 20 I. C. 194 = 3 P. R. 1914. Where no appeal lies to an Appellate Court, the Court has no jurisdiction to make

a reference to the High Court under O. 46, R. 1. 18 I. C. 314 = 61 P. R. 1913. No reference can under O. 46, R. 1, C. P. C. be made in suits or appeals in which the decrees are subject to an appeal. 39 M. L. T. 657 = 54 M. L. J. 66. Where the referring Court has no reasonable doubt on the question of law referred, no reference can be made. (*Ibid.*) The word "Court" in O. 46, R. 1 means Court of Civil Judicature. 54 I. C. 564 = 22 O. C. 319. The functions of a Collector in execution of a decree do not make him such a Court as to empower him to make a reference. (*Ibid.*) Reference under O. 46, R. 1 cannot be made to the High Court on the mere ground that there are conflicting rulings on any particular matter of law. 18 I. C. 977 = 15 O. C. 380. Where a Court entertains a reasonable doubt regarding a question of law a reference to High Court can be made. 48 All. 188 = 93 I. C. 24 = 1926 All. 204.

but no decree or order shall be executed in any case in which such reference is made until the receipt of a copy of the Judgment of the High Court upon the reference.

3. [S. 619.] The High Court, after hearing the parties if they appear and desire to be heard, shall decide the point so referred, and shall transmit a copy of its judgment, under the signature of the Registrar, to the Court by which the reference was made; and such Court shall, on the receipt thereof, proceed to dispose of the case in conformity with the decision of the High Court.

Costs of reference to High Court.

4. [S. 620.] The costs (if any) consequent on a reference for the decision of the High Court shall be costs in the case.

5. [S. 621.] Where a case is referred to the High Court under rule 1, the High Court may return the case for amendment, and may alter, cancel or set aside any decree or order which the Court making the reference has passed or made in the case out of which the reference arose, and make such order as it thinks fit.

Power to alter, etc., decree of Court making reference.

6. [S. 646-A.] (1) Where at any time before Judgment a Court in which a suit has been instituted doubts whether the suit is cognizable by a Court of Small Causes or is not so cognizable, it may submit the record to the High Court with a statement of its reasons for the doubt as to the nature of the suit.

Power to refer to High Court questions as to jurisdiction in small causes.

(2) On receiving the record and statement, the High Court may order the Court either to proceed with the suit or to return the plaint for presentation to such other Court as it may in its order declare to be competent to take cognizance of the suit.

7. [S. 646-B.] (1) Where it appears to a District Court that a Court subordinate thereto has, by reason of erroneously holding a suit to be cognizable by a Court of Small Causes or not to be so cognizable, failed to exercise a jurisdiction vested in it by law, or exercised a jurisdiction not so vested, the District Court may, and if required by a party shall, submit the record to the High Court with a statement of its reasons for considering the opinion of the subordinate Court with respect to the nature of the suit to be erroneous.

Power to District Court to submit for revision proceedings had under mistake as to jurisdiction in small causes

(2) On receiving the record and statement the High Court may make such order in the case as it thinks fit.

(3) With respect to any proceedings subsequent to decree in any case submitted to the High Court under this rule, the High Court may make such order as in the circumstances appears to it to be just and proper.

(4) A Court subordinate to a District Court shall comply with any requisition which the District Court may make for any record or information for the purposes of this rule.

[Allahabad.] Add after Rule 7 to Order XLVI:—

8. Rule 38 of O. XI shall apply, so far as may be, to proceedings under this order.

ORDER XLVII.

REVIEW.

Application for review of judgment.

1. [S. 623.] (1) Any person considering himself aggrieved—

O. 46, R. 5.—When a High Court hears a reference, it acts like Court of Appeal quite as much as it undoubtedly does when it hears an application for revision. 25 C. W. N. 81 = 32 C. L. J. 433. But a power of reference is not a modified form of appellate jurisdiction. A Court to whom a reference can be made is not necessarily authorised to hear appeals from the Court making a reference. 47 A. 513 = 23 A. L. J. 385 = 1925 All. 380 (F. B.).

O. 46 Rr. 6 and 7.—See 21 C. W. N. 724 = 27

C. L. J. 96.

O. 47.—APPLICABILITY.—The provisions of O. 47 are applicable to an insolvency Court. 1927 M. 175 = 1926 M. W. N. 256 = 94 I. C. 351 = 23 L. W. 644 = 51 M. L. J. 60. The provisions of O. 47 would apply to review applications in appeals preferred under the Letters Patent. 29 Bom. L. R. 371 = 101 I. C. 766 = 1927 Bom. 232; (40 M. 651 F.)

O. 47, R. 1.—GROUNDS FOR REVIEW.—Under O. 47, R. 1 a party has a right to apply for a

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,

review of judgment to the Court that has decided the case before an appeal has been preferred. The grounds on which such an application may be made are specifically set forth in R. 1. 2 Pat. 676=50 I. A. 183=45 M. L. J. 578 (P. C.) Where an appeal against a decree has been dismissed for default and that order of dismissal has become final, the appellant cannot thereafter apply for review of the judgment. 21 A. L. J. 416=74 I. C. 528; 101 I. C. 766=1927 Bom. 232=29 Bom. L. R. 371. A Commissioner in order to take accounts may in his discretion and on proper grounds re-open the enquiry into anyone or more of the items before his report is made. Until then he decides nothing that is final and conclusive. 47 Bom. 593=25 Bom. L. R. 280. Where an order under S. 41, Presidency Towns Insolvency Act, was made by the Registrar in Insolvency, an application for review of his order must be made to the Registrar and not to the Court. 27 C. W. N. 916=1924 Cal. 83. Fraud practised upon a party in connection with a petition of compromise upon which a decree was made, is a good ground for review. A remedy by suit is an alternative and a more appropriate remedy. (13 C. W. N. 1197; 10 C. W. N. 286, Ref.) 64 I. C. 259. Power of making interlocutory orders is not a suitable subject for review. 5 I. A. 131=54 M. L. J. 423=1928 P. C. 49 (P. C.). If the party to the appeal presents his case to the Court of Appeal by way of cross-objections or otherwise, it is manifest that an application for review by him is incompetent. 35 I. C. 529. An applicant in a review application must confine himself to the grounds on which the application is admitted. 73 P. R. 1911=11 I. C. 427. The ground for review must be something which existed at the date of the decree. 43 M. L. J. 33=70 I. C. 741=1922 Mad. 227. See also 73 I. C. 4=1923 Nag. 70; 1926 Nag. 10 (1). Point not raised at trial cannot be raised in review. 47 A. 881. Where the lower Court had decided a case following the decision of the High Court in a connected case which was subsequently reversed on appeal by the Privy Council the reversal of the High Court's judgment is not a ground for review of the lower Court's judgment. [24 M. 1 (P. C.); 4 M. L. T. 86, foll.; 13 B. 330=33 A. 566; 31 B. 128; 13 M. L. T. 225; 3 Pat. L. J. 372, Ref.] 43 M. L. J. 33=70 I. C. 741=1922 Mad. 227. See also 73 I. C. 4=1923 Nag. 70. Decree on the basis of agreement between parties as to abiding by decision in another suit. Decision in other suit subsequently set aside—Original Decree can be reviewed. 5 R. 261=103 I. C. 258=A. I. R. 1927 Rang. 189. But see 104 I. C. 136=31 C. W. N. 822. Plaintiff can apply for review when his suit has been dismissed for default under O. 9, R. 8 and he has not applied under O. 9, R. 9 to set the order aside. [26 C. 598=16 C. W. N. 43, foll.; 1 Pat. L. J. 547, not foll.] 50 I. C. 327=37 M. L. J. 59. An inferior Court has no power of review unless such power is granted by statute. 34 I. C. 503. It is not a sufficient reason for granting a review that if another opportunity is given to the applicant he would satisfy the Court that its previous order was wrong. 57 I. C. 145. Where the question decided is one of right be-

tween the parties and when the matter is one of general importance review is justified, 1926 Mad. 764=50 M. L. J. 493. A wrong decision on a question of law, is not a sufficient ground for review. 24 O. C. 154=63 I. C. 344. It is not a sufficient ground to order a review that the decision of the Court was based on a view of the law which had been overruled by a Full Bench decision. 3 Pat. 134=5 Pat. L. T. 52. Exposition of law by a Superior Court contrary to that applied after the judgment is no ground for review. 19 S. L. R. 30=1925 Sind. 53. The mere omission to raise a point of law which had it been raised, might and probably would have brought about a different result is not necessarily a "mistake or error apparent on the face of the record" for which a review can be claimed. 13 Cal. 62; 20 C. W. N. 1099; 1 P. L. J. 625=57 I. C. 111. Wrongly applying law is no ground for review. 102 I. C. 6=1927 Nag. 252. Judge failing to consider a decision—No review is permissible. 1927 Mad. 998 (1921 M. 98; 1925 Cal. 304, Dist. 1922 P. C. 112, Ref. on.) A Court can review an order as to costs if the order is not a proper one. 6 Pat. L. J. 284=3 P. L. T. 67. The production of an authority which was not brought to the notice of the Judge at the first hearing and which lays down a view of the law contrary to that taken by the Judge is not a sufficient ground for granting a review. 57 I. C. 147=1 P. L. T. 561=1921 Pat. 152. A Court has jurisdiction to review its own order erroneously made directing delivery of possession and the High Court has no power to interfere in revision. 3 P. L. J. 571=48 I. C. 129. New case not to be set up on review. 38 I. C. 196. Point not raised at the hearing, cannot be raised subsequently in an application for review. 100 I. C. 429=135 L. J. 507. The mere fact that another judge is inclined to take a different view of the case is no ground for review. 4 L. B. R. (1921) 27=4 I. C. 895.

MISTAKE OR ERROR.—A decree can be reviewed on such grounds only as, if tenable, would justify an alteration or cancellation of the decree. 36 All. 277=12 A. L. J. 382. Where the High Court gave two inconsistent judgments in the same case one before and another after remand, and the error was apparent on the face of it, a review lies. 13 I. C. 646. An application for review of a decree based on an award, on the ground of an evident mistake in the award, is maintainable. 52 I. C. 666. A mere mistake of law is not in itself a sufficient mistake or error apparent on the face of the record so as to form a ground for review of judgment. 44 I. C. 161. Where the mistake arises from the negligent conduct of the applicant for review, the mistake cannot even be pleaded. 44 I. C. 161. As to want of jurisdiction see 21 C. W. N. 1109=27 C. L. J. 594. An order under O. 45 rejecting an application to grant leave to appeal may be reviewed by the Court which made the order. 39 Cal. 1037=16 C. W. N. 1089. Erroneous view as to cognizability of a suit by a Court is a sufficient cause for review. 11 I. C. 15=195 P. L. R. 1911. Where a Court passes a personal decree where it ought not to have done so, and the same is found out by the party aggrieved only when it is sought to be executed his remedy is

(b) by a decree or order from which no appeal is allowed, or

not by way of amendment but by way of review. 18 L. W. 876 = 76 I. C. 786 = 1924 M. 225. The mere fact that an application to set aside the decree is headed as made under S. 151 (which is clearly inapplicable to the case) does not preclude the Court from dealing with the application as one for review. 43 M. L. J. 290 = 70 I. C. 425 = 1922 Mad. 446. The Court has jurisdiction to review its judgment on the ground that the previous finding was wrong. 9 I. C. 273 = 9 M. L. T. 361; 36 I. C. 83 = 3 O. L. J. 257; 1 P. L. T. 561 = 57 I. C. 147. Where there is no mistake in computing the period of notice but only an error in law, there is no sufficient ground for review. 1922 P. 308. Error of law apparent on the face of judgment—Review lies. 105 I. C. 710 = 5 R. 610.

NEW EVIDENCE.—The High Court cannot, in a second appeal, entertain review based on the ground that since the disposal of the appeal new documentary evidence has been discovered. 45 A. 458 = 21 A. L. J. 377. The applicant praying for review of judgment on the ground of discovery of new evidence must prove his inability to produce it during trial in spite of due diligence. 38 A. 280 = 14 A. L. J. 204. Review on the sole allegation that new evidence had been discovered which was not within the applicant's knowledge cannot be granted without strict proof of such allegation. 9 I. C. 26. The High Court will not accept a review of a judgment in a second appeal dismissed under O. 41, R. 11 on the ground that new evidence to prove a fact has been discovered. (41 C. 809, foll.) 36 C. L. J. 76 = 27 C.W.N. 918. The new important matter alleged to have been discovered must have existed at the date of the decree. (24 M. L. J. 50 I. C. 119, foll.; 51 I. C. 625, dist.) 64 I. C. 324. The greatest care ought to be exercised in granting a review when it is asked for on the ground of discovery of fresh evidence after judgment. 45 Cal. 60 = 21 C. W. N. 1076 = 42 I. C. 474 = 26 C. L. J. 187; 64 I. C. 324; 47 Cal. 568 = 31 C. L. J. 134; 50 I. C. 119 = 23 C.W. N. 242; 26 I. C. 281 = 41 C. 809. The new evidence must be such as would entitle the Court to modify or cancel the decree. 38 I. C. 142. An application to receive fresh evidence discovered out of Court by the parties to an appeal comes under O. 47, R. 1 and not under O. 47, R. 27. 19 C.W.N. 401 = 42 C. 675. Discovery of a document after judgment containing an admission of liability by defendant is a good ground for review. 140 P. W. R. 1911 = 11 I. C. 15 = 195 P.L. R. 1911; 135 P. L. R. 1916 = 35 I. C. 342. Though the case of a *pardanashin* lady is neglected by her agents, she cannot apply for re-hearing of the case in review. 42 I. C. 970; 40 I. C. 79. Review—Duty whether confined to the evidence on the basis of which review was granted. 53 Cal. 856 = 31 C. W. N. 1035 = 1927 Cal. 21 = 97 I. C. 731.

OTHER SUFFICIENT REASON.—Rule 1 must be read as defining the limits within which review is under the new Code, permitted, and reference to practise under former and different statutes is misleading. 43 M. L. J. 332 = 3 Lah. 127 = 49 I.A. 144 = 1922 P.C. 112 (P.C.). So construing, the words, "any other sufficient reason," are to be interpreted as meaning a reason sufficient on grounds at least analogous to those specified

immediately previously. (*Ibid.*); 49 B. 839 = 4 R. 266 = 1927 Rang. 20; 96 I.C. 832 = 1926 L.Ah. 665; 92 I.C. 1013; 5 Rang. 675; 100 I.C. 30; 104 I.C. 136 = 31 C.W.N. 822. The "discovery of new and important evidence" in O. 47, R. 1 would refer only to a discovery made since the order sought to be reviewed was passed. 66 I. C. 558 = 1922 All. 366. Review is not to be granted on the ground that if the Court allowed the applicants another opportunity of producing evidence they might persuade the Judge that the view taken by him on the previous occasion was erroneous. 37 All. 440 = 13 A. L. J. 673; 57 I. C. 145; 14 I. C. 837. Where a judgment is based on the decision of the Revenue Court, the reversing of the Revenue Court's decision in appeal is a good ground for granting a review of the judgment. 33 All. 566 = 8 A.L.J. 584; 19 I.C. 629. The omission of the Court and the pleaders to notice certain provisions of the Code which apply to a case is a sufficient reason within O. 47, R. 1, for granting a review. 52 I.C. 29 = 30 C.L.J. 250. The expression "where the ground of such appeal is common to the applicant and the appellant" refers to a case where the grounds of appeal and review are the same and does not refer to a comparison between the actual appeal by a party and a possible appeal by the applicant for review. 24 C. L. J. 517 = 21 C.W.N. 430. An application for restoration of an appeal rejected under O. 41, R. 10 (2) may be treated as an application for review of the order rejecting appeal. 32 I.C. 86. The discovery of the ruling of the High Court contrary to another ruling of equal authority of the same High Court on which the Court has passed an order is not a sufficient cause for review. 18 I.C. 275 = 17 C. L. J. 416. 1927 M. 998; 1926 Mad. 764 = 50 M.L.J. 493. An application for review of judgment can be granted in part. 11 I. C. 102 = 15 C.L.J. 339. A Court can review its order, which was passed on the alleged consent of both parties on an application by one of the parties that he never consented to it. 15 C. L. J. 408 = 17 C.W. N. 631. A review of the decree, which was right when it was made on the ground of the happening of some subsequent event is not justified. 48 I. C. 157 = 111 P. W. R. 1918. 104 I. C. 136 = 31 C.W.N. 822. A review cannot be granted on ground other than those enumerated in O. 47. 22 I. C. 785 = 197 P. L. R. 1914. A Court can entertain review of an order of dismissal for default even in cases where no application for restoration of the suit is made within time. (15 P. R. 189, D.st.) 109 P. R. 1913 = 19 I. C. 481; 4 Pat. 704 (dismissal for non-payment of printing fees). Default of appearance is not a reason contemplated by O. 47, R. 1, C. P. C. nor is it analogous to any such reason. 25 L. W. 192 = 52 M.L.J. 123 = 1927 Mad. 355 = 99 I. C. 954. A party can only ask for a review on the ground of other 'sufficient cause' if he can show the judgment to be incorrect. 13 I. C. 318 = 131 P. W. R. 1912; 17 L. W. 254 = 1923 Mad. 392. Where a decision is erroneous owing to the fact that a decision of the High Court binding upon the Court was not referred to it, the Court can grant a review. 26 I. C. 366 = (1915) M. W. N. 22. But see 1926 M. 764 = 50 M. L. J. 493; 1927 Mad.

(c) by a decision on a reference from a Court of Small Causes, and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the Appellate Court the case on which he applies for the review.

2. [Ss. 624, 626, cl. (c).] An application for review of a decree or order of a Court, not being a High Court, upon some ground other

To whom applications for review may be made. than the discovery of such new and important matter or evidence as is referred to in rule 1 or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the Judge who passed the decree or made the order sought to be reviewed; but any such application may, if the Judge who passed the decree or made

998. Where a Judge who heard the case issues notice on an application for review, his successor is not prohibited from disposing of it. (*Ibid.*). Review—Notice to the opposite side, see 92 I. C. 800=1926 Mad. 133 (2). The phrase "or for any other sufficient reason" means that the reason must be one sufficient to satisfy the Court. 62 I. C. 253=4 N. L. J. 16. The mere fact of failing to produce evidence on account of wrong advice of counsel is no ground for re-hearing the case. 48 I. C. 918=4 O. L. J. 695. For review there should be more than simply non-reference by the Judge to evidence in favour of either party. 2 P. 765. A point of law which could have been raised but was not raised does not justify grant of review. 5 P. L. J. 344=57 I. C. 11. An order rejecting a memorandum of appeal as being insufficiently stamped is open to review. 55 I. C. 502. The fact that the judgment as it stood was open to misconstruction and that the points raised involved questions of importance and of frequent occurrence and that it was desirable to have the views of the Appellate Court declared are good grounds for review. 19 I. C. 363=6 S. L. R. 127.

MISCELLANEOUS: APPEAL AND REVIEW.—Effect of filing appeal—Review—Duty and power of appellate Court, 2 Pat. 676=45 M. L. J. 578=50 I. A. 183=1923 P. C. 128 (P. C.). Rules of procedure are not made for the purpose of hindering justice. (*Ibid.*) O. 47, R. 1 does not apply where after filing an application for review the opposite party prefers an appeal. 63 I. C. 841. When an appeal is withdrawn, it must be treated as if it had never been "presented" within the meaning of O. 47, R. 1. 13 All. 288=19 A. L. J. 21. A Court can entertain an application for review and dispose of it on the merits even though subsequently an appeal is filed against the decree originally passed. 18 A. L. J. 135=42 A. 317; 17 A. L. J. 1021=42 A. 79. The application for review is not maintainable after preferring an appeal against the same decree. 35 I. C. 867. 1927 Bom. 232=29 Bom. L. R. 371=101 L. C. 766; 30 C. W. N. 96. On the withdrawal of the appeal the original Court has jurisdic-

tion to entertain an application for review of its judgment. 14 I. C. 327. Where an appeal against judgment by the High Court is dismissed under O. 41, R. 11, the District Court cannot deal with an application for review of the same judgment. 23 Bom. L. R. 597=46 Bom. 1. If an application for review is made and also an appeal is preferred the Court to which the review application is made, can still entertain the application for review. [32 M. 416 (F. B.) Foll.] 38 Bom. 416=23 I. C. 513=16 Bom. L. R. 189; 41 I. C. 497=44 C. 1011. An appeal may be preferred even after an application for review; the Court in such a case can proceed with application for review; but the hearing of the appeal must be stayed. 57 I. C. 785; 65 I. C. 125. A Lower Court cannot review its order after it has been confirmed on appeal. 40 P. K. 1918=45 I. C. 84. It is illegal for an inferior Court to review the judgment of a superior Court. 50 I. C. 910. An application for review can be continued after the filing of appeal from the decree. If the review succeeds then the appeal becomes incompetent and cannot be heard. 50 I. C. 329=15 N. L. R. 65. But see 11 I. C. 343=14 O. C. 108; 24 O. C. 280=66 I. C. 205. Every order in which in granting review a Court fails to observe the terms of O. 47 should not be interfered with in revision. 104 I. C. 746. Appeal against original decree—Supersession of the decree on review appeal cannot be heard. 30 C. W. N. 738=96 I. C. 384=1926 Cal. 943.

O. 47, R. 2.—Review cannot be granted where applicant has mismanaged his case and wishes to secure a re-hearing of the case. 23 I. C. 374. On this section see also 18 C. W. N. 22; 17 C. W. N. 403; 5 Cal. 86. Review by Judge who signed decree, but not passed it—if competent, see 32 I. C. 101=20 C. W. N. 391. As to effect of transfer of judge, see 47 A. 751=1925 All. 804. A review petition on the ground of an accidental slip in the decree is entertainable before the successor of the judge who disposed of the case. 24 L. W. 447=97 I. C. 545=1926 Mad. 1083. See also 100 I. C. 425=1927 Oudh 131.

the order has ordered notice to issue under rule 4; sub-rule (2), proviso (a), be disposed of by his successor.

Form of applications for review.

Application where rejected.

Application where granted.

Provided that—

(a) no such application shall be granted without previous notice to the opposite party, to enable him to appear and be heard in support of the decree or order, a review of which is applied for; and

(b) no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made, without strict proof of such allegation.

5. [S. 627.] Where the Judge or Judges, or any one of the Judges, who passed the decree or made the order, a review of which is applied for, continues or continue attached to the Court at the time when the application for a review is presented, and is not or are not precluded by absence or other cause for a period of six months next after the application from considering the decree or order to which the application refers, such Judge or Judges or any of them shall hear the application, and no other Judge or Judges of the Court shall hear the same.

6. [S. 628.] (1) Where the application for a review is heard by more than one Judge and the Court is equally divided, the application shall be rejected.

Application where rejected.

O. 47, R. 4.—The right of appeal under O. 43, R. 1 (a) is subject to conditions laid down by O. 47, R. 7, and therefore an appeal, not coming under this rule, cannot be maintained. 42 All. 626=18 A. L. J. 838; 18 C. W. N. 22=19 C. L. J. 225; 20 I. C. 647; 64 I. C. 219. Review—Stages of proceedings. 20 I. C. 647. When once an application for review is granted an order dismissing the application for review is wrong. 74 I. C. 214=26 O. C. 24. See also 1923 Lah. 303. An order granting a review on the ground that the view of the law taken was contrary to a Full Bench decision which had not been taken to its notice, is appealable. 3 Pat. 134=75 I. C. 177=5 Pat. L. T. 52. The discretion of the Court in saying what constitutes good and sufficient reason is unlimited. 9 I. C. 512. The absence of a pleader is not a ground for review. 50 M. 67=(1926) M.W.N. 890=97 I. C. 1008=1076 Mad. 980=51 M. L. J. 219. If the Court thinks that an application for review should be granted, the rule does not stand in its way. 38 I. C. 769=115 P. R. 1916. An application for review of an order summarily dismissing an appeal can be granted without the issue of notice to respondent. (42 Cal 1433, Ref.) 43 Cal. 178=19 C. W. N. 1077. The expression "opposite party" means the party interested to support the order sought to be vacated. 43 Cal. 178=19 C. W. N. 1077. See also 63 I. C. 99=1921 Pat. 337. Grounds which satisfied a Court that its own judgment may be reconsidered should not be criticised by Court of appeal. 31 M. L. J. 509=36 I. C. 437.

Before granting an application for review notice to opposite party is necessary or else the granting is a nullity. 30 I. C. 165=42 Cal. 433; 19 I. C. 864=237 P. L. R. 1913. Notice to opposite party is imperative. 50 M. 67=(1926) M.W.N. 890=97 I. C. 1008=1926 Mad. 980=51 M. L. J. 219. When a party seeks a review of judgment saying that a document not produced at the trial was subsequently discovered, he must strictly show that the document was not available at the time of the trial, or that no diligence on his part was wanting to produce the document. 37 I. C. 399. "Strict proof" refers to the formal correctness of the evidence offered and not to its sufficiency, effect or result. 20 Bom. L. R. 434=42 Bom. 295; 42 Cal. 830=19 C. W. N. 804; 35 I. C. 651=27 C. L. J. 540. Application for review on the ground of discovery of new evidence must be strictly proved. (31 B. 381, Foll.) 9 I. C. 320. See also 42 Cal. 830=19 C. W. N. 804; 38 I. C. 401; 45 Cal. 60=21 C. W. N. 1076. Court must consider reasons for failure to produce the new evidence before order is passed. 104 I. C. 746. Court not considering whether new matters are important. Petition ordered to be re-heard. 1927 Mad. 826 (1)=104 I. C. 290 (2)=39 M. L. T. 119.

O. 47, R. 5.—Successor of Judge deciding case—When can grant review. 26 I. C. 366=(1915) M.W.N. 22. Appeal heard by two Judges—One of whom has since left—Continuing Judge can grant review. 9 I. C. 552. See also 22 C. W. N. 550; 22 C. L. J. 95; 29 Bom. L. R. 371=1927 Bom. 232=101 I. C. 766.

(2) Where there is a majority, the decision shall be according to the opinion of the majority.

Order of rejection not appealable. Objections to order granting application.

7. [S. 629.] (1) An order of the Court rejecting the application shall not be appealable; but an order granting an application may be objected to on the ground that the application was—

- (a) in contravention of the provisions of rule 2,
- (b) in contravention of the provisions of rule 4, or
- (c) after the expiration of the period of limitation prescribed therefor and without sufficient cause.

Such objection may be taken at once by an appeal from the order granting the application or in any appeal from the final decree or order passed or made in the suit.

(2) Where the application has been rejected in consequence of the failure of the applicant to appear, he may apply for an order to have the rejected application restored to the file, and, where it is proved to the satisfaction of the Court that he was prevented by any sufficient cause from appearing when such application was called on for hearing, the Court shall order it to be restored to the file upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for hearing the same.

(3) No order shall be made under sub-rule (2) unless notice of the application has been served on the opposite party.

Registry of application granted, and order for rehearing.

8. [S. 630.] When an application for review is granted, a note thereof shall be made in the register, and the Court may at once rehear the case or make such order in regard to the rehearing as it thinks fit.

O. 47, R. 7.—The change in the language of O. 47, R. 7 (1) is due to a mistake on the part of the Legislature and there is no deliberate departure from S. 629 of the C. P. Code, 1882. 31 M. L. J. 509 = 36 I. C. 437. See also 10 I. C. 725; 12 I. C. 624 = 10 P. L. R. 1912. Execution application—Dismissal for default—Order granting review—Notice is not necessary. 69 I. C. 506.

APPEAL.—Rule is permissive. If party chooses to appeal he must restrict to grounds specified therein. 8 Lah. 617 = 1927 Lah. 435 (2). No appeal lies from an order granting a review except on grounds mentioned in O. 47, R. 7. 14 I. C. 39; 3 I. C. 860; 28 I. C. 707 = 2 L. W. 366; 31 M. L. J. 827 = 38 I. C. 373 = 5 L. W. 472; 20 A. L. J. 517 = 44 All. 605. See also 1927 Bom. 599 = 29 Bom. L. R. 1355; 3 Lah. L. J. 341 = 66 I. C. 992; 15 A. L. J. 899 = 43 I. C. 490 = 40 All. 68; 18 C. W. N. 22 = 19 C. L. J. 225; 31 M. L. J. 509. Error in thinking that there was a mistake apparent on face of record—No appeal lies. 1926 All. 492 = 94 I. C. 78 (1). Under Rule 7 (1), an objection that the lower Court granted a review can be taken in appeal from the final decree only upon one of the three grounds specified in the sub-rule (1). 19 I. C. 481 = 109 P. R. 1913; 38 I. C. 709 = 115 P. R. 1913; 49 P. W. R. 1913 = 18 I. C. 309; 11 P. R. 1913; 10 P. L. R. 1912 = 12 I. C. 624; 10 I. C. 725 = 35 P. W. R. 1911; 38 M. L. J. 224 = 55 I. C. 144. O. 43, R. 1 (w) should be read with O. 47, R. 7. 14 I. C. 39. Under R. 7 the sufficiency or otherwise of the reason for granting a review is not a ground for appeal. 63 I. C. 171. No appeal is allowed from an order granting an application for review of an order dismissing a suit for default. 17 I. C. 661 = 10 A. L. J. 396. An order refusing to readmit application for review of judgment is not appealable but is open to revision. 5 Rang. 121 = 102 I.

C. 706 = 1927 Rang. 204. Where a decree is modified on review, the original decree is superseded and so no appeal lies from that decree, the remedy being to appeal from the decree passed on review. (28 A. 240; A. W. N. (1890) 144, Foll.; 30 A. 79, dist.) 9 A. L. J. 183 = 34 All. 282; 36 C. L. J. 484 = 1923 Cal. 113. The objection that the Court admitted in review, inadmissible evidence may be taken on appeal from the final decree, i.e., original decree amended on review. 50 I. C. 119 = 23 C. W. N. 242. Against an order granting an application for review of judgment and restoring the appeal to the file, an appeal lies. 21 I. C. 943.

POWER OF APPELLATE COURTS.—Order granting review of judgment confined to arrears of revenue only—Power of appellate Courts to re-open other questions. 1926 Cal. 213. Review by successor on the ground of accidental slip in the decree—Appellate Court cannot interfere. 24 L. W. 447 = 97 I. C. 545 = A. I. R. 1926 Mad. 1083. The fact that the appellate Court cannot interfere with the order granting review does not prevent that court from considering the appeal from the ultimate decree passed after review on the merits. (1927) M. W. N. 411. Where an order was passed granting a review and setting aside the previous order, an appeal did not lie in so far as the order granting the review was concerned but that the order, of the lower Court setting aside the previous order must be set aside in appeal. 105 I. C. 4.

REVISION.—No revision lies when there is a right of appeal from the final decree. 32 I. C. 860 = 48 P. W. R. 1916; 1927 Bom. 599 = 29 Bom. L. R. 1355. But see also 12 I. C. 246 = 49 P. W. R. 1911; 31 M. L. J. 509 = 36 I. C. 437.

O. 47, R. 8.—A review may be granted either as to the whole or part, and according to R. 8 on

9. [S. 629, last para.] No application to review an order made on an application for a review or a decree or order passed or made on Bar of certain applications. a review shall be entertained.

[Allahabad and Oudh] Add the following rule at the end of O. 47 :—

"10. Rule 38 of Order XLI shall apply, so far as may be, to proceedings under this order."

ORDER XLVIII.

MISCELLANEOUS.

1. [S. 93.] (1) Every process issued under this Code shall be served at the expense of the party on whose Process to be served at expense of party issuing. behalf it is issued unless the Court otherwise directs.

[Allahabad] Add the words "except as provided in O. 4, R. 1 (2)" at the beginning of Cl. (1) of R. 1.

- (2) The Court-fee chargeable for such service shall be paid within a time to be fixed before the process is issued. Costs of service.

2. [S. 94.] All orders, notices and other documents required by this Code to be given to or served on any person shall be served in the manner provided for the service of summonses. Orders and notices how served.

3. [S. 644.] The forms given in the appendices, with such variation as the circumstances of each case may require, shall be used for the purposes therein mentioned. Use of forms in appendices.

[Lower Burma] The words "or such forms as may be prescribed by the Chief Court of Lower Burma" shall be inserted after the word "Appendices".

[Oudh] The following is added as Rule 4 to Order XLVIII :—

"Except as otherwise provided, in every interlocutory proceeding and in every proceeding after decree in the trial Court, the Court may, either on the application of any party, or of its own motion, dispense with service upon any defendant who has not appeared or upon any defendant who has not filed a written statement."

ORDER XLIX.

CHARTERED HIGH COURTS.

1. [S. 636.] Notice to produce documents, summonses to witnesses, and every other judicial process, issued in the exercise of the original civil jurisdiction of the High Court, and of its matrimonial, testamentary and intestate jurisdictions, except summonses to defendants, writs of execution and notice to respondents, may be served by the attorneys in the suits, or by persons employed by them, or by such other persons as the High Court, by any rule or order, directs. Who may serve processes of High Court.

2. Nothing in this schedule shall be deemed to limit or otherwise affect any rules in force at the commencement of this Code for the taking of evidence or the recording of judgments and orders by a Chartered High Court. Saving in respect of Chartered High Courts.

admitting of a review the whole case is not re-opened. 20 C. W. N. 1165 = 27 C. L. J. 326. It is open to the Court to determine whether the whole case is to be reheard or in part or in its entirety. In the absence of any special direction the whole case is re-opened. 53 Cal 856 = 97 I. C. 731 = 31 C. W. N. 1035 = 1927 Cal. 21. A Court can under R. 8 grant a review and at once proceed to rehear the case. 26 I. C. 366 = (1915) M. W. N. 22.

O. 47, R. 9.—Where a plea of *res judicata* has been wrongly accepted between the parties by a single Judge of the Chief Court, the question cannot be re-opened afterwards by a Division Bench. 10 I. C. 679 = 25 P. W. R. 1911. As to scope and effect of O. 47, R. 9, see 8 Lah. 54 = 1927 Lah. 200 = 102 I. C. 523 (2). A second

review of an order is barred by O. 47, R. 9 as it is practically for the review of the order passed on review. 10 I. C. 679 = 25 P. W. R. 1911; 20 C. W. N. 1165 = 27 C. L. J. 326. See also 8 Lah. 54 = 1927 Lah. 200 = 102 I. C. 523 (2).

O. 48, R. 1.—See 3 C. W. N. 82; 11 W. R. 290; 9 W. R. 127. The provisions of O. 48, R. 1 operate as between party and party and not between the Government and the party. 8 Pat. L. T. 756 = 102 I. C. 791 = 1927 Pat. 318 (26 Cal. 124, Foll.).

O. 48, R. 2.—See 5 Bom. 249.

O. 48, R. 3.—See 24 Cal. 766 (772).

O. 49, R. 1.—Mode of effecting of summonses. 96 I. C. 375 = 1926 Cal. 977.

O. 49, R. 2.—See 9 All. 93.

3. [S. 638.] The following rules shall not apply to any Chartered High Court in the exercise of its ordinary or extraordinary original civil jurisdiction, namely:—

Application of rules.

- (1) rule 10 and rule 11, clauses (b) and (c) of Order VII;
 - (2) rule 3 of Order X;
 - (3) rule 2 of Order XVI;
 - (4) rules 5, 6, 8, 9, 10, 11, 13, 14, 15 and 16 (so far as relates to the manner of taking evidence) of Order XVIII;
 - (5) rules 1 to 8 of Order XX; and
 - (6) rule 7 of Order XXXIII (so far as relates to the making of a memorandum);
- and rule 35 of Order XLI shall not apply to any such High Court in the exercise of its appellate jurisdiction.

[Bor. bay] The following be added as R. 4 in O. XLIX:—

"4. Where on a memorandum of appeal presented within the time prescribed for the same, the whole or any part of the fee prescribed by the law for the time being in force relating to Court-fees has not been paid, the Registrar may in his discretion allow the appellant to pay the whole or part as the case may be of such Court-fees and may admit the appeal to be registered even though the subsequent payment of Court-fee may have been made after the time prescribed for presentation of the appeal."

ORDER L.

PROVINCIAL SMALL CAUSE COURTS.

1. The provisions hereinafter specified shall not extend to Courts constituted under the Provincial Small Causes Courts Act, 1887, or to Courts exercising the jurisdiction of a Court of Small Causes under that Act, that is to say,—

- (a) so much of this schedule as relates to—
- (i) suits excepted from the cognizance of a Court of Small Causes or the execution of decrees in such suits;
 - (ii) the execution of decrees against immoveable property or the interest of a partner in partnership property;
 - (iii) the settlement of issues; and
- (b) the following rules and orders,—
- Order II, rule 1 (frame of suit);
 - Order X, rule 3 (record of examination of parties);
 - Order XV, except so much of rule 4 as provides for the pronouncement at once of judgment;
 - Order XVIII, rules 5 to 12 (evidence);
 - Orders XLI to XLV (appeals);
 - Order XLVII, rules 2, 3, 5, 6, 7, (review);
 - Order LI.

ORDER LI.

PRESIDENCY SMALL CAUSE COURTS.

1. Save as provided in rules 22 and 23 of Order V, rules 4 and 7 of Order XXI, and rule 4 of Order XXVI, and by the Presidency Small Cause Courts Act, 1882, this schedule shall not extend to any suit or proceeding in any Court of Small Causes established in the towns of Calcutta, Madras and Bombay.

ORDER LII.

[Allahabad and Oudh] Rule 18 of Order XLI shall apply, so far as may be, to proceedings under S. 115 of the Code

O. 50, B. 1 (a) (iii).—Though a Small Cause Court is not required to frame issues yet where a case involves many questions, the Court should indicate what the points are to give the parties an opportunity to produce their evidence thereon. 59 I. C. 703.

APPENDIX A.

PLEADINGS.

(1) Titles of Suits.

IN THE COURT OF

A. B. (*add description and residence*) *Plaintiff.*
against

C. D. (*add description and residence*) *Defendant.*

(2) Description of Parties in Particular Cases.

The Secretary of State for India in Council.

The Advocate-General of

The Collector of

The State of

The A. B. Company, Limited, having its registered office at

A. B., a public officer of the C. D. Company

A. B. (*add description and residence*), on behalf of himself and all other creditors
of C. D., late of (*add description and residence*).

A. B. (*add description and residence*), on behalf of himself and all other holders of
debentures issued by the Company, Limited.

The Official Receiver.

A. B., a minor (*add description and residence*), by C. D. [*or by the Court of Wards*], his
next friend.

A. B. (*add description and residence*), a person of unsound mind [*or of weak mind*],
by C. D., his next friend.

A. B., a firm carrying on business in partnership at

A. B. (*add description and residence*), by his constituted attorney C.D. (*add description
and residence*).

A. B. (*add description and residence*), Shebait of Thakur.

A. B. (*add description and residence*), executor of C. D., deceased.

A. B. (*add description and residence*), heir of C. D., deceased.

(3) Plaints.

No. 1.

MONEY LENT.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. On the day of 19 , he lent the defendant rupees repayable on
the day of .
2. The defendant has not paid the same, except rupees paid on the day
of 19 .

[*If the plaintiff claims exemption from any law of limitation, say :—*]

3. The plaintiff was a minor [*or insane*] from the day of till the
day of .
4. [*Facts showing when the cause of action arose and that the Court has jurisdiction.*]
5. The value of the subject-matter of the suit for the purpose of jurisdiction is
rupees and for the purpose of court-fees is rupees.
6. The plaintiff claims rupees, with interest at per cent. from
the day of 19 .

No. 2.

MONEY OVERPAID.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. On the day of 19 , the plaintiff agreed to buy and the defendant agreed to sell bars of silver at annas per tola of fine silver.
2. The plaintiff procured the said bars to be assayed by E. F., who was paid by the defendant for such assay, and E. F. declared each of the bars to contain 1,500 tolas of fine silver, and the plaintiff accordingly paid the defendant rupees.
3. Each of the said bars contained only 1,200 tolas of fine silver, of which fact the plaintiff was ignorant when he made the payment.
4. The defendant has not repaid the sum so overpaid.
[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 3.

GOODS SOLD AT A FIXED PRICE AND DELIVERED.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. On the day of 19 , E. F. sold and delivered to the defendant [one hundred barrels of flour, or the goods mentioned in the schedule hereto annexed, or sundry goods].
2. The defendant promised to pay rupees for the said goods on delivery [or on the day of , some day before the plaint was filed].
3. He has not paid the same.
4. E. F. died on the day of 19 . By his last will he appointed his brother, the plaintiff, his executor.
[As in paras. 4 and 5 of Form No. 1.]
7. The plaintiff as executor of E. F. claims [Relief claimed].

No. 4.

GOODS SOLD AT A REASONABLE PRICE AND DELIVERED.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. On the day of 19 , plaintiff sold and delivered to the defendant [sundry articles of house furniture], but no express agreement was made as to the price.
2. The goods were reasonably worth rupees.
3. The defendant has not paid the money.
[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 5.

GOODS MADE AT DEFENDANT'S REQUEST, AND NOT ACCEPTED.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. On the day of 19 , E. F. agreed with the plaintiff that the plaintiff should make for him [six tables and fifty chairs] and that E. F. should pay for the goods on delivery rupees.
2. The plaintiff made the goods, and on the day of 19 offered to deliver them to E. F., and has ever since been ready and willing so to do.
3. E. F. has not accepted the goods or paid for them.
[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 6.

DEFICIENCY UPON A RE-SALE [GOODS SOLD AT AUCTION].

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. On the day of 19 , the plaintiff put up at auction sundry [goods], subject to the condition that all goods not paid for and removed by the purchaser within [ten days] after the sale should be re-sold by auction on his account, of which condition the defendant had notice.
2. The defendant purchased [one crate of crockery] at the auction at the price of rupees.

3. The plaintiff was ready and willing to deliver the goods to the defendant on the date of the sale and for [ten days] after.

4. The defendant did not take away the goods purchased by him, nor pay for them within [ten days] after the sale, nor afterwards.

5. On the day of 19 , the plaintiff re-sold the [crate of crockery] on account of the defendant, by public auction, for rupees.

6. The expenses attendant upon such re-sale amounted to rupees.

7. The defendant has not paid the deficiency thus arising, amounting to rupees.
[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 7.

SERVICES AT A REASONABLE RATE.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. Between the day of 19 , and the day of 19 , at , plaintiff [executed sundry drawings, designs and diagrams] for the defendant, at his request ; but no express agreement was made as to the sum to be paid for such services.

2. The services were reasonably worth rupees.

3. The defendant has not paid the money.

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 8.

SERVICES AND MATERIALS AT A REASONABLE COST.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. On the day of 19 , at , the plaintiff built a house [known as No. , in], and furnished the materials therefor, for the defendant, at his request, but no express agreement was made as to the amount to be paid for such work and materials.

2. The work done and materials supplied were reasonably worth rupees.

3. The defendant has not paid the money.

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 9.

USE AND OCCUPATION.

(Title.)

A. B., the above-named plaintiff, executor of the will of X. Y., deceased, states as follows :—

1. That the defendant occupied the [house No. , Street], by permission of the said X. Y., from the day of 19 , until the day of 19 , and no agreement was made as to payment for the use of the said premises.

2. That the use of the said premises for the said period was reasonably worth rupees.

3. The defendant has not paid the money.

[As in paras. 4 and 5 of Form No. 1.]

6. The plaintiff as executor of X. Y. claims [Relief claimed].

No. 10.

ON AN AWARD.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. On the day of 19 , the plaintiff and defendant, having a difference between them concerning [a demand of the plaintiff for the price of ten barrels of oil which the defendant refused to pay], agreed in writing to submit the difference to the arbitration of E. F. and G. H., and the original document is annexed hereto.

2. On the day of 19 , the arbitrators awarded that the defendant should [pay the plaintiff rupees].

3. The defendant has not paid the money.

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 11.

ON A FOREIGN JUDGMENT.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. On the day of 19 , at , in the State [or Kingdom] of , the Court of that State [or Kingdom], in a suit therein pending between the plaintiff and the defendant, duly adjudged that the defendant should pay to the plaintiff rupees, with interest from the said date.

2. The defendant has not paid the money.

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 12.

AGAINST SURETY FOR PAYMENT OF RENT.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. On the day of 19 , E. F. hired from the plaintiff for the term on years, the [house No. , Street], at the annual rent of rupees, payable [monthly].

2. The defendant agreed, in consideration of the letting of the premises to E. F., to guarantee the punctual payment of the rent.

3. The rent for the month of 19 , amounting to rupees, has not been paid.

[If, by the terms of the agreement, notice is required to be given to the surety, add :—]

4. On the day of 19 , the plaintiff gave notice to the defendant of the non-payment of the rent, and demanded payment thereof.

5. The defendant has not paid the same.

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 13.

BREACH OF AGREEMENT TO PURCHASE LAND.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. On the day of 19 , the plaintiff and defendant entered into an agreement, and the original document is hereto annexed.

[Or, on the day of 19 , the plaintiff and defendant mutually agreed that the plaintiff should sell to the defendant and that the defendant should purchase from the plaintiff forty bighas¹ of land in the village of for rupees.]

2. On the day of 19 , the plaintiff, being then the absolute owner of the property [and the same being free from all incumbrances as was made to appear to the defendant], tendered to the defendant a sufficient instrument of transfer of the same [or, was ready and willing, and is still ready and willing, and offered, to transfer the same to the defendant by a sufficient instrument] on the payment by the defendant of the sum agreed upon.

3. The defendant has not paid the money.

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 14.

NOT DELIVERING GOODS SOLD.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. On the day of 19 , the plaintiff and defendant mutually agreed that the defendant should deliver [one hundred barrels of flour] to the plaintiff on the day of 19 , and that the plaintiff should pay therefor rupees on delivery.

2. On the [said] day the plaintiff was ready and willing, and offered, to pay the defendant the said sum upon delivery of the goods.

3. The defendant has not delivered the goods, and the plaintiff has been deprived of the profits which would have accrued to him from such delivery.

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

¹For the word "Bighas" the Calcutta High Court has substituted

"acres"

"bighas";

No. 15.

WRONGFUL DISMISSAL.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. On the day of 19 , the plaintiff and defendant mutually agreed that the plaintiff should serve the defendant as [an accountant, or in the capacity of foreman, or as the case may be,] and that the defendant should employ the plaintiff as such for the term of [one year] and pay him for his services rupees [monthly].

2. On the day of 19 , the plaintiff entered upon the service of the defendant and has ever since been, and still is, ready and willing to continue in such service during the remainder of the said year whereof the defendant always has had notice.

3. On the day of 19 , the defendant wrongfully discharged the plaintiff, and refused to permit him to serve as aforesaid, or to pay him for his services.

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 16.

BREACH OF CONTRACT TO SERVE.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. On the day of 19 , the plaintiff and defendant mutually agreed that the plaintiff should employ the defendant at an [annual] salary of rupees, and that the defendant should serve the plaintiff as [an artist] for the term of [one year.]

2. The plaintiff has always been ready and willing to perform his part of the agreement [and on the day of 19 , offered so to do].

3. The defendant [entered upon] the service of the plaintiff on the above-mentioned day, but afterwards on the day of 19 , he refused to serve the plaintiff as aforesaid.

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 17.

AGAINST A BUILDER FOR DEFECTIVE WORKMANSHIP.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. On the day of 19 , the plaintiff and defendant entered into an agreement, and the original document is hereto annexed. [Or state the tenor of the contract.]

[2. The plaintiff duly performed all the conditions of the agreement on his part.]

3. The defendant [built the house referred to in the agreement in a bad and unworkmanlike manner.]

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 18.

ON A BOND FOR THE FIDELITY OF A CLERK.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. On the day of 19 , the plaintiff took E. F. into his employment as a clerk.

2. In consideration thereof, on the day of 19 , the defendant agreed with the plaintiff that if E. F. should not faithfully perform his duties as a clerk to the plaintiff, or should fail to account to the plaintiff for all moneys, evidences of debt or other property received by him for the use of the plaintiff, the defendant would pay to the plaintiff whatever loss he might sustain by reason thereof, not exceeding rupees.

[Or, 2. In consideration thereof, the defendant by his bond of the same date bound himself to pay the plaintiff the penal sum of rupees, subject to the condition that if E. F. should faithfully perform his duties as clerk and cashier to the plaintiff and should justly account to the plaintiff for all moneys, evidences of debt or other property which should be at any time held by him in trust for the plaintiff, the bond should be void.]

[Or, 2. In consideration thereof, on the same date the defendant executed a bond in favour of the plaintiff, and the original document is hereto annexed.]

3. Between the day of 19 , and the day of 19 *E. F.* received money and other property, amounting to the value of rupees, for the use of the plaintiff, for which sum he has not accounted to him, and the same still remains due and unpaid.

[*As in paras. 4 and 5 of Form No. 1, and Relief claimed.*]

No. 19.

BY TENANT AGAINST LANDLORD, WITH SPECIAL DAMAGE.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. On the day of 19 , the defendant, by a registered instrument, let to the plaintiff [the house No. , Street] for the term of years, contracting with the plaintiff, that he, the plaintiff, and his legal representatives should quietly enjoy possession thereof for the said term.

2. All conditions were fulfilled and all things happened necessary to entitle the plaintiff to maintain this suit.

3. On the day of 19 , during the said term, *E. F.* who was the lawful owner of the said house, lawfully evicted the plaintiff therefrom, and still withholds the possession thereof from him.

4. The plaintiff was thereby [prevented from continuing the business of a tailor at the said place, was compelled to expend rupees in moving, and lost the custom of *G. H.* and *I. J.* by such removal].

[*As in paras. 4 and 5 of Form No. 1, and Relief claimed.*]

No. 20.

ON AN AGREEMENT OF INDEMNITY.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. On the day of 19 , the plaintiff and defendant, being partners in trade under the style of *A. B.* and *C. D.*, dissolved the partnership, and mutually agreed that the defendant should take and keep all the partnership property, pay all debts of the firm and indemnify the plaintiff against all claims that might be made upon him on account of any indebtedness of the firm.

2. The plaintiff duly performed all the conditions of the agreement on his part.

3. On the day of 19 , [a judgment was recovered against the plaintiff and defendant by *E. F.*, in the High Court of Judicature at upon a debt due from the firm to *E. F.*, and on the day of 19 , the plaintiff paid rupees [in satisfaction of the same].

4. The defendant has not paid the same to the plaintiff.

[*As in paras. 4 and 5 of Form No. 1, and Relief claimed.*]

No. 21.

PROCURING PROPERTY BY FRAUD.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. On the day of 19 , the defendant, for the purpose of inducing the plaintiff to sell him certain goods, represented to the plaintiff that [he, the defendant, was solvent, and worth rupees over all his liabilities].

2. The plaintiff was thereby induced to sell [and deliver] to the defendant [dry goods] of the value of rupees.

3. The said representations were false [or state the particular falsehoods] and were then known by the defendant to be so.

4. The defendant has not paid for the goods. [Or, if the goods were not delivered.] The plaintiff, in preparing and shipping the goods and procuring their restoration, expended rupees.

[*As in paras. 4 and 5 of Form No. 1, and Relief claimed.*]

No. 22.

FRAUDULENTLY PROCURING CREDIT TO BE GIVEN TO ANOTHER PERSON.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. On the day of 19 , the defendant represented to the plaintiff that *E. F.* was solvent and in good credit, and worth rupees over all his

liabilities [or that E. F. then held a responsible situation and was in good circumstances, and might safely be trusted with goods on credit].

2. The plaintiff was thereby induced to sell to E. F. [rice] of the value of rupees [on months credit].

3. The said representations were false and were then known by the defendant to be so, and were made by him with intent to deceive and defraud the plaintiff [or to deceive and injure the plaintiff].

4. E. F. [did not pay for the said goods at the expiration of the credit aforesaid, or] has not paid for the said rice, and the plaintiff has wholly lost the same.

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 23.

POLLUTING THE WATER UNDER THE PLAINTIFF'S LAND.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. The plaintiff is, and at all the times hereinafter mentioned was, possessed of certain land called and situate in and of a well therein, and of water in the well, and was entitled to the use and benefit of the well and of the water therein, and to have certain springs and streams of water which flowed and ran into the well to supply the same to flow or run without being fouled or polluted.

2. On the day of 19 , the defendant wrongfully fouled and polluted the well and the water therein and the springs and streams of water which flowed into the well.

3. In consequence the water in the well became impure and unfit for domestic and other necessary purposes, and the plaintiff and his family are deprived of the use and benefit of the well and water.

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 24.

CARRYING ON A NOXIOUS MANUFACTURE.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. The plaintiff is, and at all the times hereinafter mentioned was, possessed of certain lands called situate in

2. Ever since the day of 19 , the defendant has wrongfully caused to issue from certain smelting works carried on by the defendant large quantities of offensive and unwholesome smoke and other vapours and noxious matter, which spread themselves over and upon the said lands and corrupted the air, and settled on the surface of the lands.

3. Thereby the trees, hedges, herbage and crops of the plaintiff growing on the lands were damaged and deteriorated in value, and the cattle and livestock of the plaintiff on the lands became unhealthy, and many of them were poisoned and died.

4. The plaintiff was unable to graze the lands with cattle and sheep as he otherwise might have done, and was obliged to remove his cattle, sheep and farming-stock therefrom, and has been prevented from having so beneficial and healthy a use and occupation of the lands as he otherwise would have had.

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 25.

OBSTRUCTING A RIGHT OF WAY.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. The plaintiff is, and at the time hereinafter mentioned was, possessed of [a house in the village of].

2. He was entitled to a right of way from the [house] over a certain field to a public highway and back again from the highway over the field to the house, for himself and his servants [with vehicles, or on foot] at all times of the year.

3. On the day of 19 , defendant wrongfully obstructed the said way, so that the plaintiff could not pass [with vehicles, or on foot, or in any manner] along the way [and has ever since wrongfully obstructed the same].

4. (State special damage, if any.)

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 26.

OBSTRUCTING A HIGHWAY.

(Title.)

1. The defendant wrongfully dug a trench and heaped up earth and stones in the public highway leading from _____ to _____ so as to obstruct it.

2. Thereby the plaintiff, while lawfully passing along the said highway, fell over the said earth and stones [or into the said trench] and broke his arm, and suffered great pain, and was prevented from attending to his business for a long time, and incurred expense for medical attendance.

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 27.

DIVERTING A WATERCOURSE.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. The plaintiff is, and at the time hereinafter mentioned was, possessed of a mill situated on a [stream] known as the _____, in the village of _____, district of _____.

2. By reason of such possession the plaintiff was entitled to the flow of the stream for working the mill.

3. On the _____ day of _____ 19____, the defendant, by cutting the bank of the stream, wrongfully diverted the water thereof, so that less water ran into the plaintiff's mill.

4. By reason thereof the plaintiff has been unable to grind more than _____ sacks per day, whereas, before the said diversion of water, he was able to grind _____ sacks per day.

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 28.

OBSTRUCTING A RIGHT TO USE WATER FOR IRRIGATION.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. Plaintiff is, and was at the time hereinafter mentioned, possessed of certain lands situate, etc., and entitled to take and use a portion of the water of a certain stream for irrigating the said lands.

2. On the _____ day of _____ 19____, the defendant prevented the plaintiff from taking and using the said portion of the said water as aforesaid, by wrongfully obstructing and diverting the said stream.

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 29.

INJURIES CAUSED BY NEGLIGENCE ON A RAILROAD.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. On the _____ day of _____ 19____, the defendants were common carriers of passengers by railway between _____ and _____.

2. On that day the plaintiff was a passenger in one of the carriages of the defendants on the said railway.

3. While he was such passenger, at _____ [or near the station of _____ or between the stations of _____ and _____], a collision occurred on the said railway caused by the negligence and unskilfulness of the defendants' servants, whereby the plaintiff was much injured [having his leg broken, his head cut, etc., and state the special damage, if any, as], and incurred expense for medical attendance, and is permanently disabled from carrying on his former business as [a salesman].

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

[Or thus:—2. On that day the defendants by their servants so negligently and unskilfully drove and managed an engine and a train of carriages attached thereto upon and along the defendants' railway which the plaintiff was then lawfully crossing, that the said engine and train were driven and struck against the plaintiff, whereby, etc., as in para. 3.]

No. 30.

INJURIES CAUSED BY NEGLIGENT DRIVING.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. The plaintiff is a shoemaker, carrying on business at _____. The defendant is a merchant of _____.

2. On the day of 19 , the plaintiff was walking southward along Chowringhee, in the City of Calcutta, at about 3 o'clock in the afternoon. He was obliged to cross Middleton Street, which is a street running into Chowringhee at right angles. While he was crossing this street, and just before he could reach the foot pavement on the further side thereof, a carriage of the defendant's drawn by two horses under the charge and control of the defendant's servants, was negligently, suddenly and without any warning turned at a rapid and dangerous pace out of Middleton Street into Chowringhee. The pole of the carriage struck the plaintiff and knocked him down, and he was much trampled by the horses.

3. By the blow and fall and trampling the plaintiff's left arm was broken, and he was bruised and injured on the side and back, as well as internally, and in consequence thereof the plaintiff was for four months ill and in suffering, and unable to attend to his business, and incurred heavy medical and other expenses, and sustained great loss of business and profits.

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 31.

FOR MALICIOUS PROSECUTION.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. On the day of 19 , the defendant obtained a warrant of arrest from [a Magistrate of the said city, or as the case may be] on a charge of and the plaintiff was arrested thereon, and imprisoned for [days, or hours, and gave bail in the sum of rupees to obtain his release].

2. In so doing the defendant acted maliciously and without reasonable or probable cause.

3. On the day of 19 , the Magistrate dismissed the complaint of the defendant and acquitted the plaintiff.

4. Many persons, whose names are unknown to the plaintiff, hearing of the arrest, and supposing the plaintiff to be a criminal, have ceased to do business with him; or in consequence of the said arrest, the plaintiff lost his situation as clerk to one E. F.; or in consequence the plaintiff suffered pain of body and mind, and was prevented from transacting his business, and was injured in his credit, and incurred expense in obtaining his release from the said imprisonment and in defending himself against the said complaint.

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 32.

MOVEABLES WRONGFULLY DETAINED.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. On the day of 19 , plaintiff owned [or state facts showing a right to the possession] the goods mentioned in the schedule hereto annexed [or describe the goods], the estimated value of which is rupees.

2. From that day until the commencement of this suit the defendant has detained the same from the plaintiff.

3. Before the commencement of the suit, to wit, on the day of 19 , the plaintiff demanded the same from the defendant, but he refused to deliver them.

[As in paras. 4 and 5 of Form No. 1.]

6. The plaintiff claims—

- (1) delivery of the said goods, or rupees, in case delivery cannot be had;
- (2) rupees compensation for the detention thereof.

The Schedule.

No. 33.

AGAINST A FRAUDULENT PURCHASER AND HIS TRANSFeree WITH NOTICE.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. On the day of 19 , the defendant C. D., for the purpose of inducing the plaintiff to sell him certain goods, represented to the plaintiff that [he was solvent, and worth rupees over all his liabilities].

2. The plaintiff was thereby induced to sell and deliver to C. D. [one hundred boxes of tea], the estimated value of which is rupees.

3. The said representations were false, and were then known by *C. D.* to be so [or at the time of making the said representations, *C. D.* was insolvent, and knew himself to be so].

4. *C. D.* afterwards transferred the said goods to the defendant *E. F.* without consideration [or who had notice of the falsity of the representation].

[As in paras. 4 and 5 of Form No. 1.]

7. The plaintiff claims—

- (1) delivery of the said goods, or rupees, in case delivery cannot be had;
- (2) rupees compensation for the detention thereof.

No. 34.

RESCISSION OF A CONTRACT ON THE GROUND OF MISTAKE.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. On the day of 19, the defendant represented to the plaintiff that a certain piece of ground belonging to the defendant, situated at , contained [ten bighas].

2. The plaintiff was thereby induced to purchase the same at the price of rupees in the belief that the said representation was true, and signed an agreement, of which the original is hereto annexed. But the land has not been transferred to him.

3. On the day of 19, the plaintiff paid the defendant rupees as part of the purchase money.

4. That the said piece of ground contained in fact only [five bighas].

[As in paras. 4 and 5 of Form No. 1.]

7. The plaintiff claims—

- (1) rupees, with interest from the day of 19.
- (2) that the said agreement be delivered up and cancelled.

No. 35.

AN INJUNCTION RESTRAINING WASTE.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. The plaintiff is the absolute owner of [describe the property].

2. The defendant is in possession of the same under a lease from the plaintiff.

3. The defendant has [cut down a number of valuable trees, and threatens to cut down many more for the purpose of sale] without the consent of the plaintiff.

[As in paras. 4 and 5 of Form No. 1.]

6. The plaintiff claims that the defendant be restrained by injunction from committing or permitting any further waste on the said premises.

[Pecuniary compensation may also be claimed.]

No. 36.

INJUNCTION RESTRAINING NUISANCE.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. Plaintiff is, and at all times hereinafter mentioned was, the absolute owner of [the house No. , Street, Calcutta].

2. The defendant is, and at all the said times was, the absolute owner of [a plot of ground in the same street].

3. On the day of 19, the defendant erected upon his said plot a slaughter-house, and still maintains the same; and from that day until the present time has continually caused cattle to be brought and killed there [and has caused the blood and offal to be thrown into the street opposite the said house of the plaintiff].

[4. In consequence the plaintiff has been compelled to abandon the said house, and has been unable to rent the same.]

[As in paras. 4 and 5 of Form No. 1.]

7. The plaintiff claims that the defendant be restrained by injunction from committing or permitting any further nuisance.

No. 37.

PUBLIC NUISANCE.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. The defendant has wrongly heaped up earth and stones on a public road known as Street at so as to obstruct the passage of the public along

the same and threatens and intends, unless restrained from so doing, to continue and repeat the said wrongful act.

2. The plaintiff has obtained the consent in writing of the Advocate-General [or of the Collector or other officer appointed in this behalf] to the institution of this suit.

[As in paras. 4 and 5 of Form No. 1.]

5. The plaintiff claims—

(1) a declaration that the defendant is not entitled to obstruct the passage of the public along the said public road;

(2) an injunction restraining the defendant from obstructing the passage of the public along the said public road and directing the defendant to remove the earth and stones wrongfully heaped up as aforesaid.

No. 38.

INJUNCTION AGAINST THE DIVERSION OF A WATER-COURSE.

(Title.)

A. B., the above-named plaintiff, states as follows :—

[As in Form No. 27.]

The plaintiff claims that the defendant be restrained by injunction from diverting the water as aforesaid.

No. 39.

RESTORATION OF MOVEABLE PROPERTY THREATENED WITH DESTRUCTION, AND FOR AN INJUNCTION.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. Plaintiff is, and at all times hereinafter mentioned was, the owner of [a portrait of his grandfather which was executed by an eminent painter], and of which no duplicate exists [or state any facts showing that the property is of a kind that cannot be replaced by money].

2. On the _____ day of _____ 19____, he deposited the same for safe-keeping with the defendant.

3. On the _____ day of _____ 19____, he demanded the same from the defendant and offered to pay all reasonable charges for the storage of the same.

4. The defendant refuses to deliver the same to the plaintiff and threatens to conceal, dispose of, cut or injure the same if required to deliver it up.

5. No pecuniary compensation would be an adequate compensation to the plaintiff for the loss of the [painting].

[As in paras. 4 and 5 of Form No. 1.]

8. The plaintiff claims—

(1) that the defendant be restrained by injunction from disposing of, injuring or concealing the said [painting];

(2) that he be compelled to deliver the same to the plaintiff.

No. 40

INTERPLEADER.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. Before the date of the claims hereinafter mentioned G. H. deposited with the plaintiff [describe the property] for [safe-keeping].

2. The defendant C. D. claims the same [under an alleged assignment thereof to him from G. H.].

3. The defendant E. F. also claims the same [under an order of G. H. transferring the same to him].

4. The plaintiff is ignorant of the respective rights of the defendants.

5. He has no claim upon the said property other than for charges and costs, and is ready and willing to deliver it to such persons as the Court shall direct.

6. The suit is not brought by collusion with either of the defendants.

[As in paras. 4 and 5 of Form No. 1.]

9. The plaintiff claims—

(1) that the defendants be restrained, by injunction, from taking any proceedings against the plaintiff in relation thereto;

(2) that they be required to interplead together concerning their claims to the said property;

[(3) that some person be authorized to receive the said property pending such litigation;]

(4) that upon delivering the same to such [person] the plaintiff be discharged from all liability to either of the defendants in relation thereto.

No. 41.

ADMINISTRATION BY CREDITOR ON BEHALF OF HIMSELF AND ALL OTHER CREDITORS.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. E. F., late of , was at the time of his death, and his estate still is, indebted to the plaintiff in the sum of

[Here insert nature of debt and security, if any].

2. E. F. died on or about the day of . By his last will, dated the day of , he appointed C. D. his executor [or devised his estate in trust, etc., or died intestate, as the case may be].

3. The will was proved by C. D. [or letters of administration were granted, etc.].

4. The defendant has possessed himself of the moveable [and immoveable, or the proceeds of the immoveable] property of E. F., and has not paid the plaintiff his debt.

[As in paras. 4 and 5 of Form No. 1.]

7. The plaintiff claims that an account may be taken of the moveable [and immoveable] property of E. F., deceased and that the same may be administered under the decree of the Court.

No. 42.

ADMINISTRATION BY SPECIFIC LEGATEE.

(Title.)

[Alter Form No. 41 thus] :

[Omit paragraph 1 and commence paragraph 2] E. F., late of , died on or about the day of . By his last will, dated the day of

he appointed C. D. his executor, and bequeathed to the plaintiff [here state the specific legacy].

For paragraph 4 substitute—

The defendant is in possession of the moveable property of E. F., and, amongst other things, of the said [here name the subject of the specific bequest].

For the commencement of paragraph 7 substitute—

The plaintiff claims that the defendant may be ordered to deliver to him the said, [here name the subject of the specific bequest], or that, etc.

No. 43.

ADMINISTRATION BY PECUNIARY LEGATEE.

(Title.)

[Alter Form No. 41 thus] :

[Omit paragraph 1 and substitute for paragraph 2] E. F., late of , died on or about the day of

will, dated the day of . By his last C. D. his executor, and bequeathed to the plaintiff a legacy of rupees.

In paragraph 4 substitute "legacy" for "debt."

Another form.

(Title.)

E. F., the above-named plaintiff, states as follows :—

1. A. B. of K. in the died on the day of . By his last will, dated the day of , he appointed the defendant and M. N. [who died in the testator's lifetime] his executors, and bequeathed his property, whether moveable or immoveable, to his executors in trust, to pay the rents and income thereof to the plaintiff for his life ; and after his decease, and in default of his having a son who should attain twenty-one, or a daughter who should attain that age or marry, upon trust as to his immoveable property for the person who would be the testator's heir-at-law, and as to his moveable property for the persons who would be the testator's next-of kin if he had died intestate at the time of the death of the plaintiff, and such failure of his issue as aforesaid.

2. The will was proved by the defendant on the day of . The plaintiff has not been married.

3. The testator was at his death entitled to moveable and immoveable property ; the defendant entered into the receipt of the rents of the immoveable property and got in the moveable property ; he has sold some part of the immoveable property.

[As in paras. 4 and 5 of Form No. 1.]

6. The plaintiff claims—

- (1) to have the moveable and immoveable property of *A. B.* administered in this Court, and for that purpose to have all proper directions given and accounts taken ;
- (2) such further or other relief as the nature of the case may require.

No. 44.

EXECUTION OF TRUSTS.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. He is one of the trustees under an instrument of settlement bearing date on or about the day of made upon the marriage of *E. F.* and *G. H.* the father and mother of the defendant [or an instrument of transfer of the estate and effects of *E. F.* for the benefit of *C. D.*, the defendant, and the other creditors of *E. F.*].

2. *A. B.* has taken upon himself the burden of the said trust, and is in possession of [or of the proceeds of] the moveable and immoveable property transferred by the said instrument.

3. *C. D.* claims to be entitled to a beneficial interest under the instrument.

[As in paras. 4 and 5 of Form No. 1.]

6. The plaintiff is desirous to account for all the rents and profits of the said immoveable property [and proceeds of the sale of the said, or of part of the said, immoveable property, or moveable, or the proceeds of the sale of, or of part of, the said moveable property, or the profits accruing to the plaintiff as such trustee in the execution of the said trust] ; and he prays that the Court will take the accounts of the said trust, and also that the whole of the said trust estate may be administered in the Court for the benefit of *C. D.*, the defendant, and all other persons who may be interested in such administration, in the presence of *C. D.* and such other persons so interested as the Court may direct, or that *C. D.* may show good cause to the contrary.

[N. B.—Where the suit is by a beneficiary, the plaint may be modelled, mutatis mutandis, on the plaint by a legatee.]

No. 45.

FORECLOSURE OR SALE.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. The plaintiff is mortgagee of lands belonging to the defendant.

2. The following are the particulars of the mortgage :—

- (a) (date) ;
- (b) (names of mortgagor and mortgagee) ;
- (c) (sum secured) ;
- (d) (rate of interest) ;
- (e) (property subject to mortgage) ;
- (f) (amount now due) ;
- (g) (if the plaintiff's title is derivative, state shortly the transfers or devolution under which he claims.)

(If the plaintiff is mortgagee in possession, add)

3. The plaintiff took possession of the mortgaged property on the day of and is ready to account as mortgagee in possession from that time.

[As in paras. 4 and 5 of Form No. 1.]

6. The plaintiff claims—

(1) payment, or in default [sale or] foreclosure [and possession] ;

[Where Order 34, Rule 6, applies.]

(2) in case the proceeds of the sale are found to be insufficient to pay the amount due to the plaintiff, then that liberty be reserved to the plaintiff to apply for a decree for the balance.

No. 46.

REDEMPTION.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. The plaintiff is mortgagor of lands of which the defendant is mortgagee.

2. The following are the particulars of the mortgage :—

- (a) (date) ;
- (b) (names of mortgagor and mortgagee) ;
- (c) (sum secured) ;
- (d) (rate of interest) ;

(e) (property subject to mortgage) ;

(f) (if the plaintiff's title is derivative, state shortly the transfers or devolution under which he claims).

(If the defendant is mortgagee in possession, add)

3. The defendant has taken possession [or has received the rents] of the mortgaged property.

[As in paras. 4 and 5 of Form No. 1.]

6. The plaintiff claims to redeem the said property and to have the same reconveyed to him [and to have possession thereof].

No. 47.

SPECIFIC PERFORMANCE (No. 1).

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. By an agreement dated the _____ day of _____ and signed by the defendant, he contracted to buy of [or sell to] the plaintiff certain immoveable property therein described and referred to, for the sum of _____ rupees.

2. The plaintiff has applied to the defendant specifically to perform the agreement on his part but the defendant has not done so.

3. The plaintiff has been and still is ready and willing specifically to perform the agreement on his part of which the defendant has had notice.

[As in paras. 4 and 5 of Form No. 1.]

6. The plaintiff claims that the Court will order the defendant specifically to perform the agreement and to do all acts necessary to put the plaintiff in full possession of the said property [or to accept a transfer and possession of the said property] and to pay the costs of the suit.

No. 48.

SPECIFIC PERFORMANCE (No. 2).

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. On the _____ day of _____ 19____, the plaintiff and defendant entered into an agreement, in writing, and the original document is hereto annexed.

The defendant was absolutely entitled to the immoveable property described in the agreement.

2. On the _____ day of _____ 19____, the plaintiff tendered _____ rupees to the defendant, and demanded a transfer of the said property by a sufficient instrument.

3. On the _____ day of _____ 19____, the plaintiff again demanded such transfer. [Or the defendant refused to transfer the same to the plaintiff.]

4. The defendant has not executed any instrument of transfer.

5. The plaintiff is still ready and willing to pay the purchase-money of the said property to the defendant.

[As in paras. 4 and 5 of Form No. 1.]

8. The plaintiff claims—

(1) that the defendant transfers the said property to the plaintiff by a sufficient instrument [following the terms of the agreement];

(2) _____ rupees compensation for withholding the same.

No. 49.

PARTNERSHIP.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. He and C. D., the defendant, have been for _____ years [or months] past carrying on business together under articles of partnership in writing [or under a deed, or under a verbal agreement].

2. Several disputes and differences have arisen between the plaintiff and defendant as such partners whereby it has become impossible to carry on the business in partnership with advantage to the partners. [Or the defendant has committed the following breaches of the partnership articles :—

(1)

(2)

(3)

]

[As in paras. 4 and 5 of Form No. 1.]

[N.B.—In suits for the winding up of any partnership, omit the claim for dissolution; and instead insert a paragraph stating the facts of the partnership having been dissolved.]

General Defences.

Denial	..	The defendant denies that (<i>set out facts</i>). The defendant does not admit that (<i>set out facts</i>). The defendant admits that but says that
Protest	..	The defendant denies that he is a partner in the defendant firm of The defendant denies that he made the contract alleged or any contract with the plaintiff. The defendant denies that he contracted with the plaintiff as alleged or at all. The defendant admits assets but not the plaintiff's claim. The defendant denies that the plaintiff sold to him the goods mentioned in the plaint or any of them.
Limitation	..	The suit is barred by article or article of the second schedule to the ¹ Indian Limitation Act, 1877.
Jurisdiction	..	The Court has no jurisdiction to hear the suit on the ground that (<i>set forth the grounds</i>). On the day of a diamond ring was delivered by the defendant to and accepted by the plaintiff in discharge of the alleged cause of action.
Insolvency	..	The defendant has been adjudged an insolvent. The plaintiff before the institution of the suit was adjudged an insolvent and the right to sue vested in the receiver.
Minority	..	The defendant was a minor at the time of making the alleged contract.
Payment into Court	..	The defendant as to the whole claim (<i>or as to Rs. part of the money claimed, or as the case may be</i>) has paid into Court Rs. and says that this sum is enough to satisfy the plaintiff's claim (<i>or the part aforesaid</i>).
Performance remitted	..	The performance of the promise alleged was remitted on the (<i>date</i>).
Rescission	..	The contract was rescinded by agreement between the plaintiff and defendant.
Res judicata	..	The plaintiff's claim is barred by the decree in suit (<i>give the reference</i>).
Estoppel	..	The plaintiff is estopped from denying the truth of (<i>insert statement as to which estoppel is claimed</i>) because (<i>here state the facts relied on as creating the estoppel</i>).
Ground of defence subsequent to institution of suit.	..	Since the institution of the suit, that is to say, on the day of (<i>set out facts</i>).

DEFENCE IN SUITS FOR GOODS SOLD AND DELIVERED.

1. The defendant did not order the goods.
2. The goods were not delivered to the defendant.
3. The price was not Rs.

4. } Except as to Rs. , same as { 1.
5. }
6. }

7. The defendant [or A. B., the defendant's agent] satisfied the claim by payment before suit to the plaintiff [or to C. D., the plaintiff's agent] on the _____ day of _____ 19____.
8. The defendant satisfied the claim by payment after suit to the plaintiff on the _____ day of _____ 19____.

¹ See now the Indian Limitation Act, 1908 (IX of 1908), *infra*.

No. 2.

DEFENCE IN SUITS ON BONDS.

1. The bond is not the defendant's bond.
2. The defendant made payment to the plaintiff on the day according to the condition of the bond.
3. The defendant made payment to the plaintiff after the day named and before suit of the principal and interest mentioned in the bond.

No. 3.

DEFENCE IN SUITS ON GUARANTEES.

1. The principal satisfied the claim by payment before suit.
2. The defendant was released by the plaintiff giving time to the principal debtor in pursuance of a binding agreement.

No. 4.

DEFENCE IN ANY SUIT FOR DEBT.

1. As to Rs. 200 of the money claimed, the defendant is entitled to set off for goods sold and delivered by the defendant to the plaintiff.

Particulars are as follows :—

						Rs.
1907, January 25th	..	..	..	..	..	150
„ February 1st	..	..	..	..	..	50
Total						200

2. As to the whole [or as to Rs. _____], part of the money claimed] the defendant made tender before suit of Rs. _____ and has paid the same into Court.

No. 5.

DEFENCE IN SUITS FOR INJURIES CAUSED BY NEGLIGENT DRIVING.

1. The defendant denies that the carriage mentioned in the plaint was the defendant's carriage, and that it was under the charge or control of the defendant's servants. The carriage belonged to _____ of _____ Street, Calcutta, livery stable-keepers employed by the defendant to supply him with carriages and horses ; and the person under whose charge and control the said carriage was, was the servant of the said _____.
2. The defendant does not admit that the said carriage was turned out of Middleton Street either negligently, suddenly or without warning, or at a rapid or dangerous pace.
3. The defendant says the plaintiff might and could, by the exercise of reasonable care and diligence, have seen the said carriage approaching him, and avoided any collision with it.
4. The defendant does not admit the statements contained in the third paragraph of the plaint.

No. 6.

DEFENCE IN ALL SUITS FOR WRONGS.

1. Denial of the several acts [or matters] complained of.

No. 7.

DEFENCE IN SUITS FOR DETENTION OF GOODS.

1. The goods were not the property of the plaintiff.
2. The goods were detained for a lien to which the defendant was entitled.

Particulars are as follows :—

1907, May 3rd. To carriage of the goods claimed from Delhi to Calcutta :—					
45 maunds @ Rs. 2 per maund	..	..	..	..	Rs. 90

No. 8.

DEFENCE IN SUITS FOR INFRINGEMENT OF COPYRIGHT.

1. The plaintiff is not the author [assignee, etc.]
2. The book was not registered.
3. The defendant did not infringe.

No. 9.

DEFENCE IN SUITS FOR INFRINGEMENT OF TRADE MARK.

1. The trade mark is not the plaintiff's.
2. The alleged trade mark is not a trade mark.
3. The defendant did not infringe.

No. 10.

DEFENCES IN SUITS RELATING TO NUISANCES.

1. The plaintiff's lights are not ancient [or deny his other alleged prescriptive rights].
2. The plaintiff's lights will not be materially interfered with by the defendant's buildings.
3. The defendant denies that he or his servants pollute the water [or do what is complained of].

[If the defendant claims the right by prescription or otherwise to do what is complained of, he must say so, and must state the grounds of the claim. i.e., whether by prescription, grant or what.]

4. The plaintiff has been guilty of laches of which the following are particulars:—
 1870. Plaintiff's mill began to work.
 1871. Plaintiff came into possession.
 1883. First complaint.

5. As to the plaintiff's claim for damages the defendant will rely on the above grounds of defence, and says that the acts complained of have not produced any damage to the plaintiff. [If other grounds are relied on, they must be stated, e.g., limitation as to past damage.]

No. 11.

DEFENCE TO SUIT FOR FORECLOSURE.

1. The defendant did not execute the mortgage.
2. The mortgage was not transferred to the plaintiff (if more than one transfer is alleged, say which is denied).
3. The suit is barred by article _____ of the second schedule to the Indian Limitation Act, 1877.
4. The following payments have been made, viz.—

					Rs.
(Insert date)	_____	..	..	..	1,000
(Insert date)	_____	..	..	..	500

5. The plaintiff took possession on the _____ of _____, and has received the rents ever since.
6. That plaintiff released the debt on the _____ of _____
7. The defendant transferred all his interest to A. B. by a document, dated _____.

No. 12.

DEFENCE TO SUIT FOR REDEMPTION.

1. The plaintiff's right to redeem is barred by article _____ of the second schedule to the Indian Limitation Act, 1877.
2. The plaintiff transferred all interest in the property to A.B.
3. The defendant, by a document dated the _____ day of _____ transferred all his interest in the mortgage-debt and property comprised in the mortgage to A. B.
4. The defendant never took possession of the mortgaged property, or received the rents thereof.

(If the defendant admits possession for a time only, he should state the time, and deny possession beyond what he admits.)

No. 13.

DEFENCE TO SUIT FOR SPECIFIC PERFORMANCE.

1. The defendant did not enter into the agreement.
2. A. B. was not the agent of the defendant (if alleged by plaintiff).
3. The plaintiff has not performed the following conditions—(conditions).
4. The defendant did not—(alleged acts of part performance).
5. The plaintiff's title to the property agreed to be sold is not such as the defendant is bound to accept by reason of the following matter—(state why).
6. The agreement is uncertain in the following respects—(state them.)
7. (or) The plaintiff has been guilty of delay.
8. (or) The plaintiff has been guilty of fraud (or misrepresentation).

¹ See now the Indian Limitation Act, 1908 (IX of 1908), General Acts, Vol. VI.

9. (or) The agreement is unfair.
 10. (or) The agreement was entered into by mistake.
 11. The following are particulars of (7), (8), (9), (10) (or as the case may be).
 12. The agreement was rescinded under Conditions of Sale No. 11 (or by mutual agreement).
- (In cases where damages are claimed and the defendant disputes his liability to damages, he must deny the agreement or the alleged breaches, or show whatever other ground of defence he intends to rely on, e.g., the Indian Limitation Act, accord and satisfaction, release, fraud, etc.)

No. 14.

DEFENCE IN ADMINISTRATION SUIT BY PECUNIARY LEGATEE.

1. A. B.'s will contained a charge of debts; he died insolvent; he was entitled at his death to some immoveable property which the defendant sold and which produced the net sum of Rs. and the testator had some moveable property which the defendant got in, and which produced the net sum of Rs. .
2. The defendant applied the whole of the said sums and the sum of Rs. which he the defendant received from rents of the immoveable property in the payment of the funeral and testamentary expenses and some of the debts of the testator.
3. The defendant made up his accounts and sent a copy thereof to the plaintiff on the day of 19 , and offered the plaintiff free access to the vouchers to verify such accounts, but he declined to avail himself of the defendant's offer.
4. The defendant submits that the plaintiff ought to pay the costs of this suit.

No. 15.

PROBATE OF WILL IN SOLEMN FORM.

1. The said will and codicil of the deceased were not duly executed according to the provisions of the Indian Succession Act, 1865 [or of the Hindu Wills Act, 1870].
 2. The deceased at the time of the said will and codicil respectively purport to have been executed, was not of sound mind, memory and understanding.
 3. The execution of the said will and codicil was obtained by the undue influence of the plaintiff [and others acting with him whose names are at present unknown to the defendant].
 4. The execution of the said will and codicil was obtained by the fraud of the plaintiff, such fraud, so far as is within the defendant's present knowledge, being [state the nature of the fraud].
 5. The deceased at the time of the execution of the said will and codicil did not know and approve of the contents thereof [or of the contents of the residuary clause in the said will, as the case may be].
 6. The deceased made his true last will, dated the 1st January, 1873, and thereby appointed the defendant the sole executor thereof.
- The defendant claims—
- (1) that the Court will pronounce against the said will and codicil propounded by the plaintiff;
 - (2) that the Court will decree probate of the will of the deceased, dated the 1st January, 1873, in solemn form of law.

No. 16.

PARTICULARS. (O. 6, R. 5.)

(Title of suit.)

The following are the particulars of (here state the matters in respect of which particulars have been ordered) delivered pursuant to the order of the

(Here set out the particulars ordered in paragraphs if necessary.)

APPENDIX B.

PROCESS.

No. 1.

SUMMONS FOR DISPOSAL OF SUIT. (O. 5, Rr. 1, 5.)

(Title.)

To

[Name, description and place of residence.]

WHEREAS has instituted
a suit against you for you are hereby
summoned to appear in this Court in person or by a pleader duly instructed, and able to
answer all material questions relating to the suit, or who shall be accompanied by some
person able to answer all such questions, on the day of 19 ,
at o'clock in the noon, to answer the claim ; and as the day fixed for your
appearance is appointed for the final disposal of the suit, you must be prepared to produce
on that day all the witnesses upon whose evidence and all the documents upon which you
intend to rely in support of your defence.

Take notice that, in default of your appearance on the day before mentioned, the suit
will be heard and determined in your absence.

GIVEN under my hand and the seal of the Court, this day of 19 .
Judge.

NOTICE.—1. Should you apprehend your witnesses will not attend of their own accord,
you can have a summons from this Court to compel the attendance of any witness, and the
production of any document that you have a right to call upon the witness to produce, on
applying to the Court and on depositing the necessary expenses.

2. If you admit the claim, you should pay the money into Court together with the
costs of the suit, to avoid execution of the decree, which may be against your person or
property, or both.

No. 2.

SUMMONS FOR SETTLEMENT OF ISSUES. (O. 5, Rr. 1, 5.)

(Title.)

To

[Name, description and place of residence.]

WHEREAS has instituted
a suit against you for you are hereby summoned to appear in this Court in person, or by a pleader duly instructed,
and able to answer all material questions relating to the suit, or who shall be accompanied
by some person able to answer all such questions on the day of
19 , at o'clock in the noon, to answer the claim; and you are directed to
produce on that day all the documents upon which you intend to rely in support of your
defence.

Take notice that, in default of your appearance on the day before mentioned, the suit
will be heard and determined in your absence.

GIVEN under my hand and the seal of the Court, this day of 19 .
Judge.

NOTICE.—1. Should you apprehend your witnesses will not attend of their own accord,
you can have a summons from this Court to compel the attendance of any witness, and the
production of any document that you have a right to call upon the witness to produce, on
applying to the Court and on depositing the necessary expenses.

2. If you admit the claim, you should pay the money into Court together with the
costs of the suit, to avoid execution of the decree, which may be against your person or
property, or both.

No. 3.

SUMMONS TO APPEAR IN PERSON. (O. 5, R. 3.)

(Title.)

To

[Name, description and place of residence.]

WHEREAS has instituted
a suit against you for you are hereby summoned to appear in this Court in person on the day
of 19 , at o'clock in the noon, to answer

No. 7.

ORDER FOR TRANSMISSION OF SUMMONS FOR SERVICE IN THE JURISDICTION OF ANOTHER COURT. (O. 5, R. 21.)¹
(Title.)

WHEREAS it is stated that defendant in the above suit is at present residing witness : It is ordered in that a summons returnable on the _____ day of _____ 19____, be forwarded to the _____ Court of _____ for service on the said defendant with a duplicate of witness this proceeding.
The court-fee of _____ chargeable in respect to the summons has been realized in this Court in stamps.
Dated _____ 19____.

Judge.

No. 8.

ORDER FOR TRANSMISSION OF SUMMONS TO BE SERVED ON A PRISONER.
(O. 5, R. 24.)
(Title.)

To _____
The Superintendent of the Jail at _____
UNDER the provisions of Order V, Rule 24, of the Code of Civil Procedure, 1908, a summons in duplicate is herewith forwarded for service on the defendant _____ who is _____ a prisoner in Jail. You are requested to cause a copy of the said summons to be served upon the said defendant and to return the original to this Court signed by the said defendant, with a statement of service endorsed thereon by you.

Judge.

No. 9.

ORDER FOR TRANSMISSION OF SUMMONS TO BE SERVED ON A PUBLIC SERVANT OR SOLDIER. (O. 5, Rr. 27, 28.)
(Title.)

To _____
Under the provisions of Order V, Rule 27 (or 28, as the case may be) of the Code of Civil Procedure, 1908, a summons in duplicate is herewith forwarded for service on the defendant _____ who is stated to be serving under you. You are requested to cause a copy of the said summons to be served upon the said defendant and to return the original to this Court signed by the said defendant, with a statement of service endorsed thereon by you.

Judge.

No. 10.

TO ACCOMPANY RETURNS OF SUMMONS OF ANOTHER COURT.¹
(O. 5, R. 23.)
(Title.)

Read proceeding from the _____ forwarding for service on _____ in Suit No. _____ of 19____ of that Court.
Read Serving Officer's endorsement stating that the _____ and proof of the above having been duly taken by me on the oath of _____ and _____ it is ordered that the _____ be returned to _____ the _____ with a copy of this proceeding.²

Judge.

¹ Allahabad :—This form has been cancelled by the Rules of the Allahabad High Court.

² Bombay :—Add the words "I hereby declare that the said summons on..... has been duly served."

NOTE.—This form will be applicable to process other than summons, the service of which may have to be effected in the same manner.

No. 11.

AFFIDAVIT OF PROCESS-SERVER TO ACCOMPANY RETURN OF A SUMMONS OR
NOTICE. (O. 5, R. 18.)
(Title.)

The affidavit of

son of

I

make oath
affirm

and say as follows:—

(1) I am a process-server of this Court.

(2) On the day of

19

I received a

Summons
notice issued by the Court of

in Suit No.

of 19

in the said Court, dated the

day of

19 for service on

(3) The said

was at the

time personally known to me, and I served the said Summons notice on him
her on the
day of 19 at about o'clock in the noon at

by tendering a copy thereof to him
her and requiring his
her

signature to the original Summons
notice.

(a)

(b)

(a) Here state whether the person served signed or refused to sign the process, and in whose presence.

(b) Signature of process-server.

or,

(3) The said

not being personally known to me
accompanied me to

and pointed out to me a person whom

he stated to be the said

on the , and I served the said Summons
19 , at about day of notice on him
o'clock in the noon at by tendering

a copy thereof to him
her and requiring his
her signature to the original

Summons
notice.

(a)

(b)

(a) Here state whether the person served signed or refused to sign the process and in whose presence.

(b) Signature of process-server.

or,

(3) The said and the house in which he ordinarily resides being personally known to me, I went to the said house, in and there on the
day of 19 , at about o'clock in the

noon, I did not find the said

(a)

(b)

(a) Enter fully and exactly the manner in which the process was served, with special reference to Order 5, Rules 15 and 17.

(b) Signature of process-server.

or,

(3) One accompanied me to and there pointed out to me which he said was the house in which ordinarily resides. I did not find the said there

(a)

(b)

(a) Enter fully and exactly the manner in which the process was served, with special reference to Order 5, Rules 15 and 17.

(b) Signature of process-server.

or,

If substituted service has been ordered, state fully and exactly the manner in which the summons was served with special reference to the terms of the order for substituted service.

Sworn
Affirmed by the said
day of 19 .

before me this

Empowered under section 139 of the
Code of Civil Procedure, 1908, to
administer the oath to deponents.

No. 12.

NOTICE TO DEFENDANT. (O. 9, R. 6.)

(Title.)

To

[Name, description and place of residence.]

WHEREAS this day was fixed for the hearing of the above suit and a summons was issued to you and the plaintiff has appeared in this Court and you did not so appear, but from the return of the Nazir it has been proved to the satisfaction of the Court that the said summons was served on you but not in sufficient time to enable you to appear and answer on the day fixed in the said summons;

Notice is hereby given to you that the hearing of the suit is adjourned this day and that the day of 19 is now fixed for the hearing of the same; in default of your appearance on the day last mentioned the suit will be heard and determined in your absence.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 13.

SUMMONS TO WITNESS. (O. 16, Rr. 1, 5.)

(Title.)

To

WHEREAS your attendance is required to on behalf of
the in the above suit, you are hereby required
[personally] to appear before this Court on the
day of 19 , at o'clock in the forenoon, and to bring
with you [or to send to this Court].

A sum of Rs. , being your travelling and other expenses
and subsistence allowance for one day, is herewith sent. If you fail to comply with this
order without lawful excuse, you will be subject to the consequences of non-attendance laid
down in rule 12 of Order XVI of the Code of Civil Procedure, 1908.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

NOTICE.—(1) If you are summoned only to produce a document and not to give evidence, you shall be deemed to have complied with the summons if you cause such document to be produced in this Court on the day and hour aforesaid.

(2) If you are detained beyond the day aforesaid, a sum of Rs. will be tendered to you for each day's attendance beyond the day specified.

No. 14.

PROCLAMATION REQUIRING ATTENDANCE OF WITNESS.

(O. 16, R. 10.)

(Title.)

To

WHEREAS it appears from the examination on oath of the serving officer that the summons could not be served upon the witness in the manner prescribed by law : and whereas it appears that the evidence of the witness is material, and he absconds and keeps out of the way for the purpose of evading the service of the summons : This proclamation is therefore, under rule 10 of Order XVI of the Code of Civil Procedure, 1908, issued requiring

the attendance of the witness in this Court on the _____ day of _____ 19____
 at _____ o'clock in the forenoon and from day to day until he shall have leave to
 depart; and if the witness fails to attend on the day and hour aforesaid he will be dealt
 with according to law.

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19____.

Judge.

No. 15.

PROCLAMATION REQUIRING ATTENDANCE OF WITNESS.

(O. 16, R. 10.)

(Title.)

To

WHEREAS it appears from the examination on oath on the serving officer that the
 summons has been duly served upon the witness, and whereas it appears that the evidence
 of the witness is material and he has failed to attend in compliance with such summons :
 This proclamation is therefore, under Rule 10 of Order XVI of the Code of Civil Procedure,
 1908, issued requiring the attendance of the witness in this Court on the _____ day of
 19____ at _____ o'clock in the forenoon, and from day to
 day until he shall have leave to depart; and if the witness fails to attend on the day and
 hour aforesaid he will be dealt with according to law.

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19____.

Judge.

No. 16.

WARRANT OF ATTACHMENT OF PROPERTY OF WITNESS.

(O. 16, R. 10.)

(Title.)

To

The Bailiff of the Court.

WHEREAS the witness
 cited by _____ has not after
 the expiration of the period limited in the proclamation issued for his attendance, appeared
 in Court; You are hereby directed to hold under attachment _____ property belong-
 ing to the said witness to the value of _____ and to submit a return, accompanied
 with an inventory thereof, within _____ days.

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19____.

Judge.

No. 17.

WARRANT OF ARREST OF WITNESS. (O. 16, R. 10.)

(Title.)

To

The Bailiff of the Court.

WHEREAS _____ has been duly served with a summons but has failed
 to attend [absconds and keeps out of the way for the purpose of avoiding service of a
 summons]; You are hereby ordered to arrest and bring the said _____ before the
 Court.

You are further ordered to return this warrant on or before the _____ day of
 19____ with an endorsement certifying the day on and the manner in
 which it has been executed, or the reason why it has not been executed.

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19____.

Judge.

No. 18.

WARRANT OF COMMITTAL. (O. 16, R. 16.)

(Title.)

To

The Officer in charge of the Jail at _____

WHEREAS the plaintiff (or defendant) in the above-named suit has made application
 to this Court that security be taken for the appearance of _____ to give

evidence (or to produce a document) on the day of 19 ,
and whereas the Court has called upon the said to furnish such
security, which he has failed to do; This is to require you to receive the said into
your custody in the civil prison and to produce him before this Court at
on the said day and on such other day or days as may be hereafter ordered.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 19.

WARRANT OF COMMITTAL. (O. 16, R. 18.)

(Title.)

To

The Officer in charge of the Jail at

WHEREAS , whose attendance is required before this
Court in the above-named case to give evidence (or to produce a document), has been
arrested and brought before the Court in custody; and whereas owing to the absence of the
plaintiff (or defendant) the said cannot give such evidence or produce such
document, and whereas the Court has called upon the said to give security
for his appearance on the day of 19 , at

which he has failed to do; This is to require you to receive the said
into your custody in the civil prison and to produce him before this

Court at on the day of

19 .

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

APPENDIX C.

DISCOVERY, INSPECTION AND ADMISSION.

No. 1.

ORDER FOR DELIVERY OF INTERROGATORIES. (O. 11, R. 1.)

In the Court of

Civil suit No.

of

19 .

A. B.

against

C. D., E. F. and G. H.

Upon hearing

and upon reading the affidavit of

filed the

day of

19 .

It is ordered that the
be at liberty to deliver to the interroga-
tories in writing, and that the said do answer the interrogatories as
prescribed by Order XI, Rule 8, and that the costs of this application be

No. 2.

INTERROGATORIES. (O. 11, R. 4.)

(Title as in No. 1 supra.)

Interrogatories on behalf of the above-named [Plaintiff or defendant C. D.,] for the
examination of the above-named [defendants E. F. and G. H. or plaintiff.]

1. Did not, etc.

2. Has not, etc.

etc.

etc.

etc.

[The defendant E. F. is required to answer the interrogatories numbered

[The defendant G. H. is required to answer the interrogatories numbered

].

].

No. 3.

ANSWER TO INTERROGATORIES. (O. 11, R. 9.)

(Title as in No. 1 supra.)

The answer of the above-named defendant E. F. to the interrogatories for his
examination by the above-named plaintiff.

In answer to the said interrogatories, I, the above-named E. F., make oath and say
as follows :—

1. }

2. }

Enter answers to interrogatories in paragraphs numbered consecutively.

3. I object to answer the interrogatories numbered _____ on the ground that [*state grounds of objection.*]

No. 4.

ORDER FOR AFFIDAVIT AS TO DOCUMENTS. (O. 11, R. 12.)
(*Title as in No. 1 supra.*)

Upon hearing _____
It is ordered that the _____ do within _____ days from the date of this order, answer on affidavit stating which documents are or have been in his possession or power relating to the matter in question in this suit, and that the costs of this application be _____

No. 5.

AFFIDAVIT AS TO DOCUMENTS. (O. 11, R. 13.)
(*Title as in No. 1 supra.*)

I, the above-named defendant *C. D.*, make oath and say as follows:—

1. I have in my possession or power the documents relating to the matters in question in this suit set forth in the first and second parts of the first schedule hereto.

2. I object to produce the said documents set forth in the second part of the first schedule hereto [*state grounds of objection.*]

3. I have had, but have not now, in my possession or power the documents relating to the matters in question in this suit set forth in second schedule hereto.

4. The last-mentioned documents were last in my possession or power on [*state when and what has become of them, and in whose possession they now are.*]

5. According to the best of my knowledge, information and belief I have not now, and never had, in my possession, custody or power, or in the possession, custody, or power of my pleader or agent, or in the possession, custody or power of any other person on my behalf, any account, book of account, voucher, receipt, letter, memorandum, paper or writing, or any copy of or extract from any such document, or any other document whatsoever, relating to the matters in question in this suit or any of them, or wherein any entry has been made relative to such matters or any of them, other than and except the documents set forth in the said first and second schedules hereto.

No. 6.

ORDER TO PRODUCE DOCUMENTS FOR INSPECTION. (O. 11, R. 14.)
(*Title as in No. 1, supra.*)

Upon hearing _____ and upon reading the affidavit of _____ filed the _____ day of _____ 19 _____; It is ordered that the _____ do, at all reasonable times, on reasonable notice, produce at _____ situate at _____, the following documents, namely, _____, and that the _____ be at liberty to inspect and peruse the documents so produced, and to make notes of their contents. In the meantime it is ordered that all further proceedings be stayed and that the costs of this application be _____

No. 7.

NOTICE TO PRODUCE DOCUMENTS. (O. 11, R. 16.)
(*Title as in No. 1, supra.*)

Take notice that the [*plaintiff or defendant*] requires you to produce for his inspection the following documents referred to in your [*plaint or written statement or affidavit*] dated the _____ day of _____ 19 _____.

[*Describe documents required.*]

X. Y., Pleader for the

To *Z.*, Pleader for the _____

No. 8.

NOTICE TO INSPECT DOCUMENTS. (O. 11, R. 17.)
(*Title as in No. 1 supra.*)

Take notice that you can inspect the documents mentioned in your notice of the _____ day of _____ 19 _____ [*except the documents numbered _____ in that notice*] at [*insert place of inspection*] on Thursday next the _____ instant, between the hours of 12 and 4 o'clock.

Or, that the [*plaintiff or defendant*] objects to giving you inspection of documents mentioned in your notice of the _____ day of _____ 19 _____ on the ground that [*state the ground*]:—

No. 9.

NOTICE TO ADMIT DOCUMENTS. (O. 12, R. 3.)

(Title as in No. 1 *supra*.)

Take notice that the plaintiff [or defendant] in this suit proposes to adduce in evidence the several documents hereunder specified, and that the same may be inspected by the defendant [or plaintiff], his pleader or agent, at _____ on _____ between the hours of _____ and the defendant [or plaintiff] is hereby required, within forty-eight hours from the last mentioned hour, to admit that such of the said documents as are specified to be originals were respectively written, signed or executed, as they purport respectively to have been; that such as are specified as copies are true copies; and such documents as are stated to have been served, sent or delivered were so served, sent or delivered, respectively, saving all just exceptions to the admissibility of all such documents as evidence in this suit.

G. H., pleader [or agent] for plaintiff [or defendant].

To E. F., pleader [or agent] for defendant [or plaintiff].

[Here describe the documents and specially as to each document whether it is original or a copy.]

No. 10.

NOTICE TO ADMIT FACTS. (O. 12, R. 5.)

(Title as in No. 1 *supra*.)

Take notice that the plaintiff [or defendant] in this suit requires the defendant [or plaintiff] to admit, for the purposes of this suit only, the several facts respectively hereunder specified; and the defendant [or plaintiff] is hereby required, within six days from the service of this notice, to admit the said several facts, saving all just exceptions to the admissibility of such facts as evidence in this suit.

G. H., pleader [or agent] for plaintiff [or defendant].

To E. F., pleader [or agent] for defendant [or plaintiff].

The facts, the admission of which is required, are—

1. That M. died on the 1st January, 1890.
2. That he died intestate.
3. That N. was his only lawful son.
4. That O. died on the 1st April, 1896.
5. That O. was never married.

No. 11.

ADMISSION OF FACTS PURSUANT TO NOTICE. (O. 12, R. 5.)

(Title as in No. 1 *supra*.)

The defendant [or plaintiff] in this suit, for the purposes of this suit only, hereby admits the several facts respectively hereunder specified, subject to the qualifications or limitations, if any, hereunder specified, saving all just exceptions to the admissibility of any such facts, or any of them, as evidence in the suit:

Provided that this admission is made for the purposes of this suit only, and is not an admission to be used against the defendant [or plaintiff] on any other occasion or by any one other than the plaintiff [or defendant, or party requiring the admission].

E. F., pleader [or agent] for defendant [or plaintiff].

To. G. H., pleader [or agent] for plaintiff [or defendant].

Facts admitted.	Qualifications or limitations, if any, subject to which they are admitted.
1. That M. died on the 1st January, 1890	1.
2. That he died intestate	2.
3. That N. was his lawful son	3. But not that he was his only lawful son.
4. That O. died	4. But not that he died on the 1st April, 1896.
5. That O. was never married	5.

No. 12.

NOTICE TO PRODUCE (GENERAL FORM). (O. 12, R. 8.)

(Title as in No. 1 supra.)

Take notice that you are hereby required to produce and show to the Court at the first hearing of this suit all books, papers, letters, copies of letters and other writings and documents in your custody, possession or power, containing any entry, memorandum or minute relating to the matters in question in this suit, and particularly.

G. H., pleader [or agent] for plaintiff [or defendant].

To E. F., pleader [or agent] for defendant [or plaintiff].

APPENDIX D.

DECREES.

No. 1.

DECREE IN ORIGINAL SUIT. (O. 20, Rr. 6, 7.)

(Title.)

Claim for
THIS suit coming on this day for final disposal before
in the presence of _____ for the plaintiff and of _____ for the
defendant, it is ordered and decreed that _____ and that the sum of Rs.
_____ be paid by the _____ to the _____ on account
of the costs of this suit, with interest thereon at the rate of _____ per cent. per annum
from that date to date of realization.

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19 _____.

Judge.

Costs of Suit.

Plaintiff.			Defendant.		
	RS.	A. P.		RS.	A. P.
1. Stamp for plaint . . .			Stamp for power . . .		
2. Do. for power . . .			Do. for petition. . .		
3. Do. for exhibits . . .			Pleader's fee . . .		
4. Pleader's fee on Rs. . .			Subsistence for witnesses . .		
5. Subsistence for witnesses .			Service of process . . .		
6. Commissioner's fee . . .			Commissioner's fee . . .		
7. Service of process . . .					
Total ..			Total ..		

No. 2.

SIMPLE MONEY DECREE. (S. 34).

(Title.)

Claim for
THIS suit coming on this day for final disposal before _____ in
the presence of _____ for the plaintiff
and of _____ for the defendant, it is ordered that the _____ do
pay to the _____ the sum of Rs. _____ with interest thereon at the
rate of _____ per cent. per annum from _____ to the date of realization
of the said sum and do also pay Rs. _____, the costs of this suit, with interest thereon at
the rate of _____ per cent. per annum from this date to the date of realization.

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19 _____.

Judge.

Costs of Suit.

Plaintiff.				Defendant.			
RS. A. P.				RS. A. P.			
1. Stamp for plaint . . .				Stamp for power . . .			
2. Do. for power . . .				Do. for petition . . .			
3. Do. for exhibits . . .				Pleader's fee . . .			
4. Pleader's fee on Rs. . .				Subsistence for witnesses . .			
5. Subsistence for witnesses .				Service of process . . .			
6. Commissioner's fee . . .				Commissioner's fee . . .			
7. Service of process. . .							
Total .				Total .			

No. 3.

PRELIMINARY DECREE FOR FORECLOSURE. (O. 34, R. 2.)

(Title.)

THIS suit coming on this day, etc.; It is hereby declared that the amount due to the plaintiff on account of principal, interest and costs calculated up to the day of 19 , is Rs. ;

And it is declared as follows :—

(1) That if the defendant pays into Court the amount so declared due on or before the said day of 19 , the plaintiff shall deliver up to the defendant or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required retransfer the property to the defendant free from the mortgage and from all incumbrances created by the plaintiff or any person claiming under him. [Where the plaintiff claims by derived title add *or by those under whom he claims*]. [Where the plaintiff is in possession add *and shall put the defendant in possession of the property*.]

(2) That if such payment is not made on or before the said day of 19 the defendant shall be debarred from all right to redeem the property.

*Schedule.**Description of the mortgaged property.*

No. 4.

PRELIMINARY DECREE FOR SALE. (O. 34, R. 4.)

(Title.)

THIS suit coming on this day, etc.; It is hereby declared that the amount due to the plaintiff on account of principal, interest and costs calculated up to the day of 19 is Rs. and that such amount shall carry interest at the rate of per cent. per annum until realization;* and it is decreed as follows :—

(1) That if the defendant pays into Court the amount so declared due on or before the said day of 19 , the plaintiff shall deliver up to the defendant or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, retransfer the property to the defendant free from the mortgage and from all incumbrances created by the plaintiff or any person claiming under him. [Where the plaintiff claims by derived title add *or by those under whom he claims*]. [Where the plaintiff is in possession add *and shall put the defendant in possession of the property*.]

(2) That if such payment is not made on or before the said day of 19 the mortgaged property or a sufficient part thereof be sold and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court

* *Bombay*.—For the word “realization” substitute the words “the day hereinafter referred to”.

and applied in payment of what is declared due to the plaintiff as aforesaid together with subsequent interest and subsequent costs, and that the balance, if any, be paid to the defendant.

(3) That if the net proceeds of the sale are insufficient to pay such amount and such subsequent interest and costs in full, the plaintiff shall be at liberty to apply for a personal decree for the amount of the balance.

Schedule.

Description of the mortgaged property.

[Bombay.] Schedule 1—Appendix D—Form No. 4.

For clause (2) of the said form, substitute “(2) that if such payment is not made on or before the said day of 19 , the plaintiff shall be entitled to apply to the Court for a final decree for sale.”

Delete clause (3) of the said form.

No. 5.

PRELIMINARY DECREE FOR REDEMPTION. (O. 34, R. 7.)

(Title.)

THIS suit coming on this day, etc.; It is hereby declared that the amount due to the defendant on account of principal, interest and costs calculated up to the day of 19 is Rs. ;

And it is decreed as follows :—

(1) That if the plaintiff pays into Court the amount so declared due on or before the said day of 19 , the defendant shall deliver up to the plaintiff, or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, retransfer the property to the plaintiff free from the mortgage and from all incumbrances created by the defendant or any person claiming under him. [Where the defendant claims by derived title add or by those under whom he claims.] [Where the defendant is in possession add and shall put the plaintiff in possession of the property.]

(2) That if such payment is not made on or before the said day of 19 , the plaintiff shall be debarred from all right to redeem the property. [If the mortgage is simple or usufructuary, substitute the property shall be sold.]

Schedule.

Description of the mortgaged property.

[Bombay.] Schedule I—Appendix D—Form No. 5.

For clause (2) of Form No. 5 in Appendix D, substitute “(2) That if such payment is not made on or before the day of 19 , the defendant shall be entitled to apply for a final decree for foreclosure or sale.”

No. 6.

DECREE FOR FORECLOSURE.—FIRST MORTGAGEE *v.* SECOND MORTGAGEE AND MORTGAGOR.—SUCCESSIVE PERIODS FOR REDEMPTION.

(Title.)

It is hereby declared that the amount due to the plaintiff on account of Principal, interest and costs calculated up to the day of 19 (a) is Rs. x, and that on the day of 19 (b) there will be due to the plaintiff for interest the further sum of Rs. making in all Rs. y; and it is further declared that on the day of 19 (b) there will be due to the first defendant on account of principal, interest and costs Rs. z;

And it is decreed as follows :—

(1) That if the first defendant pays into Court the said sum of Rs. x on or before the said day of 19 (a) the plaintiff shall deliver up, etc. (as in Form No. 3),

(2) That in default of the first defendant paying the said sum on or before the said day he shall be debarred from all right to redeem the property.

(3) That in case of such foreclosure and if the second defendant pays into Court the said sum of Rs. y, on or before the day of 19 , (b) the plaintiff shall deliver up, etc., (as in Form No. 3).

(4) That in default of the second defendant paying the said sum on or before the said day he shall be debarred from all right to redeem the property.

(5) That in case the first defendant shall redeem the mortgaged property, if the second

(a) Insert a day within six months from the date of decree.

(b) Insert a day within three months from the date mentioned in (a).

defendant pays into Court the said sums of Rs. *y* and Rs. *z* on or before the day of 19, (b) the first defendant shall deliver up, etc. (as in Form No. 3.)

(6) That in default of the second defendant paying the said sums on or before the said day he shall be debarred from all right to redeem the property. [Where the second defendant is in possession add and shall put the first defendant in possession of the property.]

No. 7.

DECREE FOR SALE.—FIRST MORTGAGEE *v.* SECOND MORTGAGEE AND MORTGAGOR.—

ONE PERIOD FOR REDEMPTION.

(Title.)

It is hereby declared that the amount due to the plaintiff on account of principal, interest and costs calculated up to the day of 19 is Rs. *x* and that on the said day there will be due to the first defendant on account of principal, interest and costs Rs. *y*;

And it is decreed as follows :—

(1) That if the defendants or either of them pay into Court the said sum of Rs. *x* on or before the said day of 19 the plaintiff shall deliver up, etc. (as in Form No. 4).

(2) That if payment of the said sum is not made on or before the day of 19 the mortgaged property or a sufficient part thereof be sold, and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court to the credit of this suit, and applied, first, in payment to the plaintiff of the said sum of Rs. *x* and such subsequent interest and costs as may be allowed by the Court; secondly, in payment to the first defendant of the said sum of Rs. *y*, and such subsequent interest and costs as aforesaid; and that the balance, if any, be paid to the second defendant.

(3) That in case the defendants or either of them shall pay the said sum of Rs. *x* as aforesaid he or they shall be at liberty to apply to the Court that the plaintiff's mortgage may be kept alive for the benefit of the person making the said payment or otherwise as he or they may be advised.

(4) That if the net proceeds of the sale are insufficient to pay the said sum of Rs. *x* and such subsequent interest and costs in full, the plaintiff shall be at liberty to apply for a personal decree for the amount of the balance.

No. 8.

DECREE FOR SALE.—SECOND MORTGAGEE *v.* FIRST MORTGAGEE AND

MORTGAGOR.—ONE PERIOD FOR REDEMPTION.

(Title.)

[Insert declarations of the amounts due to the plaintiff Rs. *y* and to the first defendant Rs. *x* as in Form No. 7.]

And it is decreed as follows :—

(1) That if the plaintiff or the second defendant pays into Court the said sum of Rs. *x* on or before the said day of 19, the first defendant shall deliver up, etc. (as in Form No. 4).

(2) That if payment of the said sum is not made on or before the day of 19, the first defendant shall be at liberty to apply that the suit be dismissed or for the sale of the mortgaged property; and in case he shall apply for a sale the mortgaged property or a sufficient part thereof shall be sold free from the incumbrances of the plaintiff and first defendant, and the proceeds of the sale (after defraying thereout the expenses of the sale) shall be paid into Court and applied, first, in payment to the first defendant of the said sum of Rs. *x* and such subsequent interest and costs as may be allowed by the Court: secondly, in payment to the plaintiff of the said sum of Rs. *y* and such subsequent interest and costs as aforesaid; and that the balance, if any, be paid to the second defendant.

(3) That if the plaintiff shall pay the said sum of Rs. *x* into Court on or before the day of 19, the second defendant shall be at liberty to pay into Court the said sum and the sum of Rs. *y* on or before the day of 19, and thereupon the plaintiff shall deliver, etc. (as in Form. No. 4.)

(4) That if the plaintiff shall pay the said sum as aforesaid, but the second defendant shall fail to pay the said sums as aforesaid, the mortgaged property or a sufficient part thereof shall be sold, and the proceeds of the sale (after defraying thereout the expenses of the sale) shall be applied in payment to the plaintiff of the said sums of Rs. *x*

and Rs. *y* and such subsequent interest and costs as may be allowed by the Court, and that the balance, if any, be paid to the second defendant.

(5) That if the net proceeds of the sale are insufficient to pay the said sums, interest and costs in full, the plaintiff shall be at liberty to apply for a personal decree for the amount of the balance.

No. 9.

DECREE FOR SALE.—SUB-MORTGAGEE *v.* MORTGAGEE AND MORTGAGOR, THE
AMOUNT OF THE ORIGINAL MORTGAGE EXCEEDING THAT OF THE
SUB-MORTGAGE.

(Title.)

[Insert declarations of the amounts due to the plaintiff Rs. *x* and to the first defendant Rs. *y* as in form No. 7.]

And it is decreed as follows :—

(1) The first defendant and the second defendant shall be at liberty to pay into Court the said sums of Rs. *x* and Rs. *y* respectively on or before the day of 19 , and upon either of the said payments being made the plaintiff shall deliver up, etc., (as in Form No. 4), and thereupon the sum of Rs. *x* shall be paid to the plaintiff.

(2) In the event of payment by the second defendant as aforesaid the first defendant shall also deliver up, etc. (as in Form No. 4), and thereupon the residue (after payment to the plaintiff as aforesaid) shall be paid to the first defendant.

(3) In default of payment by the first and second defendants as aforesaid the mortgaged property or a sufficient part thereof shall be sold, and the proceeds of the sale (after deducting thereout the expenses of the sale) shall be paid into Court and applied, first, in payment to the plaintiff of the said sum of Rs. *x* and such subsequent interest and costs as may be allowed by the Court (but so that the aggregate amount of principal and interest shall not exceed the amount of principal and interest due to the first defendant; secondly, in payment to the first defendant of the excess of Rs. *y* over Rs. *x* and such subsequent interest and costs as aforesaid; and that the balance, if any, be paid to the second defendant.

(4) In the event of payment by the first defendant and in default of payment by the second defendant as aforesaid, the first defendant shall be at liberty to apply for the sale of the mortgaged property, and thereupon the same or a sufficient part thereof shall be sold, and the net sale-proceeds shall be applied in payment to the first defendant of the said sum of Rs. *y* and such further interest and costs as may be allowed by the Court, and the balance, if any, shall be paid to the second defendant.

(5) That if the net proceeds of the sale are insufficient to pay the aforesaid sums with further interest and costs, the plaintiff or the first defendant, as the case may be, shall be at liberty to apply for a personal decree for the amount of the balance.

No. 10.

FINAL DECREE FOR FORECLOSURE. (O. 34, R. 3.)

(Title.)

Upon reading the decree passed in the above suit on the day of 19 , and the application of the plaintiff dated the day of 19 , and after hearing

Pleader for the plaintiff and pleader for the defendant, and it appearing that the payment directed by the said decree has not been made :

It is hereby decreed as follows :—

That the defendant and all persons claiming through or under him be debarred from all right to redeem the mortgaged property set out and described in the schedule hereunto annexed. [Where the defendant is in possession add *and shall put the plaintiff in possession of the said property.*

Schedule.

Description of the mortgaged property.

[Bombay.] Schedule 1—Appendix D—Form No. 10-A add the following Form as Form No. 10-A.

“ No. 10-A.

FINAL DECREE FOR SALE.

(Title.)

Upon reading the decree passed in the above suit on the day of 19 , and the application of the plaintiff, dated the day of 19 , and after hearing pleader for the plaintiff and

pleader for the defendant, and it appearing that the payment directed by the said decree has not been made :

It is hereby decreed as follows :—

(1) That the mortgaged property or a sufficient part thereof be sold and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court and applied in payment of what is declared due to the plaintiff as aforesaid together with subsequent interest at _____ per cent. per annum and subsequent costs, and that the balance, if any, be paid to the defendant.

(2) That if the net proceeds of the sale are insufficient to pay such amount and such subsequent interest and costs in full, the plaintiff shall be at liberty to apply for a personal decree for the amount of the balance.”

No. 11.

DECREE AGAINST MORTGAGOR PERSONALLY. (O. 34, R. 6.)

(Title.)

Whereas the net proceeds of the sale held under the final decree for sale passed in this suit on the _____ day of _____ 19____, and now in Court to the credit of this suit, amount to Rs. *y*, and there is now due to the plaintiff the sum of Rs. *x* mentioned in the said decree together with the further sum of Rs. _____ interest thereon at the rate of 6 per cent. per annum from the _____ day of _____ 19____ to this day, and also the sum of Rs. _____ for his costs of this suit subsequent to the decree, making a balance due to the plaintiff of Rs. *z*; And whereas it appears to this Court that the defendant is personally liable for the said balance;

It is hereby decreed as follows :—

(1) That the said sum of Rs. *y* be paid out of the Court to the plaintiff.

(2) That the defendant do pay to the plaintiff the said sum of Rs. *z* with interest thereon at the rate of 6 per cent. per annum from this day to the date of realization of the said sum.

No. 12.

DECREE FOR RECTIFICATION OF INSTRUMENT.

(Title.)

It is hereby declared that the _____, dated the _____ day of _____ 19____ does not truly express the intention of the parties to such _____.
And it is decreed that the said _____ be rectified by _____.

No. 13.

DECREE TO SET ASIDE A TRANSFER IN FRAUD OF CREDITORS.

(Title.)

It is hereby declared that the _____, dated the _____ day of _____ 19____, and made between _____ and _____, is void as against the plaintiff and all other creditors, if any, of the defendant.

No. 14.

INJUNCTION AGAINST PRIVATE NUISANCE.

(Title.)

Let the defendant _____, his agents, servants and workmen, be perpetually restrained from burning, or causing to be burnt, any bricks on the defendant's plot of land marked B in the annexed plan, so as to occasion a nuisance to the plaintiff as the owner or occupier of the dwelling-house and garden mentioned in the plaint as belonging to and being occupied by the plaintiff.

No. 15.

INJUNCTION AGAINST BUILDING HIGHER THAN OLD LEVEL.

(Title.)

Let the defendant _____, his contractors, agents and workmen, be perpetually restrained from continuing to erect upon his premises in _____ any house or building of a greater height than the buildings which formerly stood upon his said premises and which have been recently pulled down, so or in such manner as to darken, injure or obstruct such of the plaintiff's windows in his said premises as are ancient lights.

No. 16.

INJUNCTION RESTRAINING USE OF PRIVATE ROAD.

(Title.)

Let the defendant , his agents, servants and workmen, be perpetually restrained from using or permitting to be used any part of the lane at , the soil of which belongs to the plaintiff, as a carriage way for the passage of carts, carriages or other vehicles, either going to or from the land marked B in the annexed plan or for any purpose whatsoever.

No. 17.

PRELIMINARY DECREE IN AN ADMINISTRATION SUIT.

(Title.)

It is ordered that the following accounts and inquiries be taken and made ; that is to say :—

In creditor's suit—

1. That an account be taken of what is due to the plaintiff and all other the creditors of the deceased.

In suits by legatees—

2. That an account be taken of the legacies given by the testator's will.

In suits by next-of-kin—

3. That an inquiry be made and account taken of what or of what share, if any, the plaintiff is entitled to as next-of-kin [or one of the next-of-kin] of the intestate.

[After the first paragraph, the decree will where necessary, order, in a creditor's suit, inquiry and accounts for legatees, heirs-at-law and next-of-kin. In suits by claimants other than creditors, after the first paragraph, in all cases an order to inquire and take an account of creditors will follow the first paragraph and such of the others as may be necessary will follow omitting the first formal words. The form is continued as in a creditor's suit.]

4. An account of the funeral and testamentary expenses.

5. An account of the moveable property of the deceased come to the hands of the defendant, or to the hands of any other person by his order or for his use.

6. An inquiry what part (if any) of the moveable property of the deceased is outstanding and undisposed of.

7. And it is further ordered that the defendant do, on or before the day of next, pay into Court all sums of money which shall be found to have come to his hands, or to the hands of any person by his order or for his use.

8. And that if the *shall find it necessary for carrying out the objects of the suit to sell any part of the moveable property of the deceased, that the same be sold accordingly, and the proceeds paid into Court.

9. And that Mr. E. F., be receiver in the suit (or proceeding) and receive and get in all outstanding debts and outstanding moveable property of the deceased, and pay the same into the hands of the *(and shall give security by bond for the due performance of his duties to the amount of rupees).

10. And it is further ordered that if the moveable property of the deceased be found insufficient for carrying out the objects of the suit, then the following further inquiries be made, and accounts taken, that is to say—

(a) an inquiry what immoveable property the deceased was seized of or entitled to at the time of his death ;

(b) an inquiry what are the incumbrances (if any) affecting the immoveable property of the deceased or any part thereof ;

(c) an account, so far as possible, of what is due to the several incumbrancers, and to include a statement of the priorities of such of the incumbrancers as shall consent to the sale hereinafter directed.

11. And that the immoveable property of the deceased, or so much thereof as shall be necessary to make up the fund in Court sufficient to carry out the object of the suit, be sold with the approbation of the Judge, free from incumbrances (if any) of such incumbrancers as shall consent to the sale and subject to the incumbrances of such of them as shall not consent.

12. And it is ordered that G. H. shall have the conduct of the sale of the immoveable property, and shall prepare the conditions and contracts of sale subject to the approval of the *and that in case any doubt or difficulty shall arise the papers shall be submitted to the Judge to settle.

13. And it is further ordered that, for the purpose of the inquiries hereinbefore directed, the *shall advertise in the newspapers according to the practice of the Court, or shall make such inquiries in any other way which shall appear to the *to give the most useful publicity to such inquiries.

14. And it is ordered that the above inquiries and accounts be made and taken and that all other acts ordered to be done be completed, before the day of and that the *do certify the result of the inquiries, and the accounts, and that all other acts ordered are completed, and have his certificate in that behalf ready for the inspection of the parties on the day of

15. And, lastly, it is ordered that this suit [or proceeding] stand adjourned for making final decree to the day of [Such part only of this decree is to be used as is applicable to the particular case.]

No. 18.

FINAL DECREE IN AN ADMINISTRATION SUIT BY A LEGATEE.

(Title.)

1. It is ordered that the defendant do, on or before the day of , pay into Court the sum of Rs. , the balance by the said certificate found to be due from the said defendant on account of the estate of , the testator and also the sum of Rs. for interest, at the rate of Rs. per cent. per annum, from the day of to the day of , amounting together to the sum of Rs. .

2. Let the *of the said Court tax the costs of the plaintiff and defendant in this suit, and let the amount of the said costs, when so taxed, be paid out of the said sum of Rs. ordered to be paid into Court as aforesaid, as follows:—

(a) The costs of the plaintiff to Mr. , his attorney [or pleader] or and the costs of the defendant to Mr. , his attorney [or pleader].

(b) And (if any debts are due) with the residue of the said sum of Rs. after payment of the plaintiff's and defendant's costs as aforesaid, let the sums, found to be owing to the several creditors mentioned in the schedule to the certificate, of the *, together with subsequent interest on such of the debts as bear interest, be paid; and, after making such payments, let the amount coming to the several legatees mentioned in the schedule, together with subsequent interest (to be verified as aforesaid), be paid to them.

3. And if there should then be any residue, let the same be paid to the residuary legatee.

No. 19.

PRELIMINARY DECREE IN AN ADMINISTRATION SUIT BY A LEGATEE, WHERE AN EXECUTOR IS HELD PERSONALLY LIABLE FOR THE PAYMENT OF LEGACIES.

(Title.)

1. It is declared that the defendant is personally liable to pay the legacy of Rs. bequeathed to the plaintiff;

2. And it is ordered that an account be taken of what is due for principal and interest on the said legacy;

3. And it is also ordered that the defendant do, within weeks after the date of the certificate of the *, pay to the plaintiff the amount of what the * shall certify to be due for principal and interest;

4. And it is ordered that the defendant do pay the plaintiff his costs of suit, the same to be taxed in case the parties differ.

No. 20.

FINAL DECREE IN AN ADMINISTRATION SUIT BY NEXT-OF-KIN.

(Title.)

1. Let the * of the said Court tax the costs of the plaintiff and defendant in this suit, and let the amount of the said plaintiff's costs, when so taxed, be paid by the defendant to the plaintiff out of the sum of Rs. , the balance by the said certificate found to be due from the said defendant on account of the personal estate of E. F., the intestate, within one week after the taxation of the said costs by the said *, and let the defendant retain for her own use out of such sum her costs, when taxed.

2. And it is ordered that the residue of the said sum of Rs. , after payment of the plaintiff's and defendant's costs as aforesaid, be paid and applied by defendant as follows :—

(a) Let the defendant, within one week after the taxation of the said costs by the *as aforesaid, pay one-third share of the said residue to the plaintiff A. B., and C. D., his wife, in her right as the sister and one of the next-of-kin of the said E. F., the intestate.

(b) Let the defendant retain for her own use one other third share of the said residue, as the mother and one of the next-of-kin of the said E. F., the intestate.

(c) And let the defendant, within one week after the taxation of the said costs by the * as aforesaid, pay the remaining one-third share of the said residue to G. H., as the brother and the other next-of-kin or the said E. F., the intestate.

No. 21.

PRELIMINARY DECREE IN A SUIT FOR DISSOLUTION OF PARTNERSHIP AND THE TAKING OF PARTNERSHIP ACCOUNTS.

It is declared that the proportionate shares of the parties in the partnership are as follows :—

It is declared that this partnership shall stand dissolved [or shall be deemed to have been dissolved] as from the day of and it is ordered that the dissolution thereof as from that day be advertised in the Gazette, etc.

And it is ordered that be the receiver of the partnership-estate and effects in this suit and do get in all the outstanding book-debts and claims of the partnership.

And it is ordered that the following accounts be taken :—

1. An account of the credits, property and effects now belonging to the said partnership ;
2. An account of the debts and liabilities of the said partnership ;
3. An account of all dealings and transactions between the plaintiff and defendant, from the foot of the settled account exhibited in this suit and marked (A), and not disturbing any subsequent settled accounts.

And it is ordered that the good-will of the business heretofore carried on by the plaintiff and defendant as in the plaint mentioned, and the stock-in-trade, be sold in the premises, and that the * may, on the application of any of the parties, fix a reserved bidding for all or any of the lots at such sale, and that either of the parties is to be at liberty to bid at the sale.

And it is ordered that the above accounts be taken, and all the other acts required to be done be completed, before the day of and that the do certify the results of the accounts, and that all other acts are completed, and have his certificate in that behalf ready for the inspection of the parties on the day of

And, lastly, it is ordered that this suit stand adjourned for making a final decree to the day of

No. 22.

FINAL DECREE IN A SUIT FOR DISSOLUTION OF PARTNERSHIP AND TAKING OF PARTNERSHIP ACCOUNTS.

(Title.)

It is ordered that the fund now in Court, amounting to the sum of Rs. , be applied as follows :—

1. In payment of the debts due by the partnership set forth in the certificate of the * amounting in the whole to Rs. .
2. In payment of the costs of all parties in this suit, amounting to Rs. .
[These costs must be ascertained before the decree is drawn up.]
3. In payment of the sum of Rs. to the plaintiff as his share of the partnership assets, of the sum of Rs. , being the residue of the said sum of Rs. now in Court, to the defendant as his share of the partnership-assets.

[Or, And that the remainder of the said sum of Rs. be paid to the said plaintiff (or defendant) in part payment of the sum of Rs. certified to be due to him in respect of the partnership-accounts.]

4. And that the defendant [or plaintiff] do on or before the day of pay to the plaintiff [or defendant] the sum of Rs.

WHEREAS the decree-holder in the above suit has applied to this Court for a certificate to be sent to the Court of _____ at _____ for execution of the decree in the above suit by the said Court, alleging that the judgment-debtor resides or has property within the local limits of the jurisdiction of the said Court, and it is deemed necessary and proper to send a certificate to the said Court under Order XXI, Rule 6 of the Code of Civil Procedure, 1908, it is

Ordered :

That a copy of this order be sent to _____ with a copy of the decree and of any order which may have been made for execution of the same and a certificate of non-satisfaction.

Dated the _____ day of _____ 19 ____.

Judge.

No. 4.

CERTIFICATE OF NON-SATISFACTION OF DECREE. (O. 21, R. 6.)

(Title.)

Certified that no [1] satisfaction of the decree of this Court in Suit No. _____ of 19 ____, a copy which is hereunto attached, has been obtained by execution within the jurisdiction of this Court.

Dated the _____ day of _____ 19 ____.

Judge.

[1] If partial, strike out "no" and state to what extent.

No. 5.

CERTIFICATE OF EXECUTION OF DECREE TRANSFERRED TO ANOTHER COURT.

(O. 21, R. 6.)*

(Title.)

Number of suit and the Court by which the decree was passed.	Name of parties.	Date of application for execution.	Number of the execution case.	Processes issued and dates of service thereof.	Costs of execution.	Amount realized.	How the case is disposed of.	REMARKS.
1	2	3	4	5	6	7	8	9
					RS. A. P.	RS.A.P.		

Signature of Muharrir in charge.

Signature of Judge.

No. 6.

APPLICATION FOR EXECUTION OF DECREE. (O. 21, R. 11.)

In the Court of _____

I, _____, decree-holder, hereby apply for execution of the decree herein below set forth :—

*[Burma] For "O. 21, R. 6" substitute "section 41".

No. of suit.	Names of parties.	Date of decree	Whether any appeal preferred from decree	Payment or adjustment made, if any.	Previous application, if any, with date and result.	Amount with interest due upon the decree or other relief granted thereby together with particulars of any cross decree.	Amount of costs, if any, awarded.	Against whom to be executed.	Mode in which the assistance of the Court is required.												
1	2	3	4	5	6	7	8	9	10												
789 of 1897	A. B.—Plaintiff. C. D.—Defendant.	October 11th, 1897.	No.	None.	Rs. 72-4 recorded on application, dated the 4th March, 1899.	Rs. 314 8-2 principal [interest at 6 per cent. per annum from date of decree till payment].	<table><tr><td>As awarded in the decree</td><td>Rs.</td><td>A. P.</td></tr><tr><td>Subsequently incurred</td><td>..</td><td>47 10 4</td></tr><tr><td></td><td>..</td><td>8 2 0</td></tr><tr><td>Total</td><td>..</td><td>55 12 4</td></tr></table>	As awarded in the decree	Rs.	A. P.	Subsequently incurred	..	47 10 4		..	8 2 0	Total	..	55 12 4	Against the defendant C. D.	[When attachment and sale of moveable property is sought.] I pray that the total amount of Rs. [together with interest on the principal sum up to date of payment] and the costs of taking out this execution, be realized by attachment and sale of defendant's moveable property as per annexed list and paid to me. [When attachment and sale of immoveable property is sought.] I pray that the total amount of Rs. [together with interest on the principal sum up to date of payment] and the costs of taking out this execution be realized by the attachment and sale of defendant's immoveable property specified at the foot of this application and paid to me.
As awarded in the decree	Rs.	A. P.																			
Subsequently incurred	..	47 10 4																			
	..	8 2 0																			
Total	..	55 12 4																			

I declare that what is stated herein is true to the best of my knowledge and belief.

Dated the day of 19 , decree-holder.

[When attachment and sale of immoveable property is sought.]

Description and specification of Property.

The undivided one-third share of the judgment-debtor in a house situated in the village of , value Rs. 40, and bounded as follows :—

East by G's house ; west by H's house ; south by public road ; north by private lane and J's house.

I declare that what is stated in the above description is true to the best of my knowledge and belief, and so far as I have been able to ascertain the interest of the defendant in the property therein specified.

Signed , decree-holder.

No. 7.

NOTICE TO SHOW CAUSE WHY EXECUTION SHOULD NOT ISSUE. (O. 21, R. 16.)*

(Title.)

To

WHEREAS

has made application to this Court for

* App. E, No. 7.—The words "R. 16" for the word "R. 22" were substituted by Act X of 1914, Sch. I.

execution of decree in Suit No. _____ of 19 _____ on the allegation that the said decree has been transferred to him by assignment, this is to give you notice that you are to appear before this Court _____ on the _____ day of _____ 19 _____, to show cause why execution should not be granted.

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19 _____ .
Judge.

No. 8.

WARRANT OF ATTACHMENT OF MOVEABLE PROPERTY IN EXECUTION OF
A DECREE FOR MONEY. (O. 21, R. 30.)
(Title.)

To
The Bailiff of the Court.
WHEREAS _____ was ordered by decree of this Court passed on the _____ day of _____ 19 _____, in Suit No. _____ of _____ 19 _____, to pay to the plaintiff the sum of Rs. _____ as noted in the margin; and whereas the said sum of Rs. _____ has not been paid. These are to command you to attach the moveable property of the said _____ as set forth in the schedule hereunto annexed or which shall be pointed out to you by the said _____ and unless the said _____ shall pay to you the said sum of Rs. _____ together with Rs. _____, the cost of this attachment, to hold the same until further orders from this Court.

DECREE.				
Principal				
Interest				
Costs				
Costs of execution . .				
Further interest . .				
Total ..				

You are further commanded to return this warrant on or before the _____ day of _____ 19 _____, with an endorsement certifying the day on which and manner in which it has been executed or why it has not been executed.

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19 _____ .
Schedule.
Judge.

No. 9.

WARRANT FOR SEIZURE OF SPECIFIC MOVEABLE PROPERTY ADJUDGED
BY DECREE. (O. 21, R. 31.)
(Title.)

To
The Bailiff of the Court.
WHEREAS _____ was ordered by decree of this Court passed on the _____ day of _____ 19 _____, in Suit No. _____ of _____ 19 _____, to deliver to the plaintiff the moveable property (or a _____ share in the moveable property) specified in the schedule hereunto annexed, and whereas the said property (or share) has not been delivered;
These are to command you to seize the said moveable property (or a _____ share of the said moveable property) and to deliver it to the plaintiff or to such person as he may appoint in his behalf.

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19 _____ .
Schedule.
Judge.

No. 10.

NOTICE TO STATE OBJECTIONS TO DRAFT OF DOCUMENT. (O. 21, R. 34.)
(Title.)

To
TAKE notice that on the _____ day of _____ 19 _____, the decree-holder in the above suit presented an application to this Court that the Court may execute on your behalf a deed of _____, whereof a draft is hereunto annexed, of the immovable property specified hereunder, and that the _____ day of _____ 19 _____ is appointed for the hearing of the said application, and that you are at liberty to appear on the said day and to state in writing any objections to the said draft.

Description of property.
GIVEN under my hand and the seal of the Court, this _____ day of _____ 19 _____ .
Judge.

No. 11.

WARRANT TO THE BAILLIFF TO GIVE POSSESSION OF LAND, ETC. (O. 21, R. 35.)
(Title.)

To

The Bailiff of the Court.

WHEREAS the undermentioned property in the occupancy of _____ has been decreed to _____, the plaintiff in this suit; you are hereby directed to put the said _____ in possession of the same, and you are hereby authorized to remove any person bound by the decree who may refuse to vacate the same.

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19 _____
Schedule.

Judge.

No. 12.

NOTICE TO SHOW CAUSE WHY A WARRANT OF ARREST SHOULD NOT ISSUE. (O. 21, R. 37.)
(Title.)

To

WHEREAS _____ has made application to this Court for execution of decree in Suit No. _____ of 19 _____ by arrest and imprisonment of your person, you are hereby required to appear before this Court on the _____ day of _____ 19 _____, to show cause why you should not be committed to the civil prison in execution of the said decree.

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19 _____.

Judge.

No. 13.

WARRANT OF ARREST IN EXECUTION. (O. 21, R. 38.)
(Title.)

To

The Bailiff of the Court.

WHEREAS _____ was adjudged by a decree of the Court in Suit No. _____ of 19 _____, dated the _____ day of _____ 19 _____, to pay

				to the decree-holder the sum of Rs. _____ as
				noted in the margin, and whereas the said sum of
				Rs. _____ has not been paid to the said decree-
				holder in satisfaction of the said decree, these are to
				command you to arrest the said judgment-debtor and
				unless the said judgment-debtor shall pay to you the
				said sum of Rs. _____ together
				with Rs. _____ for the costs of executing
				this process, to bring the said defendant before the
				Court with all convenient speed. You are further com-
				manded to return this warrant on or before the
				_____ day of _____ 19 _____, with an endorsement certify-
				ing the day on which and manner in which it has been
				executed, or the reason why it has not been executed.
Principal.				
Interest				
Costs				
Execution				
Total ..				

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19 _____.

Judge.

No. 14.

WARRANT OF COMMITTAL OF JUDGMENT-DEBTOR TO JAIL. (O. 21, R. 40.)
(Title.)

To

The Officer in charge of the Jail at

WHEREAS _____ who has been brought before this Court this _____ day of _____ 19 _____, under a warrant in execution of a decree which was made and pronounced by the said Court on the _____ day of _____ 19 _____, and by which decree it was ordered that the said _____ should pay _____

; And whereas the said _____ has not obeyed the decree nor satisfied the Court that he is entitled to be discharged from custody; You are hereby, in the name of the King-Emperor of India, commanded and required to take and receive the said _____ into the civil prison and keep him imprisoned therein for a period not exceeding _____ or until the said decree shall be fully satisfied, or the said _____ shall

be otherwise entitled to be released according to the terms and provisions of section 58 of the Code of Civil Procedure, 1908 ; and the Court does hereby fix annas per diem as the rate of the monthly allowance for the subsistence of the said during his confinement under this warrant of committal.

GIVEN under my signature and the seal of the Court, this day of 19 .
Judge.

No. 15.

ORDER FOR THE RELEASE OF A PERSON IMPRISONED IN EXECUTION OF A DECREE.
 (Sections 58, 59.)

(Title.)

To

The Officer in charge of the Jail at
 UNDER orders passed this day, you are hereby directed to set free judgment-debtor now in your custody.

Judge.

Dated

No. 16.

ATTACHMENT IN EXECUTION.

PROHIBITORY ORDER, WHERE THE PROPERTY TO BE ATTACHED CONSISTS OF MOVEABLE PROPERTY TO WHICH THE DEFENDANT IS ENTITLED SUBJECT TO A LIEN OR RIGHT OF SOME OTHER PERSON TO THE IMMEDIATE POSSESSION THEREOF. (O. 21, R. 46.)

(Title.)

To

WHEREAS has failed to satisfy a decree passed against on the day of 19 in Suit No. of 19 , in favour of for Rs. ; It is ordered that the defendant be, and is hereby, prohibited and restrained until the further order of this Court, from receiving from the following property in the possession of the said that is to say, , to which the defendant is entitled, subject to any claim of the said , and the said is hereby prohibited and restrained, until the further order of this Court, from delivering the said property to any person or persons whomsoever.

GIVEN under my hand and the seal of the Court, this day of 19 .
Judge.

No. 17.

ATTACHMENT IN EXECUTION.

PROHIBITORY ORDER, WHERE THE PROPERTY CONSISTS OF DEBTS NOT SECURED BY NEGOTIABLE INSTRUMENTS. (O. 21, R. 46.)

(Title.)

To

WHEREAS has failed to satisfy a decree passed against on the day of 19 in Suit No. of 19 , in favour of for Rs. ; It is ordered that the defendant be, and is hereby, prohibited and restrained, until the further order of this Court, from receiving from you a certain debt alleged now to be due from you to the said defendant, namely and that you, the said , be, and you are hereby, prohibited and restrained, until the further order of this Court, from making payment of the said debt, or any part thereof, to any person whomsoever or otherwise than into this Court.

GIVEN under my hand and the seal of the Court, this day of 19 .
Judge.

No. 18.

ATTACHMENT IN EXECUTION.

PROHIBITORY ORDER, WHERE THE PROPERTY CONSISTS OF SHARES IN THE CAPITAL OF A CORPORATION. (O. 21, R. 46.)

(Title.)

To

Defendant and to
 Corporation.
 WHEREAS has failed to satisfy a decree passed

against _____ on the _____ day of _____ 19 _____, in
 Suit No. _____ of 19 _____, in favour of _____, for Rs. _____;
 It is ordered that you, the defendant, be, and you are hereby, prohibited and restrained,
 until the further order of this Court, from making any transfer of
 shares in the aforesaid Corporation, namely, _____, or from receiving payment
 of any dividends thereon; and you, _____, the Secretary of the said
 Corporation, are hereby prohibited and restrained from permitting any such transfer or
 making any such payment.

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19 _____.
 Judge.

No. 19.

ORDER TO ATTACH SALARY OF PUBLIC OFFICER OR SERVANT OF RAILWAY
 COMPANY OR LOCAL AUTHORITY. (O. 21, R. 48.)

(Title.)

To

WHEREAS _____, judgment-debtor in the above-named case, is a
(describe office of judgment-debtor) receiving his salary (or allowances) at your hands;
 and whereas _____, decree-holder in the said case, has applied in this
 Court for the attachment of the salary (or allowances) of the said _____ to the
 extent of _____ due to him under the decree; You are hereby required to
 withhold the said sum of _____ from the salary of the said _____ in
 the monthly instalments of _____ and to remit the said sum (or monthly
 instalments) to this Court.

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19 _____.
 Judge.

No. 20.

ORDER OF ATTACHMENT OF NEGOTIABLE INSTRUMENT. (O. 21, R. 51.)

(Title.)

To

The Bailiff of the Court.

WHEREAS an order has been passed by this Court on the _____ day
 of _____ 19 _____, for the attachment of _____;
 You are hereby directed to seize the said _____ and bring the same into Court.

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19 _____.
 Judge.

No. 21.

ATTACHMENT.

PROHIBITORY ORDER, WHERE THE PROPERTY CONSISTS OF MONEY OR OF ANY SECURITY
 IN THE CUSTODY OF A COURT OF JUSTICE OR OFFICER OF GOVERNMENT.

(O. 21, R. 52.)

(Title.)

To

SIR,

The plaintiff having applied, under Rule 52 of Order XXI of the Code of Civil Proce-
 dure, 1908, for an attachment of certain money now in your hands (*here state how the
 money is supposed to be in the hands of the person addressed, on what account, etc.*), I
 request that you will hold the said money subject to the further order of this Court.

I have the honour to be,

SIR,

Your most obedient Servant,

Judge.

Dated the _____ day of _____ 19 _____.

No. 22.

NOTICE OF ATTACHMENT OF A DECREE TO THE COURT WHICH PASSED IT.

(O. 21, R. 53.)

(Title.)

To

The Judge of the Court of

SIR,

I have the honour to inform you that the decree obtained in your Court on the

day of 19 , by
 in Suit No. of 19 , in which he was and
 was has been attached by this Court on the application of
 , the in the suit specified above. You are therefore
 requested to stay the execution of the decree of your Court until you receive an intimation
 from this Court that the present notice has been cancelled or until execution of the said
 decree is applied for by the holder of the decree now sought to be executed or by his judgment-
 debtor.

Dated the day of 19 .

I have the honour, etc.,

Judge.

No. 23.

NOTICE OF ATTACHMENT OF A DECREE TO THE HOLDER OF THE DECREE. (O. 21, R. 53.)
 (Title.)

To

WHEREAS an application has been made in this Court by the decree-holder in the above
 suit for the attachment of a decree obtained by you on the
 day of 19 , in the Court of

in Suit No. of 19 , in which

was and .

It is ordered that you, the said and you are hereby,
 prohibited and restrained, until the further order of this Court, from transferring or
 charging the same in any way.

GIVEN under my hand and the seal of the Court, this day of 19 .
Judge.

No. 24.

ATTACHMENT IN EXECUTION.

PROHIBITORY ORDER, WHERE THE PROPERTY CONSISTS OF IMMOVEABLE PROPERTY.
 (O. 21, R. 54.)

(Title.)

To

defendant.

WHEREAS you have failed to satisfy a decree passed against you on the
 day of 19 , in Suit No.
 of 19 , in favour of for Rs.

; It is ordered that you, the said ,
 be, and you are hereby, prohibited and restrained, until the further order of this Court
 from transferring or charging the property specified in the schedule hereunto annexed, by
 sale, gift or otherwise, and that all persons be, and that they are hereby, prohibited from
 receiving the same by purchase, gift or otherwise.

GIVEN under my hand and the seal of the Court, this day of 19 .
Schedule.

Judge.

No. 25.

ORDER FOR PAYMENT TO THE PLAINTIFF, ETC., OF MONEY, ETC., IN THE HANDS OF A THIRD
 PARTY. (O. 21, R. 56.)

(Title.)

To

WHEREAS the following property has been attached in execution
 of a decree in Suit No. of 19 , passed on
 the day of 19 , in favour of
 for Rs. ; It is ordered that the property so attached,
 consisting of Rs. in money and Rs.

in currency-notes, or a sufficient part thereof to satisfy the said decree, shall
 be paid over by you, the said to

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 26.

NOTICE TO ATTACHING CREDITOR. (O. 21, r. 5E.)

(Title.)

To

WHEREAS

has made application to this Court for the removal of attachment on placed at your instance in execution of the decree in Suit No. of 19, this is to give you notice to appear before this Court on , the day of 19, either in person or by a pleader of the Court duly instructed to support your claim, as attaching creditor. GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 27.

WARRANT OF SALE OF PROPERTY IN EXECUTION OF A DECREE FOR MONEY. (O. 21, r. 66.)

(Title.)

To

The Bailiff of the Court,

THESE are to command you to sell by auction, after giving days' previous notice, by affixing the same in this Court-house, and after making due proclamation, the property attached under a warrant from this Court, dated the day of 19, in execution of a decree in favour of in Suit No. of 19 or so much of the said property as shall realize the sum of Rs. being the of the said decree and costs still remaining unsatisfied.

You are further commanded to return this warrant on or before the day of 19, with an endorsement certifying the manner in which it has been executed, or the reason why it has not been executed.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 28.

NOTICE OF THE DAY FIXED FOR SETTLING A SALE PROCLAMATION. (O. 21, r. 66.)

(Title.)

To

Judgment-debtor.

WHEREAS in the above-named suit, , the decree-holder, has applied for the sale of ; you the hereby informed that the day of 19 has been fixed for settling the terms of the proclamation of sale.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 29.

PROCLAMATION OF SALE. (O. 21, r. 66.)

(Title.)

Notice is hereby given that, under rule 64 of Order XXI of the Code of Civil Procedure, 1908, an [1] Suit No. of 19, order has been passed by this Court for the sale of the attached property decided by the mentioned in the annexed schedule, in satisfaction of the claim of in which of the decree-holder in the suit [1] mentioned in the margin, was plaintiff and amounting with costs and interest up to date of sale to the sum of was defendant.

The sale will be by public auction, and the property will be put up for sale in the lots specified in the schedule. The sale will be of the property of the judgment-debtors above-named as mentioned in the schedule below; and the liabilities and claims attaching to the said property, so far as they have been ascertained, are those specified in the schedule against each lot.

In the absence of any order of postponement, the sale will be held by the at the monthly sale commencing at

o'clock on . In the

event, however, of the debt above specified and of the costs of the sale being tendered or paid before the knocking down of any lot, the sale will be stopped.

At the sale the public generally are invited to bid, either personally or by duly authorized agent. No bid by, or on behalf of, the judgment-creditors above-mentioned, however, will be accepted, nor will any sale to them be valid without the express permission of the Court previously given. The following are the further.

Conditions of Sale.

1. The particulars specified in the schedule below have been stated to the best of the information of the Court, but the Court will not be answerable for any error, misstatement or omission in this proclamation.

2. The amount by which the biddings are to be increased shall be determined by the officer conducting the sale. In the event of any dispute arising as to the amount bid, or as to the bidder, the lot shall at once be again put up to auction.

3. The highest bidder shall be declared to be the purchaser of any lot, provided always that he is legally qualified to bid, and provided that it shall be in the discretion of the Court or Officer holding the sale to decline acceptance of the highest bid when the price offered appears so clearly inadequate as to make it advisable to do so.

4. For reasons recorded, it shall be in the discretion of the officer conducting the sale to adjourn it subject always to the provisions of rule 69 of Order XXI.

5. In the case of moveable property, the price of each lot shall be paid at the time of sale or as soon after as the officer holding the sale directs, and in default of payment the property shall forthwith be again put up and resold.

6. In the case of immoveable property, the person declared to be purchaser shall pay immediately after such declaration a deposit of 25 per cent. on the amount of his purchase-money to the officer conducting the sale, and in default of such deposit the property shall forthwith be put up again and re-sold.

7. The full amount of the purchase-money shall be paid by the purchaser before the Court closes on the fifteenth day after the sale of the property exclusive of such day, or if the fifteenth day be a Sunday or other holiday, then on the first office day after the fifteenth day.

8. In default of payment of the balance of purchase-money within the period allowed, the property shall be re-sold after the issue of a fresh notification of sale. The deposit, after defraying the expenses of the sale, may, if the Court thinks fit, be forfeited to Government, and the defaulting purchaser shall forfeit all claim to the property or to any part of the sum for which it may be subsequently sold.

GIVEN under my hand and the seal of the Court, this

day of

19

Judge.

Schedule of Property.

Number of lot.	Description of property to be sold, with the name of each owner where there are more judgment debtors than one	The revenue assessed upon the estate or part of the estate, if the property to be sold is an interest in an estate or a part of an estate paying revenue to Government.	Detail of any incumbrances to which the property is liable.	Claims, if any, which have been put forward to the property and any other known particulars bearing on its nature and value.

No. 30.

ORDER ON THE NAZIR FOR CAUSING SERVICE OF PROCLAMATION OF SALE.
(O. 21, r. 66.)

(Title.)

To

The Nazir of the Court.

WHEREAS an order has been made for the sale of the property of the judgment-debtor specified in the schedule hereunder annexed, and whereas the day of 19, has been fixed for the sale of the said property, copies of the proclamation of sale are by this warrant made over to you, and you are hereby ordered to have the proclamation published by beat of drum within each of the properties specified in the said schedule, to affix a copy of the said proclamation on a conspicuous part of each of the said properties and afterwards on the Court-house, and then to submit to this Court a report showing the dates on which and the manner in which the proclamations have been published.

Dated the

day of
Schedule.

19

Judge.

No. 31.

CERTIFICATE BY OFFICER HOLDING A SALE OF THE DEFICIENCY OF PRICE ON A RE-SALE OF PROPERTY BY REASON OF THE PURCHASER'S DEFAULT. (O. 21, r. 71.)

(Title.)

Certified that at the re-sale of the property in execution of the decree in the above-named suit, in consequence of default on the part of purchaser, there was a deficiency in the price of the said property amounting to Rs. , and that the expenses attending such re-sale amounted to Rs. , making a total of Rs. , which sum is recoverable from the defaulter.

Dated the

day of

19

Officer holding the sale.

No. 32.

NOTICE TO PERSON IN POSSESSION OF MOVEABLE PROPERTY SOLD IN EXECUTION. (O. 21, r. 79.)

(Title.)

To

WHEREAS has become the purchaser at a public sale in execution of the decree in the above suit of now in your possession, you are hereby prohibited from delivering possession of the said to any person except the said

GIVEN under my hand and the seal of the Court, this day of 19

Judge.

No. 33.

PROHIBITORY ORDER AGAINST PAYMENT OF DEBTS SOLD IN EXECUTION TO ANY OTHER THAN THE PURCHASER. (O. 21, r. 79.)

(Title.)

To

WHEREAS and to has become the purchaser at a public sale in execution of the decree in the above suit of being debts due from you to you

; it is ordered that you be, and you are hereby, prohibited from receiving, and you from making payment of, the said debt to any person or persons except the said

GIVEN under my hand and the seal of the Court, this day of 19

Judge.

No. 34.

PROHIBITORY ORDER AGAINST THE TRANSFER OF SHARES SOLD IN EXECUTION. (O. 21, r. 79.)
(Title.)

To

and

, Secretary of
Corporation.

WHEREAS _____ has become the purchaser at a public sale in execution of the decree, in the above suit, of certain shares in the above Corporation, that is to say, of _____ standing in the name of you _____; it is ordered that you _____ be, and you are hereby, prohibited from making any transfer of the said shares to any person except the said _____, the purchaser aforesaid, or from receiving any dividends thereon; and you Secretary of the said Corporation, from permitting any such transfer or making any such payment to any person except the said _____, the purchaser aforesaid.

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19 _____.

Judge.

No. 35.

CERTIFICATE TO JUDGMENT-DEBTOR AUTHORISING HIM TO MORTGAGE, LEASE, OR SELL PROPERTY. (O. 21, r. 83.)

(Title.)

WHEREAS in execution of the decree passed in the above suit an order was made on the _____ day of _____ 19 _____ for the sale of the under-mentioned property of the judgment-debtor _____, and whereas the Court has, on the application of the said judgment-debtor, postponed the said sale to enable him to raise the amount of the decree by mortgage, lease or private sale of the said property or of some part thereof:

This is to certify that the Court doth hereby authorize the said judgment-debtor to make the proposed mortgage, lease or sale within a period of _____ from the date of this certificate; provided that all monies payable under such mortgage, lease or sale shall be paid into this Court and not to the said judgment-debtor.

Description of property.

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19 _____.

Judge.

No. 36.

NOTICE TO SHOW CAUSE WHY SALE SHOULD NOT BE SET ASIDE. (O. 21, rr. 90, 92.)

(Title.)

To

WHEREAS the under-mentioned property was sold on the _____ day of _____ 19 _____ in execution of the decree passed in the above-named suit, and whereas _____ the decree-holder [or judgment-debtor], has applied to this Court to set aside the sale of the said property on the ground of a material irregularity [or fraud] in publishing [or conducting] the sale, namely, that

Take notice that if you have any cause to show why the said application should not be granted, you should appear with your proofs in this Court on the _____ day of _____ 19 _____, when the said application will be heard and determined.

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19 _____.

Description of property.

Judge.

No. 37.

NOTICE TO SHOW CAUSE WHY SALE SHOULD NOT BE SET ASIDE. (O. 21, rr. 91, 92.)

(Title.)

To

WHEREAS _____, the purchaser of the under-mentioned property sold on the _____ day of _____ 19 _____, in execution of the decree passed in the above-named suit, has applied to this Court to set aside the sale of the said property on the ground that the judgment-debtor, had no saleable interest therein:

Take notice that if you have any cause to show why the said application should not be granted, you should appear with your proofs in this Court on the _____ day of _____ 19 _____ when the

said application will be heard and determined.

GIVEN under my hand and the seal of the Court, this
19

day of

Description of property.

Judge.

No. 38.

CERTIFICATE OF SALE OF LAND. (O. 21, r. 94.)

(Title.)

THIS is to certify that _____ has been declared the purchaser at a
sale by public auction on the _____ day of _____ 19____, of
_____ in execution of decree in this suit, and that the said
sale has been duly confirmed by this Court.

GIVEN under my hand and the seal of the Court, this _____ day of
19____.

Judge.

No. 39.

ORDER FOR DELIVERY TO CERTIFIED PURCHASER OF LAND AT A SALE IN EXECUTION.

(O. 21, r. 95.)

(Title.)

To

The Bailiff of the Court.

WHEREAS _____ has become the certified
purchaser of _____ at a sale in execution of
decree in suit No. _____ of 19____; you are hereby ordered to put the said
_____, the certified purchaser, as aforesaid, in possession of the same.

GIVEN under my hand and the seal of the Court, this _____ day of
19____.

Judge.

No. 40.

SUMMONS TO APPEAR AND ANSWER CHARGE OF OBSTRUCTING EXECUTION OF DECREE.

(O. 21, r. 97.)

(Title.)

To

WHEREAS _____, the decree-holder in the above
suit, has complained to this Court that you have resisted [or obstructed] the officer charged
with the execution of the warrant for possession;

You are hereby summoned to appear in this Court on the _____ day of
19____ at _____ A.M., to answer the said complaint.

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19____.

Judge.

No. 41.

WARRANT OF COMMITTAL. (O. 21, r. 98.)

(Title.)

To

The Officer in charge of the Jail at

WHEREAS the undermentioned property has been decreed to _____, the plaintiff in
this suit, and whereas the Court is satisfied that _____ without any just cause
resisted [or obstructed] and is still resisting [or obstructing] the said _____ in
obtaining possession of the property, and whereas the said _____ has made
application to this Court that the said _____ be committed to the civil prison;

You are hereby commanded and required to take and receive the said _____
into the civil prison and to keep him imprisoned therein for the period of
_____ days.

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19____.

Judge.

No. 42.

AUTHORITY OF THE COLLECTOR TO STAY PUBLIC SALE OF LAND.

(Section 72.)

(Title.)

To

, Collector of

SIR,

In answer to your communication No. , dated , representing that the sale in execution of the decree in this suit of land situate within your district is objectionable, I have the honour to inform you that you are authorized to make provision for the satisfaction of the said decree in the manner recommended by you.

I have the honour to be,

SIR,

Your obedient Servant,

Judge.

No. 43.

The security to be furnished under section 55 (4) shall be, as nearly as may be. by a bond in the following form :—

In the Court of

at

Suit No.

of 19

Against

.. Plaintiff

.. Defendant.

C. D. of

WHEREAS in execution of the decree in the suit aforesaid, the said C. D. has been arrested under a warrant and brought before the Court of ; and whereas the said C. D. has applied for his discharge on the ground that he undertakes within one month to apply under section 5 of Act No. III of 1907, to be declared an insolvent, and the said Court has ordered that the said C. D. shall be released from custody if the said C. D. furnish good and sufficient security in the sum of Rs. that he will appear when called upon and that he will within one month from this date apply under section 5 of Act No. III of 1907, to be declared an insolvent. Therefore I, E. F., inhabitant of have voluntarily become security, and do hereby bind myself, my heirs and executors, to as Judge of the said Court and his successors in office that the said C. D., will appear at any time when called upon by the said Court, and will apply in the manner and within the time hereinbefore set forth, and in default of such appearance or of such application, I bind myself, my heirs and executors, to pay to the said Court, on its order, the sum of Rs.

Witness my hand at

this

day of

19

(Sd.) E. F.,

Surety.

Witness:

APPENDIX F.

SUPPLEMENTAL PROCEEDINGS.

No. 1.

WARRANT OF ARREST BEFORE JUDGMENT. (O. 38, r. 1.)

(Title.)

To

The Bailiff of the Court.

WHEREAS

, the plaintiff in the above suit, claims

the sum of Rs. as noted in the margin, and has proved to the satisfaction of the Court that there is probable cause for believing that the defendant

is

about to . These are to command you to demand and receive from the said the sum of Rs.

as sufficient to satisfy the plaintiff's claim, and unless the said sum of Rs. is forthwith delivered to you by or on behalf of the said

, to take the said into

custody, and to bring him before this Court, in order that he may show cause why he should not furnish security to the amount of Rs.

	Principal	..	..			
	Interest	..	..			
	Costs	..	..			
	TOTAL	..	..			

for his personal appearance before the Court, until such time as the said suit shall be fully and finally disposed of, and until satisfaction of any decree that may be passed against him in the suit.

GIVEN under my hand and the seal of the Court, this day of 19 .
Judge.

No. 2.

SECURITY FOR APPEARANCE OF A DEFENDANT ARRESTED BEFORE JUDGMENT.

(O. 38, r. 2.)

(*Title.*)

WHEREAS at the instance of , the plaintiff in the above suit, , the defendant, has been arrested and brought before the Court;

And whereas on the failure of the said defendant to show cause why he should not furnish security for his appearance, the Court has ordered him to furnish such security:

Therefore I have voluntarily become surety and do hereby bind myself, my heirs and executors, to the said Court, that the said defendant shall appear at any time when called upon while the suit is pending and until satisfaction of any decree that may be passed against him in the said suit; and in default of such appearance I bind myself, my heirs and executors, to pay to the said Court, at its order, any sum of money that may be adjudged against the said defendant in the said suit.

Witness my hand at this day of 19 .
(Signed.)

Witnesses:

- 1.
- 2.

No. 3.

SUMMONS TO DEFENDANT TO APPEAR ON SURETY'S APPLICATION FOR DISCHARGE.

(O. 38, r. 3.)

(*Title.*)

To

WHEREAS , who became surety on the day of 19 for your appearance in the above suit, has applied to this Court to be discharged from his obligation:

You are hereby summoned to appear in this Court in person on the day of 19 , at A.M., when the said application will be heard and determined.

GIVEN under my hand and the seal of the Court, this day of 19 .
Judge.

No. 4.

ORDER FOR COMMITTAL. (O. 38, r. 4.)

(*Title.*)

To

WHEREAS , plaintiff in this suit, has made application to the Court that security be taken for the appearance of , the defendant, to answer any judgment that may be passed against him in the suit; and whereas the Court has called upon the defendant to furnish such security, or to offer a sufficient deposit in lieu of security, which he has failed to do; it is ordered that the said defendant be committed to the civil prison until the decision of the suit; or, if judgment be pronounced against him, until satisfaction of the decree.

GIVEN under my hand and the seal of the Court, this day of 19 .
Judge.

No. 5.

ATTACHMENT BEFORE JUDGMENT, WITH ORDER TO CALL FOR SECURITY FOR FULFILMENT OF DECREE. (O. 38, r. 5.)

(*Title.*)

To

The Bailiff of the Court.

WHEREAS has proved to the satisfaction of the Court that the defendant in the above suit ;

These are to command you to call upon the said defendant on or before

the day of 19 either to furnish security for the sum of rupees to produce and place at the disposal of this Court when required or the value thereof, or such portion of the value as may be sufficient to satisfy any decree that may be passed against him; or to appear and show cause why he should not furnish security; and you are further ordered to attach the said and keep the same under safe and secure custody until the further order of the Court; and you are further commanded to return this warrant on or before the day of 19, with an endorsement certifying the date on which and the manner in which it has been executed, or the reason why it has not been executed.

GIVEN under my hand and the seal of the Court, this day of 19 .
Judge.

No. 6.

SECURITY FOR THE PRODUCTION OF PROPERTY. (O. 38, r. 5.)

(*Title.*)

WHEREAS at the instance of _____, the plaintiff in the above suit, the defendant has been directed by the Court to furnish security in the sum of Rs. _____ to produce and place at the disposal of the Court the property specified in the schedule hereunto annexed;

Therefore I _____ have voluntarily become surety and do hereby bind myself, my heirs and executors, to the said Court, that the said defendant shall produce and place at the disposal of the Court, when required, the property specified in the said schedule, or the value of the same, or such portion thereof as may be sufficient to satisfy the decree; and in default of his so doing, I bind myself, my heirs and executors, to pay to the said Court, at its order, the said sum of Rs. _____ or such sum not exceeding the said sum as the said Court may adjudge.

Schedule.

Witness my hand at _____ this _____ day of _____ 19 ____.

(Signed.) _____

Witnesses:

- 1.
- 2.

No. 7.

ATTACHMENT BEFORE JUDGMENT, ON PROOF OF FAILURE TO FURNISH SECURITY.

(O. 38, r. 6.)

(Title.)

To

The Bailiff of the Court.

WHEREAS _____, the plaintiff in this suit, has applied to the Court to call upon _____, the defendant, to furnish security to fulfil any decree that may be passed against him in the suit, and whereas the Court has called upon the said _____ to furnish such security, which he has failed to do; these are to command you to attach _____, the property of the said _____, and keep the same under safe and secure custody until the further order of the Court; and you are further commanded to return this warrant on or before the _____ day of _____ 19____ with an endorsement certifying the date on which and manner in which it has been executed, or the reason why it has not been executed.

GIVEN under my hand and the seal of the Court, this day of 19 .
Judge.

No. 8.

TEMPORARY INJUNCTIONS. (O. 39, r. 1.)

(Title.)

Upon motion made unto this Court by _____, Pleader of [or Counsel for] the Plaintiff A. B., and upon reading the petition of the said plaintiff in this matter filed [this day] [or the plaint filed in this suit on the _____ day of _____, or the written statement of the said plaintiff filed on the _____ day of _____] and upon hearing the evidence of _____ in support thereof [if after notice and defendant not appearing: add, and also the evidence of _____]

as to service of notice of this motion upon the defendant C. D.] : This Court doth order that an injunction be awarded to restrain the defendant C. D., his servants, agents and workmen, from pulling down or suffering to be pulled down, the house in the plaint in the said suit of the plaintiff mentioned [or in the written statement, or petition, of the plaintiff and evidence at the hearing of this motion mentioned], being No. 9, Oilmongers Street, Hindupur, in the Taluk of _____, and from selling the materials whereof the said house is composed, until the hearing of this suit or until the further order of this Court.

Dated this _____ day of _____ 19 _____.

Judge.

[Where the injunction is sought to restrain the negotiation of a note or bill, the ordering part of the order may run thus :—

to restrain the defendant _____ and _____
from parting with out of the custody of them or any of them or endorsing, assigning or negotiating the promissory note [or bill of exchange] in question, dated on or about the _____, etc., mentioned in the plaintiff's plaint [or petition] and the evidence heard at this motion until the hearing of this suit, or until the further order of this Court.

[In Copyright cases] _____ to restrain the defendant C. D., his servants agents or workmen, from printing, publishing or vending a book, called _____, or any part thereof, until the, etc.

[Where part only of a book is to be restrained]
to restrain the defendant C. D., his servants, agents or workmen, from printing, publishing, selling or otherwise disposing of such parts of the book in the plaint [or petition and evidence, etc.] mentioned to have been published by the defendant as hereinafter specified, namely, that part of the said book which is entitled _____

and also that part which is entitled _____ [or, which is contained in page _____ to page _____ both inclusive], until _____, etc.

[In Patent cases] _____ to restrain the defendant C. D. his agents, servants and workmen, from making or vending any perforated bricks [or as the case may be] upon the principle of the inventions in the plaintiff's plaint [or petition, etc., or written statement, etc.] mentioned, belonging to the plaintiffs, or either of them, during the remainder of the respective terms of the patents in the plaintiff's plaint [or as the case may be] mentioned, and from counterfeiting, imitating or resembling the same inventions, or either of them, or making any addition thereto, or subtraction therefrom, until the hearing, etc.

[In cases of Trade marks] _____ to restrain the defendant C. D., his servants, agents or workmen, from selling or exposing for sale, or procuring to be sold, any composition or blacking [or as the case may be] described as or purporting to be blacking manufactured by the plaintiff A. B., in bottles having affixed thereto such labels as in the plaintiff's plaint [or petition, etc.] mentioned, or any other labels so contrived or expressed as, by colourable imitation or otherwise, to represent the composition or blacking sold by the defendant to be the same as the composition or blacking manufactured and sold by the plaintiff A. B., and from using trade-cards so contrived or expressed as to represent that any composition or blacking sold or proposed to be sold by the defendant is the same as the composition or blacking manufactured or sold by the plaintiff A. B., until the, etc.

[To restrain a partner from in any way interfering in the business]

to restrain the defendant C. D., his agents and servants, from entering into any contract, and from accepting, drawing, endorsing or negotiating any bill of exchange, note or written security in the name of the partnership-firm of B. and D., and from contracting any debt, buying and selling any goods, and from making or entering into any verbal or written promise, agreement or undertaking, and from doing, or causing to be done, any act, in the name or on the credit of the said partnership-firm of B. and D., or whereby the said partnership-firm can or may in any manner become or be made liable to or for the payment of any sum of money, or for the performance of any contract, promise or undertaking until the, etc.

No. 9.*

APPOINTMENT OF A RECEIVER. (O. 40, r. 1.)

(Title.)

To _____
WHEREAS _____ has been attached in execution of a decree passed in the above suit on the _____ day of _____ 19 _____, in favour of _____ ;

* The last two forms were re-numbered "9 and 10" instead of "6 and 7" respectively by Act X of 1914, Sch. I.

You are hereby (subject to your giving security to the satisfaction of the Court) appointed receiver of the said property under Order XL of the Code of Civil Procedure, 1908, with full powers under the provisions of that Order.

You are required to render a due and proper account of your receipts and disbursements in respect of the said property on You will be entitled to remuneration at the rate of per cent. upon your receipts under the authority of this appointment.

GIVEN under my hand and the seal of the Court, this day of 19 Judge.

No. 10.*

BOND TO BE GIVEN BY RECEIVER. (O. 40, r. 3.)

(Title.)

KNOW all men by these presents, that we, and and are jointly and severally bound to of the Court of in Rs. to be paid to the said or his successor in office for the time being. For which payment to be made we bind ourselves, and each of us, in the whole, our and each of our heirs, executors and administrators, jointly and severally, by these presents.

Dated this day of 19

Whereas a plaint has been filed in this Court by against for the purpose of [*here insert the object of suit*]:

And whereas the said has been appointed, by order of the above-mentioned Court, to receive the rents and profits of the immoveable property and to get in the outstanding moveable property of in the said plaint named:

Now the condition of this obligation is such, that if the above-bounden shall duly account for all and every the sum and sums of money which he shall so receive on account of the rents and profits of the immoveable property, and in respect of the moveable property, of the said at such periods as the said Court shall appoint, and shall duly pay the balances which shall from time to time be certified to be due from him as the said Court hath directed or shall hereafter direct, then this obligation shall be void, otherwise it shall remain in full force.

Signed and delivered by the above-bounden in the presence of

Note.—If deposit of money is made, the memorandum thereof should follow the terms of the condition of the bond.

No. 11.

[*Allahabad*].—The security to be furnished under Order XXXVIII, rule 9, shall be, as nearly as may be, by a bond in the following form:—

In the Court of at Suit No. of 19

.. Plaintiff.

versus

.. Defendant.

Amount of suit, Rupees

Whereas in the suit above specified the plaintiff aforesaid, has applied to the said Court that the said defendant,, may be called on to furnish sufficient security to fulfil any decree that may be passed against him in the said suit, or that on his failure so to do, certain property of the said defendant,, may be attached:

And whereas, on the failure of the said defendant,, to furnish such security, or, show cause why it should not be furnished, the property aforesaid of the said defendant, has been attached by order of the said Court:

Therefore I, inhabitant of, have voluntarily become security and hereby bind myself, my heirs and executors, to as Judge of the said Court, and his successors in Office, that the said defendant, shall produce and place at the disposal of the said Court, when required, the property herein below specified, namely, (here give description of property or refer to an annexed schedule), or the value of the same, or such portion thereof as may be sufficient to fulfil such decree and shall when required pay the costs of the attachment, and in default of his so doing I bind myself, my heirs and executors, to pay to as Judge of the said Court and his successors in office on its order such sum to the extent of rupees (here enter a sufficient sum to cover the amount of suit with costs and the costs of the attachment) as the said Court may adjudge against the said defendant.

Witness my hand at this day of 19

(Signed)

Witnessess:

surety.

(Signed)

* The last two forms were renumbered "9 and 100" instead of "6 and 7" respectively by Act X of 1914, Sch. I.

No. 12.

The security to be furnished under Order XXXIX, rule 2 (2), shall be as far as may be, by a bond in the following form :—

In the Court of _____ at _____ Suit No. _____ of 19 ____
 .. Plaintiff
versus
 .. Defendant.

Whereas, in the suit above specified, instituted by the said plaintiff, to restrain the said defendant, _____, from (here state the breach of contract or other injury), the said Court has, on the application of the said Court has, on the application of the said plaintiff, granted an injunction to restrain the said defendant from the repetition (or the continuance) of the said breach of contract (or the wrongful act complained of), and required security from the said defendant against such repetition (or continuance):

Therefore I, _____, inhabitant of _____, have voluntarily become security and do hereby bind myself, my heirs and executors to _____ as Judge of the said Court and his successors in office that the said defendant _____ shall abstain from the repetition (or continuance) of the breach of contract aforesaid (or wrongful act, or from the committal of any breach of contract or injury of a like kind, arising out of the same contract, or relating to the same property or right), and in default of his so abstaining, I bind myself my heirs and executors to pay into Court, on the order of the Court such sum to the extent of rupees _____, as the Court shall adjudge against the said defendant.

Witness my hand at _____ this _____ day of _____ 19 ____
 Witnesses : _____ Surety.

APPENDIX G.

APPEAL, REFERENCE AND REVIEW

No. 1.

MEMORANDUM OF APPEAL. (O. 41, r. 1.)

(Title.)

The

_____ above-named appeals to the _____ of
 Court at _____ from the decree of _____ in Suit No. _____
 19, dated the _____ day of _____ 19, and sets forth
 the following grounds of objection to the decree appealed from, namely :—

No. 2.

SECURITY BOND TO BE GIVEN ON ORDER BEING MADE TO STAY EXECUTION OF DECREE.

(O. 41, r. 5.)

(Title.)

To

THIS security bond on stay of execution of decree executed by
 witnesseth :—

That _____, the plaintiff in Suit No. _____ of 19 ____, having sued _____, the defendant, in this Court and a decree having been passed on the _____ day of _____ 19 ____ in favour of the plaintiff, and the defendant having preferred an appeal from the said decree in the _____ Court, the said appeal is still pending.

Now the plaintiff decree-holder having applied to execute the decree, the defendant has made an application praying for stay of execution and has been called upon to furnish security. Accordingly I, of my own free will, stand security to the extent of Rs. _____, mortgaging the properties specified in the schedule hereunto annexed, and covenant that if the decree of the first Court be confirmed or varied by the Appellate Court the said defendant shall duly act in accordance with the decree of the Appellate Court and shall pay whatever may be payable by him thereunder, and if he should fail therein then and amount so payable shall be realized from the properties hereby mortgaged, any if the proceeds of the sale of the said properties are insufficient to pay the amount due, I and my legal representatives will be personally liable to pay the balance. To this effect I execute this security bond this _____ day of _____ 19 ____.

Schedule.

(Signed).

Witnessed by :—

- 1.
- 2.

No. 3.

SECURITY BOND TO BE GIVEN DURING THE PENDENCY OF APPEAL. (O. 41, r. 6.)

(Title.)

To

THIS security bond on stay of execution of decree executed by
witnesseth :—

That _____, the plaintiff in Suit No. _____ of 19 _____, having sued
the defendant, in this Court and a decree having been passed on the
day of _____ 19 _____ in favour of the plaintiff, and the defendant having preferred
an appeal from the said decree in the _____ Court, the said appeal is still pending.

Now the plaintiff decree-holder has applied for execution of the said decree and has
been called upon to furnish security. Accordingly I, of my own free will, stand security
to the extent of Rs. _____ mortgaging the properties specified in the schedule hereunto
annexed, and covenant that if the decree of the first Court be reversed or varied by the
Appellate Court, the plaintiff shall restore any property which may be or has been taken in
execution of the said decree and shall duly act in accordance with the decree of the
Appellate Court and shall pay whatever may be payable by him thereunder, and if he should
fail therein then any amount so payable shall be realized from the properties hereby
mortgaged, and if the proceeds of the sale of the said properties are insufficient to pay
the amount due, I and my legal representatives will be personally liable to pay the balance.
To this effect I execute this security bond this _____ day of _____ 19 _____.

Schedule.

Witnessed by

(Signed)

- 1.
- 2.

No. 4.

SECURITY FOR COSTS OF APPEAL. (O. 41, r. 10.)

(Title.)

To

THIS security bond for costs of appeal executed by _____ witnesseth :—

This appellant has preferred an appeal from the decree in Suit No. _____
of 19 _____, against the respondent, and has been called upon to furnish security. Accordingly
I, of my own free will, stand security for the costs of the appeal, mortgaging the proper-
ties specified in the schedule hereunto annexed. I shall not transfer the said properties
or any part thereof, and in the event of any default on the part of the appellant. I shall
duly carry out any order that may be made against me with regard to payment of the
costs of appeal. Any amount so payable shall be realized from the properties hereby mort-
gaged, and if the proceeds of the sale of the said properties are insufficient to pay the
amount due I and my legal representatives will be personally liable to pay the balance.
To this effect I execute this security bond this _____ day of _____ 19 _____.

Schedule.

(Signed).

Witnessed by

- 1.
- 2.

No. 5.

INTIMATION TO LOWER COURT OF ADMISSION OF APPEAL. (O. 41, r. 13.)

(Title.)

To

You are hereby directed to take notice that _____, the _____ in the
above suit, has preferred an appeal to this Court from the decree passed by you therein
on the _____ day of _____ 19 _____.

You are requested to send with all practicable despatch all material papers in the suit.

Dated the _____ day of _____ 19 _____.

Judge.

No. 6.

NOTICE TO RESPONDENT OF THE DAY FIXED FOR THE HEARING OF THE APPEAL.

(O. 41, r. 14.)

(Title.)

APPEAL from the
day of _____

of the Court of
19 _____

dated the _____

To

Respondent.
TAKE notice that an appeal from the decree of _____ in this case has been presented by _____ and registered in this Court, and that the _____ day of _____ 19 _____ has been fixed by this Court for the hearing of this appeal.
If no appearance is made on your behalf by yourselves, your pleader, or by some one by law authorised to act for you in this appeal, it will be heard and decided in your absence.
GIVEN under my hand and the seal of the Court, this _____ day of _____ 19 _____ Judge.

[Note.—If a stay of execution has been ordered, intimation should be given of the fact on this notice.]

No. 7.

NOTICE TO A PARTY TO A SUIT NOT MADE A PARTY TO THE APPEAL BUT JOINED
by the Court as a Respondent. (O. 41, r. 20.)
(Title.)

To

WHEREAS you were a party in Suit No. _____ of 19 _____, in the Court of _____ and whereas the _____ has preferred an appeal to this Court from the decree passed against him in the said suit and it appears to this Court that you are interested in the result of the said appeal :

This is to give you notice that this Court has directed you to be made a respondent in the said appeal and has adjourned the hearing thereof till the _____ day of _____ 19 _____, at _____ A.M. If no appearance is made on your behalf on the said day and at the said hour the appeal will be heard and decided in your absence.

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19 _____ Judge.

No. 8.

MEMORANDUM OF CROSS-OBJECTION. (O. 41, r. 22.)
(Title.)

WHEREAS the _____ Court at _____ has preferred an appeal to the _____ in Suit No. _____ of 19 _____, dated the _____ day of _____ 19 _____, and whereas notice of the day fixed for hearing the appeal was served on the _____ on the _____ day of _____ 19 _____, the _____ files this memorandum of cross-objection under rule 22 of Order XLI of the Code of Civil Procedure, 1908, and sets forth the following grounds of objection to the decree appealed from, namely :—

No. 9.

DECREE IN APPEAL. (O. 41, r. 35.)
(Title.)

Appeal No. _____ of 19 _____, from the decree of the Court of _____ dated the _____ day of _____ 19 _____.

[Memorandum of Appeal

.. Plaintiff
versus .. Defendant.

The _____ above-named appeals to the _____ Court at _____ from the decree of _____ in the above suit, dated the _____ day of _____ 19 _____, for the following reasons, namely :—]*

This appeal coming on for hearing on the _____ day of _____ 19 _____ before _____, in the presence for _____ for the appellant and of _____ for the respondent, it is ordered—

The costs of this appeal, as detailed below, amounting to Rs. _____ are to be paid by _____ . The costs of the original suit are to be paid by _____ .

GIVEN under my hand this _____ day of _____ 19 _____ Judge.

* Calcutta.—Omitted by the Rules of the Calcutta High Court.

Costs of Appeal.

Appellant.		Amount.			Respondent.		Amount.		
		RS.	A.	P.			RS.	A.	P.
1.	Stamp for memorandum of appeal.				Stamp for power	..			
2.	Do. for power ..				Do. for petition	..			
3.	Service of processes ..				Service of processes	..			
4.	Pleader's fee on Rs. ..				Pleader's fee on Rs.	..			
	Total ..				Total	..			

No. 10.

APPLICATION TO APPEAL IN FORMA PAUPERIS. (O. 44, r. 1.)

(Title.)

I, the above-named, present the accompanying memorandum of appeal from the decree in the above suit and apply to be allowed to appeal as a pauper.

Annexed is a full and true schedule of all the moveable and immoveable property belonging to me with the estimated value thereof.

Dated the _____ day of _____ 19____.

(Signed.) _____

[Note.—Where the application is by the plaintiff he should state whether he applied and was allowed to sue in the Court of first instance as a pauper.]

No. 11.

NOTICE OF APPEAL IN FORMA PAUPERIS. (O. 44, r. 1.)

(Title.)

WHEREAS the above-named _____ has applied to be allowed to appeal as a pauper from the decree in the above suit dated the _____ day of _____ 19____ and whereas the _____ day of _____

19 19 and whereas the day of

19 has been fixed for hearing the application, notice is hereby
given to you that if you desire to show cause why the applicant should not be allowed to
appeal as a pauper an opportunity will be given to you of doing so on the afore-
mentioned date.

GIVEN under my hand and the seal of the Court, this* day of 19 .
Judge.

No. 12.

NOTICE TO SHOW CAUSE WHY A CERTIFICATE OF APPEAL TO THE KING IN COUNCIL SHOULD NOT BE GRANTED. (O. 45, r. 3.)

(Title.)

To

TAKE notice that _____ has applied to this Court for a certificate that as regards amount or value and nature the above case fulfils the requirements of section 110 of the Code of Civil Procedure, 1908, or that it is otherwise a fit one for appeal to His Majesty in Council.

The _____ day of _____ 19____ is fixed for you
to show cause why the Court should not grant the certificate asked for.

GIVEN under my hand and the seal of the Court, this day of 19 .
Registrar.

No. 13.

NOTICE TO RESPONDENT OF ADMISSION OF APPEAL TO THE KING IN COUNCIL. (O. 45, r. 8.)
(Title.)

To

WHEREAS

in the above case, has furnished the security and made the deposit required by Order XLV, rule 7, of the Code of Civil Procedure, 1908 :

Take notice that the appeal of the said to His Majesty in
Council has been admitted on the day of 19 .
GIVEN under my hand and the seal of the Court, this day of 19 .

Registrar.

No. 14.

NOTICE TO SHOW CAUSE WHY A REVIEW SHOULD NOT BE GRANTED. (O. 47, r. 4.)
(Title.)

To

TAKE notice that has applied to this Court for a
review of its decree passed on the day of 19 in the
above case. The day of 19 is fixed for you to show
cause why the Court should not grant a review of its decree in this case.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

APPENDIX H.

MISCELLANEOUS.

No. 1.

AGREEMENT OF PARTIES AS TO ISSUES TO BE TRIED. (O. 14, r. 6.)

(Title.)

WHEREAS we, the parties in the above suit, are agreed as to the question of fact [or of law] to be decided between us and the point at issue between us is whether a claim founded on a bond, dated the day of 19 and filed as Exhibit in the said suit, is or is not beyond the statute of limitation (or state the point at issue whatever it may be):

We therefore severally bind ourselves that, upon the finding of the Court in the negative [or affirmative] of such issue, will pay to the said the sum of Rupees (or such sum as the Court shall hold to be due thereon,) and I, the said, will accept the said sum of Rupees (or such sum as the Court shall hold to be due) in full satisfaction of my claim on the bond aforesaid [or that upon such finding I, the said, will do or abstain from doing, etc., etc.].

Plaintiff.
Defendant.

Witnesses.—

- 1.
- 2.

Dated the day of 19 .

No. 2.

NOTICE OF APPLICATION FOR THE TRANSFER OF A SUIT TO ANOTHER COURT FOR TRIAL.
(SECTION 24.)

In the Court of the District Judge of

To No. of 19 .

WHEREAS an application, dated the day of 19 in Suit No. has been made to this Court by the of 19 now pending in the Court of the

at, in which is plaintiff and is defendant, for the transfer of the suit for trial to the Court of the at :—

You are hereby informed that the day of 19

has been fixed for the hearing of the application, when you will be heard if you desire to offer any objection to it.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 3.

NOTICE OF PAYMENT INTO COURT. (O. 24, r. 2.)

(Title.)

TAKE notice that the defendant has paid into Court Rs. _____ and says
that the sum is sufficient to satisfy the plaintiff's claim in full.

X. Y., Pleader for the defendant.

To Z., Pleader for the plaintiff.

No. 4.

NOTICE TO SHOW CAUSE. (GENERAL FORM.)

(Title.)

To

WHEREAS the above-named _____ has made
application to this Court that _____ ;

You are hereby warned to appear in this Court in person or by a pleader duly instruct-
ed on the _____ day of _____ 19____,
at _____ o'clock in the forenoon, to show cause against the application,
failing wherein, the said application will be heard and determined *ex parte*.

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19____
Judge.

No. 5.

LIST OF DOCUMENTS PRODUCED BY $\frac{\text{PLAINTIFF}}{\text{DEFENDANT}}$. (O. 13, r. 1.)

(Title.)

No.	Description of document.	Date, if any, which the document bears.	Signature of party or pleader.
1	2	3	4

[Allahabad.] LIST OF DOCUMENTS PRODUCED BY $\frac{\text{PLAINTIFF}}{\text{DEFENDANT}}$ (O. 13, r. 1.)

In the Court of

at

District

Suit No.

of 19 ____

.. Plaintiff.

versus.

.. Defendant.

versus..

List of documents produced with the plaint or at first hearing) on behalf of plaintiff
(or defendant).

This list was filed by _____ this _____ day of _____ 19 ____

Allahabad High Court Rules.—Add “and, it will be presumed that you consent to
be appointed guardian for the suit.”

Serial number.	Description and date, if any, of the document.	What became of the document.		Remarks.
1	2	3		4
		If brought on the record the exhibit mark put on the document.	If rejected, date of return to party, and signature of party or pleader to whom the document was returned.	If it remains on the record after decision of the case and is enclosed in an envelope, under rule 24, chapter III, the date of enclosure in the envelope.

Signature of party or pleader producing the list

No. 6.

NOTICE TO PARTIES OF THE DAY FIXED FOR EXAMINATION OF A WITNESS ABOUT TO LEAVE THE JURISDICTION. (O. 18, r. 16.)

(Title.)

To *plaintiff* (or *defendant*).

WHEREAS in the above suit application has been made to the Court by *plaintiff* (or *defendant*) that the examination of *plaintiff* (or *defendant*), a witness required by the said *plaintiff* (or *defendant*), in the said suit may be taken immediately; and it has been shown to the Court's satisfaction that the said witness is about to leave the Court's jurisdiction (or any other good and sufficient cause to be stated):

TAKE notice that the examination of the said witness *plaintiff* (or *defendant*) will be taken by the Court on the *day of* 19 *day of* 19 *day of* 19.

Dated the *day of* 19

Judge.

No. 7.

COMMISSION TO EXAMINE ABSENT WITNESS. (O. 26, rr. 4, 18.)

(Title.)

To

WHEREAS the evidence of *plaintiff* (or *defendant*) is required by the *plaintiff* (or *defendant*) in the above suit; and whereas *plaintiff* (or *defendant*); you are requested to take the evidence on interrogatories [or *viva voce*] of such witness *plaintiff* (or *defendant*), and you are hereby appointed Commissioner for that purpose. The evidence will be taken in the presence of the parties or their agents if in attendance, who will be at liberty to question the witness on the points specified, and you are further requested to make return of such evidence as soon as it may be taken.

Process to compel the attendance of the witness will be issued by any Court having jurisdiction on your application.

A sum of Rs. *plaintiff* (or *defendant*), being your fee in the above, is herewith forwarded.

GIVEN under my hand and the seal of the Court, this *day of* 19 *day of* 19 *day of* 19.

Judge.

No. 8.

LETTER OF REQUEST. (O. 26, r. 5.)

(Title.)

(Heading :—To the President and Judges of, etc., etc., or as the case may be.)

WHEREAS a suit is now pending in the *plaintiff* (or *defendant*) in which A. B. is plaintiff and C. D. is defendant; And in the said suit the plaintiff claims

(Abstract of claim.)

And whereas it has been represented to the said Court that it is necessary for the purposes of justice and for the due determination of the matters in dispute between the parties, that the following persons should be examined as witnesses upon oath touching such matters, that is to say :

E. F. of _____
 G. H. of _____ and
 I. J. of _____

And it appearing that such witnesses are resident within the jurisdiction of your honourable Court;

Now I _____, as the _____ of the said Court, have the honour to request, and do hereby request, that for the reasons aforesaid and for the assistance of the said Court, you, as the President and Judges of the said _____, or some one or more of you, will be pleased to summon the said witness (and such other witnesses as the agents of the said plaintiff and defendant shall humbly request you in writing so to summon) to attend at such time and place as you shall appoint before some one or more of you or such other person as according to the procedure of your Court is competent to take the examination of witnesses, and that you will cause such witnesses to be examined upon the interrogatories which accompany this letter of request (*or viva voce*) touching the said matters in question in the presence of the agents of the plaintiff and defendant or such of them as shall, on due notice given, attend such examination.

And I further have the honour to request that you will be pleased to cause the answers of the said witnesses to be reduced into writing, and all books, letters, papers and documents produced upon such examination to be duly marked for identification, and that you will be further pleased to authenticate such examination by the seal of your tribunal, or in such other way as is in accordance with your procedure, and to return the same, together with such request in writing, if any, for the examination of other witnesses to the said Court.

(Note.—If the request is directed to a Foreign Court, the words “through His Majesty’s Secretary of State for Foreign Affairs for transmission” should be inserted after the words “other witnesses” in the last line of this form.)

No. 9.

COMMISSION FOR A LOCAL INVESTIGATION, OR TO EXAMINE ACCOUNTS.

(O. 26, rr. 9, 11.)

(Title.)

To

WHEREAS it is deemed requisite, for the purposes of this suit, that a commission for _____ should be issued; You are hereby appointed Commissioner for the purpose of _____ Process to compel the attendance before you of any witnesses, or for the production of any documents whom or which you may desire to examine or inspect, will be issued by any Court having jurisdiction on your application.

A sum of Rs. _____, being your fee in the above, is herewith forwarded.

Given under my hand and the seal of the Court, this _____ day of _____ 19 ____ Judge.

No. 10.

COMMISSION TO MAKE A PARTITION. (O. 26, r. 13.)

(Title.)

To

WHEREAS it is deemed requisite for the purposes of this suit that a commission should be issued to make the partition or separation of the property specified in, and according to the rights as declared in, the decree of this Court, dated the _____ day of _____ 19 ____; You are hereby appointed Commissioner for the said purpose and are directed to make such inquiry as may be necessary, to divide the said property according to the best of your skill and judgment in the shares set out in the said decree, and to allot such shares to the several parties. You are hereby authorized to award sums to be paid to any party by any other party for the purpose of equalizing the value of the shares.

Process to compel the attendance before you of any witness, or for the production of any documents, whom or which you may desire to examine or inspect, will be issued by any Court having jurisdiction on your application.

A sum of Rs. _____, being your fee in the above, is herewith forwarded.

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19 ____ Judge.

No. 11.

NOTICE TO MINOR DEFENDANT AND GUARDIAN. (O. 32, r. 3.)

(Title.)

To

*Minor Defendant.
Natural Guardian.*

WHEREAS an application has been presented on the part of the plaintiff in the above suit for the appointment of a guardian for the suit to the minor defendant, you, the said minor, and you* are hereby required to take notice that unless within _____ days from the service upon you of this notice, an application is made to this Court for the appointment of you* _____ or of some friend of you, the minor, to act as guardian for the suit, the Court will proceed to appoint some other person to act as a guardian to the minor for the purposes of the said suit.

GIVEN under my hand and the seal of the Court, this _____ day of 19 ____ .
Judge.

No. 12.

NOTICE TO OPPOSITE PARTY OF DAY FIXED FOR HEARING EVIDENCE OF PAUPERISM.

(O. 33, r. 6.)

(Title.)

To

WHEREAS _____ has applied to this Court for permission to institute a suit against _____ *in forma pauperis* under Order XXXIII of the Code of Civil Procedure, 1908; and whereas the Court sees no reason to reject the application; and whereas the _____ day of 19 _____, has been fixed for receiving such evidence as the applicant may adduce in proof of his pauperism and for hearing any evidence which may be adduced in disproof thereof :

Notice is hereby given to you under rule 6 of Order XXXIII that in case you may wish to offer any evidence to disprove the pauperism of the applicant, you may do so on appearing in this Court on the said _____ day of 19 ____ .

GIVEN under my hand and the seal of the Court, this _____ day of 19 ____ .
Judge.

No. 13.

NOTICE TO SURETY OF HIS LIABILITY UNDER A DECREE. (SECTION 145.)

(Title.)

To

WHEREAS you _____ did on _____ become liable as surety for the performance of any decree which might be passed against the said _____ defendant in the above suit; and whereas a decree was passed on the _____ day of 19 _____ against the said defendant for the payment of _____, and whereas application has been made for execution of the said decree against you :

Take notice that you are hereby required on or before the _____ day of 19 _____ to show cause why the said decree should not be executed against you, and if no sufficient cause shall be, within the time specified, shown to the satisfaction of the Court, an order for its execution will be forthwith issued in the terms of the said application.

GIVEN under my hand and the seal of the Court, this _____ day of 19 ____ .
Judge.

* Insert the name of the guardian.

THE SECOND SCHEDULE.

ARBITRATION.

Arbitration in Suits.

1. (1) [S. 506.] Where in any suit all the parties interested agree that any matter in difference between them shall be referred to

Parties to suit may apply for order of reference.

arbitration, they may, at any time before judgment is pronounced, apply to the Court for an order of reference.

Para. 1. SCOPE OF THE SCHEDULE. See 29 C. 167=29 I. A. 51. Provisions should be strictly complied with. 49 I. C. 262=A. I. R. 1923 A. 65. See also 49 M. L. J. 812 (P.C.) A party to an agreement after the arbitrator proceeds to evidence, cannot withdraw from the arbitration. The Court cannot compel a private arbitrator to arbitrate against his will. 43 All. 101=18 A. L. J. 952.

FORM OF REFERENCE.—All parties interested must join in the application. See 47 C. 555; 27 C. L. J. 339; 42 M. 632=36 M. L. J. 538; 44 M. L. J. 359. A reference is bad if one interested party does not join. 17 M. L. J. 394; 29 A. 423; 64 I. C. 221; 79 I. C. 48. It is open to the parties to refer to arbitration only some of the disputes in a pending suit and the expression all the parties interested can only refer to the parties interested in the subject matter of the arbitration and not on the subject matter of the whole suit where the two are not identical. 104 I. C. 342=1927 Sind 239. (14 S. L. R. 156 Diss; A. I. R. 1923 Pat. 33; A. I. R. 1923 Mad. 502 Appr.). That one of the parties did not sign the petition of reference is not conclusive that he was not a party and the award will not be invalid by reason of such omission. 38 I. C. 226. Cl. (2) requiring application to be in writing is directory and not mandatory. 105 I. C. 105. A verbal submission to arbitration is valid even though there is a likelihood of a question of title to immoveable property being affected. 11 I. C. 481=14 C. L. J. 188; 34 I. C. 741=3 L. W. 375; 46 A. 208; 78 I. C. 378. When a reference to arbitration in a suit is a general one of the whole case the power of dealing with costs rests with the arbitrator. (91 P. R. 1888 Rel. on) 46 I. C. 182. The parties could ratify a reference to arbitration though the procedure laid down has not been strictly followed by appearing before the arbitrator and giving evidence. (30 A. 32; 27 C. 61 Ref.) 9 I. C. 412. A person having an option to avoid an award is deemed to have consented to it if he voluntarily submits to the proceedings before arbitrators. 19 I. C. 374=6 S. L. R. 146; 9 I. C. 522. A court executing a decree cannot refer a matter in the execution proceedings. 52 C. 559=87 I. C. 633.

INSOLVENCY PROCEEDINGS.—A Court cannot refer to arbitrators a proceeding in insolvency (88 P. R. 1887 referred to.) 50 P. R. 1916=34 I. C. 549.

OMISSION TO SIGN THE PETITION.—Sch. II, Para. 1 does not require an application in writing for an order of reference to arbitration should necessarily be signed by the parties to the suit agreeing to the reference. 43 Cal. 290=43 I. A. 1=20 C. W. N. 137=30 M. L. J. 67 (P. C.); 48 All. 237=24 A. L. J. 235=1916 All. 238.

MINOR PARTIES.—Where one of the parties to a suit being an infant, the agreement to refer was signed by the adult parties and by the guard-

ian *ad litem* of the infant and all the parties, including the guardian, appeared before the Judge and he thereupon, made an order of reference, the order was proper and the award thereon was not vitiated. 43 C. 290=43 I. A. 1=30 M. L. J. 67 (P. C.). A natural guardian can, on behalf of a minor, enter into an arbitration so as to be binding on minor if it is proper, reasonable and for the benefit of minor. 44 Bom. 202=22 Bom. L. R. 266; 11 I. C. 481=14 C. L. J. 188; 56 I. C. 593; 29 I. C. 800=8 Bur. L. T. 122. A minor is bound by an agreement of arbitration entered into by his predecessor in title. 50 I. C. 879=23 C. W. N. 293; 11 I. C. 481=14 C. L. J. 188. Where a minor, party to a reference, is not properly represented and his guardian fails in his duty to protect his interests, the award is not binding on the minors. 56 I. C. 593. Where some of the parties to a reference to arbitration are minors, it is the duty of the Court to ascertain if the reference is for the benefit of the minors. 15 S. L. R. 165=64 I. C. 50.

AUTHORITY OF PLEADERS.—Pleader must be expressly authorised to refer a matter. 29 A. 492. Unless he is authorised his signature will not bind his client. 29 A. 423. See 104 I. C. 202=1927 Lah. 362. One pleader appearing for another pleader cannot make a valid reference. 96 I. C. 277=1926 Lah. 563. The authority need not be in writing of the parties consenting to the reference. 23 B. 629. If a party knows about it and acquiesces in it, he cannot afterwards raise objection. 29 A. 429.

PARTIES-EFFECT OF NON-JOINDER OF SOME PARTIES.—When some of the depts. to a suit do not join in a reference to arbitration, the court should examine the facts of each case before coming to the conclusion that the arbitration is invalid. 39 All. 489=15 A. L. J. 427; 11 C. 37. Objections to the award on the ground of invalidity from any cause whatever should be decided by the Court which has made the order of reference to arbitration and by no other Court. 39 A. 489.

UNNECESSARY PARTIES.—A Hindu widow in possession of property in lieu of maintenance is not a necessary party to a suit for partition, and her not joining in a reference to arbitration in such a suit does not vitiate the award. 35 All. 107=11 A. L. J. 66.

DEATH OF A PARTY.—The death of one of the parties to an arbitration does not necessarily revoke the authority of the arbitrator. 33 All. 645=8 A. L. J. 678; 14 C. L. J. 188=11 I. C. 481.

Who is an interested party. See 24 A. 229; 32 A. 657; 39 A. 489; 27 C. L. J. 999; 25 C. L. J. 339. If all the parties interested at the time of the reference have not joined in the reference, the reference is invalid 8 A. L. J. 645=10 I. C. 559; 71 I. C. 326=1924 Cal. 353; 21 C. W. N. 387; 102 I. C. 26.

(2) Every such application shall be in writing and shall state the matter sought to be referred.

2. [S. 507.] The arbitrator shall be appointed in such manner as may be agreed upon between the parties.

Appointment of arbitrator.

Subsequent agreement cannot make the reference, valid 48 All. 239=24 A. L. J. 235=1926 All. 238. A reference, however, made by father of a joint Hindu family is binding on sons unless fraud is proved. 104 I. C. 202=1927 Lah. 362. Where a claimant objects to the attachment of property in execution of a decree and the matter is referred to arbitration the judgment debtor is a necessary party to the reference. 64 I. C. 469. A person who is not a necessary party is not a person interested within para. 1. 42 M. 632=36 M. L. J. 538. A Court has no jurisdiction to make an order of reference without the consent of all the parties, and an award made on such reference is illegal, 55 I. C. 747=47 Cal. 555=31 C. L. J. 150; 43 I. C. 169=27 C. L. J. 339; 41 I. C. 295=25 C. L. J. 339=21 C. W. N. 387; 61 I. C. 221; 9 C. W. N. 873; 61 I. C. 451; 45 I. C. 321; 49 A. 812; 25 A. L. J. 606=102 I. C. 236=1927 All. 563. Whether an order of reference to arbitration made by the Court on application of the plaintiff and one of the defendants is legal. See 44 I. C. 480. A defendant who is *ex parte* may be a party "interested" within Sch. II, Para. 1, (32 A. 657; 30 A. 486; 18 M. L. J. 374 Diss. 27 C. L. J. 339; 25 C. L. J. 339 Foll.) 42 Mad. 632=36 M. L. J. 538; 22 L. W. 395=1925 Mad. 1209; 96 I. C. 273 (1)=23 L. W. 769; 50 M. L. J. 100. An award is not invalid because certain defendants having no interest in the suit or only nominally on the record do not join in the reference to arbitration by the other parties. 36 Mad. 353=21 M. L. J. 990; 76 I. C. 2=5 Pat. L. T. 239=2 Pat. 777; 48 All. 239=91 I. C. 930=1926 All. 238=24 A. L. J. 235. But see 48 M. L. J. 142=1925 Mad. 621. A person having a limited interest in the land cannot by a reference to arbitration confer on him an authority to alienate a more extensive interest than he himself has. 25 I. C. 949.

PRIVATE REFERENCE.—Parties can refer disputes to private arbitration though a suit between them is pending. They need not apply to the Court for the purpose. 33 I. C. 67=19 M. L. T. 228. 23 M. L. J. 290=16 I. C. 478. See also 27 All. 53; But see 30 Cal. 218; 37 Cal. 63; 29 Cal. 167. But the same arbitration cannot relate to matters within and without jurisdiction between parties and non-parties and partly under agreement and partly under order of reference. 53 Cal. 258=53 I. A. 1=43 C. L. J. 14=92 I. C. 633=A. I. R. 1925 P. C. 293 (P. C.) Though some of the parties have not joined in the reference of the dispute to arbitration, the award does not become invalid or ineffectual as between the persons making the reference. The award is binding on them especially when it has been acted upon. 71 I. C. 860.

REFERENCE TO COURT.—When a suit is not maintainable under the law an agreement by a party to abide by the decision of the Court cannot be binding. 21 I. C. 958=19 C. W. N. 1141. The parties may appoint court as arbitrator and if the judge accepts his award is final and is not open to appeal, 26 M. 76; 23 B. 752; 37 M. L. J. 100. Though the Government orders prohibits

such acceptance. 44 M. L. J. 258; 43 A. 266. See also 42 M. 625; 38 C. 421. In case of reference to Chamber of Commerce Rules of the Chamber are binding on the parties. See 30 I. C. 681=42 Cal. 1140=19 C. W. N. 820=21 C. L. J. 584.

SUBJECT OF REFERENCE.—A portion of the claim under reference to an arbitration cannot be withdrawn without the consent of the other party 46 I. C. 477=28 C. L. J. 275. The jurisdiction of Courts to refer to arbitration is confined to matters in difference in the suit itself. 14 L. W. 666=65 I. C. 92. An award under an invalid reference being itself invalid gives no rights either as an award or as a compromise. (*Ibid.*) Where parties apply to the Court to refer to the arbitration of a particular person the words used in the application should not be interpreted in a narrow sense but should be taken to mean that the parties are desirous of having the whole dispute settled by the arbitrator and therefore he could award damages. 15 I. C. 321.

VALIDITY OF REFERENCE.—Validity of reference—Pending reference to High Court—jurisdiction—Separate suit, if lies. 19 A. L. J. 876=44 A. 91. The provisions of para. 1 of Sch. II must be strictly complied with, in order that there might be a valid reference. 25 C. W. N. 832. See also 60 I. C. 195=24 C. W. N. 775. Where a pleader signed a reference on behalf of a party but his vakalatnama did not contain a power to refer to arbitration, held, the reference was not valid so far as that party is concerned. 25 C. W. N. 832. Successive disputes as they arise may be referred, and successive awards passed. 60 I. C. 195=24 C. W. N. 775. The arbitration is not revoked by the death of one of the parties if there is an agreement among the parties to bind themselves and their representatives-in-interest by the arbitration. (11 I. C. 481 Rel. on.) 15 C. L. J. 360=13 I. C. 161. To constitute a valid reference to arbitration it is enough if all the parties to suit interested in the subject-matter agree to the reference. (42 M. 632=47 Cal. 555 Foll.) 44 M. L. J. 359=17 L. W. 424=1923 Mad. 502. The High Court will not interfere in revision with an award on the ground that certain exonerated defendants were not parties to the reference when no such objection had been taken to the award in the Court below. 44 M. L. J. 359 *supra*. Absence of one of the arbitrators at one of the meetings at which, it is shown, that nothing material was done, does not make the award invalid. 12 L. W. 505=60 I. C. 181. It is within Court's jurisdiction on equitable grounds to restrain the defendant from proceeding to arbitration when an action brought impeaches the instrument containing the agreement for reference. 70 I. C. 864=15 S. L. R. 5. Revocation of arbitrator's authority. See 29 C. 278; 27 M. 112; 4 P. L. J. 394.

Para. 2.—In order that a reference may be made under R. 2 all parties must join in the application to the Court. It is not enough if the petition is signed by all. (29 C. 167; 26 M. 47. 9 C. W. N. 873 Foll.) 17 P. R. 1911=9 I. C. 195. The Commissioner merely submits his report for

3. [S. 508.] (1) The Court shall, by order, refer to the arbitrator the matter in difference which he is required to determine, and shall fix such time as it thinks reasonable for the making of the award, and shall specify such time in the order.

(2) Where a matter is referred to arbitration, the Court shall not, save in the manner and to the extent provided in this schedule, deal with such matter in the same suit.

Where reference is to two or more, order to provide for difference of opinion.

4. [S. 509.] (1) Where the reference is to two or more arbitrators, provision shall be made in the order for a difference of opinion among the arbitrators—

- (a) by the appointment of an umpire ; or
- (b) by declaring that, if the majority of the arbitrators agree, the decision of the majority shall prevail ; or
- (c) by empowering the arbitrators to appoint an umpire ; or
- (d) otherwise as may be agreed between the parties or, if they cannot agree, as the Court may determine.

(2) Where an umpire is appointed, the Court shall fix such time as it thinks reasonable for the making of his award in case he is required to act.

Power of Court to appoint arbitrator in cer

5. [S. 510.] (1) In any of the following cases, namely :—

the approval of the Court and he has no greater power than what the parties and the Court choose to give him. 25 I. C. 227.

Para. 3. MATTER IN DIFFERENCE.—When the order states that "all matters in difference in the suit are referred," the arbitrators should ascertain upon what points the parties are at issue. 2 N. W. P. 150. The decision of arbitrators upon a matter not in difference between the parties, not referred to them, is null and void. 15 W. R. 172. The arbitrators have no implied power to deal with the question of costs 7 B. 82. The Court will not confirm an order made by the arbitrators making payment of their fees a condition precedent to hearing the reference. 6 C. 809.

MAKING OF THE AWARD.—The word "making" has been substituted for the word "delivery" to give effect to the decisions in 22 M. 22 ; 26 A. 105. See also 13 B. 119.

Para. 3, Cl. (2).—Cl. (2) has the effect to rigidly restricting the Courts to the exact procedure laid down in this schedule. 10 B. 381.

PRACTICE AND PROCEDURE.—It is the duty of the Court to appoint a date within which to make the award. 46 I. C. 324=5 O. L. J. 205. See also 13 All. 300 ; 18 Mad. 22. Where the Court had fixed no time for making the award but had fixed one for filing it, *held*, that the award filed before the latter date is not invalid. 20 I. C. 773=16 O. C. 233. See also 46 I. C. 324=5 O. L. J. 205 ; 37 I. C. 844. Time for submission of award—Extension by arbitrators themselves—Propriety of. 27 C. W. N. 420=1923 Cal. 410. The law gives the parties the right to have the matter submitted to arbitration at any time before the judgment is pronounced. 24 I. C. 610. A party cannot resile from a reference to arbitration at his sweet will and pleasure. 17 O. C. 386=27 I. C. 424. The appropriate time for entertaining charges of misconduct against an arbitrator is when the award has been filed. 27 C. W. N. 420=1923 Cal. 410.

Para. 4.—An award is not invalid in case the order of reference does not provide for a differ-

ence of opinion between the arbitrators, when there is no difference of opinion among them. 17 W. R. 30. That there is no provision made for the appointment of an umpire in case of difference of opinion among arbitrators, does not make the submission bad on that account. 13 I. C. 161=15 C. L. J. 360. Award of umpire without consultation with arbitrators is good. 55 P. R. 1915=30 I. C. 87. In case where arbitrators are empowered to appoint an umpire from seven persons named in the order of reference, they cannot appoint a person not named. 7 M. H. C. R. 72. A majority award is not bad even in the absence of a specific provision to that effect in the reference. 40 I. C. 646=21 C. W. N. 895. But see next case. Where a dispute is referred to several arbitrators and the deed of reference does not provide for the prevalence of the views of the majority in the case of the decision not being unanimous, a majority award cannot be maintained. 49 I. C. 522. Where parties have entered into an agreement to be bound by the opinion of the majority of arbitrators, the omission of the Court to record that fact in the order of reference does not vitiate the arbitration. 23 I. C. 842. In the absence of a clause providing for an award made by less than all being valid, each of them must act personally as if he were the sole arbitrator. For as the office is joint if one refuse or omit to act, the others can make no valid award. 17 I. C. 320=16 O. C. 94. In case no provision is made that the decision of the majority of arbitrators should be binding, and two out of five arbitrators withdraw, a decision by the majority is invalid. 7 M. 174 ; 4 M. 311 ; 17 B. 129.

Para. 4, Cl. (2).—The Court can extend the time allowed. 4 M. 311.

Para. 5. SCOPE.—The section applies to cases where the arbitrator accepts and afterwards refuses to act. 6 M. 414 ; 48 C. 324 (327). A reference to arbitration stands on the same footing as all other lawful agreements and cannot be revoked by a party except on good cause. 22 I. C. 548=(1914) M. W. N. 52. See also 64 I. C.

(a) [S. 507, cl. (2).] Where the parties cannot agree within a reasonable time with respect to the appointment of an arbitrator, or the person appointed refuses to accept the office of arbitrator, or

(b) where an arbitrator or umpire—

(i) dies, or

(ii) [S. 510.] refuses or neglects to act or becomes incapable of acting, or

(iii) leaves British India in circumstances showing that he will probably not return at an early date, or

(c) [S. 511.] where the arbitrators are empowered by the order of reference to appoint an umpire and fail to do so,

any party may serve the other party or the arbitrators, as the case may be, with a written notice to appoint an arbitrator or umpire.

(2) If, within seven clear days after such notice has been served or such further time as the Court may in each case allow, no arbitrator or no umpire is appointed, as the case may be, the Court may, on application by the party who gave the notice, and after giving the other party an opportunity of being heard, appoint an arbitrator or umpire or make an order superseding the arbitration, and in such case shall proceed with the suit.

Powers of arbitrator or umpire appointed under paragraph 4 or 5.

6. [S. 512.] Every arbitrator or umpire appointed under paragraph 4 or paragraph 5 shall have the like powers as if his name had been inserted in the order of reference.

Summoning witnesses and default.

7. [S. 513.] (1) The Court shall issue the same processes to the parties and witness whom the arbitrator or umpire desires to examine, as the Court may issue in suits tried before it.

459 = 19 A. L. J. 823. Where in fact the reference to arbitration has become impossible and by implication the Court has superseded it, the jurisdiction of the Court to try the issue between the parties is not affected. But where the proceeding is still pending before the arbitrators, Court has no jurisdiction to try the case. 5 Pat. L. J. 672 = 57 I. C. 473 ; 16 I. C. 277 = 10 A. L. J. 23. The Court can revoke an arbitration only in the cases specified in paragraphs 5, 8 and 15. 39 M. L. T. 195 = 105 I. C. 92 = A. I. R. 1927 Mad. 110. The fact that one of three arbitrators gave evidence before the others, does not constitute misconduct on the part of the arbitrators so as to vitiate their award. 40 I. C. 646 = 21 C. W. N. 895. Where one of the parties to an arbitration deliberately absents himself from the hearing, the award concluded in his absence is not bad. (*Id.*) "Refuses to act," meaning of. 7 A. 20 ; 7 A. 523 ; 10 A. 137 ; 1 A. L. J. 683. The mere fact that an arbitrator has declined to sign an award made by a majority of arbitrators does not show that he has refused to act. 1 A. L. J. 683. A refusal to accept by some arbitrators makes the award of the rest illegal. 21 M. L. J. 263 = 9 I. C. 173 (F. B.). The appointment of a new arbitrator in place of one who refused to act must be made by both the parties. 112 P. R. 1918 = 48 I. C. 395.

Cl. (1) (b).—According to the true construction of S. 5 the Court may appoint a new arbitrator in the place of one who has refused nomination, for that is a refusal to act within the meaning of the section. (6 Mad. 414 ; 18 Cal. 324, overruled.) 43 A. 743 = 38 I. A. 181 = 15 C. W. N. 1005 = 21 M. L. J. 1151 (P. C.). A Court appointing fresh arbitrator, on refusal of first arbitrator without giving notice to the other

party acts with material irregularity. 50 I. C. 655 = 17 A. L. J. 643. An arbitrator failing to submit his award within the time fixed may be held to have refused or neglected to act within para. 5 (b) so that if another arbitrator is appointed without formally discharging the former, the appointment cannot be questioned. 23 I. C. 842. Where two arbitrators were appointed to decide a case and one of them withdraws pending the arbitration the remaining arbitrator cannot proceed with the case and file an award. 56 I. C. 644 = 2 Lah. L. J. 637 ; 17 I. C. 389 = 24 M. L. J. 15.

BECOMES INCAPABLE OF ACTING.—When person goes away from the country and remains away, and there is no evidence to show an intention to return, that person becomes incapable of acting. 4 B.L.R. O. C. 89. Arbitrators could not delegate the powers conferred on them. 17 B. 129. The performance of acts of a ministerial character may be delegated. 29 C. 854 (P.C.). Where only one arbitrator is appointed to decide a matter, no umpire can be appointed. 25 W. R. 11.

Sub-para. (2).—See 1 C. 200 ; 11 M.L.J. 128 ; 23 W. R. 221 ; 6 C.L.R. 1 ; 24 A. 312 ; 16 I. C. 177 = 10 A. L. J. 23. When the agreement to refer does not give the Court any power to appoint an umpire, the Court could not appoint one. 8 A. 64. When a party selects an arbitrator he cannot subsequently ask the Court to select another on the ground that the arbitrator whom he selected turned out to be a friend of the opposite party. 3 A. L. J. 185.

Para. 7.—There is nothing illegal in the parties to an arbitration agreeing before the Panchayat-dars to have evidence taken after the administration of any reasonable form of oath to the

(2) Persons not attending in accordance with such process, or making any other default, or refusing to give their evidence, or guilty of any contempt to the arbitrator or umpire during the investigation of the matters referred, shall be subject to the like disadvantages, penalties and punishments, by order of the Court on the representation of the arbitrator or umpire, as they would incur for the like offences in suits tried before the Court.

8. [S. 514.] Where the arbitrators or the umpire cannot complete the award within the period specified in the order, the Court may, if it thinks fit, either allow further time, and from time to time, either before or after the expiration of the period fixed for the making of the award, enlarge such period; or may make an order superseding the arbitration and in such case shall proceed with the suit.

9. [S. 515.] Where an umpire has been appointed, he may enter on the reference in the place of the arbitrators,—

(a) if they have allowed the appointed time to expire without making an award, or

(b) if they have delivered to the Court or to the umpire a notice in writing stating that they cannot agree.

10. [S. 516.] Where an award in a suit has been made, the persons who made it shall sign it and cause it to be filed in Court, together with any depositions and documents which have been taken and proved before them; and notice of the filing shall be given to the parties.

witnesses. (4 A. 283, F.) 29 I.C. 49=2 L.W. 320. The words 'refusing to give their evidence' are intended to refer to the case of a person who refuses to give evidence when placed on oath and required to answer questions put to him. 11 I.C. 259=8 A. L. J. 929.

Para. 8.—A Court can act under this section at any time before the award is actually made. 14 A. 343. Time can be extended only before the award has been made and filed. 9 I. C. 241. The time for filing an award may be extended by the Court either before or after the expiration of the period fixed for the making of the award. But the extension must be made before the award is delivered. 45 Bom. 1071=23 Bom. L. R. 614. An application for extension of time must be made in writing. 3 M. 59. The power of extending time vested in Court, is permissive and discretionary and the provision does not negative the right to extend time by agreement and acquiescence of parties. 50 I. C. 52=4 P. L. J. 265. An order of a Court permitting the arbitrator to enlarge time for making an award is not *ultra vires* and there is no objection to the Court's delegation, with the consent of parties, functions regarding enlargement of time. 31 I.C. 597=19 C. W. N. 165. An award which is not delivered within the time fixed by the Court is a nullity. 55 I. C. 221. But see 27 I. C. 233=18 C. W. N. 325. Award filed after the time fixed—Not a nullity. 44 P. W. R. 1916=34 I. C. 177=56 P. L. R. 1917. See also 52 I. C. 352. If the arbitrators do not submit their award within time the Court may supersede the arbitration and proceed with the suit. 57 I. C. 890. When the Court without extending the time for submission of an award proceeded to deal with the suit, there was in effect an order superseding arbitration and no formal order to the effect was necessary. 21 I. C. 558=(1913) M. W. N. 863. See also 5 P. L. J.

672=57 I. C. 473. Where an order of supersession was passed on the date fixed but the award reached the court the same day after passing of the order the Court would be justified in setting aside its order of supersession. 17 I. C. 320=16 O. C. 94. Date fixed for filing of award—Non-appearance of parties—Dismissal of suit is bad. 3 Pat. L. T. 346=65 I. C. 144. Where parties submit their difference to arbitration, they cannot be allowed to revoke or withdraw from the submission except for very good cause. 48 I. C. 711=4 P. L. J. 394. Delay in making an award by the arbitrators caused by the voluntary absence of one of the parties who now seeks to impugn the award is not enough to justify the Court in refusing to file the award on the ground of delay. (*Ibid.*)

Para. 9.—In case where arbitrators are unable to decide the case, the award of the umpire alone is valid. 4 M. 311.

Para. 10. SCOPE AND ILLUSTRATIVE CASES.—The provisions of the rule are mandatory. 17 I. C. 430=15 O. C. 294. The duty imposed upon the arbitrator by this rule can be enforced by an order of Court made upon the arbitrator. 17 C. 832 (\$39). Whether omission to file depositions and documents invalidates the award, see 93 I. C. 446 (2)=1926 Oudh 307=1 Luck. 139. The arbitrators may deliver their award to a third person to be filed in Court. 5 B.L.R. 357. The court is bound to give notice to the parties of the filing of the award. 20 A. 474. Omission to give notice is a serious irregularity and is a good ground for revision. 94 I. C. 115=1926 Cal. 1018. Notice is not necessary where the parties are present in Court when the award is filed or where they have come to know of the award otherwise. 21 I.C. 298=310 P.L.R. 1913. See also 28 Bom. L. R. 511=95 I. C. 547=1926 Bom. 312. Notice to pleaders sufficient.

11. [S. 517.] Upon any reference by an order of the Court, the arbitrator or umpire may, with the leave of the Court, state the award as to the whole or any part thereof in the form of a special case for the opinion of the Court, and the Court shall deliver its opinion thereon, and shall order such opinion to be added to and to form part of the award.

Statement of special case by arbitrators or umpire.

12. [S. 518.] The Court may, by order, modify or correct an award,—

(a) where it appears that a part of the award is upon a matter not referred to arbitration and such part can be separated from the other part and does not affect the decision on the matter referred ; or

(b) where the award is imperfect in form, or contains any obvious error which can be amended without affecting such decision ; or

(c) where the award contains a clerical mistake or an error arising from an accidental slip or omission.

13. [S. 519.] The Court may also make such order as it thinks fit respecting the costs of the arbitration where any question arises respecting such costs and the award contains no sufficient provision concerning them.

Order as to costs of arbitration.

45 C. L. J. 458=1927 Cal. 619. Pleadings of parties suing the award and initialling the order sheet amount to waiver of notice. 95 I. C. 321= (1926) P. H. C. C. 161=A. I. R. 1927 Pat. 135. In case a decree is passed without notice of the filing of the award being given to the parties, the decree is invalid. 11 M. 144 ; 62 I. C. 849=24 O. C. 263 ; 89 I. C. 240=1925 Lah. 619. The Court cannot pass a decree in terms of an award before the expiry of 10 days allowed by Art. 158 of the Lim. Act. An agreement not to object to the award does not cover illegalities. 45 Mad. 465=71 I. C. 266=1922 Mad. 179. The draft award signed by the arbitrators is the award. 1 M. H. C. 178. The arbitrators need not sign the award at the same time and in the presence of each other. 18 M. 22 ; 29 B. 36. When two out of three arbitrators alone sign the award and file it in Court, and the third signs it after it is filed, the award is invalid. 33 C. 498. See also 1 P. L. J. 306=35 I. C. 358. After an award is made the arbitrators have no power to review it. 9 C. 575. Award signed by arbitrators—Subsequent change of opinion by one of them—Legality. 11 I. C. 481=14 C. L. J. 188. Rejection of an application for further time to file objections—Effect of. 45 Mad. 466=71 I. C. 266. See also 24 O. C. 234=64 I. C. 90=8 O. L. J. 626. Where the parties agree to be bound by the decision of the majority of arbitrators, the refusal of the minority to sign the award will not invalidate the proceedings provided there was a decision of the majority after full discussion by the whole body of arbitrators. 1 P. L. J. 90=34 I. C. 105.

Para. 11. SCOPE.—1925 Bom. 22. Award may be made in the form of a special case. 52 C. 100=1925 Cal. 599. The arbitrators cannot apply to the Court for confirmation of an order passed by them making payment of their fees a condition precedent to the hearing of the reference. 6 C. 899.

Para. 12.—Where one portion of the award related to matters referred, and another portion went beyond the strict terms of the reference, but the two portions are clearly separable, the whole award is not invalid. 29 C. 854 (P. C.). If some

portion of the award refers to extraneous matters it can be separated from other portions, provided it does not attack the decision relating to matters of reference. 2 Pat. 777=76 I. C. 2=5 Pat. L. T. 239. An award should be construed not by oral evidence given by the arbitrators, but by looking at the language of the award itself. 3 N. W. P. 117 ; 20 A. 245. Paras. 12 and 14 do not apply to an award made without the intervention of the Court. In such a case the Court has no power to amend or remit the award. (27 A. 526, approved) 14 I. C. 978=5 Bur. L. T. 55. Modifications and corrections of the award by the Court must be confined to para. 12 and if a Court goes beyond that and make substantial modifications because it takes a different view from that held by the arbitrator as to what was just and fair, it acts without jurisdiction. 78 P. R. 1916=35 I. C. 887. The award in accordance with which the Court has to pronounce judgment is the one that embodies the real intention of the parties. 19 I. C. 496=24 M. L. J. 483. The Court is bound to correct any obvious mistakes or slips in an award as in the case of decrees. 19 I. C. 496=24 M. L. J. 483. Award—Reference to Commissioner for taking accounts—Report—Procedure. 22 Bom. L. R. 1416=45 Bom. 512. Dissolution of partnership—Power to award interest. 56 I. C. 941. An arbitrator has no power to review his own award. 99 P. R. 1917=43 I. C. 350. Material irregularity on the part of the Court in dealing with objections to an award of arbitrators is a ground for revision. 78 P. R. 1916=35 I. C. 887.

Para. 13.—If the submission does not leave the question of costs to the arbitrators they can not decide it. 9 B. 82. When under the reference all matters in dispute between the parties are referred, the arbitrators can deal with the question of costs. 1 B. L. R. (O. C.) 144. The Court can award arbitration fees as costs in a suit where no award is made or where it is silent though an award has been made. 19 I. C. 611=6 S. L. R. 226. The costs incurred in processes of obtaining an order from the Court are within the discretion of the Court, and outside the

Where award or matter referred to arbitration may be remitted.

14. [S. 520.] The Court may remit the award or any matter referred to arbitration to the reconsideration of the same arbitrator or umpire, upon such terms as it thinks fit,—

- (a) where the award has left undetermined any of the matters referred to arbitration, or where it determines any matter not referred to arbitration, unless such matter can be separated without affecting the determination of the matters referred ;
- (b) where the award is so indefinite as to be incapable of execution ;
- (c) where an objection to the legality of the award is apparent upon the face of it.

province of arbitrators but an award is not bad merely because of their inclusion. 27 I. C. 526 = 8 S. L. R. 136

Para. 14. SCOPE.—This section does not apply to arbitrations under the Arbitration Act of 1899 (IX of 1899). 29 C. 793 ; nor to awards on private references. 14 I. C. 978 ; 24 I. C. 132 ; 34 I. C. 355. An award should not be remitted for reconsideration in the light of legal opinion obtained by one of the parties. 2 A. 181. *See also* 16 Cal. 806. A portion only of the award cannot be remitted. 24 A. L. J. 705 = 96 I. C. 531 = 1926 All. 567. An award is not invalid if it refers the parties to a regular suit concerning certain matters. 15 M. 348. The legality of an order remitting an award for the reconsideration of the arbitrators may be challenged on appeal against the decree ultimately passed. 22 M. 202. *See also* 3 A. 636. A document although headed as an award and signed by the arbitrators, which merely recommended a solution of the matters referred, will not be treated as an award. 11 C. 356. In case the arbitrators refuse to reconsider an award remitted to them, Court may set aside the award under S. 15. If it does so it should decide the case itself. 16 C. 806.

ILLUSTRATIVE CASES.—Evidence taken by some only of the arbitrators—Award is invalid. 45 I. C. 34 = 16 A. L. J. 307. Court could set aside an award if there was an error of law patent on the face of it as misconstruction of documents. 44 Bom. 780 = 21 Bom. L. R. 1037. Acting on evidence adduced by one party behind the back of the other vitiates the award. 64 I. C. 363 = 22 P. L. R. 1922. Where parties agree to refer their dispute to an arbitrator they ought not to be allowed to resile from the position which they took at the time of the reference. 15 I. C. 321. Merely technical objections should not be allowed to disturb an award, which is fairly made. (*Ibid.*) Parties representing whole property to be theirs—Third persons interested in the property—Party to reference cannot challenge the award on that ground. 4 P. 670 = 1925 Pat. 810. An obvious slip on the part of the arbitrator, *see* 52 I. C. 100 = 1925 Cal. 599. Where a portion of the award is in excess of the reference, it is open to the Court to pass a decree and enforce the award so far as it relates to the dispute between the parties. 1 Bur. L. J. 265 = 72 I. C. 193 = 1923 Rang. 130.

Cl. (a).—Where the parties to arbitration withdraw certain questions they cannot be allowed to say that they are not decided. 38 All. 380 = A. L. J. 481. Arbitrators have jurisdiction to decide whether they should award interest and an award of interest does not invalidate the award. 46 Cal. 534 = 23 C. W. N. 704. An award must conform both in form and substance to the submission. 31 I. C. 33 = 22 C. L. J. 237.

An award is bad if it goes beyond the scope of the reference. 26 I. C. 73. Mistake of law on a legal point referred to an arbitrator does not vitiate his award. 26 I. C. 697 = 19 C. W. N. 476. A Court may remit an award on ground of some matters being left out. 23 I. C. 862. An arbitrator is not bound by the rules of practice adopted in Courts but he cannot go beyond the questions submitted to him. 15 C. L. J. 110 = 16 C. W. N. 256. When an award deals with a matter extraneous to the reference which matter can be separated therefrom the Court may modify the award or may remit it to the arbitrators for correction. 76 I. C. 1007 = 1923 Lah. 411 ; 66 P. R. 1915 = 31 I. C. 80. An arbitrator appointed to decide whether a sale should be set aside is competent to set aside if the vendor repays the purchase-money. 15 I. C. 573 = (1912) M. W. N. 901. When the valid part of an award is separable from the invalid part the award should be declared valid to that extent but where misconduct is proved, the whole award is invalid. 14 I. C. 978 = 5 Bur. L. T. 55. A refusal of a Court to remit an award is unappealable. 15 I. C. 573 = (1912) M. W. N. 901. When arbitrators have to decide disputes between firms they must inquire who the partners are, to discover whether they have jurisdiction, whom they must serve with notices and the scope of their inquiries. 9 I. C. 712 = 4 S. L. R. 196. The fact that the arbitrators have taken evidence on matters outside their jurisdiction will not necessarily invalidate the award or make the proceedings improper, if the award is within jurisdiction. 9 I. C. 712 = 4 S. L. R. 196.

Cl. (b).—An award against a firm is not bad and is governed by the provisions relating to the execution of a decree against a firm. 56 I. C. 325 = 47 Cal. 29. Where the arbitrators give rules for calculation without giving the actual result, it can be considered as sufficiently certain if the actual result may be worked out. 13 I. C. 161 = 15 C. L. J. 360. An award should be a final decision on all matters referred to the arbitrator. Where it leaves undecided one of the cardinal points in controversy the award is bad. 10 I. C. 450 = 13 C. L. J. 399 ; 92 P. R. 1913. It should be signed by all the arbitrators at the same time and place. 92 P. R. 1913 = 22 I. C. 811. But *see* 45 I. C. 154. Private arbitration—Omission to determine some of the questions—Court not empowered to remit—Refusal. 48 I. C. 711 = 4 Pat. L. J. 394. Uncertain award—Setting aside of. 34 I. C. 355 = 3 O. L. J. 137.

Cl. (c).—The error of law must be apparent on the face of the award or from any document or paper connected with or forming part of the award. *See* 49 C. 646 ; 52 C. 100 ; 24 A. L. J. 480 ; 78 I. C. 230 ; 78 I. C.

15. [S. 521.] (1) An award remitted under paragraph 14 becomes void on failure of the arbitrator or umpire to reconsider it. But no award shall be set aside except on one of the following grounds, namely:—

Grounds for setting aside award.

238 (M.); 48 A. 475=95 I. C. 416=1926 A. 501. An arithmetical error will not bring it under this clause if the decision is within the terms of reference. 42 A. 277=18 A. L. J. 241. A patent inconsistency or mistake can be corrected before the award is made a rule of Court. 21 A. L. J. 541. Where an award of the arbitrators of both parties represents their decision, the failure of the arbitrator of one party to sign, does not render it invalid. 43 I. C. 154. But see 22 I. C. 811. When a party's absence is intentional at the time of the delivery of the award, whether it is vitiated by such absence. 33 I. C. 467. Award given after a long time—Revocation of submission—Effect of. 13 I. C. 48. An award to be valid must be the award of all the arbitrators without difference. Where there is an uneven number of arbitrators, there is no presumption that a majority award shall be binding. 54 I. C. 912=38 M. L. J. 145. (42 B. 668, Dist.) Reference to three persons—Award signed by two—Application to set aside award—Limitation. 8 L. W. 171=47 I. C. 597. A decision of an arbitrator should not be set aside under S. 115 on the ground of errors in the admission of evidence where such admission does not materially affect his decision. 26 I. C. 106=(1911) M. W. N. 614. [9 M. L. T. 273; 11 C. 6 (P. C.); 30 C. 397; 17 M. 410 (F. B.), Foll.] An award need not be a reasoned judicial decision and the arbitrators need not even give their reasons for their conclusions. 23 M. L. J. 290=16 I. C. 478 (20 C. 854, Rel.) Arbitrators can get the help of other's opinions in arriving at their own opinions provided they do not thereby delegate or surrender their own judgments. 23 M. L. J. 290=16 I. C. 478. A refusal by some arbitrators to act makes the award of the rest illegal. 9 M. L. T. 251=21 M. L. J. 263=9 I. C. 173=(1911) M. W. N. 151 (F. B.) (12 M. 113 and 7 A. 523, Foll.). The mere approval of a compromise arrived at between the parties before an arbitrator is not an award. 54 I. C. 311.

On this section see also the following cases:—Effect of award signed by some arbitrators only. See 25 C. L. J. 396=22 C. W. N. 301; 55 I. C. 883=24 M. L. T. 102=8 L. W. 171=47 I. C. 597=(1918) M. W. N. 477; 1 Lah. 481, distinguishing 12 Mad. 113 and 7 All. 523. Award in excess of claim cannot be upheld. 25 I. C. 951. Effect of arbitrators signing at different times. 13 I. C. 161=15 C. L. J. 360; 16 I. C. 223=16 C. L. J. 573; 55 I. C. 883=1 Lah. 481. Minute of dissent by one of the arbitrators after signing award. 49 I. C. 522.

Para. 15. SCOPE AND APPLICABILITY.—The provisions of this para. and para. 16 are applicable to Appellate Courts. 10 A. 8. Objection on the very merits of the question adjudicated upon by the arbitrators is beyond the scope of this section. 7 Bom. L. R. at p. 797. No objection can be raised as to the form of proceedings anterior to the reference or to the form of issues. 43 A. 395=19 A. L. J. 33.

OBJECTION WHEN TO BE RAISED.—Objection to irregularity may be waived by party. 1 R. 15

=74 I. C. 6=1923 Rang. 187. See also 9 P. R. 1913=16 I. C. 996; 51 I. C. 53=10 L. W. 57. Agreement not to object to award does not preclude parties from objecting on the ground of fraud or bad faith. 107 P. W. R. 1916=34 I. C. 192. The parties cannot raise objection to jurisdiction after having submitted to jurisdiction of the arbitrators. 42 A. 661=18 A. L. J. 644. Objection to be taken only in the trial Court, not in Appellate Court. 36 A. 69=12 A. L. J. 57 (F. B.). Award when not binding on minor. 34 M. L. J. 71=45 I. C. 763.

AWARD WHEN CAN BE SET ASIDE.—An award cannot be set aside under this section on the ground of irregularity of the reference. 11 C. W. N. 1152. Award should not be set aside on account of technical error. 91 I. C. 659 (2)=A. I. R. 1925 Rang. 383. The same presumption which attaches to proceedings before a Court of Justice should attach to proceedings before arbitrators. 18 A. 422 (F. B.). Arbitrator having personal interest, unknown to one of the parties cannot act as such. 31 I. C. 597=19 C. W. N. 165. Award after supersession by Court can be set aside. 21 M. L. J. 263=9 I. C. 173 (F. B.). Award otherwise than in accordance with the order of reference is 'otherwise invalid' within S. 15. 53 Cal. 258=53 I. A. 1=1925 P. C. 293 (P. C.). An award cannot be set aside on the mere surmise that the arbitrator had been partial. 7 A. 273. Or on the ground that the arbitrator's decision is against the written statement of the defendant. 7 W. R. 28. Award made out of time is not void but voidable. 50 I. C. 52=4 P. L. J. 265. When there is provision for extension of time, it is not sufficient ground for refusing to file the award. 55 P. W. R. 1919=51 I. C. 636.

MISCONDUCT.—"Misconduct" means neglect of duties or judicial misconduct; does not necessarily mean moral turpitude. 9 A. 253; 30 C. 397. See 3 O. W. N. 279=93 I. C. 446 (2)=1926 Oudh 307=1 Luck. 139. 'Misconduct' means misconduct in carrying out terms of reference. Acting beyond powers is acting without jurisdiction. 49 M. L. J. 529. Perversity is misconduct. 14 I. C. 978=5 Bur. L. J. 55. Error of law if misconduct. 42 A. 277=18 A. L. J. 241=58 I. C. 585. Not hearing parties is misconduct. 25 Bom. L. R. 392=1924 Bom. 149. Irregularities in procedure may amount to misconduct. 36 A. 336=12 A. L. J. 537=27 M. L. J. 181 (P. C.); 85 I. C. 424=1924 Bom. 149. Where the terms of reference to arbitration do not authorize the making of private enquiries, an arbitrator making private enquiries is guilty of legal misconduct. 4 A. L. J. 159; 20 A. L. J. 117=65 I. C. 779; see also 26 O. C. 107=74 I. C. 401; 10 I. C. 450=13 C. L. J. 399; 49 I. C. 303=9 P. W. R. 1919. But if the parties had expressly bound themselves to abide by his decision in whatsoever manner he might see fit to arrive at, he cannot be said to be guilty of such misconduct. 20 A. L. J. 125=64 I. C. 934; 29 O. C. 258=94 I. C. 162=1926 Oudh 383=13 O. L. J. 504. Private enquiries when justifiable. 67 I. C. 866=1922 L. 480.

(a) corruption or misconduct of the arbitrator or umpire ;
 (b) either party having been guilty of fraudulent concealment of any matter which he ought to have disclosed, or of wilfully misleading or deceiving the arbitrator or umpire ;

(c) the award having been made after the issue of an order by the Court superseding the arbitration and proceeding with the suit or after the expiration of the period allowed by the Court, or being otherwise invalid.

(2) Where an award becomes void or is set aside under clause (1), the Court shall make an order superseding the arbitration and in such case shall proceed with the suit.

16. [S. 522.] (1) Where the Court sees no cause to remit the award or any of the matters referred to arbitration for re-consideration in manner aforesaid, and no application has been made to set aside the award, or the Court has refused such

Judgment to be according to award.

Refusal to call witnesses produced by either party. 12 C. W. N. 569. Hearing one side and declining to hear the other side. 27 M. 255 ; 9 A. 253. Making private inquiries. 4 A. L. J. 159. But when an arbitrator communicates the private information to the other arbitrators and parties who can check the information and contradict it, the award will not be vitiated. 41 M. L. J. 276. Examining witness in the absence of parties and making enquiries behind their back. 44 M. L. J. 263=73 I. C. 470 ; 8 Lah. 329=101 I. C. 153 (1)=1927 Lah. 425. Examining the witness of one party in the absence of the other party. 34 C. L. J. 39 ; private communication with parties is misconduct. L. R. 3 A. 84. *Ex parte* procedure, if misconduct. 33 I. C. 467. Arbitrators when justified in hearing case *ex parte*. 47 C. 29=56 I. C. 325 ; 53 I. C. 337=13 S. L. R. 75 ; 27 I. C. 526=8 S. L. R. 136. Decision without taking evidence is fatal to the award in the absence of agreement that an arbitrator should decide a dispute on his own knowledge of the facts. 42 A. 185=18 A. L. J. 78=54 I. C. 443 ; *see also* 49 M. L. J. 115=1925 Mad. 1056. Delegation of functions is misconduct. 31 I. C. 33=22 C. L. J. 237. An award given without applying the mind to the question really involved in the case is not binding. 34 M. 453=38 I. A. 169=21 M. L. J. 1110 (P.C.). An arbitrator can conduct business in any way he thinks best and is not fettered by rules of practice or procedure obtaining in Courts. 13 I. C. 520=14 O. C. 308. Arbitrators can use their personal knowledge of trade usages. 41 B. 518=37 I. C. 271=18 B. L. R. 532 ; *see also* 28 Bom. L. R. 986=97 I. C. 673=1926 Bom. 527. But *see* 57 I. C. 604. In practice it is advisable that the arbitrator should acquaint the parties of his personal knowledge, so that the parties may alter his opinions by adducing evidence, if necessary. 28 Bom. L. R. 986=1926 Bom. 527. An honest admission of evidence in violation of rule of evidence is no ground for setting aside an award. 28 B. 60=15 Bom. L. R. 392. Nor refusal to summon witnesses cited by party. 39 I. C. 767. When an award is set aside on the ground of misconduct the Appellate Court cannot pass a decree in terms of the award. 4 A. L. J. 256.

APPLICATIONS TO SET ASIDE AWARD.—An application to set aside an award falls within para. 15 and does not include proceedings under paras. 12 and 14. (1913) M. W. N. 333=24 M. L. J. 483. No form is prescribed for an application to

set aside award. 45 B. 1071=23 Bom. L. R. 614.

APPEAL FROM DECREE ON AN AWARD.—An appeal lies on the ground that the so-called award was never delivered by the arbitrator and was in fact and in law no award at all. 29 A. 439. No appeal lies from a decree on the sole ground that the arbitrator was guilty of misconduct. 29 A. 457 (F.B.). *See also* 45 A. 441=21 A. L. J. 326 ; 65 I. C. 50=15 S. L. R. 165=1922 Sind 1. No appeal lies against an order setting aside an award. 28 A. 408 ; 11 C. 172. But *see* 37 A. 456=13 A. L. J. 653 ; 34 I. C. 192 ; 15 I. C. 928=236 P. L. R. 1912 (Award can be restored by Court of Appeal). Appeal from order superseding award. *See* 55 I. C. 1. Judgment partly based on award and partly on findings of fact is appealable. 24 A. L. J. 705=96 I. C. 531=1926 All. 567.

REVISION.—An order setting aside an award on the ground of misconduct is not liable to revision. 26 B. 551. *See also* 5 A. 293 ; 47 A. 916=1925 All. 566. As to finality of award, *see also* 17 O. C. 33=18 C. W. N. 426=1 O. L. J. 159=22 I. C. 315=27 M. L. J. 128 (P.C.).

LIMITATION.—*See* 9 C. 36 ; 29 C. 106.

Para. 16. RIGHT OF SUIT.—No suit to set aside an award is maintainable, the proper way being an application to the Court to set aside the award. 56 I. C. 677=13 Bur. L. T. 34. Nor a suit on the original claim which has become merged in the award. 33 I. C. 554=8 L. B. R. 157. The provisions of the section are applicable to appellate Courts. 10 A. 8.

POWERS OF COURT.—In delivering the judgment the Court must confine itself to the plaintiff's claim and give a decision thereon. 14 W. R. 369 ; and cannot grant interest when the award does not grant it. 23 W. R. 105. When an award grants maintenance in perpetuity the Court will not pass a decree to that effect. 7 B. 151. Court can separate the valid part from the invalid part of an award. 16 P. W. R. 1913=17 I. C. 684. The word "award" in the last sentence must be understood to mean an award as given by the arbitrators, and not as amended by the Court. 8 A. 449 (452).

AFTER THE TIME FOR MAKING SUCH APPLICATION HAS EXPIRED.—The Court should give time to enable a party to apply to set aside an award. 1906 A. W. N. 221. *See* Art. 158, Lim. Act. A decree passed before the expiration of such time is liable to be set aside. 9 I. C. 197 (2)=21 M. L. J. 444. *See also* 25 A. L. J. 787=102 I. C. 608=1927 All. 614. Such decree can

application, the Court shall, after the time for making such application has expired, proceed to pronounce judgment according to the award.

(2) Upon the judgment so pronounced a decree shall follow, and no appeal shall lie from such decree except in so far as the decree is in excess of, or not in accordance with, the award.

Order of reference on agreements to refer.

- 17. [S. 523.]** (1) Where any persons agree in writing that any difference between them shall be referred to arbitration, the parties to the agreement, or any of them, may apply to any Court having jurisdiction in the matter to which the agreement relates, that the agreement be filed in Court.

Application to file in Court agreement to refer to arbitration.

be set aside by the High Court only under S. 115, C. P. C., and no appeal lies. 45 B. 832=22 Bom. L. R. 1454=59 I. C. 811. (29 A. 584, Not Foll.) An appeal against such a decree can be treated as a revision. (1912) M. W. N. 1232=17 I. C. 431; (1911) 1 M. W. N. 141=9 I. C. 197=21 M. L. J. 444. An order refusing to hear such objections as time-barred is liable to be set aside in revision. 96 P. L. R. 1915=28 I. C. 427. It is not necessary to allow 10 days where an award has been accepted by the parties. 27 P. W. R. 1914=23 I. C. 591; but see 34 I. C. 845 (Sindh). Where such objections were dismissed for default, and decree was passed on the award, the Court cannot refuse to entertain a subsequent application for restoration of the petition of objections. 18 A. L. J. 756=57 I. C. 200.

APPEAL AND REVISION.—An appeal will lie from a decree passed in accordance with an award if such decree has been passed without allowing to the parties the time prescribed for filing objections. 29 A. 584. Where an award is made according to law no appeal lies. 29 B. 285; see also 14 I. C. 455=9 A. L. J. 258. There must be strict conformity with the provisions of clause (1) of this para. 49 A. 178=98 I. C. 993=24 A. L. J. 1036=1927 A. 120. Matters outside the arbitration proceedings are open to appeal. 39 M. 853=32 I. C. 881=30 M. L. J. 465. Decree on an award overruling the objections of a party without giving him an opportunity to substantiate them by evidence is revisable but not appealable. 3 Lah. L. J. 487=20 P. L. R. 1922; 37 I. C. 400=3 O. L. J. 583. A second appeal is maintainable when the Court of first instance sets aside the award and passes a decree on the merits and the Lower Appellate Court sets aside that decree and passes a decree in accordance with the award. 4 O. W. N. 1085 (F. B.). An appeal lies from an order directing a private award to be filed even though the Court has passed a decree on its basis. 38 A. 380=35 I. C. 833=14 A. L. J. 481. But where the Court had granted frequent adjournments on the ground that the dispute had been referred to an arbitrator, such orders amount in substance, to a reference by the Court and no appeal will lie. 39 A. 401=15 A. L. J. 452. An order refusing to file an award is a decree and is appealable. 27 M. 255. Where the validity of the award is in question an appeal lies. 11 C. 37 (41); 49 I. C. 262. Also when the award is shown to be illegal and void *ab initio*. 24 C. 469 (472); 1903 A. W. N. 159. But no appeal lies after passing of decree, even though the award could have been set aside by objections being raised under para. 15. 39 C. 822=18 I. C. 69; see also 18 C. L. J. 35=18 C.

W. N. 626; 19 I. C. 405; 29 C. 167; 18 M. L. T. 374=31 I. C. 206. No appeal or revision will lie. 25 I. C. 583=(1914) M. W. N. 865; 38 M. 256=25 M. L. J. 507; 34 I. C. 845=9 S. L. R. 183; 104 I. C. 202=1927 Lah. 362. Also when such objections are overruled no appeal lies. 1 P. L. J. 306=35 I. C. 358. An order determining that there has been no valid reference to arbitration is a decree. 25 C. 757 (F. B.); 18 A. 442 (F. B.); 18 M. 423 (F. B.); 8 C. W. N. 916; 29 C. 167; 33 C. 899.

REVISION.—As to cases where no revision lies, see 29 C. 167; 26 O. C. 107=74 I. C. 401. But see 9 M. 475. Revision lies on the ground of material irregularity. 11 P. W. R. 1916=31 I. C. 700; see also 31 I. C. 458 (Mad.). As to when such decree is liable to be set aside on revision, see 2 L. L. J. 487 and 37 I. C. 400 cited *supra*.

Para. 17. SCOPE OF PARA.—This section does not apply where there is a pending suit which affects the subject-matter of the reference to arbitration. 30 C. 218 (226); 115 P. R. 1912=15 I. C. 140. See also 17 P. R. 1911=9 I. C. 195. 40 I. C. 38=4 O. L. J. 131. Where there is no matter of difference between the parties there can be no reference. 30 C. 831; 21 B. 335 (342); 2 A. L. J. 493; 11 C. W. N. 1152. No reference in anticipation of future differences. 12 I. C. 639=5 S. L. R. 92.

ESSENTIALS OF A VALID AGREEMENT TO REFER.—The agreement to refer must clearly define the powers of the arbitrators. 16 C. 482; 11 C. 232. Para. 17 does not require that arbitrators should necessarily be named, in the agreement. 35 P. R. 1911=9 I. C. 655. Arbitrators who are left for future election cannot be said to be "named" in the agreement. 20 B. 232 (236). The application need not now be made by the parties in person or by their respective pleaders specially authorized in writing in this behalf. See 24 C. 459. The application is not a suit though it has to be registered as a suit. 61 I. C. 390=6 P. L. J. 287.

ALL THE PARTIES INTERESTED.—The parties who are materially interested in the suit should join in the application. 10 W. R. 171; 17 C. 37; 4 C. L. R. 65; 24 A. 229. An award on a reference not agreed to by all the parties interested is invalid in law. 9 C. W. N. 873; See also 17 M. L. J. 394. But see 33 C. 899 and 11 C. W. N. 1152. The agreement for reference must be executed by all the parties. 38 I. C. 577=9 Bur. L. T. 253. In a suit for winding up a partnership, a petition to refer the suit to arbitration must meet with the consent of all the parties. 26 M. 47; 22 All. 135. The father of a joint Hindu family in his capacity of managing

(2) The application shall be in writing and shall be numbered and registered as a suit between one or more of the parties interested or claiming to be interested as plaintiff or plaintiffs and the others or other of them as defendants or defendant, if the application has been presented by all the parties, or if otherwise, between the applicant as plaintiff and the other parties as defendants.

(3) On such application being made, the Court shall direct notice thereof to be given to all the parties to the agreement, other than the applicants, requiring such parties to show cause, within the time specified in the notice, why the agreement should not be filed.

(4) Where no sufficient cause is shown, the Court shall order the agreement to be filed, and shall make an order of reference to the arbitrator appointed in accordance with the provisions of the agreement or, if there is no such provision and the parties cannot agree, the Court may appoint an arbitrator.

18. Where any party to any agreement to refer to arbitration, or any person claiming under him, institutes any suit against any other party to the agreement, or any person claiming under him, in respect of any matter agreed to be referred, any party to such suit may, at the earliest possible opportunity and

Stay of suit where there is an agreement to refer to arbitration.

member can refer to arbitration the partition of joint-family property, 16 A. 231. Mother though *de facto* guardian of Muhammadan minors is not competent to agree to reference to arbitration affecting minor's property. 47 C. 713=26 C. W. N. 246. Where one of two appointed guardians consents to the agreement to refer to arbitration subsequently but not at the time of agreement, the agreement is not valid. 47 C. 713=57 I. C. 945.

REFERENCE TO ARBITRATION AFTER SUIT—PROCEDURE. 45 B. 245=59 I. C. 53=22 Bom. L. R. 1048.

Clause (4).—The conduct of the parties, coupled with the long and unexplained delay of six years amounted to a cancellation of the agreement to refer their disputes to arbitration and the agreement could not be filed. 54 I. C. 126. The Court has no discretion to refuse to make the reference to the arbitrators nominated by the parties. 61 I. C. 390=6 P. L. J. 287. The Court has no jurisdiction to make the order of reference except to all the specified arbitrators. An agreement to refer becomes void if any one of the arbitrators die or refuse to act. 42 I. C. 911 (1)=11 Bur. L. T. 160; 44 I. C. 866=71 P. R. 1918; But see 40 I. C. 38=4 O. L. J. 131 (Court can substitute another in his place.) The Court will refuse to file an agreement in case the arbitrators named in it decline to act. 12 B. L. R. Ap. 13. But where there is a distinct provision by which a party is authorised to appoint another in the place of the one refusing to act, the agreement to refer would still hold good. 155 P. R. 1919=51 I. C. 636. Also the Court cannot give a direction that in case of difference of opinion, the opinion of the majority must prevail. 24 L. W. 384=97 I. C. 824=1926 Mad. 1183=51 M. L. J. 440. A Court acts with material irregularity if it does not strictly comply with the terms of the agreement to refer to arbitration. 35 P. R. 1911=9 I. C. 655.

REVOCATION OF AGREEMENT.—A party to a reference can only revoke his submission on good grounds. 17 C. 200; See also 20 A. 145; 27 M. at p. 115. Consent to reference being obtained by misrepresentation is ground for revocation. 50 I. C. 637. A reference once made cannot be

arbitrarily revoked. 29 A. 49; 20 A. 145; 27 M. at p. 115. See also 39 I. C. 349=12 P. R. 1917. As to what is good cause for revocation, see 10 B. 381; 17 C. 200; 29 C. 278. Parties prosecuting case before arbitrators cannot afterwards challenge the award on ground of jurisdiction. 42 A. 661=18 A. L. J. 644. After reference is made the suit cannot be withdrawn. 9 A. 168. A Judge can act as arbitrator by consent of the parties. 26 M. 76; 23 B. 752. When he so acts, no appeal will lie from his decree. 10 C. W. N. 835; 4 A. L. J. 89.

UMPIRE.—As to the power of the Court to appoint an umpire, see 8 A. 64.

APPEAL.—A decision passed under this section is a decree, and an appeal lies therefrom. 22 M. 229. An order refusing to file an agreement is not appealable. 5 A. 333 (F. B.) But see 9 M. L. J. 10. Where an agreement to refer to arbitration was filed but on the arbitrators failing to act, the Court revoked the order of reference and dismissed the suit, *held* the order of revocation was not appealable. 48 A. 27=23 A. L. J. 891=89 I. C. 404=1926 All. 55.

COURT-FEE.—The Court-fee on a memorandum of appeal is an *ad valorem* fee computed on the value of the subject-matter in dispute. 5 A. 333.

Para. 18. SUIT IN CONTRAVENTION OF AGREEMENT.—Court can stay such suit. 61 I. C. 322; 66 I. C. 43=2 Lah. 335=1922 Lah. 353; 2 Lah. 19=60 I. C. 776; 39 I. C. 508=62 P. R. 1917; 68 I. C. 235=25 O. C. 63=1922 Oudh 158. The power vested in a Court to stay a suit is purely discretionary and can be exercised only on an application made for that purpose by one of the parties to the suit at or before the settlement of issues. 22 I. C. 811=92 P. R. 1913; 68 I. C. 235=25 O. C. 63. (41 Mad. 115; 12 A. L. J. 75 Ref.) The existence of the award is a complete bar to the suit until the award is set aside by a Court of competent jurisdiction. 57 I. C. 894=3 U. B. R. (1920) 210. An award extinguishes all claims embraced in the submission and afterwards furnishes the only basis on which the rights of the parties can be determined, and constitutes a bar to any action on the original demand. 25 I.

in all cases where issues are settled at or before such settlement, apply to the Court to stay the suit : and the Court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the agreement to refer to arbitration, and that the applicant was, at the time when the suit was instituted and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the suit.

19. [S. 524.] The foregoing provisions, so far as they are consistent with any agreement filed under paragraph 17, shall be applicable to all proceedings under the order of reference made by the Court under that paragraph, and to the award and to

the decree following thereon.

ARBITRATION WITHOUT THE INTERVENTION OF A COURT.

20. [S. 525.] (1) Where any matter has been referred to arbitration without the intervention of a Court, and an award has been made thereon, any person interested in the award may apply to any Court having jurisdiction over the subject-matter of the award that the award be filed in Court.

Filing award in matter referred to arbitration without intervention of Court.

C. 220=7 Bur. L. T. 308. In case of an agreement to allow disputes to be tried by another tribunal the Court will take into consideration all those grounds as in a case of submission to arbitration. 15 S. L. R. 83. Where after a reference to arbitration one of the parties brings a suit against the other and the latter deliberately refrains from applying for stay of the suit he must be deemed to have waived his right to arbitration. 44 A. 292=20 A.L.J. 128 (47 Cal. 752; 41 Mad. 115 not foll.). A party to an agreement to refer a dispute to arbitration is not debarred from bringing an independent suit on title. 24 I. C. 490=12 A. L. J. 757. Para. 18 does not apply if an order for stay of a suit is vacated owing to the refusal of one of the arbitrators to act and the suit is proceeded with. 50 I.C. 879=23 C.W.N. 293. Where in spite of an agreement to refer to arbitration the plaintiff filed the suit and one of the arbitrators refused to act. *Held*, that the plaintiff is entitled to a removal of the stay. The suit was not barred by the agreement to refer to arbitration. 64 I.C. 289=23 Bom. L.R. 511. Agreement to refer to arbitration after institution of suit. If adjustment within the meaning of O. 23, R. 3—Stay of suit. 31 Bom. 687=16 Bom. L.R. 653. Where a contract between plaintiffs and defendants, providing for reference to arbitration in case of disputes arising out of the contract, is impeached by a suit by the plaintiffs on equitable grounds, arbitration proceedings which had commenced should be stayed pending the disposal of the suit. 46 I.C. 173=22 C.W.N. 535.

Para 19. SCOPE.—This section does not prohibit the setting aside of an award for misconduct although the agreement states that the award should be accepted as final. 6 M. 368; 17 M. 498. Order filing or refusing to file award. Appeal lies. 60 I.C. 590. The provision of C. P. Code apply as far as possible, to the proceedings under Sch. II of the Code. 62 I. C. 927. A mere declaratory award is incomplete and should be remitted to arbitrators for completion. It cannot be executed. 6 S. L. R. 146=19 I. C. 374.

Paras 20 and 21. SCOPE.—Paras. 20 and 21 do not apply where the matters referred to arbitration are already the subject-matter of a suit between the parties to the reference. 45 Bom. 245=

22 Bom. L. R. 1048.

Para. 20.—Para. 20 was devised for the purpose of enabling any Court having jurisdiction, where the subject matter of the award lies within more than one jurisdiction, to direct the award to be filed. 37 Bom. 442=15 Bom. L. R. 362. The powers of the Court in a proceeding under this rule are exhausted as soon as the Court decides either to file the award or refuses to file it. 47 I. C. 960=5 O. L. J. 471. The provisions of this section are not superseded by S. 47 of the Dekhan Agriculturists' Relief Acts. 8 B. 20. The word "matter" is not wider than the expression "matter in difference" in para. 1 of the same schedule. 12 J.C. 639=5 S.L.R. 92.

AWARD.—A document although headed an award and signed by the arbitrators, which merely recommends a solution of the questions referred, will not be treated as an award. 11 C. 356. A settlement recorded by a person asked to act as mediator and, agreed on by the parties, is not an award and if at all it is operative it is so only as a contract as between those who have signed it. 53 I. C. 283 (Mad.); 48 P.L.R. 1915=28 I.C. 298. When an award has been lost, a court can take secondary evidence of its provisions and pass a decree. 15 M. 99. *See also* 1 Lah. 45=55 I. C. 845. An award which is partly within and partly exceeds the terms of the submission to arbitration cannot be enforced. 3 M. 68. An award may be delivered bit by bit where the agreement to refer provides for it. 4 C. L.R. 92. *See* 22 A. 224. A suit for a declaration that an award was fraudulently passed does not lie. 20 M. 89. If there was no matter in difference between the parties, there could be no reference and award. 30 C. 831; 16 C. 482; 31 C. 203; 29 M. 44; 27 A. 526; 9 Bom. L. R. 259; but *see* 9 Bom. L. R. at p. 888. A Court should refuse to file an award which refers to matters not referred to arbitration. 29 M. 303. An order rejecting an application to file an award is not a decision that the award is bad in law. 43 All. 108=18 A. L. J. 960; 22 Bom. L. R. 1377=45 Bom. 329. If a party to an arbitration proceeding fails to take an objection to the absence of one out of several arbitrators, he will be deemed to have waived his right to take objection to the whole of the irregularity caused there-

(2) The application shall be in writing and shall be numbered and registered as a suit between the applicant as plaintiff and the other parties as defendants.

(3) The Court shall direct notice to be given to the parties to the arbitration, other than the applicant, requiring them to show cause, within a time specified, why the award should not be filed.

21. [S. 526.] (1) Where the Court is satisfied that the matter has been referred to arbitration and that an award has been made thereon, and where no ground such as is mentioned or referred to in paragraph 14 or paragraph 15 is proved, the Court

Filing and enforcement of such award.

by and the award must be filed. 67 I. C. 866 = 1922 Cal. 181 (1). A plaintiff who has not carried out what he was directed to perform under the award cannot sue to enforce that part of the award which is favourable to him. 22 C. W. N. 66 = 27 C. L. J. 486. Award on private reference—Institution of suit prior to commencement of proceedings by arbitrators—Jurisdiction of arbitrators—Legality of the, for contract of submission—Enquiry into—Suit to set aside the award—Maintainability. 3 Lah. 296 = 69 I. C. 583. On a private reference to arbitration an award which is passed by the arbitrators and which does not partition agricultural land but only settles the shares of the parties can be validly filed in the Civil Court. 81 P. W. R. 1918 = 45 I. C. 166. Award alleged invalid—Decree on original cause of action may be granted 33 I. C. 494 = 68 P. W. R. 1916. Para. 20 does not limit the time for the issue of notice thereunder. 21 I. C. 298 = 310 P. L. R. 1913. It is not within the jurisdiction of a Small Cause Court to file an award which, though it directs payment of money within the limits of its pecuniary jurisdiction, goes on to declare the dissolution of marriage between the parties. The jurisdiction of the Court to file an award depends on the reliefs awarded. 51 I. C. 53 = 10 L. W. 57. A Civil Court can accept the award passed on reference to arbitration by parties in a dispute as to the demarcation of boundaries under S. 41, U. P. Land Revenue Act, 1901. 50 I. C. 193 = 6 O. L. J. 84. The expression "subject-matter of the award" means the whole matter dealt with and decreed by the award and not any particular portion. 51 I. C. 53 = 10 L. W. 57. A suit lies on an award even though it has not been filed in Court under Para 20 within 6 months as required by Art. 178 of the Limitation Act. 2 L. W. 230 = 29 I. C. 49; 42 I. C. 116 = 4 O. L. J. 487; 27 I. C. 31 = 7 Bur. L. T. 279. Where an award is not acted upon by parties, it does not bar a suit regarding the original rights of the parties. 29 Bom. L. R. 301 = 101 I. C. 398 = 1927 Bom. 237. Arbitrators need not even give reasons for their decision and are not even bound to record anything of the proceedings. They may even ignore any position advanced by the parties, as an award is not a judicial decision. 17 I. C. 33 = (1912) M. W. N. 1076. (23 M. L. J. 290; 38 Cal. 143 Ref.) Arbitrators are not bound to decide a point if the parties show by their conduct that they did not want a formal decision thereon. 17 I. C. 33 = (1912) M. W. N. 1076. Arbitrators are bound to decide all matters in dispute in their award and their failure to do so cannot be condoned because the Court does not sustain a contention not dealt with by them. 17 I. C. 33 = (1912) M. W. N. 1076. A person who

is a stranger to the submission to reference and under no obligation to abide by the award could not avail himself of it and could not be said to be a person interested in the award. 69 I. C. 714 = 26 O. C. 1. A Court is competent to pass a decree on an award as modified by a lawful compromise filed by the parties and that from a decree so passed no appeal lies except in so far as the decree is in excess of or not in accordance with the award so modified. 25 O. C. 213 = 68 I. C. 209; (31 C. 516; 45 B. 245; 37 B. 693; 2 Lah. 114; 27 A. 526; 29 M. 303; 4 Pat. L. J. 394; 30 P. R. 1914; 21 C. L. J. 248 Ref.) An award made in arbitration cannot be remitted to the arbitrators without the intervention of the Court. 7 Bur. L. T. 287 = 24 I. C. 132. A settlement made by arbitrators cannot be reopened in order to show errors in the account except on the ground of fraud. 38 M. L. J. 247 = 43 Mad. 429. Clause (3)—See 8 A. 340 (351); 6 B. 663 (666); 28 B. 287; 16 A. 231.

STAMP.—In proceedings under S. 20, an unstamped award may be admitted in evidence and filed in Court after paying the penalty under the Stamp Act. 66 P. R. 1913 = 20 I. C. 491. (12 Mad. 331 Dist.; 20 I. C. 491, Ref.).

COURT-FEE.—This is the same as that for an application. 10 C. 11.

LIMITATION.—Six months from date of award. The date of the award is the time when it is given to the parties. 9 C. 575. Applicant cannot claim the benefit of S. 6 of the Lim. Act. 1 R. 256 = 76 I. C. 493 = 1923 R. 226. Under special circumstances, S. 5 and S. 14 of the Lim. Act may be applied. 38 All. 85 = 31 I. C. 899 = 13 A. L. J. 1115.

APPEAL.—The order refusing to file an award is a decree from which an appeal lies. 29 C. 167 (P. C.); 27 M. 255 (F. B.); 29 M. 303; But see 31 C. 757 (F. B.) See also 11 C. W. N. 220.

REVISION.—An order of refusal is subject to revision. 8 Bom. L. R. 570.

WITHDRAWAL.—An application under this section can be withdrawn. 31 C. 516; 4 C. L. J. 162; see also 18 C. 414; 28 A. 621; 29 B. 621 (F. B.); 16 M. L. J. 474; 29 M. 303.

Para 21.—The Court can determine the genuineness or validity of the award filed. 20 M. 89. A Court must, before enforcing award satisfy itself that it is enforceable in the same way as a decree is enforceable if it were a decree. 42 All. 525 = 18 A. L. J. 652. See also 12 I. C. 639 = 5 S. L. R. 92. A direction in the award to the parties to modify the decrees duly passed by Courts of law does not amount to an ousting of the jurisdiction of the Court. The award is an adjustment of decrees under O. 21, R. 2, 48 A. 475 = 24 A. L. J. 480 = 95 I. C. 416 = 1926 All. 501. In the absence of a contrary provision,

shall order the award to be filed and shall proceed to pronounce judgment according to the award.

(2) Upon the judgment so pronounced a decree shall follow, and no appeal shall lie from such decree except in so far as the decree is in excess of or not in accordance with the award.

Exclusion of certain words in the Specific Relief Act, 1877.

22. The last thirty seven words of section 21 of the Specific Relief Act, 1877, shall not apply to any agreement to refer to arbitration, or to any award, to which the provisions of this schedule apply.

parties, agreeing to settle their differences by the judgment of a body made up of an uneven number of persons are presumed to imply that they would accept the decision of the majority. 42 Bom. 669=19 Bom. L.R. 618. When a defendant denies a reference to arbitration the jurisdiction of the Court is not taken away. 25 C. 757 (F.B.) 17 A. 21 (F.B.); 20 M. 89. Generally a person who is not a party to or properly represented in any proceedings should not be bound by those proceedings. 26 C. W. N. 804=1922 Cal. 226. But proceedings before arbitrators are not intended to be carried on according to the rules of procedure contained in the C. P. Code. It will suffice if there is a substantial representation of the different interests before the arbitrators. *Ibid.* If there has been a substantial representation of the interests of the legal representatives by the other parties on the record and if the enquiry is full and fair, the award will be binding and a decree could be passed thereon. 26 C. W. N. 804=1922 Cal. 226. (31 All. 572=15 C. L. J. 360 Dist.) A father in a joint Hindu family in his capacity as managing member, can refer to arbitration the partition of family property 16 A. 231; 19 C. 334. The award of an arbitrator on a question of partition when all the members of the joint family are not parties to it is invalid. 48 I. C. 53=1919 Pat. 141. It is competent for the arbitrators to decide whether or not an alleged interpolation was in the contract as originally made. 59 I. C. 439=24 C. W. N. 567. The arbitrators can construe the terms of a will with reference to the circumstances of the case. 6 Pat. 556. A party relying on an award must prove that he has abided by its conditions. 41 I. C. 245. Capacity to make a submission to an arbitrator is co-extensive with capacity to contract. 19 C. W. N. 948=21 C. L. J. 273. As a submission only refers to the arbitrator, questions between the parties, the moment he touches the interest of strangers, he exceeds his authority and his award is void. (*Ibid.*) Submission to an arbitration does not operate as a waiver of an extrinsic objection that the award is illegal because based on an illegal act or subject matter. 19 C. W. N. 948=21 C. L. J. 273. Under para 21, a Court can direct a private award to be filed if the ground mentioned in paras. 14 and 15 are not established. If such grounds are established the Court must refuse to file the award, 21 C. L. J. 248=19 I. C. 941. A Court has no power to direct the filing of an award which is open to attack in part. 15 C. L. J. 110; 13 I. C. 118=16 C. W. N. 256. (6 Bom. 663; 31 Mad. 68; 29 Mad. 303; 27 All. 526, Rel.) It is permissible to separate such portion of the award as goes beyond the powers of the arbitrator, and to maintain the remainder if good. 53 I. C. 992. Award made after long

delay and under suspicious circumstances.—Right of parties to call upon arbitrator to decide within time. 52 I. C. 847=71 P. R. 1919. A private award which decides matters not referred to arbitration cannot be filed and no decree can be passed thereon though such matters are separable from the rest of the award. 30 P. R. 1914=23 I. C. 422. Compromise during suit—Court's duty to inquire if parties are bound by compromise set up by one of them. 63 P. L. R. 1912=15 I. C. 478. An award by arbitrators may be either oral or in writing, and both are equally binding on the parties. 45 I. C. 813=34 M. L. J. 184. An award in sufficient to pass title to property. The Transfer of Property Act is not exhaustive of the modes of transfer. 45 I. C. 813=34 M. L. J. 184. An award is not in the nature of a foreign judgment and a Court is therefore not entitled to go into the merits of the same. 29 I. C. 49=2 L. W. 320. Where a person was a party to arbitration but was not a party to the decree which followed upon the award he could not enforce the decree. 52 I. C. 849=6 O. L. J. 322.

Para. 21 (1).—The Court cannot refuse to file an award by imposing conditions beyond those mentioned in para. 21 (1). 33 I. C. 67=19 M. L. T. 228: *see also* 4 Bom. 1; 33 Cal. 757; 13 M. L. J. 275.

APPEAL.—Order filing award—Appeal lies. 60 I. C. 590.

Para. 21 (2)—18 A. L. J. 78=54 I. C. 44; 123 P. R. 1912=10 I. C. 512; 10 I. C. 454=13 C. L. J. 399. An order refusing to set aside an *ex parte* decree passed in accordance with an award is appealable. 38 All. 297=14 A. L. J. 332. A decree passed under Sch. II, para. 21 (2) is a "decree" and the provisions of R. 13 of O. 9 apply to it. 62 I. C. 927.

REVISION.—A decree based on a private award filed in Court is not open to revision. 23 I. C. 950=114 P. L. R. 1914; 49 I. C. 979=31 P. W. R. 1919. 7 P. W. R. 1911=9 I. C. 38.

APPEAL TO PRIVY COUNCIL.—The provisions of para. 21 (2) do not affect the right of applicant to go in appeal to the Privy Council. 15 I. C. 2=15 O. C. 55.

MISCELLANEOUS.—If a suit is filed before the award is made and the award is attacked as invalid, if the objections fail, the suit must be dismissed, and the plaintiff cannot claim a decree on the basis of the award. 13 S. L. R. 75=53 I. C. 337. (6 Bom. H.C.R. 231 Ref; 11 M.I.A. 7, Foll.).

Para. 22.—The scope of Sec. 21 of the Specific Relief Act is limited by paragraph 22, Sch. II. C.P.C. 64 I. C. 204. *See also* 9 Bur. L.T. 98=35 I. C. 710.

- 23.** The forms set forth in the Appendix, with such variations as the circumstances of each case require, shall be issued for the respective purposes therein mentioned.

Forms.

APPENDIX.

No. 1.

APPLICATION FOR AN ORDER OF REFERENCE.

(Title of suit.)

1. This suit is instituted for (*state nature of claim*).
2. The matter in difference between the parties is (*state matter of difference*).
3. The applicants being all the parties interested have agreed that the matter in difference between them shall be referred to arbitration.
4. The applicants therefore apply for an order of reference.

A. B.

C. D.

Dated the day of 19 .

NOTE.—If the parties are agreed as to the arbitrators, it should be so stated.

No. 2.

ORDER OF REFERENCE.

(Title of Suit.)

UPON reading the application presented on the

day of

19

it is ordered that the following matter in difference arising in this suit, namely :—

be referred for determination to X and Y, or in case of their not agreeing then to the determination of Z, who is hereby appointed to be umpire; and such arbitrators are to make their award in writing on or before the day of 19 , and in case of the said arbitrators not agreeing in an award the said umpire is to make his award in writing within months after the time during which it is within the power of the arbitrators to make an award shall have ceased.

Liberty to apply.

GIVEN under my hand and the seal of the Court, this day of

19
Judge.

No. 3.

ORDER FOR APPOINTMENT OF NEW ARBITRATOR.

(Title of Suit.)

WHEREAS by an order, dated the day of 19 , [state order of reference and death, refusal, etc., of arbitrator], it is by consent ordered that Z be appointed in the place of X (deceased, or as the case may be) to act as arbitrator with Y, the surviving arbitrator, under the said order; and it is ordered that the award of the said arbitrators be made on or before the day of 19 .

GIVEN under my hand and the seal of the Court, this day of

19
Judge,

No. 4.

SPECIAL CASE.

(Title of Suit.)

In the matter of an arbitration between A.B. of
and C. D.
of

, the following special case is stated for the opinion of the Court :—

[Here state the facts concisely in numbered paragraphs.]

The questions of law for the opinion of the Court are :—

First, whether

Secondly, whether

Dated the day of 19 .

X.

Y.

No. 5.

AWARD

(Title of Suit.)

In the matter of an arbitration between *A.B.* of _____ and *C.D.* of _____ :—

WHEREAS in pursuance of an order of reference made by the Court of _____ and dated the _____ day of _____ 19____ the following matter in difference between *A. B.* and *C. D.* namely, _____

has been referred to us for determination ;

Now we, having duly considered the matter referred to us, do hereby make our award as follows :—

We award—

(1) that _____

(2) that _____

Dated the _____ day of _____ 19____

X.

Y.

THE THIRD SCHEDULE.

EXECUTION OF DECREES BY COLLECTORS.

1. [S. 321.] Where the execution of a decree has been transferred to the Collector under section 68, he may—

(a) proceed as the Court would proceed when the sale of immoveable property is postponed in order to enable the judgment-debtor to raise the amount of the decree ; or

(b) raise the amount of the decree by letting in perpetuity, or for a term, on payment of a premium, or by mortgaging, the whole or any part of the property ordered to be sold ; or

(c) sell the property ordered to be sold or so much thereof as may be necessary.

2. [S. 322.] Where the execution of a decree, not being a decree ordering the sale of immoveable property in pursuance of a contract specifically affecting the same, but being a decree for the payment of money in satisfaction of which the Court has ordered the sale of immoveable property has been so transferred, the Collector, if, after such inquiry as he thinks necessary, he has reason to believe that all the liabilities of the judgment-debtor can be discharged without a sale of the whole of his available immoveable property, may proceed as hereinafter provided.

3. [S. 322-A.] (1) In any such case as is referred to in paragraph 2, the Collector shall publish a notice, allowing a period of sixty days from the date of its publication for compliance and calling upon—

(a) every person holding a decree for the payment of money against the judgment-debtor capable of execution by sale of his immoveable property and which

Para. 1.—When a decree is transferred to the Collector for execution he can send back the papers, if he fails in effecting a sale of the property. 42 All. 152 = 24 C. W. N. 394 = 38 M. L. J. 259 (P.C.). For good reasons the Court which passed the decree can also send back the papers to the Collector without fresh application for execution. In this case the Court enforces what

it has already ordered. *Ibid.* After a Civil Court passes a decree for joint possession of a revenue paying estate the Collector not only has to make allotment but to complete the partition by delivery of possession and he fails to exercise a jurisdiction vested in him by law if he refers the parties to the Civil Court for this purpose. 56 I.C. 806.

such decree-holder desires to have so executed, and every holder of a decree for the payment of money in execution of which proceedings for the sale of such property are pending, to produce before the Collector a copy of the decree, and a certificate from the Court which passed or is executing the same, declaring the amount recoverable thereunder ;

(b) every person having any claim on the said property to submit to the Collector a statement of such claim, and to produce the documents (if any) by which it is evidenced.

(2) Such notice shall be published by being affixed on a conspicuous part of the court-house of the Court which made the original order for sale, and in such other places (if any) as the Collector thinks fit ; and where the address of any such decree-holder or claimant is known, a copy of the notice shall be sent to him by post or otherwise.

4. [S. 322-B] (1) Upon the expiration of the said period, the Collector shall

Amount of decrees for payment of money to be ascertained, and immoveable property available for their satisfaction.

appoint a day for hearing any representations which the judgment-debtor and the decree-holders or claimants (if any) may desire to make, and for holding such inquiry as he may deem necessary for informing himself as to the nature and extent of such decrees and claims and of the judgment-debtor's immoveable property, and may, from

time to time, adjourn such hearing and inquiry.

(2) Where there is no dispute as to the fact or extent of the liability of the judgment-debtor to any of the decrees or claims of which the Collector is informed, or as to the relative priorities of such decrees or claims, or as to the liability of any such property for the satisfaction of such decrees or claims, the Collector shall draw up a statement, specifying the amount to be recovered for the discharge of such decrees, the order in which such decrees and claims are to be satisfied, and the immoveable property available for that purpose.

(3) Where any such dispute arises, the Collector shall refer the same, with a statement thereof and his own opinion thereon, to the Court which made the original order for sale, and shall, pending the reference, stay proceedings relating to the subject thereof. The Court shall dispose of the dispute if the matter thereof is within its jurisdiction, or transmit the case to a competent Court for disposal, and the final decision shall be communicated to the Collector, who shall then draw up a statement as above provided in accordance with such decision.

5. [S. 322-C.] The Collector may, instead of himself issuing the notices and

Where District Court may issue notices and hold inquiry.

holding the inquiry required by paragraphs 3 and 4, draw up a statement specifying the circumstances of the judgment-debtor and of his immoveable property so far as they

are known to the Collector or appear in the records of his office, and forward such statement to the District Court ; and such Court shall thereupon issue the notices, hold the enquiry and draw up the statement required by paragraphs 3 and 4 and transmit such statement to the Collector.

Effect of decision of Court as to dispute.

6. [S. 322-D.] The decision by the Court of any dispute arising under paragraph 4 or paragraph 5 shall, as between the parties thereto, have the force of and be

appealable as a decree.

Scheme for liquidation of decrees for payment of money.

7. [S. 323.] (1) Where the amount to be recovered and the property available have been determined as provided in paragraph 4 or paragraph 5, the Collector may,—

(a) if it appears that the amount cannot be recovered without the sale of the whole of the property available, proceed to sell such property ; or,

Para. 4.—The Collector cannot adjudicate upon questions of title.—11 A. 94 on this section. See also 18 All. 315. An appeal from the deci-

sion by which is disputed claim is settled under this section is cognizable as a miscellaneous appeal. 4 M. 420. But see 7 A. 565.

(b) if it appears that the amount with interest (if any) in accordance with the decree, and, when not decreed, with interest (if any) at such rate as he thinks reasonable, may be recovered without such sale, raise such amount and interest (notwithstanding the original order for sale)—

(i) by letting in perpetuity or for a term, on payment of a premium, the whole or any part of the said property; or

(ii) by mortgaging the whole or any part of such property; or

(iii) by selling part of such property; or

(iv) by letting on farm, or managing by himself or another, the whole or any part of such property for any term not exceeding twenty years from the date of the order of sale; or

(v) partly by one of such modes, and partly by another or others of such modes.

(2) For the purpose of managing the whole or any part of such property the Collector may exercise all the powers of its owner.

(3) For the purpose of improving the saleable value of the property available or any part thereof, or rendering it more suitable for letting or managing or for preserving the property from sale in satisfaction of an incumbrance, the Collector may discharge the claim of any incumbrancer which has become payable or compound the claim of any incumbrancer whether it has become payable or not, and, for the purpose of providing funds to effect such discharge or composition, may mortgage, let or sell any portion of the property which he deems sufficient. If any dispute arises as to the amount due on any incumbrance with which the Collector proposes to deal under this clause, he may institute a suit in the proper Court, either in his own name or the name of the judgment-debtor, to have an account taken, or he may agree to refer such dispute to the decision of two arbitrators, one to be chosen by each party, or of an umpire to be named by such arbitrators.

(4) In proceeding under this paragraph the Collector shall be subject to such rules consistent with this Act as may, from time to time, be made in this behalf by the Local Government.

8. [S. 324.] Where, on the expiration of the letting or management under paragraph 7, the amount to be recovered has not been realized,

Recovery of balance (if any)
after letting or management.

the Collector shall notify the fact in writing to the judgment-debtor or his representative in interest, stating at the same time that, if the balance necessary to make up the said amount is not paid to the Collector within six weeks from the date of such notice, he will proceed to sell the whole or a sufficient part of the said property; and, if on the expiration of the said six weeks the said balance is not so paid, the Collector shall sell such property or part accordingly.

9. [S. 324-A.] (1) The Collector shall, from time to time, render to the Court

Collector to render accounts
to Court.

which made the original order for sale an account of all moneys which come to his hands and of all charges incurred by him in the exercise and performance of the powers and duties conferred and imposed on him under the provisions of this schedule, and shall hold the balance at the disposal of the Court.

(2) Such charges shall include all debts and liabilities from time to time due to the Government in respect of the property or any part thereof, the rent (if any) from time to time due to a superior holder in respect of such property or part, and, if the Collector so directs, the expenses of any witnesses summoned by him.

(3) The balance shall be applied by the Court—

Para. 7 (1) (b).—Under S. 7 (1) (b) the Collector has to take into account the whole decretal amount with interest. 37 Bom. 32 = 17 I. C. 142 = 14 Bom. L. R. 787.

Para. 9—The Collector holds any money which may be realised in execution, at the dis-

posal of the Civil Court by which the decree was sent to him for execution. S. 73 applies to such proceeds. 16 A. 1. As to the right of revenue authorities to recover expenses of sale as in cases under the Land Revenue Code. See 28 Bom. L. R. 1191 = 99 I. C. 289 = 1927 Bom. 17.

(a) in providing for the maintenance of such members of the judgment-debtor's family (if any) as are entitled to be maintained out of the income of the property, to such amount in the case of each member as the Court thinks fit; and

(b) where the Collector has proceeded under paragraph 1, in satisfaction of the original decree in execution of which the Court ordered the sale of immoveable property, or otherwise as the Court may under section 73 direct; or

(c) where the Collector has proceeded under paragraph 2—

(i) in keeping down the interest on incumbrances on the property;

(ii) where the judgment-debtor has no other sufficient means of subsistence, in providing for his subsistence to such amount as the Court thinks fit; and

(iii) in discharging rateably the claims of the original decree-holder and any other decree-holders who have complied with the said notice, and whose claims were included in the amount ordered to be recovered.

(4) No other holder of a decree for the payment of money shall be entitled to be paid out of such property or balance until the decree-holders who have obtained such order have been satisfied, and the residue (if any) shall be paid to the judgment-debtor or such other person as the Court directs.

10. [S. 325.] Where the Collector sells any property under this schedule, he shall put it up to public auction in one or more lots, as he thinks fit, and may—

Sales how to be conducted.

(a) fix a reasonable reserved price for each lot;

(b) adjourn the sale for a reasonable time whenever, for reasons to be recorded, he deems the adjournment necessary for the purpose of obtaining a fair price for the property;

(c) buy in the property offered for sale, and re-sell the same by public auction or private contract, as he thinks fit.

11. [S. 325-A.] (1) So long as the Collector can exercise or perform in respect of the judgment-debtor's immoveable property, or any part thereof, any of the powers or duties conferred or imposed on him by paragraphs 1 to 10, the judgment-debtor or his representative in interest shall be incompetent to mortgage, charge, lease or alienate such property or part except with

Restrictions as to alienation by judgment-debtor or his representative, and prosecution of remedies by decree-holders.

the written permission of the Collector, nor shall any Civil Court issue any process against such property or part in execution of a decree for the payment of money.

(2) During the same period no Civil Court shall issue any process of execution either against the judgment-debtor or his property in respect of any decree for the satisfaction whereof provision has been made by the Collector under paragraph 7.

Para. 10.—As to whether a sale of the Collector is subject to the confirmation of the Civil Court, and whether the Collector can set aside a sale, *see* 11 B. at p. 484.

Para. 11.—The Collector cannot return the decree as satisfied till the whole amount including interest up to date of satisfaction has been paid. 37 Bom. 32=14 Bom. L. R. 787. The word "incompetent" is to be read in the exact and plain sense that the word implies. 46 Cal. 183=45 I. A. 219=35 M. L. J. 733=48 I. C. 312 (P. C.) [36 Bom. 510, Disappr. 13 N. L. R. 130 (F. B.), Appr.] The object of Para. 11 is to protect the debtor as far as possible from the risk of losing his property wholly or for all time, and mere attachment before judgment cannot defeat that object. 68 I. C. 188=1922 Nag. 238; 46 Cal. 183=45 I. A. 219=35 M. L. J. 733=48 I. C. 312 (P. C.). An order transferring decree for execution to Collector takes effect the moment it is passed; a transfer made between the passing of the order and the date of its reaching the Collector, is void. 92 I. C. 44=1926 Nag. 246. The

incompetency created by this section does not extend to the lessee from the Collector. 53 I. C. 776. [14 N. L. R. 181 (P. C.) Ref.] A party seeking to avoid transfer under para. 11, must show that on the date of transfer the Collector was exercising powers under the Code and the decree was still unsatisfied. 17 I. C. 887=8 N. L. R. 182; 66 I. C. 642=8 O. L. J. 358. While a decree is under execution by the Collector it is illegal for a Civil Court to issue process against the property. 66 I. C. 642=8 O. L. J. 358. An order by a Court executing a money decree against the judgment-debtor directing the Collector to pay surplus sale proceeds if any to the money decree-holder and not to judgment-debtor, does not amount to issuing a process and is not illegal. 102 I. C. 94=A. I. R. 1927 Oudh 216. The permission of the Collector for a mortgage by the judgment-debtor need not take the form of a certificate under O. 21, R. 83, C. P. Code. It is enough if the Collector knows of the mortgage and gives sanction to it in writing. *Ibid.*

(3) The same period shall be excluded in calculating the period of limitation applicable to the execution of any decree affected by the provisions of this paragraph in respect of any remedy of which the decree-holder has been temporarily deprived.

12. [S. 325-B.] Where the property of which the sale has been ordered is situate in more districts than one, the powers and duties conferred and imposed on the Collector by paragraphs 1 to 10 shall be exercised and performed by such one of the Collectors of the said district as the Local Government may by general rule or special order direct.

13. [S. 325-C.] In exercising the powers conferred on him by paragraphs 1 to 10 the Collector shall have the powers of Civil Court to compel the attendance of parties and witnesses and the production of documents.

THE FOURTH SCHEDULE.

(See section 155.)

ENACTMENTS AMENDED.

1	2	3	4
Year.	No.	Short title.	Amendment.
1870	VII	The Court-fees Act, 1870.	In article 1 of Schedule I, after the word "plaint" the words "written statement pleading a set-off or counter-claim" and after the word "Act" the words "or of cross-objection" shall be inserted. From article 11 of Schedule II the words "from an order rejecting a plaint or" shall be omitted. For the entry in the first column of Schedule II relating to article 19 the following entry shall be substituted, namely:— "Agreement in writing stating a question for the opinion of the Court under the Code of Civil Procedure, 1908."

THE FIFTH SCHEDULE.

(See section 156.)

ENACTMENTS REPEALED.

[Repealed by Sch. II of Act XVII of 1914].

THE INDIAN COINAGE ACT (III OF 1906).

PREFATORY NOTE.—The currency of British India is regulated by two modern Acts which supersede all prior legislation on the subject. The first, The Indian Paper Currency Act, 1905 (III

Para. 11 (3).—The words "period of limitation" in Para. 11 (3) apply to the restrictions placed upon the right of a decree-holder to take out execution of his decree both by the Lim. Act and S. 48, C. P. Code. 17 A. L. J. 1140=42 All. 118.

The Collector's powers under Para. 11 do not come to an end as soon as the property is sold by auction and fetches more than the decretal amount. They exist, at least till the confirma-

tion of the sale. 60 I. C. 310=16 N. L. R. 194.

If an objection has been raised as to a sale by a Collector his powers to confirm the sale are suspended and he must refer the objection to the Civil Court. 45 Bom. 812=61 I. C. 287=23 Bom. L. R. 254. A purchaser's suit to establish his title to the property sold, is not barred by S. 47 of the Code. 45 Bom. 812=23 Bom. L. R. 254. On this rule see also 64 I. C. 855; 45 I. C. 240.

of 1905) deals with the issue, legal tender, and payment of currency notes. The second, the India Coinage Act, 1906 (III of 1906) provides for the coining of silver (rupees) nickel (one anna pieces) and bronze (pice). The standard coin of India is the silver Government rupee. Other forms of rupee, such as the Portuguese rupee and Hyderabad or sicca rupees are, however, in circulation. Gold coin of London Mint or the branch Mints which has not been declared is legal tender at a fixed sum of rupees for one sovereign. Provision is made as to the amount of Indian coin which is legal tender. Provision is also made for the currency of certain coin made under former Acts, and the Indian Government is authorized to mint other coin for issue by the Government of territories beyond British India. (S. 23.)

The coinage of Ceylon (1892) Mauritius (1876) and East Africa and Uganda (1905) is based on the silver rupee as a standard; but in these possessions and protectorates the subsidiary pieces are the rupee-cents, and not annas and pies as in India.

In Hong-kong the standard coin is the Mexican silver dollar (1895) but British dollars and Hong-kong dollars are treated as equivalent to the Mexican dollar.

In the Straits Settlements (1903) and Labuan (1905) the standard coin is the Straits Settlements dollar.

In British South Africa the standard is British sterling money.

The Currency of the Dominion of Canada is regulated by legislation of the Dominion Parliament. (Ency. of Laws of England, 2nd Ed., Vol. III, Title "coins" p. 142.)

The following from the Statements of Objects and Reasons may also be noted (*see* Fort St. Geo. Gaz., Part III, p. 129):—

The object of this Bill is to consolidate the Acts relating to the coinage. The law, as originally formulated in the Indian Coinage Act, 1870 (XXIII of 1870) has been materially modified by two Acts namely the Indian Coinage and Paper Currency Act, 1893 (VIII of 1893) which abolished obligatory free coinage, and the Indian Coinage and Paper Currency Act, 1899 (XXII of 1899) which made gold coins a legal tender. The present Bill proposes to repeal both these Acts as well as the main Act of 1870, to reproduce their provisions, so far as they are still required, in a consolidated form, and to provide for the introduction of a nickel one-anna and of a bronze coinage."

S. 24 rep. in pt., and Sch. rep. Act 10 of 1914 Am. Act IV of 1918, Act XXI of 1919, Act XXXVI of 1920, and Act X of 1924.

Declared in force—

in the Angul District, Reg. 3 of 1913, s. 3.

in Arakan Hill District, Reg. 1 of 1906, s. 2.

THE INDIAN COINAGE ACT (III OF 1906).¹

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[2nd March 1906.]

An Act to consolidate and amend the law relating to Coinage and the Mint.

WHEREAS it is expedient to consolidate and amend the law relating to Coinage and the Mint; It is hereby enacted as follows:

¹ For Statement of Objects and Reasons, *see* Gazette of India, 1905, Pt. V, p. 32; for Report of Select Committee, *see* *ibid.*, 1906, Pt. V, p. 9; and for Proceedings in Council, *see* *ibid.*, 1905,

PRELIMINARY.

Short title and extent. 1. (1) This Act may be called THE INDIAN COIN-AGE ACT, 1906 ; and

(2) It extends to the whole of British India inclusive of British Baluchistan, the Santhal Parganas and the Pargana Spiti.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

- (a) "deface," with its grammatical variations and cognate expressions, includes clipping, filing, stamping, or such other alteration of the surface or shape of a coin as is readily distinguishable from the effects of reasonable wear ;
- (b) "the Mint " includes the Mints now existing and any which may hereafter be established ;
- (c) "prescribed " includes prescribed by a rule made under this Act ;
- (d) "remedy " means variation from the standard weight and fineness ; and
- (e) "standard weight " means the weight prescribed for any coin.

Power to establish and abolish mints.

3. The Governor-General in Council may, by notification in the Gazette of India—

- (a) establish a Mint at any place at which a Mint does not for the time being exist ; and
- (b) abolish any Mint, whether now existing or hereafter established.

SILVER COINAGE.

Silver coins.

4. The following silver coins only shall be coined at the Mint for issue under the authority of the Governor-General in Council, namely :—

- (a) a rupee to be called the Government rupee ;
- (b) a half-rupee [* * *]
- (c) a quarter-rupee [* * *]
- (d) [* * *]

Standard weight and fineness. 5. (1) The standard weight of the Government rupee shall be one hundred and eighty grains Troy and its standard fineness shall be as follows, namely : eleven-twelfths, or one hundred and sixty-five grains of fine silver, and one-twelfth, or fifteen grains of alloy.

(2) The other silver coins shall be of proportionate weight and of the same fineness :

Provided that, in the making of silver coins, a remedy shall be allowed of an amount not exceeding the following namely :—

	Remedy in weight.	Remedy in fineness.
Rupee	Five-thousandths	Two-thousandths.
Half-rupee		
Quarter-rupee	Seven-thousandths	Three-thousandths.
[* *]	[* *]	

Pt. VI, p. 142, *ibid.*, 1906, Pt. VI, p. 28. The Act has been declared in force in the Angul district by notification under S. 5 of the Angul District Regulation (I of 1894). Ben. Code, see Calcutta Gazette, 1907, Pt. I, p. 2077.

Sec. 4 (b) and (c).—The words "or eight-anna piece" in cl. (b), and the words "or four-anna piece" and in cl. (c) were omitted by Act XXI of

1919, S. 2.

Sec. 4 (d).—The words "an eighth of a rupee or two-anna piece" in cl. (d) were omitted by Act IV of 1918

Sec. 5 Proviso.—The words "eighth of a rupee" in col. (1) "Ten thousandths" in col. (2) were omitted by Act IV of 1918.

NICKEL COINAGE.

6. The following nickel coin only shall be coined at the Mint for issue under the authority of the Governor-General in Council namely :
 Nickel coin. [an eight-anna, a four-anna, a two-anna and a one-anna piece.]

7. The standard weight of the [eight-anna, four-anna, two-anna, and one-anna pieces shall be one hundred and twenty, one hundred and five, ninety and sixty grains troy, respectively.]
 Standard weight.

Provided that, in the making of nickel coin, a remedy shall be allowed of an amount not exceeding one-fortieth in weight.

BRONZE COINAGE.

8. The following bronze coins only shall be coined at the Mint for issue under the authority of the Governor-General in Council, namely :—

- (a) a pice, or quarter-anna ;
- (b) a half-pice, or one-eighth of an anna ; and
- (c) a pie, being one-third of a pice, or one-twelfth of an anna.

9. (1) The standard weight of the pice shall be seventy-five grains Troy and the other bronze coins shall be of proportionate weight.
 Standard weight and com positions.

(2) Bronze coins shall be coined from a mixed metal consisting of copper, tin and zinc.

Provided that, in the making of bronze coins, a remedy shall be allowed of an amount not exceeding one-fortieth in weight.

DIMENSIONS AND DESIGNS OF COINS.

Power to direct coining, and to prescribe dimensions and designs. 10. (1) The Governor-General in Council may, by, notification¹ in the Gazette of India,—

(a) direct the coining and issuing of all coins referred to in sections 4, 6 and 8, and

(b) determine the dimensions of, and designs for, such coins.

(2) Until the Governor-General in Council otherwise determines by notification under sub-section (1), the dimensions and designs of the silver coins coined under this Act shall be those prescribed for the like silver coins under the Indian Coinage Act, 1870,² at the time of the commencement of this Act.

LEGAL TENDER.

3[11. Gold coins, whether coined at His Majesty's Royal Mint or at any Mint established in pursuance of a proclamation of His Majesty as a branch of His Majesty's Royal Mint, shall not be legal tender in British India in payment or on account, but such coins shall be received at any Government currency office and, at any time after the 30th day of September, 1927, at any Government Treasury other than a Sub-Treasury, at the bullion value of such coins calculated at the rate of 8'47512 grains troy of fine gold per rupee.]
 Demonetization of sovereign and half-sovereign.

Silver coin when a legal tender. 12. (1) The rupee and half-rupee shall be a legal tender in payment or on account :

Provided that the coin—

(a) has not lost in weight so as to be more than two per cent. below standard weight, and

(b) has not been defaced.

Secs. 6 and 7.—The words in square brackets these two sections were amended by Acts IV of 1918 and XXI of 1919, respectively.

Sec. 10 (1).—¹ For notification relating to the coinage of bronze coin—see Gen. R. & O, Gazette of India, 1906, Pt. I, p. 491 ; for notification for

the coining and issue of the nickel one-anna piece see *ibid.* 1907, Pt. I, p. 632.

Sec. 10 (2).—² Repealed by this Act.

³Sec. 11 was substituted by Act X of 1927. See 28 Bom. L.R. 515 = 95 I.C. 552 = A.I.R. 1926 Bom. 516.

(2) The quarter-rupee [* * * *]¹ shall be a legal tender in payment or on account for any sum not exceeding one rupee :

Provided that the coin—

(a) has not lost in weight so as to be more than such percentage below standard weight as may be prescribed as the limit of reasonable wear, and

(b) has not been defaced.

[13. The eight-anna, four-anna, two-anna, and one-anna nickel coins specified in section 6 shall be a legal tender in payment or on account for any sum not exceeding one rupee at the rate of two, four, eight and sixteen for a rupee respectively.]

Nickel coin when a legal tender.

Bronze coin when a legal tender.

14. The bronze coins specified in section 8 shall be a legal tender in payment or on account for any sum not exceeding one rupee at the following rates, respectively, namely:—

- (a) the pice at the rate of sixty-four for a rupee, or four for an anna ;
- (b) the half-pice at the rate of one hundred and twenty-eight for a rupee, or eight for an anna ; and
- (c) the pie at the rate of one hundred and ninety-two for a rupee, or twelve for an anna.

Coin made under former Acts.

Act, 1870, ⁴ and

15. (1) (a) All silver coin of the weight and standard specified in Acts No. XVII of 1835, ² No. XXI of 1838, ³ No. XIII of 1862 ² and the Indian Coinage

(b) all copper coin of the weight specified in Acts No. XXI of 1835, ² No. XXII of 1844, ³ No. XIII of 1862, ² and the Indian Coinage Act, 1870, ⁴

which may have been issued since the passing of those Acts respectively, and declared by those Acts respectively to be a legal tender, shall, [subject only to the provisions of section 15-A and]⁵ in the case of silver coin to the provisos contained in section 12 of this Act in so far as such provisos apply to like coins under this Act, continue to be a legal tender for the amounts for which the like silver and bronze coins are a legal tender under this Act respectively.

(2) All double pice copper coins which may have been issued under the Acts specified in sub-section (1), clause (b), shall continue to be a legal tender in payment or on account for any sum not exceeding one rupee at the rate of thirty-two for a rupee or two for an anna.

6 [“ 15-A. Notwithstanding anything contained in section 12, section 13, section

Power to call in coin.

14 or section 15, the Governor-General in Council may, by notification in the Gazette of India call in, with effect from such date as may be specified in the notification, any coin, of whatever date or denomination, referred to in any of those sections, other than the rupee and half-rupee referred to in sub-section (1) of section 12, and on and from the date so specified such coin shall cease to be a legal tender save at a Government currency office :

Provided that such coin shall continue to be a legal tender also at Government treasuries until the expiry of such further period, not being less than twelve months, as the Governor-General in Council may fix by the notification.”]

Sec. 12 (2).—¹ The words “ and eighth of a rupee ” were omitted by Act IV of 1918.

Sec. 13 was substituted and amended by Acts IV of 1918 and XXI of 1919.

Sec. 15 (1).—² Repealed by the Indian Coinage Act, 1870.

³ Repealed by Act XIII of 1862.

⁴ Repealed by this Act.

Sec. 15 (1) (b).—⁵ The words “ subject only... S. 15-A and ” were substituted for the words, “ notwithstanding anything contained in this Act or in any Act hereby repealed but subject ” by Act X of 1924.

⁶ Sec. 15-A was inserted by Act X of 1924.

DIMINISHED, DEFACED AND COUNTERFEIT [* *] 1 COINS.

- 16.** Where any silver coin which has been coined and issued under the authority of the Governor-General in Council is tendered to any person authorized ² by the Governor-General in Council or by the Local Government to act under this section, and such person has reason to believe that the coin—

Power to certain persons to cut diminished or defaced silver coins.

(a) has been diminished in weight so as to be more than such percentage below standard weight as may be prescribed as the limit of reasonable wear, or

(b) has been defaced,
he shall, by himself or another, cut or break the coin.

Procedure in regard to coin cut under section 16 (a).

- 17.** A person cutting or breaking coin under the provisions of clause (a) of section 16 shall observe the following procedure, namely:—

(a) if the coin has been diminished in weight so as to be more than such percentage below standard weight as may be prescribed as the limits of reasonable wear, but not more than such further percentage as may be prescribed in this behalf, he shall either return the pieces to the person tendering the coin, or, if such person so requests, shall receive and pay for the coin at such rates as may be prescribed in this behalf; and

(b) if the coin has been diminished in weight so as to be more than such further percentage below standard weight so prescribed as aforesaid, he shall return the pieces to the person tendering the coin, who shall bear the loss caused by such cutting or breaking.

Procedure in regard to coin cut under section 16 (b).

- 18.** A person cutting or breaking coin under the provisions of clause (b) of section 16 shall observe the following procedure, namely:—

(a) if such person has reason to believe that the coin has been fraudulently defaced, he shall return the pieces to the person tendering the coin, who shall bear the loss caused by such cutting or breaking;

(b) if such person has not reason to believe that the coin has been fraudulently defaced, he shall receive and pay for the coin at its nominal value.

Explanation.—For the purposes of this section a coin which there is reason to believe has been defaced by sweating shall be deemed to have been fraudulently defaced.

Procedure in regard to coin which is liable to be cut under both clause (a) and clause (b) of section 16.

- 19.** If a coin is liable to be cut or broken under the provisions of both clause (a) and clause (b) of section 16, the person cutting or breaking the coin shall deal with it,—

(a) if he has reason to believe that the coin has been fraudulently defaced, under clause (a) of section 18, and

(b) in other cases, under section 17.

- 20.** Where any silver [or nickel³ coin purporting to be coined or issued under the authority of the Governor-General in Council is tendered to any person authorized by the Governor-General in Council or by the Local Government to act under this section, and such person has reason to believe that the coin is counterfeit, he shall by himself or another cut or

Power to certain persons to cut counterfeit silver coin and procedure in regard to coin so cut.

break the coin, and may at his discretion either return the pieces to the tenderer, who shall bear the loss caused by such cutting or breaking, or receive and pay for the coin according to the value of the silver bullion contained in it.

¹ The word "Silver" was omitted in the heading for section 16 by Act XXI of 1919.

² For persons so authorized, see Genl. R. and O. and Gazette of India, 1907, Pt. I, p.

204, and *ibid.* 1909, Pt. I, p. 34.

³ Sec. 20.—³ The words "or nickel" were added by Act XXI of 1919.

SUPPLEMENTAL PROVISIONS.

Power to make rules.

21. (1) The Governor-General in Council may make rules to carry out the purposes and objects of this Act.

(2) In particular and without prejudice to the generality of the foregoing powers, such rules may—

(a) reduce the amount of remedy allowed by section 5, 7 and 9 in the case of any coin ;

(b) provide for the guidance of persons authorized to cut or break coin under sections 16 and 20 ;

(c) determine the percentage of diminution in weight below standard weight not being less in any case than two per cent. which shall be the limit of reasonable wear ;

(d) prescribe the further percentage referred to in clause (a) of section 17, and the rates at which payments shall be made in the case of coins falling under the same clause.¹

(3) Every such rule shall be published in the Gazette of India, and on such publication shall have effect as if enacted in this Act.

22. No suit or other proceeding shall lie against any person in respect of anything in good faith done, or intended to be done, under or in pursuance of the provisions of this Act.

Bar of suits.

23. Nothing in this Act shall be deemed to prohibit or restrict the making at the Mint of coins intended for issue as money by the Government of any territories beyond the limits of British India.

Saving of making of other coins at Mints.

24. [* * * * *]

[* * *] copper coins of such descriptions as at the time of the commencement of this Act may be coined at the Mint for issue under the authority of the Governor-General in Council

may [* * *] continue to be so coined until such time² as the Governor-General in Council may by notification in the Gazette of India otherwise direct, and all copper coins so coined shall be a legal tender in payment or on account for the amounts for which bronze coins of corresponding nominal value are a legal tender under this Act.

Repeals.

THE SCHEDULE.

[*Repealed by Act X of 1914, Sch. II.*]

THE COLONIAL COURTS OF ADMIRALTY (INDIA) ACT (XIV OF 1891).³

S. 5 and Sch. Rep. Act 10 of 1914.

Am. (in Lower Burma), Act 6 of 1900, S. 47.

[14th May, 1891.]

An Act to declare certain Courts in British India to be Colonial Courts of Admiralty.

WHEREAS it is provided by the Colonial Courts of Admiralty Act, 1890⁴ that the Legislature of a British possession may by any colonial law declare any Court of unlimited civil jurisdiction in that possession to be a Colonial Court of Admiralty ;

And whereas it is expedient, in pursuance of that provision, to declare certain Courts in British India to be Colonial Courts of Admiralty ;

It is hereby enacted as follows :—

¹ Sec. 21.—The word at the end of Cl. (d) and Cl. (e) were omitted by Act IV of 1927.

² Sec. 24.—The words "The Acts mentioned in the Schedule are hereby repealed to the extent specified in the last column thereof", in the beginning of the section, the words "Provided that" following next afterwards, and the words "notwithstanding the repeal of the said Acts"

in the middle of the section were repealed by Act X of 1914, Sch. II.

³ See Gazette of India, 1908, Pt. I, p. 491.

⁴ For Statement of Objects and Reasons, see Gazette of India, 1892, Pt. V. p. 140 ; for Proceedings in Council, see *ibid.*, 1891, Pt. VI, p. 116.

⁵ See Gazette of India, 1890, Pt. I, p. 654.

Title and commencement. 1. (1) This Act may be called THE COLONIAL COURTS OF ADMIRALTY (INDIA) ACT, 1891; and

(2) It shall come into effect—

(a) if Her Majesty's pleasure thereon has been signified, by notification in the Gazette of India, on or before the first day of July, 1891, then on that day,¹ or

(b) if Her Majesty's pleasure thereon has not been so signified on or before that day, then on the day on which Her Majesty's pleasure shall be signified by such a notification as aforesaid.

Appointment of Colonial Courts of Admiralty. 2. The following Courts of unlimited civil jurisdiction are hereby declared to be Colonial Courts of Admiralty, namely :—

(1) the High Court of Judicature at Fort William in Bengal,

(2) the High Court of Judicature at Madras,

(3) the High Court of Judicature at Bombay,

(4) [the Chief Court of Lower Burma]²

[(4-a) the Chief Court of Sind, and]³

(5) the Court of the Resident at Aden.

[* * *]⁴

3. The expressions "Court having Admiralty jurisdiction" and "Admiralty Court" and the expression "Admiralty or Vice-Admiralty cause," and other expressions referring to Admiralty or Vice-Admiralty Courts or causes, shall, wherever any such expression occurs in any enactment of the Governor-General in Council, or of a Governor in Council or Lieutenant-Governor in Council, be deemed to include a Colonial Court of Admiralty and a Colonial Court of Admiralty cause, and to refer to a Colonial Court of Admiralty or a Colonial Court of Admiralty cause, respectively.

4. Court-fees in suits instituted in the Colonial Court of Admiralty at Rangoon, Aden or Karachi shall, unless the jurisdiction of the Court is to be exercised in any matter relating to the slave-trade, be leviable in accordance with the provisions of Chapter III of the Court-fees Act, 1870.

5. [Repealed by Act X of 1914, Sch. II.]

THE SCHEDULE.

[Rep. by Act X of 1914, Sch. II.]

THE INDIAN AND COLONIAL DIVORCE JURISDICTION ACT, 1926.

16 & 17 GEO. 5, CH. 40.

[27th January, 1927]

An act to confer on Courts in India and other parts of His Majesty's Dominions jurisdiction in certain cases with respect to the dissolution of marriages, the parties whereto are domiciled in England or Scotland, and to validate certain decrees granted for the dissolution of the marriage of persons so domiciled. (15th December, 1926.)

Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons in this present Parliament assembled, and by the authority of the same, as follows :—

¹ For notification publishing Her Majesty's assent to this Act, see Gazette of India, 1891, Pt. I, p. 371.

Sec. 2 (4).—² The words "The Chief Court of Lower Burma" were substituted for the words

"the Court of the Recorder of Rangoon" by Act VI of 1900, S. 47.

³ Cl. (4-a) inserted by Act XXXIV of 1926.

⁴ The word "and" at the end of Cl. (5) and Cl. (6) omitted by Act XXXIV of 1926.

1 (1) Subject to the provisions of this Act, a High Court in India to which part IX, of the Government of India Act applies shall have jurisdiction to make a decree for the dissolution of a marriage, and as incidental thereto to make an order as to damages, alimony or maintenance, custody of children, and costs, where the parties to the marriage are British

Divorce jurisdiction of High Courts in India where parties are domiciled in England or Scotland.

subjects domiciled in England or Scotland, in any case where a court in India would have such jurisdiction if the parties to the marriage were domiciled in India :

Provided that—

(a) The grounds on which a decree for the dissolution of such a marriage may be granted by any such court shall be those on which such a decree might be granted by the High Court in England according to the law for the time being in force in England ; and

(b) any such court in exercising such jurisdiction shall act and give relief on principles and rules as nearly as may be conformable to those on which the High Court in England for the time being acts and gives relief ; and

(c) no such court shall grant any relief under this Act except in case where the petitioner resides in India at the time of presenting the petition and the place where the parties to the marriage last resided together was in India, or make any decree of dissolution of marriage except where either the marriage was solemnized in India or the adultery or crime complained of was committed in India ; and

(d) any such court may refuse to entertain a petition in such a case if the petitioner is unable to show that by reason of official duty, poverty or any other sufficient cause he or she is prevented from taking proceedings in the Court of the country in which he or she is domiciled and the Court shall so refuse if it is not satisfied that in the interests of justice it is desirable that the suit should be determined in India.

(2) Any such order for alimony or maintenance or for custody of children shall have effect in India on making thereof, but save as aforesaid no such decree or order shall have any force or effect either in India or elsewhere unless and until registered in manner hereinafter provided.

(3) On production of a certificate purporting to be signed by the proper officer of the High Court in India by which the decree or order is made, the decree or order shall—

(a) if the parties to the marriage are domiciled in England, be registered in the High Court in England ;

(b) if the parties to the marriage are domiciled in Scotland, be registered in the books of Council and Session;

and upon such registration shall, as from the date of registration, have the same force and effect, and proceedings may be taken thereunder as if it had been a decree or order made on the date on which it was made by the High Court in India, by the High Court in England or the Court of Session in Scotland, as the case may be and in the case of an order, proceedings may be taken for the modification or discharge thereof as if it had been such an order as aforesaid :

Provided that—

(i) the High Court in England or the Court of Session in Scotland shall not, unless the Court for special reasons sees fit so to do, entertain any application for the modification or discharge of any such order if and so long as the person on whose petition the decree for the dissolution of the marriage was pronounced is resident in India ; and

(ii) where an order for the payment of alimony has been so registered in the books of Council and Session, the Court of Session shall in addition to any other power have power in the event of any material change of circumstances to discharge or modify such order.

(4) Proceedings before a High Court in India in exercise of the jurisdiction conferred by this Act shall be conducted in accordance with rules made by the Secretary of State in Council for India with the concurrence of the Lord Chancellor, and those rules shall provide—

(a) for petitions being heard before a judge or one of two or more judges of the Court nominated for the purpose by the Chief Justice of the Court with the approval of the Lord Chancellor ;

(b) for the decree or order made by such a judge being subject to appeal to two judges of the court similarly nominated without prejudice however to any right of ultimate appeal to His Majesty in Council ;

(c) for prohibiting or restricting the exercise of the jurisdiction where proceedings for the dissolution of the marriage have also been instituted in England or Scotland ;

(d) for preventing, in the case of a decree dissolving a marriage between parties domiciled in Scotland, the making of an order for the securing of a gross or annual sum of money ;

(e) for limiting cases in which applications for the modification or discharge of an order may be entertained by the Court to cases where at the time the application is made the person on whose petition the decree for the dissolution of the marriage was pronounced is resident in India ;

(f) for prescribing the officer of the Court empowered to give certificates under this Act, and the form of any such certificate ;

(g) for conferring such official as may be appointed for the purpose within the jurisdiction of each High Court the like right of showing cause why a decree should not be made absolute as is exercisable in England by the King's Proctor.

(5) The decision of a High Court in India, or on an appeal therefrom, as to the domicile of the parties to a marriage shall for the purposes of this Act be binding on all courts in England, Scotland and India.

2. (1) His Majesty may, by order in Council, provide for applying the foregoing provisions of this Act, subject to the necessary modifications, to any part of His Majesty's Dominions

other than a self-governing dominion, in like manner as they apply to India, and, in particular, any such order in Council may determine the court by which the jurisdiction conferred by those provisions is to be exercised.

(2) For the purposes of this section "Self-governing Dominion" means the Dominion of Canada, the Commonwealth of Australia (which for this purpose shall be deemed to include Papua and Norfolk Island), the Dominion of New Zealand, the Union of South Africa, the Irish Free State, Newfoundland, and the Colony of Southern Rhodesia.

3. Any decree granted under the Act of the Indian Legislature, known as

the Indian Divorce Act, 1869, and confirmed or made absolute under the provisions of that Act, for the dissolution of a marriage the parties to which were at the time of the commencement of the proceedings domiciled in England or in Scotland, and any order made by the Court in relation to any such decree shall, if the proceedings were commenced before the passing of this Act, be as valid and be deemed always to have been as valid in all respects as though the parties to the marriage had been domiciled in India.

Short title.

4. This Act may be cited as THE INDIAN AND COLONIAL DIVORCE JURISDICTION ACT, 1926.

RULES UNDER THE INDIAN AND COLONIAL DIVORCE JURISDICTION ACT, 1926.

[Published in the Gazette of India, dated 26th August, 1927.]

HOME DEPARTMENT (16th August, 1927).

RULES UNDER SECTION 1 (4), INDIAN AND COLONIAL DIVORCE JURISDICTION ACT, 1926.

1. *Short title and commencement.*—(1) These rules may be called the Indian (Non-domiciled Parties) Divorce Rules, 1927. (2) They shall come into force on the 27th day of July 1927.

2. *Appointment of Judges*—

(1) As soon as may be after the coming into force of these rules the Chief Justice of each of the High Courts referred in sub-section (1) of section 1 of the Indian and Colonial Divorce Jurisdiction Act, 1926, hereinafter called "the Act", shall submit to the Lord Chancellor through the

Secretary of State for India the names of such number of judges of the Court (including, if he thinks fit, the name of the Chief Justice himself) not exceeding six, as he may consider necessary for the purpose of exercising jurisdiction under the Act and these rules.

(2) Upon the approval of the Lord Chancellor to any nomination so submitted being signified to the Chief Justice by the Secretary of State for India, the Chief Justice shall cause the names so approved to be notified in the local official Gazette (or, in the case of the High Court of Judicature at Calcutta, in the Gazette of India) as judges appointed to exercise jurisdiction under the Act, and the judges whose names shall have been so notified shall thereupon have power to exercise jurisdiction accordingly.

(3) At any time after the first nominations under these rules have been approved, the Chief Justice may propose the names of a further judge or judges to take the place of, or to exercise jurisdiction in addition to, the judge or judges for the time being having powers under the Act; and when such further nominations are approved they shall be notified as aforesaid.

3. Every petition under the Act shall be heard by a single judge nominated and approved as hereinbefore provided, sitting without a jury, and, subject to the provisions of the Indian Limitation Act, an appeal shall lie to a bench of two other judges who have been similarly nominated and approved against any decree or order which would be appealable if it had been passed in proceedings under the Indian Divorce Act, 1869, and shall be disposed of accordingly. Each such bench shall be constituted by the Chief Justice as occasion may arise.

4. Nothing in these rules shall be deemed to prevent the exercise of any ultimate right of appeal to His Majesty in Council.

5. *Petition*.—All proceedings under the Act shall be commenced by filing a petition to which shall be attached a certified copy of the certificate of the marriage.

6. (1) In the body of a petition praying for the dissolution of a marriage shall be stated—

(i) the place and date of the marriage and the name, status and domicile of the wife before the marriage;

(ii) the status of the husband and his domicile at the time of the marriage and at the time when the petition is presented, and his occupation and the place or places of residence of the parties at the time of institution of the suit;

(iii) the principal permanent addresses where the parties have cohabited, including the address where they last resided together in India;

(iv) where there is living issue of the marriage, and, if so, the names and dates of birth or ages of such issue;

(v) whether there have been in the Divorce Division of the High Court of Justice in England or in the Court of Session in Scotland or in any Court in India any, and, if so, what previous proceedings with reference to the marriage by or on behalf of either of the parties to the marriage, and the result of such proceedings;

(vi) the matrimonial offences charged, set out in separate paragraphs, with the times and places of their alleged commission;

(vii) the claim for damages, if any;

(viii) the grounds on which the petitioner claims that in the interests of justice it is desirable that the suit should be determined in India.

(2) The petition shall conclude with a prayer setting out particulars of the relief claimed, including the amount of any claim for damages and any order for custody of children which is sought, and shall be signed by the petitioner.

7. *Verification of petition*.—The statements contained in every petition under these rules shall be verified by the petitioner or some other competent person in manner required by the Code of Civil Procedure for the time being in force for the verification of plaints, and in cases where the petitioner is seeking of a decree of dissolution of marriage the verification shall include a declaration authenticated in like manner that no collusion or connivance exists between the petitioner and the other party to the marriage, and that neither the petitioner nor within the knowledge of the petitioner the other party to the marriage has instituted proceedings which are still pending for the dissolution of the marriage in England or Scotland.

8. *Co-respondents are interveners*.—In every petition presented by a husband for the dissolution of his marriage, the petitioner shall make the alleged adulterers co-respondents in the suit, unless the Court shall otherwise direct.

9. Where a husband is charged with adultery with a named person, a certified copy of the pleading containing such charge shall, unless the Court for good cause shown otherwise directs, be served upon the person with whom adultery is alleged to have been committed, accompanied by a notice that such person is entitled, with the time therein specified, to apply for leave to intervene in the cause.

10. *Service of petitions and notices*.—Every petition or notice referred to in these rules shall be served on the party to be affected thereby, either within or without British India, in the manner prescribed by the Code of Civil Procedure for the time being in force for the service of summonses:

Provided that unless the Court for good cause shown otherwise directs, service of all such petitions and notices shall be effected delivery of the same to the party to be affected thereby, and the Court shall record that it is satisfied that service has been so effected.

11. *Answer and subsequent pleadings*.—A respondent or co-respondent, or a woman to whom leave to intervene has been granted under rule 9, may file in the Court and answer to the petition.

12. (1) Any answer which contains matter other than a simple denial of the facts stated in the petition shall be verified in respect of such matter by the respondent or co-respondent, as the case

may be, in the manner required by those rules for the verification of petitions, and when the respondent is husband or wife of the petitioner, the answer shall contain a declaration that there is not any collusion or connivance between the parties.

(2) Where the answer of a husband alleges adultery and prays relief, a certified copy thereof shall be served upon the alleged adulterer, together with a notice to appear in like manner as a petition. When in such case no relief is claimed, the alleged adulterer shall not be made a co-respondent, but a certified copy of the answer shall be served upon him together with a notice as under Rule 9 that he is entitled within the time therein specified to apply for leave to intervene in the suit, and upon such application he may be allowed to intervene, subject to such direction as shall then be given by the Court.

13. (1) If it appears to the Court that proceedings for the dissolution of the marriage have been instituted in England or Scotland before the date on which the petition was filed in India, the Court shall either dismiss the petition or stay further proceedings thereon until the proceedings in England or Scotland have terminated, or until the Court shall otherwise direct.

(2) If it appears that such proceedings were instituted after the filing of the petition in India, the Court may proceed, subject to the provisions of the Act, with the trial of the suit.

14. *Showing cause against a decree nisi.*—The Governor-General in Council in the case of the High Court of Judicature at Calcutta and the Local Government in other cases shall appoint a person to exercise within the jurisdiction of each of the High Courts referred to in section 1 of the Act the duties assigned to His Majesty's Proctor by sections 181 and 182 of the Supreme Court of Judicature (Consolidation) Act, 1925, and the name of the person so appointed shall be notified in the Gazette of India or in the local official Gazette, as the case may be, by the designation of Proctor. Every Proctor so appointed shall in the exercise of his functions act under the instructions of the Advocate-General or other Chief Law Officer of the province.

15. (1) If any person during the progress of the proceedings or before the decree *nisi* is made absolute gives information to the Proctor of any matter material to the due decision of the case, the Proctor may take such steps as he considers necessary or expedient.

(2) If in consequence of any such information otherwise the Proctor suspects that any parties to the petition are or have been in collusion for the purpose of obtaining a decree contrary to the justice of the case, he may after obtaining the leave of the Court intervene and produce evidence to prove the alleged collusion.

16. (1) When the Proctor desires to show cause against making absolute a decree *nisi* he shall enter an appearance in the suit in which such decree *nisi* has been pronounced and shall within a time to be fixed by the Court file his plea setting forth the grounds upon which he desires to show cause as aforesaid, and a certified copy of his plea shall be served upon the petitioner or person in whose favour such decree has been pronounced or his advocate. On entering an appearance the Proctor shall be made a party to the proceedings, and shall be entitled to appear in person or by advocate.

(2) Where such plea alleges a petitioner's adultery with any named person a certified copy of the plea shall be served upon each such person omitting such part thereof as contains any allegation in which the person so served is not named.

(3) All subsequent pleadings and proceedings in respect of such plea shall be filed and carried on in the same manner as is hereinbefore directed in respect of an original petition, except as hereinafter provided.

(4) If the charges contained in the plea of the Proctor are not denied or if no answer to the plea of the Proctor is filed within the time limited or if an answer is filed and withdrawn or not proceeded with the Proctor may apply forthwith for the rescission of the decree *nisi* and dismissal of the petition.

17. Where the Proctor intervenes or shows cause against a decree *nisi* in any proceedings for divorce, the Court may make such order as to the payment by other parties to the proceedings of the costs incurred by him in so doing, or, as to the payment by him of any costs incurred by any of the said parties by reason of his so doing, as may seem just.

18. Any person other than the Proctor wishing to show cause against making absolute a decree *nisi* shall, if the Court so permits, enter an appearance in the suit in which such decree *nisi* has been pronounced, and at the same time file affidavits setting forth the facts upon which he relies. Certified copies of the affidavits shall be served upon the party or the advocate of the party in whose favour the decree *nisi* has been pronounced.

19. The party in the suit in whose favour the decree *nisi* has been pronounced may within a time to be fixed by the Court file affidavits in answer, and the person showing cause against the decree *nisi* being made absolute may within a further time to be so fixed file affidavits in reply.

20. *Decree absolute.*—No decree *nisi* for the dissolution of a marriage under the Act shall be made absolute till after the expiration of six months from the pronouncing thereof, if no appeal has been filed within that period, or if any appeal (including an appeal to His Majesty in Council) has been filed, until after the decision thereof.

21. (1) Application to make absolute a decree *nisi* shall be made to the Court by filing a petition setting forth that application is made for such decree absolute, which will thereupon be pronounced in open Court at a time appointed for that purpose. In support of such application it must be shown by affidavit filed with the said petition that no proceedings for the dissolution of the marriage have been instituted and are pending in England or Scotland, and that search has been made in the proper books at the Court up to within six days of the time appointed, and that at such time no person had intervened or obtained leave to intervene in the suit, and that no appearance has been entered nor any affidavits filed on behalf of any person wishing to show cause against the

decree *nisi* being made absolute; and in case leave to intervene had been obtained, or appearance entered or affidavits filed on behalf of such person, it must be shown by affidavits what proceedings, if any, have been taken thereon.

(2) If more than twelve calendar months has elapsed since the date of the decrees *nisi*, an affidavit by the petitioner, giving reasons for the delay, shall be filed.

22. Alimony, maintenance and custody of children.—Proceedings relating to alimony, maintenance, custody of children, and to the payment, application or settlement of damages assessed by the Court shall be conducted in accordance with the provisions of the Indian Divorce Act, 1869, and of the rules made thereunder:

Provided that when a decree is made for the dissolution of a marriage the parties to which are domiciled in Scotland, the Court shall not make an order for the securing of a gross or annual sum of money:

Provided further that no Court in India shall entertain an application for the modification or discharge of an order for alimony, maintenance or the custody of children, unless the person on whose petition the decree for the dissolution of the marriage was pronounced is at the time the application is made resident in India.

23. Certifying Officer.—A certificate referred to in sub-section (3) of section 1 of the Act shall be in the form set out in the schedule and shall be signed by a Registrar or Prothonotary of the High Courts to which the Act applies and sealed with the seal of the Court.

24. Procedure generally.—Subject to the provisions of these rules all proceedings under the Act between party and party shall be regulated by the Indian Divorce Act and the rules made thereunder.

25. The forms set forth in the schedule to the Indian Divorce Act, with such variation as the circumstances of each case and these rules may require, may be used for the respective purposes mentioned in the Schedule.

SCHEDULE. (See Rule 23.)

I, [A. B. Registrar
Prothonotary] of the High Court of Judicature at.....hereby certify that the foregoing is a true copy of a ^{decree}_{order} made by the aforesaid High Court acting in exercise of the matrimonial jurisdiction conferred by the Indian and Colonial Divorce Jurisdiction Act, 1926, in Suit No....of. in which the above-named C. D. Appeal Noof....from judgment and decree in suit No....of. was petitioner and the above-named E. F. was respondent and the above-named G. H. was co-respondent.
intervener.

(Signed).....

Registrar
Prothonotary

THE INDIAN COMPANIES ACT (VII OF 1913).

PREFATORY NOTE.—"Company" is an association of a number of individuals for the purpose of carrying on a legitimate business, a number of persons united for the same purpose, or in a joint concern, as a company of merchants. The word is applicable to private partnerships, or incorporated bodies of men; hence it may signify a firm, house or partnership; or a corporation. Association is included within the meaning of the term; in fact "Company" and "Association" are frequently considered as synonymous. The Companies Act is intended to regulate the incorporation and the running of the business of companies. *James, L. J.*, said with reference to the English Companies Act of 1862, "The Act was intended to prevent the mischief arising from large trading undertakings being carried on by large fluctuating bodies, so that persons dealing with them did not know with whom they were contracting, and were put to great difficulty and expense, which was a public mischief to be repressed." (*Smith v. Anderson*, 15 Ch. D. 273). The same remarks will hold good in the case of the Indian Companies Act also. The law on the subject of Joint Stock Companies in India was contained in the Indian Companies Act, 1882, which was modelled closely on the English law in force in 1877. The object of the new Companies Act is to revise and consolidate the Indian Law on the subject of Joint Stock Companies on the lines of recent English legislation. Since 1882 the Indian law has been added to by four amending Acts, namely, the Indian Companies (Amendment) Act, 1887; the Indian Companies (Memorandum of Association) Act, 1895; the Indian Companies (Branch Registers) Act, 1900; and the Indian Companies (Amendment) Act, 1910. The substantial additions, however, which have been made to the English law by the long series of Acts passed between 1879 and 1908 have not with the exception of the matters dealt with in the four small amending Acts abovementioned, been adopted in the Indian law. The more important of the later English Acts are the Companies Act, 1879; the Companies Act, 1880; the Companies (Winding up) Act, 1890; the Directors Liability Act, 1890; the Companies Act, 1900; the Companies Act, 1907; and the Companies (Consolidation) Act, 1908. The English Companies Consolidation Act, 1908, consolidated the English law into a convenient Code and this Code had been taken as the model for the present Bill. The present Bill follows the English Act not merely in its general principles but in its detailed arrangement and expression, wherever possible, as it is considered a

matter of the first importance to have the Indian law as uniform as possible with the English law except where local circumstances demand a modification in substance. Among the new and important provisions introduced into the Indian Company law by the Companies Bill are those relating to (a) the preparation of a statutory report by a company limited by shares before the first general meeting (cl. 81); (b) the appointment and advertisement of directors (cls. 88 and 89); (c) the prospectus and statement in lieu of prospectus (cls. 96 to 104); (d) restrictions on proceeding to allotment (cls. 105 to 106); (e) restriction on commencing business (cl. 107); (f) the appointment, remuneration and duties of auditors (cls. 142 and 143); (g) the registering of information regarding certain kinds of mortgages and charges (cls. 113 to 128); and (h) the registering of information regarding companies situated outside British India but operating therein (cl. 310).

It has been considered necessary to depart from English law on the subject of the winding up of Companies by order of the Court, and in place of the provisions introduced into English law by the Companies (Winding up) Act, 1890, the procedure of existing Indian law has been in the main retained. The procedure leaves the discretion in the matter of winding up in the hands of the Court, whereas in the English law important functions are exercised by the Board of Trade, by Official Receivers, and by Committees of Inspection. On the subject of the annual balance-sheet the provisions of the existing Indian law have been retained where these appeared more complete than the provisions of the English law, and the prescribed form of balance-sheet has also been retained. In order to make inspection in the interest of share holders without difficulty where a case for such inspection has been made out, the Registrar of Joint Stock Companies has been empowered to demand from any company an explanation of anything that is not clear in its balance-sheet or other returns submitted to him, and the Company will be liable, to a penalty if it fails to provide a full and true statement to the Registrar, when called upon. A report from the Registrar will form a ground on which the local Government may order an inspection of the affairs of a company. In regard to the qualifications of auditors, a matter on which the English law imposes no restriction, a provision has been inserted authorizing local Governments to issue certificates for the auditing of company's accounts to approved persons in accordance with rules to be framed for the purpose and restricting the audit of companies' accounts to persons holding such certificates. It has not been thought necessary to include the provision of the English Act (S. 40) whereby a company is empowered to return accumulated profits in reduction of paid-up share capital. (See Statement and Object of Reasons.)

Legislative change:—Sch. I, Table A, paragraph 91 am., Act X of 1914. Am., XI of 1914, S. 2.

S. 246 am., Act XI of 1915. Am., Act XLII of 1920.

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THE INDIAN COMPANIES ACT (VII OF 1913).¹

[27th March, 1913.]

An Act to consolidate and amend the law relating to Trading Companies and other Associations.

WHEREAS it is expedient to consolidate and amend the law relating to Trading Companies and other associations ; it is hereby enacted as follows :—

PART I.

PRELIMINARY.

Short title, commencement and extent.

1. (1) This Act may be called THE INDIAN COMPANIES ACT, 1913.

(2) It shall come into force on the first day of April 1914 ; and

(3) It extends to the whole of British India including British Baluchistan and the Santhal Parganas.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

(1) " articles " means the articles of association of a company as originally framed or as altered by special resolution, including, so far as they apply to the company, the regulations contained (as the case may be) in Table B in the Schedule annexed to Act No. XIX of 1857 or in Table A in the First Schedule annexed to the Indian Companies Act, 1882, or in Table A in the First Schedule annexed to this Act :

(2) " company " means a company formed and registered under this Act or an existing company :

(3) " the Court " means the Court having jurisdiction under this Act :

(4) " debenture " includes debenture stock :

(5) " director " includes any person occupying the position of a director by whatever name called :

(6) " District Court " means the principal Civil Court of original jurisdiction in a district, but does not include a High Court in the exercise of its ordinary original civil jurisdiction :

(7) " existing company " means a company formed and registered under the Indian Companies Act, 1866, or under any Act or Acts repealed thereby, or under the Indian Companies Act, 1882 :

¹ For Statement of Objects and Reasons, see Gazette of India, 1912, Part V, p. 151; for Report of the Select Committee, see *ibid.* 1913, Pt. V, p. 45, and for Proceedings in Council, see *ibid.*, 1912, Pt. VI, p. 586, and *ibid.*, 1913, Pt. VI, pp. 6, 106 and 300.

Sec. 1.—Procedure prescribed by the Act should be strictly followed. 6 Pat. 132=8 Pat. L. T. 577=101 I. C. 750=A. I. R. 1927 Pat. 182. Where an Indian Act is copied from an *English*

Act, it should be given the same meaning as in the Parent Act, especially in a technical branch of law, as the Companies Act. 8 Lah. L. J. 376=97 I. C. 783=27 Punj. L. R. 676=A. I. R. 1926 Lah. 624. Act does not create new rights, but only regulates rights under common law. (1928) M. W. N. 442=A. I. R. 1928 Mad. 571.

Sec. 2 (5).—Who can challenge appointment of director. 31 I. C. 595.

(8) "Insurance company" means a company that carries on the business of insurance either solely or in common with any other business or businesses :

(9) "manager" includes any person occupying the position of a manager by whatever name called and whether under a contract of service or not :

(10) "memorandum" means the memorandum of association of a company as originally framed or as altered in pursuance of the provisions of this Act :

(11) "officer" includes any director, manager or secretary but, save in sections 235, 236 and 237, does not include an auditor.

(12) "prescribed" means, as respects the provisions of this Act relating to the winding up of companies, prescribed by rules made by the High Court, and, as respects the other provisions of this Act, prescribed by the Governor-General in Council :

(13) "private company" means a company which

(i) by its articles—

(a) restricts the right to transfer its shares ; and

(b) limits the number of its members (exclusive of persons who are in the employ of the company) to fifty ; and

(c) prohibits any invitation to the public to subscribe for any shares or debentures of the company ; and

(ii) continues to observe such restrictions, limitations and prohibitions :

Provided that where two or more persons hold one or more shares in a company jointly they shall, for the purposes of this definition, be considered as a single member.

(14) "prospectus" means any prospectus, notice, circular, advertisement or other invitation, offering to the public for subscription or purchase any shares or debentures of a company ;

(15) "the registrar" means a registrar or assistant registrar performing under this Act the duty of registration of companies ; and

(16) "share" means share in the share capital of the company, and includes stock except when a distinction between stock and shares is expressed or implied.

3. (1) The Court having jurisdiction under this Act shall be the High Court having jurisdiction in the place at which the registered office of the company is situate :

Provided that the Local Government may, by notification in the local official Gazette and subject to such restrictions and conditions as it thinks fit, empower any District Court to exercise all or any of the jurisdiction by this Act conferred upon the Court, and in that case such District Court shall, as regards the jurisdiction so conferred, be the Court in respect of all companies having their registered offices in the district.

(2) For the purposes of jurisdiction to wind up companies, the expression 'registered office' means the place which has longest been the registered office of the company during the six months immediately preceding the presentation of the petition for winding up.

(3) Nothing in this section shall invalidate a proceeding by reason of its being taken in a wrong Court.

Sec. 2 (9).—Unless a person is in charge of the entire business of a company he cannot be deemed to be a manager thereof. A mere branch manager does not come within S. 87. 43 I.C. 791 = 19 Cr. L. J. 215 = 47 P. R. Cr. (1917).

Sec. 2 (14).—Advertisement offering for sale certain shares of a limited company falls within the definition of "prospectus"—Omission to deposit the same with registrar is an offence under S. 98 (5). 52 Cal. 440 = 29 C. W. N. 523 = 88 I. C. 5 (2) = 26 Cr. L. J. 1061 = 1925 Cal. 714.

Sec. 2 (16).—Informal transfer of shares invalid

—Transferor remains a contributory. 31 I. C. 865 = 162 P. W. R. 1915.

Sec. 3.—As to jurisdiction of District Courts, see 20 P. R. 1915 = 29 I. C. 272.

Sec. 3 (1).—Mofussil companies—Application lies to High Court on the original side. See 29 C. W. N. 404 = 86 I. C. 910 = 1925 Cal. 606. See also 41 C. L. J. 191 = 86 I. C. 833 = 29 C. W. N. 403 = 52 Cal. 586 = 1925 Cal. 626.

Sec. 3 (3).—Applicability of proviso—Transfer of decree by Allahabad High Court to Gaya District Court—Validity. 6 Pat. 132.

PART II.

CONSTITUTION AND INCORPORATION.

4. (1) No company, association or partnership consisting of more than ten persons shall be formed for the purpose of carrying on the

Prohibition of partnerships exceeding certain number.

business of banking unless it is registered as a company under this Act, or is formed in pursuance of an Act of Parliament or some other Act of the Governor-General in Council, or of Royal Charter or Letters Patent.

(2) No company, association or partnership consisting of more than twenty persons shall be formed for the purpose of carrying on any other business that has for its object the acquisition of gain by the company, association or partnership, or by the individual members thereof, unless it is registered as a company under this Act, or is formed in pursuance of an Act of Parliament or some other Act of the Governor-General in Council or of Royal Charter or Letters Patent.

Memorandum of Association.

5. Any seven or more persons (or, where the company to be formed will be a private company, any two or more persons) associated for

Mode of forming incorporated company.

any lawful purpose may, by subscribing their names to a memorandum of association and otherwise complying with the requirements of this Act in respect of registration, form an incorporated company with or without limited liability (that is to say), either—

(i) a company having the liability of its members limited by the memorandum to the amount, if any, unpaid on the shares respectively held by them (in this Act termed a company limited by shares); or

(ii) a company having the liability of its members limited by the memorandum to such amount as the members may respectively thereby undertake to contribute to the assets of the company in the event of its being wound up (in this Act termed a company limited by guarantee); or

(iii) a company not having any limit on the liability of its members (in this Act termed an unlimited company).

Memorandum of company limited by shares.

6. In the case of a company limited by shares—

Sec. 4.—A company of more than twenty members, if unregistered under S. 4 of the Act is an association prohibited by law and is therefore illegal. 50 Mad. 175=99 I. C. 640=A.I.R. 1927 Mad. 123; 64 I.C. 447=19 A.L.J. 836; 48 All. 735. As to number of shareholders, see 84 I.C. 118=1925 Mad. 233 (2). A partnership consisting of more than 20 persons is invalid in law and a suit by one such partner against the rest for partition of assets in such an illegal transaction cannot be maintained in a Court of law. [24 A.L.J. 777, Foll.; (1926) Ch. D. 657, Dist.] 49 All. 319=100 I.C. 50=25 A.L.J. 146=A.I.R. 1927 All. 487. The word "partner" or "partnership" in an agreement between several persons jointly advancing money does not necessarily show that there was a partnership between them. 65 I.C. 368=1922 Nag. 67. The parties may call themselves partners, but if one party is to do nothing more than advance money to the other and is to be repaid by a share of the profits they must be treated as debtor and creditor. 65 I.C. 368=1922 Nag. 67. (4 All. 74 F.) An association of several firms consisting of more than twenty persons formed with the object of acquiring gain is essentially within the purview of S. 4 and requires registration. 26 I.C. 613=10 N.L.R. 98. Unregistered companies, if units for purpose of section 4. 50 Mad. 175=A.I.R. 1927 Mad. 123. The word 'persons' in S. 4

denotes individuals and does not include bodies of individuals whether corporate or not, since any such extended definition would be repugnant to the subject and context of the section. 26 I.C. 613=10 N.L.R. 98. See also 50 Mad. 175=A.I.R. 1927 Mad. 123; 24 L. W. 752=51 M. L. J. 667; 24 A.L.J. 777=97 I.C. 90=A.I.R. 1926 All. 591. To constitute an association, it is necessary that there should be more than twenty persons so associated as to create a legal relation giving rise to joint and mutual rights and obligations. 50 I.C. 513=11 Bur. L.T. 255. A chit fund creates no legal relation between the subscribers *inter se* but only as between the manager and the subscriber. (*Ibid.*) It is not an association within S. 4 and the manager can sue and be sued though the chit fund is not registered under the Companies Act.

"BUSINESS"—Test of 50 Mad. 175=A.I.R. 1927 Mad. 123.

Sec. 5.—It is not opposed to public policy for the proprietors of zemindari, who were numerous and whose interests were minute, to form themselves into a company if the means adopted for the management of property are beneficial. 13 I. C. 673=16 C. W. N. 297.

Sec. 6.—Memorandum of association can be altered only by special resolution. 1 I. C. 803=33 Mad. 36=5 M. L. T. 290.

(1) the memorandum shall state—

- (i) the name of the company, with " Limited " as the last word in its name ;
- (ii) the province in which the registered office of the company is to be situate ;
- (iii) the objects of the company ;
- (iv) that the liability of the members is limited ;
- (v) the amount of share capital with which the company proposes to be registered, and the division thereof into shares of a fixed amount ;
- (2) no subscriber of the memorandum shall take less than one share ;
- (3) each subscriber shall write opposite to his name the number of shares he takes.

Memorandum of company
limited by guarantee.

7. In the case of a company limited by guarantee—

(1) the memorandum shall state—

- (i) the name of the company, with " Limited " as the last word in its name ;
- (ii) the province in which the registered office of the company is to be situate ;
- (iii) the objects of the company ;
- (iv) that the liability of the members is limited ;
- (v) that each member undertakes to contribute to the assets of the company in the event of its being wound up while he is a member, or within one year afterwards, for payment of the debts and liabilities of the company contracted before he ceases to be a member, and of the costs, charges and expenses of winding up, and for adjustment of the rights of the contributories among themselves, such amount as may be required, not exceeding a specified amount ;

(2) if the company has a share capital—

- (i) the memorandum shall also state the amount of share capital with which the company proposes to be registered and the division thereof into shares of a fixed amount ;
- (ii) no subscriber of the memorandum shall take less than one share ;
- (iii) each subscriber shall write opposite to his name the number of shares he takes.

Memorandum of unlimited
company.

8. In the case of an unlimited company--

(1) the memorandum shall state—

- (i) the name of the company ;
- (ii) the province in which the registered office of the company is to be situate ;
- (iii) the objects of the company ;
- (2) if the company has a share capital—
- (i) no subscriber of the memorandum shall take less than one share ;
- (ii) each subscriber shall write opposite to his name the number of shares he takes.

Signature of memorandum.

9. The memorandum shall be signed by each subscriber in the presence of at least one witness who shall attest the signature.

10. A company shall not alter the conditions contained in its memorandum except in the cases and in the mode and to the extent for which express provision is made in this Act.

Restriction on alteration of
memorandum.

11. (1) A company shall not be registered by a name identical with that by which a company in existence is already registered, or so nearly resembling that name as to be calculated to deceive, except where the company in existence is in the course of being dissolved and signifies its consent in such manner as the registrar requires.

Name of company and
change of name.

Sec. 10.—Alteration of memorandum of association—Revocation of appointment of managing agent—Confirmation by Court. 18 L.W. 304 = 74 I.C. 966 = 1924 Mad. 126. The only power

that the court has to confirm resolutions of a company in regard to an alteration of the memorandum of association is in respect of matters covered by section 12, (*Ibid.*)

(2) If a company, through inadvertence or otherwise, is, without such consent as aforesaid, registered by a name identical with that by which a company in existence is previously registered, or so nearly resembling it as to be calculated to deceive, the first-mentioned company may, with the sanction of the registrar, change its name.

(3) A company shall not be registered by a name which contains any of the following words, namely :—"Crown," "Emperor," "Empire," "Empress," "Imperial," "King," "Queen," "Royal," or words expressing or implying the sanction, approval or patronage of the Crown or the Government of India or a Local Government, except where the Governor-General in Council signifies his consent to the use of such words as part of the name of the company by order in writing under the hand of one of the Secretaries to the Government of India :

Provided that nothing in this sub-section shall apply to companies registered before the commencement of this Act.

(4) Any company may, by special resolution and subject to the approval of the Local Government signified in writing, under the hand of one of the Secretaries to such Government, change its name.

(5) Where a company changes its name, the registrar shall enter the new name on the register in place of the former name, and shall issue a certificate of incorporation altered to meet the circumstances of the case. On the issue of such certificate, the change of name shall be complete.

(6) The change of name shall not affect any rights or obligations of the company, or render defective any legal proceedings by or against the company ; and any legal proceedings that might have been continued or commenced against it by its former name may be continued or commenced against it by its new name.

12. (1) Subject to the provisions of this Act, a company may, by special resolution, alter the provisions of its memorandum so as to change the place of the registered office from one province to another, or with respect to the objects of the company, so far as may be required to enable it—

- (a) to carry on its business more economically or more efficiently ; or
 - (b) to attain its main purpose by new or improved means ; or
 - (c) to enlarge or change the local area of its operations ; or
 - (d) to carry on some business which under existing circumstances may conveniently or advantageously be combined with the business of the company ; or
 - (e) to restrict or abandon any of the objects specified in the memorandum.
- (2) The alteration shall not take effect until and except in so far as it is confirmed by the Court on petition.

(3) Before confirming the alteration, the Court must be satisfied—

(a) that sufficient notice has been given to every holder of debentures of the company, and to any persons or class of persons whose interests will, in the opinion of the Court, be affected by the alteration ; and

(b) that, with respect to every creditor who in the opinion of the Court is entitled to object, and who signifies his objection in manner directed by the Court, either his consent to the alteration has been obtained or his debt or claim has been discharged or has determined, or has been secured to the satisfaction of the Court :

Provided that the Court may, in the case of any person or class, for special reasons, dispense with the notice required by this section.

13. The Court may make an order confirming the alteration either wholly or in part, and on such terms and conditions as it thinks fit, and may make such order as to costs as it thinks proper.

Sec. 11, Cl. (5).—Certificate of incorporation—Conclusive nature of. 40 Cal. 1 (P. C.)=16 C. L. J. 642=16 C. W. N. 937=23 M. L. J. 215.

Sec. 12.—See notes under S. 10. Alteration of memorandum of association by addition of new clauses—Jurisdiction and Procedure. See 29 C.

W.N. 403=52 Cal. 586=1925 Cal. 626 ; 48 All. 706. Alteration in place of registered office—Confirmation by Court—What constitutes jurisdiction. 24 A. L. J. 768=96 I. C. 753=A. I. K. 1926 All. 649.

14. The Court shall, in exercising its discretion under sections 12 and 13, have regard to the rights and interests of the members of the company or of any class of them, as well as to the rights and interest of the creditors, and may, if it thinks fit, adjourn the proceedings in order that an arrangement may be made to the satisfaction of the Court for the purchase of the interests of dissentient members; and may give such directions and make such orders as it may think expedient for facilitating or carrying into effect any such arrangement:

Provided that no part of the capital of the company may be expended in any such purchase.

15. (1) A certified copy of the order confirming the alteration, together with a printed copy of the memorandum as altered, shall, within three months from the date of the order, be filed by the company with the registrar, and he shall register the same, and shall certify the registration under his hand, and the certificate shall be conclusive evidence that all the requirements of this Act with respect to the alteration and the confirmation thereof have been complied with, and thenceforth the memorandum so altered shall be the memorandum of the company.

(2) Where the alteration involves a transfer of the registered office from one province to another, a certified copy of the order confirming such change shall be filed by the company with the registrar in each of such provinces, and each of such registrars shall register the same, and shall certify under his hand the registration thereof, and the registrar for the province from which such office is transferred shall send to the registrar for the other province all documents relating to the company registered or filed in his office.

(3) The Court may by order at any time extend the time for the filing of documents with the registrar under this section for such period as the Court thinks proper.

16. No such alteration shall have any operation until registration thereof has been duly effected in accordance with the provisions of section 15, and if such registration is not effected within three months next after the date of the order of the Court confirming the alteration, or within such further time as may be allowed by the Court in accordance with the provisions of section 15, such alteration and order and all proceedings connected therewith shall, at the expiration of such period of three months, or such further time, as the case may be, become absolutely null and void:

Provided that the Court may, on sufficient cause shown, revive the order on application made within a further period of one month.

Articles of Association.

17. (1) There may, in the case of a company limited by shares, and there shall, in the case of a company limited by guarantee or unlimited, be registered with the memorandum, articles of association signed by the subscribers to the memorandum and prescribing regulations for the company.

(2) Articles of Association may adopt all or any of the regulations contained in Table A in the First Schedule.

(3) In the case of an unlimited company or a company limited by guarantee, the articles, if the company has a share capital, shall state the amount of share capital with which the company proposes to be registered.

(4) In the case of an unlimited company or a company limited by guarantee, if the company has not a share capital, the articles shall state the number of members with which the company proposes to be registered, for the purpose of enabling the registrar to determine the fees payable on registration.

18. In the case of a company limited by shares and registered after the commencement of this Act, if articles are not registered, or if articles are registered, in so far as the articles do not exclude or modify the regulations in Table A in the First Schedule, those regulations shall, so far as applicable, be the regulations of the company in the same manner and to the same extent as if they were contained in duly registered articles.

Form and signature of articles.

19. Articles shall—

- (a) be printed ;
- (b) be divided into paragraphs numbered consecutively ; and
- (c) be signed by each subscriber of the memorandum of association in the presence of at least one witness who must attest the signature.

20. (1) Subject to the provisions of this Act and to the conditions contained in its memorandum, a company may by special resolution alter or add to its articles ; and any alteration or addition so made shall be as valid as if originally contained in the articles, and be subject in like manner to alteration by special resolution.

(2) The power of altering articles under this section shall, in the case of any company formed and registered under Act No. XIX of 1857 and Act No. VII of 1860 or either of them, extend to altering any provisions in Table B annexed to Act XIX of 1857, and shall also, in the case of an unlimited company formed and registered under the said Acts or either of them, extend to altering any regulations relating to the amount of capital or its distribution into shares, notwithstanding that those regulations are contained in the memorandum.

GENERAL PROVISIONS.

21. (1) The memorandum and articles shall, when registered, bind the company and the members thereof to the same extent as if they respectively had been signed by each member and contained a covenant on the part of each member, his heirs, and legal representatives, to observe all the provisions of the memorandum and of the articles, subject to the provisions of this Act.

(2) All money payable by any member to the company under the memorandum or articles, shall be a debt due from him to the company.

22. The memorandum and the articles (if any) shall be filed with the registrar for the province in which the registered office of the company is stated by the memorandum to be situate, and he shall retain and register them.

Registration of memorandum and articles.

23. (1) On the registration of the memorandum of a company, the registrar shall certify under his hand that the company is incorporated, and in the case of a limited company that the company is limited.

Effect of registration.

(2) From the date of incorporation mentioned in the certificate of incorporation, the subscribers of the memorandum, together with such other persons as may from time to time become members of the company, shall be a body corporate by the name contained in the memorandum, capable forthwith of exercising all the functions of an incorporated company, and having perpetual succession and a common seal, but

Sec. 18.—See 11 Bur L. T. 156 as to rectification of Register Table B.

Sec. 20.—See 33 Mad. 36 = 1 I.C. 803 = 5 M.L.T. 290. A company cannot alter the qualifications of the Director as laid down in its articles of association excepting by a special resolution. *Held also* that an ordinary resolution to that effect will be *ultra vires*. 29 Bom. L. R. 1362 = 105 I. C. 541 = A. I. R. 1927 Bom. 609. Power to modify terms on which debentures are secured—Such power must be exercised in the interest of a

class as a whole section compared with Sec. 15 of the English Companies Act, 1908. 101 I. C. 897 = A. I. R. 1927 P. C. 62 (P. C.).

Sec. 21.—The person owing money to a registered company who becomes a shareholder and bound by the articles of the association, becomes also bound by the provision (where it exists) in the articles by which any debt due by a shareholder to the company is made a first charge on the share. 7 L. W. 114 = 43 I.C. 508 = (1918) M. W. N. 51.

with such liability on the part of the members to contribute to the assets of the company in the event of its being wound up as is mentioned in this Act.

24. (1) A certificate of incorporation given by the registrar in respect of any association shall be conclusive evidence that all the requirements of this Act in respect of registration and of matters precedent and incidental thereto have been complied with, and that the association is a company authorised to be registered and duly registered under this Act.

Conclusiveness of certificate of incorporation.

(2) A declaration by an advocate, attorney or pleader entitled to appear before a High Court who is engaged in the formation of a company, or by a person named in the articles as a director, manager or secretary of the company, of compliance with all or any of the said requirements shall be filed with the registrar, and the registrar may accept such a declaration as sufficient evidence of compliance.

25. (1) Every company shall send to every member, at his request, and on payment of one rupee or such less sum as the company may prescribe, a copy of the memorandum and articles (if any).

Copies of memorandum and articles to be given to members.

(2) If a company makes default in complying with the requirements of this section it shall be liable for each offence to a fine not exceeding ten rupees.

ASSOCIATIONS NOT FOR PROFIT.

26. (1) Where it is proved to the satisfaction of the Local Government that an association capable of being formed as a limited company has been or is about to be formed for promoting commerce, art, science, [religion]¹ charity, or any other useful object, and applies or intends to apply its profits (if any) or other income in promoting its objects, and to prohibit the payment of any dividend to its members, the Local Government may, by license under the hand of one of its Secretaries, direct that the association be registered as a company with limited liability, without the addition of the word "Limited" to its name, and the association may be registered accordingly.

(2) A license by the Local Government under this section may be granted on such conditions and subject to such regulations as the Local Government thinks fit, and those conditions and regulations shall be binding on the association, and shall, if the Local Government so directs, be inserted in the memorandum and articles, or in one of those documents.

(3) The association shall on registration enjoy all the privileges of limited companies, and be subject to all their obligations, except those of using the word "Limited" as any part of its name, and of publishing its name, and of filing lists of members and directors and managers with the registrar.

(4) A license under this section may at any time be revoked by the Local Government, and upon revocation the registrar shall enter the word "Limited" at the end of the names of the association upon the register, and the association shall cease to enjoy the exemptions and privileges granted by this section :

Provided that, before a license is so revoked, the Local Government shall give to the association notice in writing of its intention, and shall afford the association an opportunity of submitting a representation in opposition to the revocation.

Sec. 24.—A certificate of incorporation of a company under the Companies Act (VI of 1882) is conclusive as to the fact of incorporation and that all the previous requisites of the Act in respect of registration have been complied with. 40 Cal. 1 = 39 I. A. 237 = 16 C. W. N. 937 = 23 M.L.J. 215 (P.C.). The statutory condition that the memorandum of association must be signed

by seven persons is as much a condition of registration as any other requisition to be found in the Act which is preliminary to registration and apparently essential. 40 Cal. 1 = 39 I. A. 237 = 16 C.W. N. 937 = 23 M.L.J. 215 (P.C.); (L. R. 2 Ch. 674) Appr.

Sec. 26.—¹ Inserted by Act XXXIII of 1926.

COMPANIES LIMITED BY GUARANTEE.

27. (1) In the case of a company limited by guarantee and not having share capital, and registered after the commencement of this

Provision as to companies limited by guarantee.

Act, every provision in the memorandum or articles or in any resolution of the company purporting to give any person a right to participate in the divisible profits of the company otherwise than as a member shall be void.

(2) For the purpose of the provisions of this Act relating to the memorandum of a company limited by guarantee and of this section, every provision in the memorandum or articles, or in any resolution, of any company limited by guarantee and registered after the commencement of this Act, purporting to divide the undertaking of the company into shares or interests, shall be treated as a provision for a share capital, notwithstanding that the nominal amount or number of the shares or interests is not specified thereby.

PART III.

SHARE CAPITAL, REGISTRATION OF UNLIMITED COMPANY AS LIMITED AND UNLIMITED LIABILITY OF DIRECTORS.

Distribution of Share Capital.

28. (1) The shares or other interest of any member in a company shall be moveable property, transferable in manner provided by the articles of the company.

Nature of shares.

(2) Each share in a company having a share capital shall be distinguished by its appropriate number.

29. A certificate, under the common seal of the company, specifying any shares or stock held by any member, shall be *prima facie* evidence of the title of the member to the shares or stock therein specified.

Certificate of shares or stock.

30. (1) The subscribers of the memorandum of a company shall be deemed to have agreed to become members of the company, and on its registration shall be entered as members in its

Definition of "member".
register of members.

Sec 28.—Every share-holder in a company has an absolute right to transfer his share to another and the transfer is complete on the day the deed is signed by both parties. 71 I. C. 814=1924 Lah. 173. The provision on the Articles of Association that no transfer would be valid and recognised unless registered in the books and that the company could refuse to register a transferee without assigning reasons is one for the protection of the company and does not prevent the passing of title. 71 I. C. 814=1924 Lah. 173. But see also cases cited *infra*. The transfer of shares of a company is incomplete until the name of the transferee is entered in the Company's Register. Such a transfer does not operate as a declaration of trust. 66 I. C. 586=48 Cal. 986. A deed of transfer of shares in a company not complying with the formalities prescribed by this Act and the Articles of Association of the Company, is invalid as against a person, who has purchased the shares in a sale in execution held under the provisions of the C. P. Code. 45 M. 537=15 L. W. 470=30 M. L. T. 231=42 M. L. J. 449=70 I. C. 659=(1922) M. W. N. 331=1923 Mad. 211. When the law prescribes a mode of transfer for shares in a limited company, compliance with that mode is necessary before property can pass so as to confer title on the transferee as

against third persons. *Ibid.* A transfer of shares in a company otherwise than as is provided by the Act and the Articles of Association, may confer a right in equity on the transferee to compel the vendor to execute a proper conveyance and the transaction evidenced by transfer can be regarded as an agreement to convey. *Ibid.* (1902) 2 K. B. 427 and 40 Mad. 1134, foll. 31 Bom. 76, not foll. It is open to the Directors of a company in the *bona fide* discretion vested in them to refuse to recognise the purchaser of the shares of the company in a court auction, as a share-holder in the company. (*Ibid.*) Agreement to set off debts against calls, instead of payment in cash, not valid. 25 I. C. 672=102 P. W. R. 1914=20 P. L. R. 1914. On this section see also 14 Bom. L. R. 648

Sec. 30—Where a person subscribed for a share but did not pay the value because the company was not started, he was not a member of the company but was only a creditor. 21 I. C. 915=35 All. 538=11 A. L. J. 924 A minor may be a member of a limited company. 39 Bom. 331=27 I. C. 335=16 Bom. L. R. 730. A share-holder who was a minor at the date of allotment of shares but after attaining majority received dividends and raised no objection to his name being included in the register of members, is estopped from denying as between himself and

(2) Every other person who agrees to become a member of a company and whose name is entered in its register of members, shall be a member of the company.

31. (1) Every company shall keep in one or more books a register of its members, and enter therein the following particulars :—

(i) the names and addresses, and the occupations, if any, of the members and, in the case of a company having a share capital, a statement of the shares held by each member, distinguishing each share by its number, and of the amount paid or agreed to be considered as paid on the shares of each member ;

(ii) the date at which each person was entered in the register as a member ;

(iii) the date at which any person ceased to be a member.

(2) If a company makes default in complying with the requirements of this section, it shall be liable to a fine not exceeding fifty rupees for every day during which the default continues ; and every officer of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty.

32. (1) Every company having a share capital shall once at least in every year make a list of all persons who on the day of the first or only ordinary general meeting in the year, are members of the company, and of all persons who have ceased to be members since the date of the last return or (in the case of the first return), of the incorporation of the company.

(2) The list shall state the names, addresses, and occupations of all the past and present members therein mentioned, and the number of shares held by each of the existing members at the date of the return, specifying shares transferred since the date of the last return or (in the case of the first return) of the incorporation of the company by persons who are still members and persons who have ceased to be members respectively and the dates of registration of the transfers, and shall contain a summary distinguishing between shares issued for cash and shares issued as fully or partly paid up otherwise than in cash, and specifying the following particulars :—

(a) the amount of the share capital of the company, and the number of the shares into which it is divided ;

(b) the number of shares taken from the commencement of the company up to the date of the return ;

(c) the amount called upon each share ;

(d) the total amount of calls received ;

(e) the total amount of calls unpaid ;

(f) the total amount of the sums (if any) paid by way of commission in respect of any shares or debentures, or allowed by way of discount in respect of any debentures, since the date of the last return ;

(g) the total number of shares forfeited ;

(h) the total amount of shares or stock for which share-warrants are outstanding at the date of the return ;

(i) the total amount of share-warrants issued and surrendered respectively since the date of the last return ;

(k) the number of shares or amount of stock comprised in each share-warrant ;

the company's representatives that he is a share-holder. 39 Bom. 331 = 27 I. C. 335 = 16 Bom. L. R. 730. Subscriber to memorandum does not cease to be member by omission of his name from register of members. 48 All. 580 = 24 A. L. J. 691 = 95 I. C. 927 = A. I. R. 1926 All. 150. A registered share-holder has a vested interest in the property of the company and may be liable to pay calls in future. Being a person entitled to control the company's affairs, he is bound to bear the burden attached to it. 39 Bom. 331 = 27 I. C. 335 = 16 B. L. R. 730.
Sec. 32.—Under the Punjab Government Noti-

fication No. 3, dated the 23rd February 1910, the Registrar of the Joint Stock Company can authorize any person to institute complaints of offences. 14 P. R. (Cr.) 1916 = 17 Cr. L. J. 242 = 34 I. C. 962 = 38 P. W. R. (Cr.) 1916. Therefore a complaint instituted against the accused by a clerk acting under the instructions of the Registrar is good in law. *Ibid.* (8 I. C. 190, dist.) Officers of company resigning their posts but not the directorships—will not absolve them from liability. 164 P. L. R. 1914 = 17 P. R. (Cr.) 1914 = 15 Cr. L. J. 300 = 23 I. C. 508 = 38 P. W. R. (Cr.) 1914.

(1) the names and addresses of the persons who at the date of the return are the directors of the company and of the persons (if any) who at the said date are the managers of the company ; and

(m) the total amount of debt due from the company in respect of all mortgages and charges which are required to be registered with the registrar under this Act.

(3) The above list and summary shall be contained in a separate part of the register of members, and shall be completed within seven days after the day of the first or only ordinary general meeting in the year, and the company shall forthwith file with the registrar a copy signed by a director or by the manager or the secretary of the company, together with a certificate from such director, manager or secretary that the list and summary state the facts as they stood on the day aforesaid.

(4) If a company makes default in complying with the requirements of this section, it shall be liable to a fine not exceeding fifty rupees for every day during which the default continues, and every officer of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty.

Trusts not to be entered on register.

33. No notice of any trust, expressed, implied or constructive, shall be entered on the register, or be receivable by the registrar.

34. On the application of the transferor of any share or interest in a company, the company shall enter in its register of members the name of the transferee in the same manner and subject to the same conditions as if the application for the entry were made by the transferee.

Registration of transfer at request of transferor.

35. A transfer of the share or other interest of a deceased member of a company made by his legal representative shall, although the legal representative is not himself a member, be as valid as if he had been a member at the time of the execution of the instrument of transfer.

Transfer by legal representative.

36. (1) The register of members, commencing from the date of the registration of the company, shall be kept at the registered office of the company, and, except when closed under the provisions of this Act, shall during business hours (subject to such reasonable restrictions, as the company in general meeting may impose, so that not less than two hours in each day be allowed for inspection) be open to the inspection of any member gratis, and to the inspection of any other person on payment of one rupee, or such less sum as the company may prescribe, for each inspection.

Inspection of register of members.

(2) Any member or other person may require a copy of the register, or of any part thereof, or of the list and summary required by this Act, or any part thereof, on payment of six annas for every hundred words or fractional part thereof required to be copied.

(3) If any inspection or copy required under this section is refused, the company shall be liable for each refusal to a fine not exceeding twenty rupees and to a further fine not exceeding twenty rupees for every day during which the refusal continues, and every officer of the company who knowingly authorises or permits the refusal shall be liable to the like penalty, and the Court may by order compel an immediate inspection of the register.

37. A company may, on giving notice by advertisement in some newspaper circulating in the district in which the registered office of the company is situate, close the register of members for any time or times not exceeding in the whole thirty days in each year.

Power to close register.

Power of Court to rectify register.

38. (1) If—

Sec. 34.—12 I. C. 581 ; 13 Bom. L. R. 998 = 36 Bom. 334 ; 16 Bom. 80.

Sec. 38.—Jurisdiction of Civil Courts to decide

questions falling under S. 38 is not excluded. 908 I. C. 192 = A. I. R. 1928 Lah. 234. The expression "omission" in section 38 may not be equivalent

(a) the name of any person is fraudulently or without sufficient cause entered in or omitted from the register of members of a company ; or

(b) default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member, the person aggrieved, or any member of the company, or the company, may apply to the Court for rectification of the register.

(2) The Court may either refuse the application, or may order rectification of the register and payment by the company of any damages sustained by any party aggrieved, and may make such order as to costs as it in its discretion thinks fit.

(3) On any application under this section the Court may decide any question relating to the title of any person who is a party to the application to have his name entered in or omitted from the register, whether the question arises between members or alleged members, or between members or alleged members on the one hand and the company on the other hand ; and generally may decide any question necessary or expedient to be decided for rectification of the register :

Provided that the Court may direct an issue to be tried in which any question of law may be raised ; and an appeal from the decision on such an issue shall lie in the manner directed by the Code of Civil Procedure, 1908, on the grounds mentioned in section 100 of that Code.

39. In the case of a company required by this Act to file a list of its members with the registrar, the Court, when making an order for rectification of the register, shall, by its order, direct notice of the rectification to be filed with the registrar.

Notice to registrar of rectification of register.

to " refusal " to register. (1928) M.W.N. 442 = A. I. R. 1928 Mad. 571. A judge is not bound to decide in a proceeding under section 38 a serious question of title. An appeal lies on a point of law, from an order passed under the section. A company has always a right to waive compliance with its rules. 19 A. L. J. 937 = 65 I. C. 291 = 44 A. 151 = L. R. 3 A. 56 = 1922 A. 258. By one resolution three shares were allotted by five directors to three directors, *held*, that allotment of shares is but a contract and where three shares were allotted by one vote recorded in one resolution the one vote is not divisible into three votes. Because it is really one vote and not three votes and because each of the allotments was not considered separately on its own merits and because each director was interested in the allotments to other two and probably voted for them in consideration of an allotment to himself. A quorum of three directors being necessary the directors in whose favour the allotment was made could not validly vote and thus the remaining two directors could form no quorum and the resolution and the allotment were therefore invalid. 64 I. C. 933 = 23 Bom. L. R. 1104. A direction by the lower Court of an issue for trial involving a question of law, and a decision actually arrived at on such issue are necessary for a right to appeal under S. 38 of the Act, and the appeal from such a decision can be based on the grounds mentioned in S. 100, C.P.C. 41 Bom. 76 = 37 I. C. 666 = 18 Bom. L. R. 982. The proviso to sec. 38 must be read with reference to all the clauses of the section. (*Ibid.*) A purchaser of shares at an execution sale has no right to compel the transfer of the shares to his name by the company, there being no difference between a private purchaser and a purchaser at a Court sale. 48 Bom. 76 = 37 I. C. 666 ; 18 Bom. L. R. 982 [Ind. Jur. (N. S.) 258, Dist.]. Register of shareholders—Rectification—Company not guilty

of default or unnecessary delay—Liquidation—Liability of transferee as contributory. 40 Bom. 134 = 28 I. C. 983 = 17 Bom. L. R. 342. If a shareholder applies to have his name removed from the Register of Members, the mortgagee of the uncalled share capital can oppose the application. 60 I. C. 946 = 47 Cal. 901. The discretion of the Court under S. 38 is unlimited and should be used according to the circumstances of each case. 60 I. C. 946 = 47 Cal. 901. Transferee of share can bring a suit for registration of his name in respect of shares purchased. 1928 M. W. N. 442 = A. I. R. 1928 Mad. 571. A person who claims to have been misled by fraud or false representation into taking shares in a company, should raise the objection without delay. The power to take summary action under S. 38 is discretionary. 110 P. L. R. 1915 = 29 I. C. 770 = 249 P. W. R. 1915. The power to order rectification of the register of a company is entirely a matter of discretion for the Court. 55 I. C. 751 = 12 Bur. L. T. 194. *See also* 49 I. C. 288 = 11 Bur. L. T. 156. It ought not to be exercised when the only object of the application is to save the expense of taking out Letters of Administration and of legal transfer of the shares to the applicant's name. 55 I. C. 751 = 12 Bur. L. T. 194 ; 49 I. C. 288 = 11 Bur. L. T. 156. Rectification of Registrar—Table A—Dividends, to be paid out of profits. 49 I. C. 288 = 11 Bur. L. T. 156. The registration of a transfer of shares sanctioned by one Director of a company is not invalid. 5 Bur. L. T. 271 = 18 I. C. 481 = 6 L. B. R. 152. *See also* 17 I. C. 640 = 14 Bom. L. R. 919. A refusal to register transfers should not be arbitrary, capricious or wanton. The Court can and should consider the ground of refusal where these are disclosed. 5 Bur. L. T. 271 = 18 I. C. 481 = 6 L. B. R. 152 ; 17 I. C. 640 = 14 Bom. L. R. 919. Jurisdiction as to registration of names. 17 I. C. 640 = 14 Bom. L. R. 919.

Register to be evidence.
to be inserted therein.

40. The register of members shall be *prima facie* evidence of any matters by this Act directed or authorised

Power for company to keep
branch register in the United
Kingdom.

41. (1) A company having a share capital may, if so authorised by its articles, cause to be kept in the United Kingdom a branch register of members (in this Act called a British register).

(2) The company shall, within one month from the date of the opening of any British register, file with the registrar notice of the situation of the office where such register is kept and, in the event of any change in the situation of such office or of its discontinuance, shall within one month from the date of such change or discontinuance, as the case may be, file notice of such change or discontinuance.

(3) If a company makes default in complying with the requirements of this section, it shall be liable to a fine not exceeding fifty rupees for every day during which the default continues.

42. (1) A British register shall be deemed to be part of the company's Regulations as to British register of members (in this section called the principal register).

(2) It shall be kept in the same manner in which the principal register is by this Act required to be kept, except that the advertisement before closing the register shall be inserted in some newspaper circulating in the locality wherein the British register is kept.

(3) The company shall transmit to its registered office in India a copy of every entry in its British register as soon as may be after the entry is made; and shall cause to be kept at such office, duly entered up from time to time, a duplicate of its British register, and the duplicate shall, for all the purposes of this Act, be deemed to be part of the principal register.

(4) Subject to the provisions of this section with respect to the duplicate register, the shares registered in a British register shall be distinguished from the shares registered in the principal register, and no transaction with respect to any shares registered in a British register shall, during the continuance of that registration, be registered in any other register.

(5) The company may discontinue to keep any British register, and thereupon all entries in that register shall be transferred to the principal register.

(6) Subject to the provisions of this Act, any company may, by its articles, make such regulations as it may think fit respecting the keeping of a British register.

43. A company limited by shares, if so authorised by its articles may, with respect to any fully paid-up shares, or to stock, issue under its common seal a warrant stating that the bearer of the warrant is entitled to the shares or stock therein specified, and may provide by coupons or otherwise, for the payment of the future dividends on the shares or stock included in the warrant, in this Act termed a share-warrant.

44. A share-warrant shall entitle the bearer thereof to the shares or stock therein specified, and the shares or stock may be transferred by delivery of the warrant.

45. The bearer of a share-warrant shall, subject to the articles of the company, be entitled, on surrendering it for cancellation to have his name entered as a member in the register of members; and the company shall be responsible for any loss incurred by any person by reason of the company entering in its register the name of a bearer of a share-warrant in respect of the shares or stock therein specified without the warrant being surrendered and cancelled.

46. The bearer of a share-warrant may, if the articles of the company so provide, be deemed to be a member of the company within the meaning of this Act, either to the full extent or for any purposes defined in the articles, except that he shall not be qualified in respect of the shares or stock specified in the warrant for being a director or manager of the company, in cases where such a qualification is required by the articles.

47. (1) On the issue of a share-warrant, the company shall strike out of its register of members the name of the member then entered therein as holding the shares or stock specified in the warrant as if he had ceased to be a member, and shall enter in the register the following particulars, namely :—

- (i) the fact of the issue of the warrant ;
 - (ii) a statement of the shares or stock included in the warrant, distinguishing each share by its number ; and
 - (iii) the date of the issue of the warrant.
- (2) If a company makes default in complying with the requirements of this section it shall be liable to a fine not exceeding fifty rupees for every day during which the default continues, and every officer of the company who knowingly and wilfully continues or permits the default shall be liable to the like penalty.

48. Until the warrant is surrendered, the above particulars shall be deemed to be the particulars required by this Act to be entered in the register of members ; and, on the surrender, the date of the surrender shall be entered as if it were the date at which a person ceased to be a member.

Power of company to arrange for different amounts being paid on shares.

49. A company, if so authorised by its articles, may do any one or more of the following things, namely :—

- (1) make arrangements on the issue of shares for a difference between the share-holders in the amounts and times of payment of calls on their shares ;
- (2) accept from any member who assents thereto the whole or a part of the amount remaining unpaid on any shares held by him although no part of that amount has been called up ;
- (3) pay dividend in proportion to the amount paid up on each share where a larger amount is paid up on some shares than on others.

Power of company limited by shares to alter its share capital.

50. (1) A company limited by shares, if so authorised by its articles, may alter the conditions of its memorandum as follows (that is to say), it may—

- (a) increase its share capital by the issue of new shares of such amount as it thinks expedient ;
- (b) consolidate and divide all or any of its share capital into shares of larger amount than its existing shares ;
- (c) convert all or any of its paid-up shares into stock and re-convert that stock into paid-up shares of any denomination ;
- (d) sub-divide its shares, or any of them, into shares of smaller amount than is fixed by the memorandum, so however, that in the sub-division the proportion between the amount paid and the amount, if any, unpaid on each reduced share shall be the same as it was in the case of the share from which the reduced share is derived ;
- (e) cancel shares which, at the date of the passing of the resolution in that behalf, have not been taken or agreed to be taken by any person, and diminish the amount of its share capital by the amount of the shares so cancelled.

Sec. 46.—See 164 P. L. R. 1914 under S. 50.

Sec. 50.—Liability under S. 50—Position as—
Not affected by resignation of the Chief Secretary

or Managing Director.—Plea of ignorance of law.
164 P. L. R. 1914 = 15 Cr.L.J. 300 = 17 P.R. 1914
(Cr.) = 23 I. C. 508 (2) = 38 P.W.R. 1914 (Cr.)

(2) The powers conferred by this section with respect to sub-division of shares must be exercised by special resolution.

(3) Where any alteration has been made under this section in the memorandum of a company, every copy of the memorandum issued after the date of the alteration shall be in accordance with the alteration.

(4) If a company makes default in complying with the requirements of sub-section (3), it shall be liable to a fine not exceeding ten rupees for each copy in respect of which default is made ; and every officer of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty.

(5) A cancellation of shares in pursuance of this section shall not be deemed to be a reduction of share capital within the meaning of this Act.

51. (1) Where a company having a share capital has consolidated and divided its share capital into shares of larger amount than its existing shares or converted any of its shares into stock, or re-converted stock into shares, it shall within fifteen days of the consolidation and division, conversion or re-conversion,

Notice to registrar of consolidation of share capital, conversion of shares into stock, etc.

file notice with the registrar of the same, specifying the share consolidated and divided, or converted, or the stock re-converted.

(2) If a company makes default in complying with the requirements of this section, it shall be liable to a fine not exceeding fifty rupees for every day during which the default continues, and every officer of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty.

52. Where a company having a share capital has converted any of its shares into

Effect of conversion of shares into stock.

stock, and filed notice of the conversion with the registrar, all the provisions of this Act which are applicable to

shares only shall cease as to so much of the share capital as is converted into stock ; and the register of members of the company, and the list of members to be filed with the registrar, shall show the amount of stock held by each member instead of the amount of shares and the particulars relating to shares hereinbefore required by this Act.

53. (1) Where a company having a share capital, whether its shares have or

Notice of increase of share capital or of members.

have not been converted into stock, has increased its share capital beyond the registered capital, and where a com-

pany not having a share capital has increased the number of its members beyond the registered number, it shall file with the registrar, in the case of an increase of share capital, within fifteen days after the passing, or in the case of a special resolution the confirmation, of the resolution authorising the increase, and in the case of an increase of members within fifteen days after the increase was resolved on or took place, notice of the increase of capital or members, and the registrar shall record the increase.

(2) If a company makes a default in complying with the requirements of this section, it shall be liable to a fine not exceeding fifty rupees for every day during which the default continues, and every officer of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty.

54. (1) A company limited by shares may, by special resolution confirmed by an

Reorganization of share capital.

order of the Court, modify the conditions contained in its memorandum so as to reorganize its share capital, whether

by the consolidation of shares of different classes or by the division of its shares into shares of different classes :

Provided that no preference or special privilege attached to or belonging to any class of shares shall be interfered with except by resolution passed by a majority in number of shareholders of that class holding three-fourths of the share capital of that class and confirmed at a meeting of shareholders of that class in the same manner as a special resolution of the company is required to be confirmed, and every resolution so passed shall bind all shareholders of the class.

(2) Where an order is made under this section, a certified copy thereof shall be filed with the registrar within twenty-one days after the making of the order, or within such further time as the Court may allow, and the resolution shall not take effect until such a copy has been so filed.

Reduction of Share Capital.

55. (1) No company limited by shares shall have power to buy its own shares unless the consequent reduction of capital is effected and sanctioned in manner hereinafter provided.

(2) Subject to confirmation by the Court, a company limited by shares if so authorised by its articles, may by special resolution reduce its share capital in any way, and in particular (without prejudice to the generality of the foregoing power) may—

(a) extinguish or reduce the liability on any of its shares in respect of share capital not paid up; or

(b) either with or without extinguishing or reducing liability on any of its shares, cancel any paid-up share capital which is lost or unrepresented by available assets; or

(c) either with or without extinguishing or reducing liability on any of its shares, pay off any paid-up share capital which is in excess of the wants of the company, and may, if and so far as is necessary, alter its memorandum by reducing the amount of its share capital and of its shares accordingly.

(3) A special resolution under this section is in this Act called a resolution for reducing share capital.

Application to Court for confirming order.

56. Where a company has passed and confirmed a resolution for reducing share capital, it may apply by petition to the Court for an order confirming the reduction.

57. On and from the confirmation by a company of a resolution for reducing share capital, or where the reduction does not involve either the diminution of any liability in respect of unpaid share capital or the payment to any share-holder of any paid-up

Addition to name of company of "and reduced".

share capital, then on and from the presentation of the petition for confirming the reduction, the company shall add to its name, until such date as the Court may fix, the words "and reduced" as the last words in its name, and those words shall, until that date, be deemed to be part of the name of the company:

Provided that, where the reduction does not involve either the diminution of any liability in respect of unpaid share capital or the payment to any share-holder of any paid-up share capital the Court may, if it thinks expedient, dispense altogether with the addition of the words "and reduced".

58. (1) Where the proposed reduction of share capital involves either diminution

Objections by creditors and settlement of list of objecting creditors.

of liability in respect of unpaid share capital, or the payment to any share-holder of any paid-up share capital, and in any other case if the Court so directs, every creditor of the company who at the date fixed by the Court is entitled

to any debt or claim which, if that date were the commencement of the winding up of the company, would be admissible in proof against the company, shall be entitled to object to the reduction.

(2) The Court shall settle a list of creditors so entitled to object, and for that purpose shall ascertain, as far as possible without requiring an application from any creditor, the names of those creditors and the nature and amount of their debts or claims, and may publish notices fixing a day or days within which creditors not entered on the list are to claim to be so entered or are to be excluded from the right of objecting to the reduction.

59. Where a creditor entered on the list of creditors whose debt or claim is not

Power to dispense with consent of creditor on security being given for his debt.

discharged or determined does not consent to the reduction, the Court may, if it thinks fit, dispense with the consent of that creditor, on the company securing payment of his debt or claim by appropriating, as the Court may

direct, the following amount (that is to say),—

(i) if the company admits the full amount of his debt or claim, or, though not admitting it, is willing to provide for it, then the full amount of the debt or claim ;

(ii) If the company does not admit or is not willing to provide for the full amount of the debt or claim, or if the amount is contingent or not ascertained, then an amount fixed by the Court after the like inquiry and adjudication as if the company were being wound up by the Court.

60. The Court, if satisfied, with respect to every creditor of the company who

under this Act is entitled to object to the reduction, that either his consent to the reduction has been obtained or his debt or claim has been discharged or has determined or has been secured, may make an order confirming the reduction on such terms and conditions as it thinks fit.

61. (1) The registrar on production to him of an order of the Court confirming

Registration of order and minute of reduction.

the reduction of the share capital of a company, and on the filing with him of a certified copy of the order and of a minute (approved by the Court) showing with respect to the share capital of the company as altered by the order, the amount of the share capital, the number of shares into which it is to be divided and the amount of each share, and the amount (if any) at the date of the registration deemed to be paid up on each share, shall register the order and minute.

(2) On the registration, and not before, the resolution for reducing share capital as confirmed by the order so registered shall take effect.

(3) Notice of the registration shall be published in such manner as the Court may direct.

(4) the registrar shall certify under his hand the registration of the order and minute, and his certificate shall be conclusive evidence that all the requirements of this Act with respect to reduction of share capital have been complied with, and that the share capital of the company is such as is stated in the minute.

62. (1) The minute when registered shall be deemed to be substituted for the

Minute to form part of memorandum.

corresponding part of the memorandum of the company, and shall be valid and alterable as if it had been originally contained therein, and shall be embodied in every copy of the memorandum issued after its registration.

(2) If a company makes default in complying with the requirements of this section, it shall be liable to a fine not exceeding ten rupees for each copy in respect of which default is made, and every officer of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty.

63. (1) A member of the company, past or present, shall not be liable in respect

Liability of members in respect of reduced shares.

of any share to any call or contribution exceeding in amount the difference (if any) between the amount paid (or as the case may be) the reduced amount, if any, which is to be deemed to have been paid, on the share and the amount of the share as fixed by the minute :

Provided that, if any creditor, entitled in respect of any debt or claim to object to the reduction of share capital, is, by reason of his ignorance of the proceedings for reduction, or of their nature and effect with respect to his claim not entered on the list of creditors, and, after the reduction, the company is unable, within the meaning of the provisions of this Act with respect to winding up by the Court, to pay the amount of his debt or claim, then—

(i) every person who was a member of the company at the date of the registration of the order for reduction and minute, shall be liable to contribute for the payment of that debt, or claim an amount not exceeding the amount which he would have been liable to contribute if the company had commenced to be wound up on the day before that registration ; and

(ii) if the company is wound up the Court, on the application of any such creditor and proof of his ignorance as aforesaid, may, if it thinks fit, settle accordingly a list of persons so liable to contribute, and make and enforce calls and orders on the

contributories settled on the list as if they were ordinary contributories in a winding up.

(2) Nothing in this section shall affect the rights of contributories among themselves.

64. If any officer of the company wilfully conceals the name of any creditor entitled to object to the reduction, or wilfully misrepresents the nature or amount of the debt or claim of any creditor, or if any officer of the company abets any such concealment or misrepresentation as aforesaid, every such officer shall be punishable with imprisonment which may extend to one year, or with fine, or with both.

65. In any case of reduction of share capital, the Court may require the company to publish as the Court directs the reasons for reduction, or such other information in regard thereto as the Court may think expedient with a view to give proper information to the public, and, if the Court thinks fit, the causes which led to the reduction.

66. A company limited by guarantee and registered after the commencement of this Act may, if it has a share capital and is so authorised by its articles, increase or reduce its share capital in the same manner and subject to the same conditions in and subject to which a company limited by shares may increase or reduce its share capital under the provisions of this Act.

Registration of Unlimited Company as Limited.

67. (1) Subject to the provisions of this section, any company registered as unlimited may register under this Act as limited or any company already registered as a limited company may re-register under this Act, but the registration of an unlimited company as a limited company shall not affect any debts, liabilities, obligations or contracts incurred or entered into by, to, with or on behalf of, the company before the registration, and those debts, liabilities, obligations and contracts may be enforced in manner provided by Part VIII of this Act in the case of a company registered in pursuance of that Part.

(2) On registration in pursuance of this section, the registrar shall close the former registration of the company, and may dispense with the delivery to him of copies of any documents with copies of which he was furnished on the occasion of the original registration of the company; but save as aforesaid, the registration shall take place in the same manner and shall have effect as if it were the first registration of the company under this Act.

68. An unlimited company having a share capital may, by its resolution for registration as a limited company in pursuance of this Act, do either or both of the following things, namely:—

(a) increase the nominal amount of its share capital by increasing the nominal amount of each of its shares, but subject to the condition that no part of the amount by which its capital is so increased shall be capable of being called up except in the event and for the purposes of the company being wound up;

(b) provide that a specified portion of its uncalled share capital shall not be capable of being called up except in the event and for the purposes of the company being wound up.

Reserve Liability of Limited Company.

69. A limited company may by special resolution determine that any portion of its share capital which has not been already called up shall not be capable of being called up, except in the event and for the purposes of the company being wound up, and thereupon that portion of its share capital shall not be capable of being called up except in the event and for the purposes aforesaid.

Unlimited Liability of Directors.

Limited company may have directors with unlimited liability.

70. (1) In a limited company the liability of the directors or of any director, may, if so provided by the memorandum, be unlimited.

(2) In a limited company in which the liability of any director is unlimited, the directors of the company (if any) and the member who proposes a person for election or appointment to the office of director shall add to that proposal a statement that the liability of the person holding that office will be unlimited and the promoters and officers of the company, or one of them, shall before the person accepts the office or acts therein, give him notice in writing that his liability will be unlimited.

(3) If any director or proposer makes default in adding such a statement, or if any promoter or officer of the company makes default in giving such a notice, he shall be liable to a fine not exceeding one thousand rupees and shall also be liable for any damage which the person so elected or appointed may sustain from the default, but the liability of the person elected or appointed shall not be affected by the default.

Special resolution of limited company making liability of directors unlimited.

71. (1) A limited company, if so authorised by its articles, may, by special resolution, alter its memorandum so as to render unlimited the liability of its directors or of any director.

(2) Upon the confirmation of any such special resolution, the provisions thereof shall be as valid as if they had been originally contained in the memorandum, and a copy thereof shall be embodied in or annexed to every copy of the memorandum issued after the confirmation of the resolution.

(3) If a company makes default in complying with the requirements of this section, it shall be liable to a fine not exceeding ten rupees for each copy in respect of which default is made; and every officer of the company, who knowingly and wilfully authorises or permits the default, shall be liable to the like penalty.

PART IV.

MANAGEMENT AND ADMINISTRATION.

Office and Name.

Registered office of company.

72. (1) Every company shall have a registered office to which all communications and notices may be addressed.

(2) Notice in writing of the situation of the registered office, and of any change therein, shall be filed with the registrar who shall record the same.

(3) If a company carries on business without complying with the requirements of this section, it shall be liable to a fine not exceeding fifty rupees for every day during which it so carries on business.

Publication of name by a limited company.

73. Every limited company—

(a) shall paint or affix, and keep painted or affixed, its name on the outside of every office or place in which its business is carried on, in a conspicuous position, in letters easily legible and in English characters, and also, if the registered office be situate in a place beyond the local limits of the ordinary original civil jurisdiction of a High Court, in the characters of one of the vernacular languages used in that place;

(b) shall have its name engraven in legible characters on its seal;

Sec. 70.—*See* 18 Mad. 56 (Relation of director to share-holder is one of fiduciary nature.)

Sec. 73.—A company purchased certain machinery and in lieu thereof one of its Secretaries and Treasurers executed a pro-note signing it in his own name. The pro-note was on a sheet of paper

printed with the name of the company and bearing a stamp impression of the Company. *Held*, the pro-note was signed on behalf of the Company and it was therefore liable on the note. 24 Bom. L. R. 355 = 67 I. C. 941 = 1923 Bom. 29.

(c) shall have its name mentioned in legible English characters in all bill-heads and letter paper and in all notices, advertisements and other official publications of the company, and in all bills of exchange, hundis, promissory notes, endorsements, cheques and orders for money or goods purporting to be signed by or on behalf of the company and in all bills of parcels, invoices, receipts and letters of credit of the company.

74. (1) If a limited company does not paint or affix, and keep painted or affixed, its name in manner directed by this Act, it shall be liable to a fine not exceeding fifty rupees for not so painting or affixing its name, and for every day during which its name is not so kept painted or affixed, and every officer of the company, who knowingly and wilfully authorises or permits the default, shall be liable to the like penalty.

(2) If any officer of a limited company, or any person on its behalf, uses or authorises the use of any seal purporting to be seal of the company whereon its name is not so engraven as aforesaid, or issues or authorises the issue of any bill head, letter paper, notice, advertisement or other official publication of the company, or signs or authorises to be signed on behalf of the company any bill of exchange, hundi, promissory note, endorsement, cheque or order for money or goods, or issues or authorises to be issued any bill of parcels, invoice, receipt or letter of credit of the company, wherein its name is not mentioned in manner aforesaid, he shall be liable to a fine not exceeding five hundred rupees, and shall further be personally liable to the holder of any such bill of exchange, hundi, promissory note, cheque or order for money or goods for the amount thereof, unless the same is duly paid by the company.

75. (1) Where any notice, advertisement or other official publication of a company contains a statement of the amount of the authorised capital of the company, such notice, advertisement or other official publication shall also contain a statement in an equally prominent position and equally conspicuous characters of the amount of the capital which has been subscribed and the amount paid up.

(2) Any company which makes default in complying with the requirements of this section and every officer of the company who is knowingly a party to the default shall be liable to a fine not exceeding one thousand rupees.

Meetings and Proceedings.

76. (1) A general meeting of every company shall be held once at the least in every year, and not more than fifteen months after the holding of the last preceding general meeting, and, if not so held, the company and every officer of the company, who is knowingly a party to the default, shall be liable to a fine not exceeding five hundred rupees.

Sec. 76.—Omission of Directors to hold general meeting—Effect of—Holding of extraordinary meeting—Offence. 72 I. C. 349=24 Cr. L. J. 349=25 Bom. L. R. 224=1923 Bom. 194 (2). *Held*, in this case that the directors were guilty of an offence under the section and that the holding of an extraordinary meeting on the requisition of the shareholder was not a sufficient compliance with S. 76. 72 I. C. 349=24 Cr. L. J. 349=25 Bom. L. R. 224=1923 Bom. 194 (2). Before an officer of a limited company can be convicted under S. 134 (4) for default in submitting the balance sheet laid before company at its general meeting, as general meeting was not held, it must be shown with reference to S. 76 that the officer was a party to the default in holding the general meeting. 21 C. W. N. 840=18 Cr. L. J. 325=38 I. C. 437. Under S. 74 (1882) the word 'manager' includes every person or body of persons who conducts or conduct the affairs of the company and to whom its management, subject to the control of the

Directors, is entrusted. 18 P. R. 1916 (Cr.)=143 P. L. R. 1916=35 I. C. 482=17 Cr. L. J. 306. Under S. 76 there is no difference between a general meeting and an extraordinary meeting of the company 1 U. P. L. R. (H.C.) 171=54 I. C. 494=21 Cr. L. J. 94.

Where an extraordinary general meeting of a company was held within fifteen months of the last general meeting, no offence had been committed under S. 76. 1 U. P. L. R. (H. C.) 171=54 I. C. 494=21 Cr. L. J. 94. A Chairman of a meeting is neither wholly a ministerial nor a judicial officer and for his *bona fide* acts of excluding a share-holder from voting or from becoming director he cannot be sued. 46 P. R. 1911=179 P. L. R. 1911=10 I. C. 515=108 P. W. R. 1911. Where the Articles of Association empower the Chairman to adjourn meeting with its consent, he is not bound to do it even if the meeting desires an adjournment. 47 Bom. 915=25 Bom. L. R. 1083=1924 Bom. 102.

(2) When default has been made in holding a meeting of the company in accordance with the provisions of this section, the Court may, on the application of any member of the company, call or direct the calling of a general meeting of the company.

77. (1) Every company limited by shares and registered after the commencement of this Act shall, within a period of six months, from the date at which the company is entitled to commence business, hold a general meeting of the members of the company which shall be called the statutory meeting.

(2) The directors shall, at least ten days before the day on which the meeting is held, forward a report (in this Act called "the statutory report") to every member of the company and to every other person entitled under this Act to receive it.

(3) The statutory report shall be certified by not less than two directors of the company or, where there are less than two directors, by the sole director and shall state—

(a) the total number of shares allotted, distinguishing shares allotted as fully or partly paid up otherwise than in cash, and stating in the case of shares partly paid up the extent to which they are so paid up, and in either case the consideration for which they have been allotted;

(b) the total amount of cash received by the company in respect of all the shares allotted distinguished as aforesaid;

(c) an abstract of the receipts of the company whether from its share capital or from debentures, and of the payments made thereout, up to a date within seven days of the date of the report, exhibiting under distinctive headings the receipts of the company from shares and debentures and other sources, the payments made here-out and particulars concerning the balance remaining in hand and an account or estimate of the preliminary expenses of the company;

(d) the names, addresses and descriptions of the directors, auditors (if any), managers (if any) and secretary of the company;

(e) the particulars of any contract, the modification of which is to be submitted to the meeting for its approval, together with the particulars of the modification or proposed modification.

(4) The statutory report shall, so far as it relates to the shares allotted by the company and to the cash received in respect of such shares and to the receipts and payments of the company on capital account, be certified as correct by the auditors (if any) of the company.

(5) The directors shall cause a copy of the statutory report, certified as by this section required, to be filed with the registrar forthwith after the sending thereof to the members of the company.

(6) Every director of the company who knowingly and wilfully authorises or permits a default in complying with the provisions of sub-section (2) or sub-section (5) shall be liable to a fine not exceeding twenty rupees for every day during which the default continues.

(7) The directors shall cause a list showing the names, descriptions and addresses of the members of the company, and the number of shares held by them respectively, to be produced at the commencement of the meeting, and to remain open and accessible to any member of the company during the continuance of the meeting.

(8) The members of the company present at the meeting shall be at liberty to discuss any matters relating to the formation of the company, or arising out of the statutory report, whether previous notice has been given or not but no resolution of which notice has not been given in accordance with the articles may be passed.

(9) The meeting may adjourn from time to time, and at any adjourned meeting any resolution of which notice has been given in accordance with the articles, either

before or subsequently to the former meeting, may be passed, and the adjourned meeting shall have the same powers as an original meeting.

(10) If a petition is presented to the Court in manner provided by Part V for winding up the company on the ground of default in filing the statutory report or in holding the statutory meeting the Court may, instead of directing that the company be wound up, give directions for the statutory report to be filed or a meeting to be held, or make such other order as may be just.

(11) The provisions of this section as to the forwarding and filing of the statutory report shall not apply in the case of a private company.

78. (1) Notwithstanding anything in the articles, the directors of a company which has a share capital shall, on the requisition of the holders of not less than one-tenth of the issued share capital of the company upon which all calls or other sums then due have been paid, forthwith proceed to call an extraordinary general meeting of the company.

(2) The requisition must state the objects of the meeting, and must be signed by the requisitionists and deposited at the registered office of the company, and may consist of several documents in like form, each signed by one or more requisitionists.

(3) If the directors do not proceed within twenty-one days from the date of the requisition being so deposited to cause a meeting to be called, the requisitionists, or a majority of them in value, may themselves call the meeting, but in either case any meeting so called shall be held within three months from the date of the deposit of the requisition.

(4) If at any such meeting a resolution requiring confirmation at another meeting is passed the directors shall forthwith call a further extraordinary general meeting for the purpose of considering the resolution and, if thought fit, of confirming it as a special resolution and, if the directors do not call the meeting within seven days from the date of the passing of the first resolution, the requisitionists, or a majority of them in value, may themselves call the meeting.

(5) Any meeting called under this section by the requisitionists shall be called in the same manner, as nearly as possible, as that in which meetings are to be called by directors.

Provisions as to meetings and votes.

79. In default of, and subject to, any regulations in the articles,—

(i) a meeting of a company may be called by fourteen days' notice in writing served on every member in manner in which notices are required to be served by Table A in the First Schedule ;

(ii) five members may call a meeting ;

(iii) any person elected by the members present at a meeting may be chairman thereof ; and

(iv) every member shall have one vote.

80. A company which is a member of another company may, by resolution of the directors, authorise any of its officials or any other person to act as its representative at any meeting of that other company, and the person so authorised shall be entitled to exercise the same powers on behalf of the company which he represents as if he were an individual shareholder of that other company.

Representation of companies at meetings of other companies of which they are members.

81. (1) A resolution shall be an extraordinary resolution when it has been passed by a majority of not less than three-fourths of such members entitled to vote as are present in person or by proxy (where proxies are allowed) at a general meeting of

Extraordinary and special resolution.

Sec. 81.—As to appointment of proxy and his qualifications, *see* 2 A.L.J. 139=29 Bom. 126=7 Bom. L. R. 29=1 C. L. J. 150 (P.C.) Inspection not allowed—Nor can shareholder even

if a woman ask to stop a general meeting for not supplying information which can be supplied at the general meeting. 97 I. C. 84=A. I. R. 1926 Sind 295. Liquidator—Appointment—Notice—

which notice specifying the intention to propose the resolution as an extraordinary resolution has been duly given.

(2) A resolution shall be a special resolution when it has been—

(a) passed in manner required for the passing of an extraordinary resolution; and

(b) confirmed by a majority of such members entitled to vote as are present in person or by proxy (where proxies are allowed) at a subsequent general meeting of which notice has been duly given, and held after an interval of not less than fourteen days, nor more than one month, from the date of the first meeting.

(3) At any meeting at which an extraordinary resolution is submitted to be passed or a special resolution is submitted to be passed or confirmed, a declaration of the chairman on a show of hands that the resolution is carried shall, unless a poll is demanded, be conclusive evidence of the fact without proof of the number or proportion of the votes recorded in favour of or against the resolution.

(4) At any meeting at which an extraordinary resolution is submitted to be passed or a special resolution is submitted to be passed or confirmed, a poll may be demanded by three persons for the time being entitled according to the articles to vote unless the articles of the company require a demand by such number of such persons, not in any case exceeding five, as may be specified in the articles.

(5) In a case where, if a poll is demanded, it may in accordance with the articles be taken in such manner as the chairman may direct, it may, if the chairman so directs, be taken at the meeting at which it is demanded.

(6) When a poll is demanded in accordance with this section, in computing the majority on the poll, reference shall be had to the number of votes to which each member is entitled by the articles of the company.

(7) For the purposes of this section notice of a meeting shall be deemed to be duly given and the meeting to be duly held when the notice is given and the meeting held in manner provided by the articles.

82. (1) A copy of every special and extraordinary resolution shall, within fifteen days from the confirmation of the special resolution or from the passing of the extraordinary resolution, as the case may be, be printed or typewritten and filed with the registrar who shall record the same.

Registration and copies of special and extraordinary resolutions.

(2) Where articles have been registered, a copy of every special resolution for the time being in force shall be embodied in or annexed to every copy of the articles issued after the date of the resolution.

(3) Where articles have not been registered, a copy of every special resolution shall be forwarded in print to any member at his request, on payment of one rupee or such less sum as the company may direct.

(4) If a company makes default in so filing with the registrar a copy of a special or extraordinary resolution, it shall be liable to a fine not exceeding twenty rupees for every day during which the default continues.

(5) If a company makes default in embodying in or annexing to a copy of its articles or in forwarding in print to a member when required by this section a copy of a special resolution, it shall be liable to a fine not exceeding ten rupees for each copy in respect of which default is made.

(6) Every officer of a company who knowingly and wilfully authorises or permits any default by the company in complying with the requirements of this section shall be liable to the like penalty as is imposed by this section on the company for that default.

83. (1) Every company shall cause minutes of all proceedings of general meetings and of its directors to be entered in books kept for that purpose.

Minutes of proceedings of meetings and directors.

(2) Any such minute, if purporting to be signed by the chairman of the meeting at which the proceedings were had, or by the chairman of the next succeeding meeting, shall be evidence of the proceedings.

(3) Until the contrary is proved, every general meeting of the company or meeting of directors in respect of the proceedings whereof minutes have been so made shall be deemed to have been duly called and held, and all proceedings had thereat to have been duly had, and all appointments of directors or liquidators shall be deemed to be valid.

*Directors.*¹

1 [83-A.] (1) Every company registered after the commencement of this Act shall have at least two directors.
Directors obligatory.

(2) This section shall not apply to a private company.]

1 [83-B.] In default of and subject to any regulations in the articles of a company other than a private company—
Appointment of directors.

(i) the subscribers of the memorandum shall be deemed to be the directors of the company until the first directors shall have been appointed ;

(ii) the directors of the company shall be appointed by the members in general meeting ; and

(iii) any casual vacancy occurring among the directors may be filled up by the directors, but the person so appointed shall be subject to retirement at the same time as if he had become a director on the day on which the director in whose place he is appointed was last appointed a director.]

84. (1) A person shall not be capable of being appointed director of a company by the articles, and shall not be named as a director or proposed director of a company in any prospectus issued by or on behalf of the company or in relation to any intended company or in any statement in lieu of prospectus filed by or on behalf of a company, unless, before the registration of the articles or the publication of the prospectus, or the filing of the statement in lieu of prospectus, as the case may be, he has, by himself or by his agent authorised in writing—
Restrictions on appointment or advertisement of director.

(i) signed and filed with the registrar a consent in writing to act as such director ; and

(ii) save in the case of a company limited by guarantee and not having a share capital, either signed the memorandum for a number of shares not less than his qualification (if any), or signed and filed with the registrar a contract in writing to take from the company and pay for his qualification shares (if any).

(2) On the application for registration of the memorandum and articles of a company the applicant shall file with the registrar a list of the persons who have consented to be directors of the company, and, if this list contains the name of any person who has not so consented, the applicant shall be liable to a fine not exceeding five hundred rupees.

(3) This section shall not apply to a private company nor to a prospectus issued by or on behalf of a company after the expiration of one year from the date at which the company is entitled to commence business.

85. (1) Without prejudice to the restrictions imposed by section 84, it shall be the duty of every director who is by the articles required to hold a specified share qualification, and who is not
Qualification of director.

Secs. 83-A and 83-B.—¹ These sections and the heading 'Directors' were inserted by Act XI of 1914, S. 2.

Secs. 83-A to 85. DIRECTOR.—Where the Directors of a Company knowing that the Company is insolvent make payment of money representing the uncalled capital due as shares, the payment must be treated as payment towards capital and not as loan to the company. 62 I. C. 889=19 A. L. J. 445. Where the Articles provided for notice in writing to a member whose share the Company desires to forfeit, it cannot work forfeiture without such notice. The Directors have no power to cancel or forfeit shares in the absence of special power conferred by the Articles.

3 U. P. L. R. (All.) 57=62 I. C. 450=19 A. L. J. 351. As to resignation of directors, *see* 36 Bom. 564=14 I. C. 253=14 Bom. L. R. 45. The Directors cannot delegate their power of allotment of shares if the allotment requires the judgment of individual Directors by reason of special features. 26 I. C. 349=16 M. L. T. 538. If the Directors have no right to delegate, a purely ministerial officer like the Secretary cannot allot. 26 I. C. 349=16 M. L. T. 538. A stranger dealing with a Joint Stock Company may assume that all the acts of the company or on its behalf are regular and proper. 17 I. C. 976=39 Cal. 810. *See also* 10 I. C. 748=13 Bom. L. R. 162.

already qualified, to obtain his qualification within two months after his appointment, or such shorter time as may be fixed by the articles.

(2) The office of director of a company shall be vacated if the director does not, within two months from the date of his appointment, or within such shorter time as may be fixed by the articles, obtain his qualification, or if after the expiration of such period or shorter time he ceases at any time to hold his qualification; and a person vacating office under this section shall be incapable of being re-appointed director of the company until he has obtained his qualification.

(3) If, after the expiration of the said period or shorter time, any unqualified person acts as a director of the company, he shall be liable to a fine not exceeding fifty rupees for every day between the expiration of the said period or shorter time and the last day on which it is proved that he acted as a director.

86. The acts of a director shall be valid notwithstanding any defect that may afterwards be discovered in his appointment or qualification: Provided that nothing in this section shall be deemed to give validity to acts done by a director after the appointment of such director has been shown to be invalid.

87. (1) Every company shall keep at its registered office a register containing the names and addresses and the occupations of its directors, and file with the registrar a copy thereof, and from time to time file with the registrar notice of any change among its directors or managers.

(2) If default is made in complying with this section, the company shall be liable to a fine not exceeding fifty rupees for every day during which the default continues; and every officer of the company, who knowingly and wilfully authorises or permits the default, shall be liable to the like penalty.

Contracts.

88. (1) Contracts on behalf of a company may be made as follows (that is to say):—

Form of contracts.

Sec. 85 (2).—Under English Law and S. 85 (2) the mere ceasing to hold the necessary qualification shares involves vacation of his office by a Director though this is not precisely provided in Act VI of 1882. 15 Cr. L. J. 380=39 P. W. R. 1914 (Cr.)=23 I. C. 748=250 P. L. R. 1914. On this section, see also 16 All. 88.

Sec. 86.—Under the articles of association if the quorum is of three Directors and two of these only are regularly appointed, the construction of the Board is irregular and its allotment of shares is invalid unless the articles validate an act of *de facto* Director done in good faith. 36 All. 412=25 I. C. 210=12 A. L. J. 667. Persons to whom no notice of allotment is served cannot be put on the list of contributories at the time of liquidation. 36 All. 412=25 I. C. 210=12 A. L. J. 667. As between a company and third persons the Directors *de facto* are directors *de jure*. 10 I. C. 748=13 Bom. L. R. 162. See also 17 I. C. 976=39 Cal. 810. A right to forfeit shares must, in order to be effectually exercised, be pursued with the greatest exactness by the proper parties. The right must be exercised *bona fide* for the purpose for which it was conferred. 37 P. R. 1915=101 P. W. R. 1915=29 I. C. 567=2 P. L. R. 1916. Acts done *bona fide* by a Manager or Director are valid in spite of a defect in their appointment not only between company and outsiders but between company and its members. 108 P. W. R. 1911=179 P. L. R. 1911=10 I. C. 515=46 P. R. 1911.

Sec. 87.—See 43 I. C. 791=19 Cr. L. J. 215. Appointment of director is a part of indoor management—Persons dealing with the company are not supposed to know its contents nor search to find whether a person is director as alleged. 27 Bom. L. R. 1218=91 I. C. 334=A. I. R. 1926 Bom. 28.

Sec. 88.—Contract before formation of company must be ratified after its formation. 2 P. L. R. 1904=2 P. R. 1905. Onerous contracts by managing agent are not binding on the company. 100 P. L. R. 1905=10 P. R. 1905. The Manager or Managing Director of a Mill Company cannot purchase, on behalf of his mill, the liability of a stranger still less of their own manager or manager's partner in a private transaction of his own. 28 M. L. J. 596=19 C. W. N. 621=21 C. L. J. 524=17 M. L. T. 443=(1915) M. W. N. 790=2 L. W. 560=30 I. C. 59=17 Bom. L. R. 484 (P. C.). A limited company is a distinct *persona* from the individuals composing it. 42 C. 1029=42 I. A. 97=19 C. W. N. 585=17 M. L. T. 377=13 A. L. J. 534=21 C. L. J. 446=17 Bom. L. R. 449=2 L. W. 555=30 I. C. 55=29 M. L. J. 80 (P. C.). A Company cannot ratify or adopt a contract entered into by a person on its behalf before incorporation though it may enter into a new contract embodying the terms of the old one. 68 I. C. 787=1923 Lah. 100=14 Bom. L. R. 45=14 I. C. 353=36 Bom. 564. When once the rights of parties dealing with a registered company have become fixed by

(i) any contract which, if made between private persons, would be by law required to be in writing, signed by the parties to be charged therewith, may be made on behalf of the company in writing signed by any person acting under its authority, express or implied, and may in the same manner be varied or discharged ;

(ii) any contract which, if made between private persons, would by law be valid although made by parol only, and not reduced into writing, may be made by parol on behalf of the company by any person acting under its authority, express or implied, and may in the same manner be varied or discharged

(2) All contracts made according to this section shall be effectual in law and shall bind the company and its successors and all other parties thereto, their heirs, or legal representatives as the case may be.

89. A bill of exchange, hundi or promissory note shall be deemed to have been made, drawn, accepted or endorsed on behalf of a company if made, drawn, accepted or endorsed in the name of, or by or on behalf or on account of, the company by any person acting under its authority, express or implied.

90. A company may, by writing under its common seal, empower any person, either generally or in respect of any specified matters, as its attorney, to execute deeds on its behalf in any place not situate in British India : and every deed signed by such attorney, on behalf of the company, and under his seal, where sealing is required, shall bind the company, and have the same effect as if it were under its common seal.

91. (1) A company whose objects require or compromise the transaction of business beyond the limits of British India may, if authorised by its articles, have for use in any territory, district or place not situate in British India, an official seal which shall be a facsimile of the common seal of the company, with the addition on its face of the name of every territory, district or place where it is to be used.

(2) A company having such an official seal may, by writing under its common seal, authorise any person appointed for the purpose in any territory, district or place not situate in British India to affix the same to any deed or other document to which the company is party in that territory, district or place.

(3) The authority of any such agent shall, as between the company and any person dealing with the agent, continue during the period (if any) mentioned in the instrument conferring the authority, or if no period is there mentioned, then until notice of the revocation or determination of the agent's authority has been given to the person dealing with him.

(4) The person affixing any such official seal shall, by writing under his hand, on the deed or other document to which the seal is affixed, certify the date and place of affixing the same.

(5) A deed or other document to which an official seal is duly affixed shall bind the company as if it had been sealed with the common seal of the company.

1[91-A.] (1) Every director who is directly or indirectly concerned or interested in any contract or arrangement entered into by or on behalf of the company shall disclose the nature of his interest at the meeting of the directors at which the contract or arrangement is determined on, if his interest then exists, or in any other case at the first meeting of the directors after the acquisition of his interest or the making of the contract or arrangement :

a contract the company cannot, by a special resolution subsequently passed, alter those rights. [(1900) 1 Ch. 656, Ref.] 28 I. C. 847.

Sec. 89.—Hundi endorsed by agent of company—Company, when bound. See 29 C. W. N. 828 = 52 Cal. 802 = 89 I. C. 328 = 1925 Cal. 1062. Evidence *de hors* the bill or note is not admissible. (*Ibid.*) (Per Rankin, J.)

Secs. 91-A to 91-D.—¹ These sections were inserted by Act XI of 1914, S. 3.

Sec. 91-A.—The Directors of the company are agents of the company and trustees for the shareholders and cannot enter into a contract with the company for personal benefit. 32 I. C. 350 = 38 Mad. 991. On this section, see also 23 Bom. L. R. 1104.

Provided that a general notice that a director is a member of any specified firm or company, and is to be regarded as interested in any subsequent transaction with such firm or company, shall as regards any such transaction be sufficient disclosure within the meaning of this sub-section, and after such general notice, it shall not be necessary to give any special notice relating to any particular transaction with such firm or company.

(2) Every director who contravenes the provisions of sub-section (1) shall be liable to a fine not exceeding one thousand rupees.]

1[91-B. (1) No director shall, as a director, vote on any contract or arrangement in which he is either directly or indirectly concerned or interested; and if he does so vote, his vote shall not be counted :
 Prohibition of voting by interested director.

Provided that the directors or any of them may vote on any contract of indemnity against any loss which they or any one or more of them may suffer by reason of becoming or being sureties or surety for the company.

(2) Every director who contravenes the provisions of sub-section (1) shall be liable to a fine not exceeding one thousand rupees.]

2[(3) This section does not apply to a private company.]

1[91-C. (1) Where company enters into a contract for the appointment of a manager of the company in which contract any director of the company is directly or indirectly concerned or interested, or varies any such existing contract, the company shall send an abstract of the terms of such contract or variation, as the case may be, together with a memorandum clearly indicating the nature of the interest of the director in such contract, or in such variation, to every member; and the contract shall be open to the inspection of any member at the registered office of the company.
 Disclosure to members in case of contract appointing a manager.

(2) If a company makes default in complying with the requirements of sub-section (1), it shall be liable to a fine not exceeding one thousand rupees; and every officer of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty.]

1[91-D. (1) Every manager or other agent of a company other than a private company who enters into a contract for or on behalf of the company in which contract the company is an undisclosed principal shall, at the time of entering into the contract, make a memorandum in writing of the terms of the contract, and specify therein the person with whom it has been made.
 Contracts by agents of company in which company is undisclosed principal.

(2) Every such manager or other agent shall forthwith deliver the memorandum aforesaid to the company, and such memorandum shall be filed in the office of the company and laid before the directors at the next directors' meeting.

(3) If any such manager or other agent makes default in complying with the requirements of this section—

(a) the contract shall, at the option of the company, be void as against the company; and

(b) such manager or other agent shall be liable to a fine not exceeding two hundred rupees.]

Prospectus.

92. (1) Every prospectus issued by or on behalf of a company or in relation to any intended company shall be dated, and that date shall, unless the contrary be proved, be taken as the date of publication of the prospectus.
 Filing of prospectus.

(2) A copy of every such prospectus, signed by every person who is named therein as a director or proposed director of the company, or by his agent authorised in writing, shall be filed for registration with the registrar on or before the date of its

publication, and no such prospectus shall be issued until a copy thereof has been so filed for registration.

(3) The registrar shall not register any prospectus unless it is dated, and the copy thereof signed, in manner required by this section.

(4) Every prospectus shall state on the face of it that a copy has been filed for registration as required by this section.

(5) If a prospectus is issued without a copy thereof being so filed, the company and every person who is knowingly a party to the issue of the prospectus, shall be liable to a fine not exceeding fifty rupees for every day from the date of the issue of the prospectus until a copy thereof is so filed.

93. (1) Every prospectus issued by or on behalf of a company, or by or on behalf of any person who is or has been engaged or interested in the formation of the company, shall state—

Specific requirements as to particulars of prospectus.

(a) the contents of the memorandum, with the names, descriptions and addresses of the signatories and the number of shares subscribed for by them respectively; and the number of founders or management or deferred shares (if any) and the nature and extent of the interest of the holders in the property and profits of the company; and

(b) the number of shares (if any) fixed by the articles as the qualification of a director, and any provision in the articles as to the remuneration of the directors; and

(c) the names, descriptions and addresses of the directors or proposed directors and of the managers or proposed managers (if any); and

(d) the minimum subscription on which the directors may proceed to allotment, and the amount payable on application and allotment on each share; and in the case of a second or subsequent offer of shares the amount offered for subscription on each previous allotment made within the two preceding years, and the amount actually allotted, and the amount (if any) paid on the shares so allotted; and

(e) the number and amount of shares and debentures which within the two preceding years have been issued, or agreed to be issued, as fully or partly paid up otherwise than in cash, and in the latter case the extent to which they are so paid up, and in either case the consideration for which those shares or debentures have been issued or agreed to be issued; and

(f) the names and addresses of the vendors of any property purchased or acquired by the company, or proposed so to be purchased or acquired, which is to be paid for wholly or partly out of the proceeds of the issue offered for subscription by the prospectus, or the purchase or acquisition of which has not been completed at the date of issue of the prospectus, and the amount payable in cash, shares or debentures to the vendor, and where there is more than one separate vendor or the company is a sub-purchaser, the amount so payable to each vendor: Provided that where the vendors or any of them are a firm, the members of the firm shall not be treated as separate vendors; and

(g) the amount (if any) paid or payable as purchase money in cash, shares or debentures, for any such property as aforesaid, specifying the amount (if any) payable for goodwill; and

(h) the amount (if any) paid within the two preceding years or payable, as commission for subscribing or agreeing to subscribe, or procuring or agreeing to procure subscriptions, for any shares in, or debentures of, the company, or the rate of any such commission: Provided that it shall not be necessary to state the commission payable to sub-under-writers; and

(i) the amount or estimated amount of preliminary expenses; and

Sec. 92 (5).—Non-filing of copy of advertisement with registrar is an offence. 52 Cal. 440 = 29 C. W. N. 523 = 88 I. C. 5 = 26 Cr.L.J. 1061 = 1925 Cal. 714.

Sec. 93.—It is not open to an outsider to challenge the appointment of Director or to con-

test a Director's authority to act on behalf of the company when the company has recognized a person to be a Director for a long time without repudiating his acts on any single occasion. 31 I. C. 595 = 182 P. W. R. 1915.

(k) the amount paid within the two preceding years or intended to be paid to any promoter, and the consideration for any such payment ; and

(l) the dates of, and parties to, every material contract, and a reasonable time and place at which any material contract or a copy thereof may be inspected : Provided that this requirement shall not apply to a contract entered into in the ordinary course of the business carried on or intended to be carried on by the company, or to any contract entered into more than two years before the date of issue of the prospectus ; and

(m) the names and addresses of the auditors (if any) of the company ; and

(n) full particulars of the nature and extent of the interest (if any) of every director in the promotion of, or in the property proposed to be acquired by, the company, or, where the interest of such a director consists in being a partner in a firm, the nature and extent of the interest of the firm, with a statement of full sums paid or agreed to be paid to him or to the firm in cash or shares or otherwise by any person either to induce him to become, or to qualify him as, a director, or otherwise for services rendered by him or by the firm in connection with the promotion or formation of the company ; and

(o) where the company is a company having shares of more than one class, the right of voting at meetings of the company conferred by the several classes of shares respectively.

(2) Where any such prospectus as is mentioned in this section is published as a newspaper advertisement, it shall not be necessary in the advertisement to specify the contents of the memorandum, or the signatories thereto, and the number of shares subscribed for by them.

(3) This section shall not apply to a circular or notice inviting existing members or debenture-holders of a company to subscribe either for shares or for debentures of the company, whether with or without the right to renounce in favour of other persons.

(4) The requirements of this section as to the memorandum and the qualification, remuneration and interest of directors, the names, descriptions and addresses of directors or proposed directors, and of managers or proposed managers, and the amount or estimated amount of preliminary expenses, shall not apply in the case of a prospectus issued more than one year after the date at which the company is entitled to commence business.

(5) Nothing in this section shall limit or diminish any liability which any person may incur under the general law or this Act apart from this section.

94. For the purposes of section 93 every person shall be deemed to be a vendor who has entered into any contract, absolute or conditional,

Meaning of " vendor " in section 93.

for the sale or purchase, or for any option of purchase, of any property to be acquired by the company, in any case

where—

(a) the purchase-money is not fully paid at the date of issue of the prospectus ; or

(b) the purchase-money is to be paid or satisfied wholly or in part out of the proceeds of the issue offered for subscription by the prospectus ; or

(c) the contract depends for its validity or fulfilment on the result of that issue.

95. Where any of the property to be acquired by the company is to be taken on lease, section 93 shall apply as if the expression " vendor "

Application of section 93 to the case of property taken on lease.

included the lessor, and the expression " purchase-money " included the consideration for the lease, and the expression " sub-purchaser " included a sub-lessee.

96. Any condition requiring or binding any applicant for shares or debentures to waive compliance with any requirements of section 93,

Invalidity of certain conditions as to waiver or notice.

or purporting to affect him with notice of any contract, document or matter not specifically referred to in the

prospectus, shall be void.

97. In the event of non-compliance with any of the requirements of section 93,

Saving in certain cases of non-compliance with S. 93. a director or other person responsible for the prospectus shall not incur any liability by reason of the non-compliance, if he proves that—

(a) as regards any matter not disclosed, he was not cognizant thereof ; or

(b) the non-compliance arose from an honest mistake of fact on his part :

Provided that, in the event of non-compliance with the requirements contained in clause (n) of sub-section (1) of section 93, no such director or other person shall incur any liability in respect of the non-compliance unless it be proved that he had knowledge of the matters not disclosed.

98. (1) A company which does not issue a prospectus on or with reference to its

Obligations of companies where no prospectus is issued.

formation shall not allot any of its shares or debentures unless before the first allotment of either shares or debentures there has been filed with the registrar a statement in lieu of prospectus signed by every person who is named therein as a director or a proposed director of the company or by his agent authorised in writing, in the form and containing the particulars set out in the Second Schedule.

(2) This section shall not apply to a private company or to a company which has allotted any shares or debentures before the commencement of this Act or, in so far as it relates to the allotment of shares to a company limited by guarantee and not having a share capital.

99. A company shall not, at any time, vary the

Restriction on alteration of terms mentioned in prospectus or statement in lieu of prospectus.

terms of a contract referred to in the prospectus or statement in lieu of prospectus, except subject to the approval of the company in general meeting.

100. (1) Where a prospectus invites persons to subscribe for shares in or debentures of a company every person who is a director of the

Liability for statements in prospectus.

company at the time of the issue of the prospectus, and every person who has authorised the naming of himself and is named in the prospectus as a director or as having agreed to become a director either immediately or after an interval of time, and every promoter of the company, and every person who has authorised the issue of the prospectus, shall be liable to pay compensation to all persons who subscribe for any shares or debentures on the faith of the prospectus for all loss or damage they may have sustained by reason of any misleading or untrue statement therein, or in any report or memorandum appearing on the face thereof, or by reference incorporated therein or issued therewith, unless it is proved—

(a) with respect to every misleading or untrue statement not purporting to be made on the authority of an expert or of a public official document or statement, that he had reasonable ground to believe and did up to the time of the allotment of the shares or debentures, as the case may be, believe that the statement fairly represented the facts or was true ;

(b) with respect to every misleading or untrue statement purporting to be a statement by or contained in what purports to be a copy of or extract from a report or valuation of an expert, that it fairly represented the statement, or was a correct and fair copy of or extract from the report or valuation : Provided that the director, person named as director, promoter or person who authorised the issue of the prospectus shall be liable to pay compensation as aforesaid if it is proved that he had no reasonable ground to believe that the person making the statement, report or valuation was competent to make it ; and

(c) with respect to every misleading or untrue statement purporting to be a statement made by an official person or contained in what purports to be a copy of or extract from a public official document, that it was a correct and fair representation of the statement or copy of or extract from the document :
or unless it is proved—

(i) that having consented to become a director of the company he withdrew his consent before the issue of the prospectus, and that it was issued without his authority or consent ; or

(ii) that the prospectus was issued without his knowledge or consent, and that on becoming aware of its issue, he forthwith gave a reasonable public notice that it was issued without his knowledge or consent ; or

(iii) that, after the issue of the prospectus and before allotment thereunder, he, on becoming aware of any misleading or untrue statement therein, withdrew his consent thereto, and gave reasonable public notice of the withdrawal, and of the reason therefor.

(2) Where a company existing at the commencement of this Act has issued shares or debentures, and for the purpose of obtaining further capital by subscriptions for shares or debentures issues a prospectus, a director shall not be liable in respect of any statement therein unless he has authorised the issue of the prospectus, or has adopted or ratified it.

(3) Where the prospectus contains the name of a person as a director of the company, or as having agreed to become a director thereof, and he has not consented to become a director, or has withdrawn his consent before the issue of the prospectus, and has not authorised or consented to the issue thereof, the directors of the company, except any without whose knowledge or consent the prospectus was issued, and any other person who authorised the issue thereof, shall be liable to indemnify the person named as aforesaid against all damages, costs and expenses to which he may be made liable by reason of his name having been inserted in the prospectus, or in defending himself against any suit or legal proceedings brought against him in respect thereof.

(4) Every person who, by reason of his being a director or named as a director, or as having agreed to become a director, or of his having authorised the issue of the prospectus, becomes liable to make any payment under this section, may recover contribution, as in cases of contract, from any other person who, if sued separately, would have been liable to make the same payment, unless the person who has become so liable was, and that other person was not, guilty of fraudulent misrepresentation.

(5) For the purposes of this section—

(a) the expression "promoter" means a promoter who was a party to the preparation of the prospectus, or the portion thereof containing the misleading or untrue statement, but does not include any person by reason of his acting in a professional capacity for persons engaged in procuring the formation of the company ;

(b) the expression "expert" includes engineer, valuer, accountant and any other person whose profession gives authority to a statement made by him.

Allotment.

101. (1) No allotment shall be made of any share capital of a company offered

Restriction as to allotment. to the public for subscription, unless the following conditions have been complied with, namely :—

(a) the amount (if any) fixed by the memorandum or articles and named in the prospectus as the minimum subscription upon which the directors may proceed to allotment ; or

(b) if no amount is so fixed and named, then the whole amount of the share capital so offered for subscription, has been subscribed, and the sum payable on application for the amount so fixed and named or for the whole amount offered for subscription, has been paid to and received in cash by the company.

(2) The amount so fixed and named and the whole amount aforesaid shall be reckoned exclusively of any amount payable otherwise than in cash, and is in this Act referred to as the minimum subscription.

(3) The amount payable on application on each share shall not be less than five per cent. of the nominal amount of the share.

(4) If the conditions aforesaid have not been complied with on the expiration of one hundred and twenty days after the first issue of the prospectus, all money received from applicants for shares shall be forthwith repaid to them without interest,

and, if any such money is not so repaid within one hundred and thirty days after the issue of the prospectus, the directors of the company shall be jointly and severally liable to repay that money with interest at the rate of seven per cent. per annum from the expiration of the one hundred and thirtieth day: Provided that a director shall not be liable if he proves that the loss of the money was not due to any misconduct or negligence on his part.

(5) Any condition requiring or binding any applicant for shares to waive compliance with any requirement of this section shall be void.

(6) This section, except sub-section (3) thereof, shall not apply to any allotment of shares subsequent to the first allotment of shares offered to the public for subscription.

(7) In the case of the first allotment of share capital payable in cash of a company which does not issue any invitation to the public to subscribe for its shares, no allotment shall be made unless the minimum subscription (that is to say)—

(a) the amount (if any) fixed by the memorandum or articles and named in the statement in lieu of prospectus as the minimum subscription upon which the directors may proceed to allotment; or

(b) if no amount is so fixed and named, the whole amount of the share capital other than that issued or agreed to be issued as fully or partly paid up otherwise than in cash;

has been subscribed and an amount not less than five per cent. of the nominal amount of each share payable in cash has been paid to and received by the company.

(8) Sub-section (7) shall not apply to a private company or to a company which has allotted any shares or debentures before the commencement of this Act.

102. (1) An allotment made by a company to an applicant in contravention of the provisions of section 101 shall be voidable at the instance of the applicant within one month after the holding of the statutory meeting of the company and not later, and shall be so voidable notwithstanding that the company is in course of being wound up.

(2) If any director of a company knowingly contravenes or permits or authorises the contravention of any of the provisions of section 101 with respect to allotment, he shall be liable to compensate the company and the allottee respectively for any loss, damages or costs which the company or the allottee may have sustained or incurred thereby: Provided that proceedings to recover any such loss, damages or costs shall not be commenced after the expiration of two years from the date of the allotment.

Restrictions on commencement of business.

103. (1) A company shall not commence any business or exercise any borrowing powers unless—

(a) shares held subject to the payment of the whole amount thereof in cash have been allotted to an amount not less in the whole than the minimum subscription; and

(b) every director of the company has paid to the company on each of the shares taken or contracted to be taken by him, and for which he is liable to pay in cash, a proportion equal to the proportion payable on application and allotment on the shares offered for public subscription or, in the case of a company which does not issue a prospectus inviting the public to subscribe for its shares, on the shares payable in cash; and

(c) there has been filed with the registrar a duly verified declaration by the secretary or one of the directors, in the prescribed form, that the aforesaid conditions have been complied with; and

Sec. 102.—Where there is no valid delegation to the Managing Director of the power of allotting shares which was reserved to the Board of Directors by the Articles of Association the shares cannot be validly allotted by him. 1 Lah. L. J. 1. The applicant can revoke his application for the allotment of any shares before any valid allotment or ratification by the Board of Directors. 1 Lah. L. J. 1. Application for allotment

of shares—Invalid allotment—Right of revocation before ratification. 52 P. W. R. 1919=51 I. C. 812. An allotment of share by the Secretaries and Treasurers is valid if the Articles of Association, not specially providing for allotment by the Directors provide that the general management should be by Secretaries and Treasurers subject to the Directors' supervision. 26 I. C. 349=16 M. L. T. 538.

(d) in the case of a company which does not issue a prospectus inviting the public to subscribe for its shares, there has been filed with the registrar a statement in lieu of prospectus.

(2) The registrar shall, on the filing of a duly verified declaration, in accordance with the provisions of this section certify that the company is entitled to commence business, and that certificate shall be conclusive evidence that the company is so entitled ;

Provided that, in the case of a company which does not issue a prospectus inviting the public to subscribe for its shares, the registrar shall not give such a certificate unless a statement in lieu of prospectus has been filed with him.

(3) Any contract made by a company before the date at which it is entitled to commence business shall be provisional only, and shall not be binding on the company until that date, and on that date it shall become binding.

(4) Nothing in this section shall prevent the simultaneous offer for subscription or allotment of any shares and debentures or the receipt of any money payable on application for debentures.

(5) If any company commences business or exercises borrowing powers in contravention of this section, every person who is responsible for the contravention shall, without prejudice to any other liability, be liable to a fine not exceeding five hundred rupees for every day during which the contravention continues.

(6) Nothing in this section shall apply to a private company, or to a company registered before the commencement of this Act which does not issue a prospectus inviting the public to subscribe for its shares or, in so far as its provisions relate to shares, to a company limited by guarantee and not having a share capital.

104. (1) Whenever a company having a share capital makes any allotment of its shares, the company shall, within one month thereafter,—

Return as to allotments.

(a) file with the registrar a return of the allotments, stating the number and nominal amount of the shares comprised in the allotment, the names, addresses and descriptions of the allottees, and the amount (if any) paid or due and payable on each share ; and

(b) in the case of shares allotted as fully or partly paid up otherwise than in cash, produce for the inspection and examination of the registrar a contract in writing constituting the title of the allottee to the allotment together with any contract of sale, or for services or other consideration in respect of which that allotment was made, such contracts being duly stamped, and filed with the registrar copies verified in the prescribed manner of all such contracts and a return stating the number and nominal amount of shares so allotted, the extent to which they are to be treated as paid up, and the consideration for which they have been allotted.

(2) Where such a contract as above mentioned is not reduced to writing, the company shall, within one month after the allotment, file with the registrar the prescribed particulars of the contract stamped with the same stamp-duty as would have been payable if the contract had been reduced to writing and these particulars shall be

Sec. 104.—An agreement that the purchaser of shares in a company need not pay unless the company made profits and paid profits thereon, is in clear violation of S. 28. If an application for shares is subject to a condition precedent that condition must be performed to create a liability to take them. But in the case of conditions subsequent, the liability arises though it is never complied with. 36 Bom. 557=14 Bom. L.R. 648=16 I.C. 696. If before a contract to take shares be rescinded a winding up be commenced or a concern ceases to be a going concern, the shareholder will be liable to be a contributory. 102 P.W.R. 1914=25 I.C. 672=201 P.L.R. 1914. It is only a debt due *in presenti* from the company that can be set off for future calls on shares. 102 P.W.R. 1914=25 I.C.

672=201 P.L.R. 1914. As to allotment of shares as fully paid up otherwise than in cash, see 41 Mad. 307=33 M.L.J. 474=(1917) M.W.N. 776=42 I.C. 674=6 L.W. 706 ; 48 All. 503=95 I.C. 570=24 A.I.R. 576=A.I.R. 1926 All. 524. On this section, see also 26 P.R. 1919 (Cr.) as to liability of directors and managers to furnish necessary returns.

Sec. 104 (b). CONTRACT IN WRITING.—A ratification of a previous contract by the Board of Directors of a company cannot be described as a contract in writing constituting the title of the allottee. (1926) M.W.N. 6=23 L.W. 571=94 I.C. 892=A.I.R. 1926 Mad. 380.

Sec. 104 (2) & (3).—See (1926) M.W.N. 6=A.I.R. 1926 Mad. 380.

deemed to be an instrument within the meaning of the Indian Stamp Act, 1899, and the registrar may, as a condition of filing the particulars, require that the duty payable thereon be adjudicated under section 31 of that Act.

(3) If default is made in complying with the requirements of this section, every officer of the company who is knowingly a party to the default shall be liable to a fine not exceeding five hundred rupees for every day during which the default continues :

Provided that, in case of default in filing with the registrar within one month after the allotment any document required to be filed by this section, the company, or any person liable for the default, may apply to the Court for relief, and the Court, if satisfied that the omission to file the document was accidental or due to inadvertence or that on other grounds it is just and equitable to grant relief, may make an order extending the time for the filing of the document for such a period as the Court may think proper.

Commissions and Discounts.

105. (1) It shall be lawful for a company to pay a commission to any person in

Power to pay certain commissions and prohibition of payment of all other commissions, discounts, etc.

consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any shares in the company, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any shares in the company, if the payment of the commission is

authorized by the articles and the commission paid or agreed to be paid does not exceed the amount of rate so authorized and if the amount or rate per cent. of the commission paid or agreed to be paid is—

(a) in the case of shares offered to the public for subscription, disclosed in the prospectus ; or

(b) in the case of shares not offered to the public for subscription, disclosed in the statement in lieu of prospectus, or in a statement in the prescribed form signed in like manner as a statement in lieu of prospectus and filed with the registrar and, where a circular or notice, not being a prospectus inviting subscription for the shares is issued, also disclosed in that circular or notice.

(2) Save as aforesaid, no company shall apply any of its shares or capital money either directly or indirectly in payment of any commission, discount or allowance, to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any shares of the company, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any shares in the company, whether the shares or money be so applied by being added to the purchase-money of any property acquired by the company or to the contract price of any work to be executed for the company, or the money be paid out of the nominal purchase-money or contract price or otherwise.

(3) Nothing in the section shall affect the power of any company to pay such brokerage as it has heretofore been lawful for a company to pay, and a vendor to, promoter of, or other person who receives payment in money or shares from, a company shall have and shall be deemed always to have had power to apply any part of the money or shares so received in payment of any commission, the payment of which, if made directly by the company, would have been legal under this section.

106. Where a company has paid any sums by way of commission in respect of

Statement in balance-sheet as to commissions and discounts.

any shares or debentures or allowed any sums by way of discount in respect of any debentures, the total amount so paid or allowed or so much thereof as has not been written off, shall be stated in every balance-sheet of the company

until the whole amount thereof has been written off.

Payment of interest out of Capital.

107. Where any shares of a company are issued for the purpose of raising money

Power of company to pay interest out of capital in certain cases.

to defray the expenses of the construction of any works or buildings or the provision of any plant which cannot be made profitable for a lengthened period, the company may pay interest on so much of that share capital as is for

the time being paid up for the period and subject to the conditions and restrictions in this section mentioned, and may charge the same to capital as part of the cost of construction of the work or building, or the provision of plant :

Provided that—

(1) no such payment shall be made unless the same is authorized by the articles or by special resolution ;

(2) no such payment, whether authorized by the articles or by special resolution, shall be made without the previous sanction of the Local Government, which sanction shall be conclusive evidence for the purposes of this section that the shares of the company, in respect of which such sanction is given, have been issued for a purpose specified in this section ;

(3) before sanctioning any such payment, the Local Government may, at the expense of the company, appoint a person to inquire and report to such Local Government as to the circumstances of the case, and may, before making the appointment, require the company to give security for the payment of the costs of the inquiry ;

(4) the payment shall be made only for such period as may be determined by the Local Government ; and such period shall in no case extend beyond the close of the half-year next after the half-year during which the works or buildings have been actually completed or the plant provided ;

(5) the rate of interest shall in no case exceed four per cent. per annum or such lower rate as the Governor-General in Council may, by notification in the Gazette of India, prescribe ;

(6) the payment of the interest shall not operate as a reduction of the amount paid up on the shares in respect of which it is paid ;

(7) the accounts of the company shall show the share capital on which, and the rate at which, interest has been paid out of capital during the period to which the accounts relate ;

(8) nothing in this section shall affect any company to which the Indian Railway Companies Act, 1895, or the Indian Tramways Act, 1902, applies.

Certificates of Shares, etc.

108. (1) Every company shall, within three months after the allotment of any of its shares, debentures or debenture stock, and within three months after the registration of the transfer of any such shares, debentures or debenture stock, complete and have ready for delivery the certificates of all shares, the debentures, and the certificates of all debenture stock allotted or transferred, unless the conditions of issue of the shares, debentures or debenture stock otherwise provide.

(2) If default is made in complying with the requirements of this section, the company, and every officer of the company who is knowingly a party to the default, shall be liable to a fine not exceeding fifty rupees for every day during which the default continues.

Information as to Mortgages, Charges, etc.

Certain mortgages and charges to be void if not registered.

109. Every mortgage or charge created after the commencement of this Act by a company and being either—

Sec. 109. SCOPE OF SECTION.—*See* L. R. 6 A. 29=83 I. C. 142=1925 All. 206. The provisions of S. 109, relating to a mortgage or charge created by a company, do not apply to a charge arising by operation of law and not by contract. 2 Luck. 299=3 O. W. N. 315 (Sup.)=99 I. C. 483=A. I. R. 1927 Oudh 55. Where a director pledges moveable assets of a company, but remains himself in possession as agent of pledgee, no pledge of specific moveables is created, but only a floating charge, which, if not registered under S. 109, is void against the liquidator. 27 Bom. L. R. 1218=91 I. C. 334=

A. I. R. 1926 Bom. 28. It is necessary to file with the Registrar the particulars of a mortgage by deposit of title deeds, whether or no it is accompanied by a memorandum of deposit. 29 Bom. L. R. 253=101 I. C. 144=A. I. R. 1927 Bom. 167. But a mortgage which is not registered in accordance with the provisions of S. 109 cannot be repudiated by the company itself while it is a going concern. 5 Rang. 585=6 Bur. L. J. 160=A. I. R. 1927 Rang 288. A question of that kind is not a substantial question of law so as to form the ground of leave to appeal to Privy Council being granted under S. 110, C. P. C.

- (a) a mortgage or charge for the purpose of securing any issue of debentures ;
or
(b) a mortgage or charge on uncalled share capital of the company ; or
(c) a mortgage or charge on any immoveable property wherever situate, or any interest therein ; or
(d) a mortgage or charge on any book debts of the company ; or
(e) a floating charge on the undertaking or property of the company ;

shall, so far as any security on the company's property or undertaking is thereby conferred, be void against the liquidator and any creditor of the company, unless the prescribed particulars of the mortgage or charge, together with the instrument (if any) by which the mortgage or charge is created or evidenced, or a copy thereof verified in the prescribed manner are filed with the registrar for registration in manner required by this Act within twenty-one days after the date of its creation, but without prejudice to any contract or obligation for repayment of the money thereby secured, and when a mortgage or charge becomes void under this section, the money secured thereby shall immediately become payable :

Provided that—

(i) in the case of a mortgage or charge created out of British India comprising solely property situate outside British India twenty-one days after the date on which the instrument or copy could, in due course, of post, and if despatched with due diligence, have been received in British India shall be substituted for twenty-one days after the date of the creation of the mortgage or charge, as the time within which the particulars and instrument or copy are to be filed with the registrar ; and

(ii) where the mortgage or charge is created in British India but comprises property outside British India, the instrument creating or purporting to create the mortgage or charge or a copy thereof verified in the prescribed manner may be filed for registration notwithstanding that further proceedings may be necessary to make the mortgage or charge valid or effectual according to the law of the country in which the property is situate ; and

(iii) where a negotiable instrument has been given to secure the payment of any book debts of a company, the deposit of the instrument for the purpose of securing an advance to the company shall not for the purposes of this section be treated as a mortgage or charge on those book debts ; and

(iv) the holding of debentures entitling the holder to a charge on immoveable property shall not be deemed to be an interest in immoveable property.

110. Where a series of debentures containing, or giving by reference to any other

Particulars in case of series of debentures entitling holders *pari passu*.

instrument, any charge to the benefit of which the debenture holders of that series are entitled *pari passu* is created by a company, it shall be sufficient for the purposes of section 109 if there are filed with the registrar

within twenty-one days after the execution of the deed containing the charge or, if there is no such deed, after the execution of any debentures of the series, the following particulars ;—

- (a) the total amount secured by the whole series ; and
(b) the dates of the resolution authorizing the issue of the series and the date of the covering deed (if any) by which the security is created or defined ; and
(c) a general description of the property charged ; and
(d) the names of the trustees (if any) for the debenture-holders ;

together with the deed or a copy thereof verified in the prescribed manner containing the charge, or if there is no such deed, one of the debentures of the series and the registrar shall, on payment of the prescribed fee, enter those particulars in the register :

(*Ibid.*) Two mortgages were executed on different dates. The later mortgage was registered with the Registrar within 21 days. The earlier mortgage was registered only subsequently after the Court granted an extension of time. *Held*, that the later mortgage had priority over the earlier mortgage. 1 Luck. C. 80 = 102 I. C. 592

= A. I. R. 1927 Oudh 300.

Sec. 109, Cl. (e).—"Floating charge"—What constitutes—Possession of assets given to lender company—Borrower company allowed to carry on business—Effect. 54 Cal. 513 = 103 I. C. 748 = A. I. R. 1927 Cal. 682.

Provided that, where more than one issue is made of debentures in the series, there shall be filed with the registrar for entry in the register particulars of the date and amount of each issue, but an omission to do this shall not affect the validity of the debentures issued.

111. Where any commission, allowance or discount has been paid or made either directly or indirectly by the company to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any debentures of the company, or procuring or agreeing to procure subscription, whether absolute or conditional, for any such debentures, the particulars required to be filed for registration under sections 109 and 110 shall include particulars as to the amount or rate per cent. of the commission, discount or allowance so paid or made, but an omission to do this shall not affect the validity of the debentures issued :

Particulars in case of commission, etc., on debentures.

Provided that the deposit of any debentures as security for any debt of the company shall not for the purposes of this provision be treated as the issue of the debentures at a discount.

112. (1) The registrar shall keep, with respect to each company, a register in the prescribed form of all the mortgages and charges created by the company after the commencement of this Act and requiring registration under section 109, and shall, on payment of the prescribed fee, enter in the register, with respect to every such mortgage or charge, the date of creation, the amount secured by it, short particulars of the property mortgaged or charged, and the names of the mortgagees or persons entitled to the charge.

Register of mortgages and charges.

(2) After making the entry required by sub-section (1), the registrar shall return the instrument (if any) or the verified copy thereof, as the case may be, filed in accordance with the provisions of section 109 or section 110 to the person filing the same.

(3) The register kept in pursuance of this section shall be open to inspection by any person on payment of the prescribed fee, not exceeding one rupee for each inspection.

113. The registrar shall keep a chronological index, in the prescribed form and with the prescribed particulars, of the mortgages or charges registered with him under this Act.

Index to register of mortgages and charges.

114. The registrar shall give a certificate under his hand of the registration of any mortgage or charge registered in pursuance of section 109, stating the amount thereby secured, and the certificate shall be conclusive evidence that the requirements of sections 109 to 112 as to registration have been complied with.

Certificate of registration.

115. The company shall cause a copy of every certificate of registration, given under section 114, to be endorsed on every debenture or certificate of debenture stock which is issued by the company, and the payment of which is secured by the mortgage or charge so registered :

Endorsement of certificate of registration on debenture or certificate of debenture stock.

Provided that nothing in this section shall be construed as requiring a company to cause a certificate of registration of any mortgage or charge so given to be endorsed on any debenture or certificate of debenture stock which has been issued by the company before the mortgage or charge was created.

116. (1) It shall be the duty of the company to file with the registrar for registration the prescribed particulars of every mortgage or charge created by the company and of the issues of debentures of a series, requiring registration under section 109, but registration of any such mortgage or charge may be effected on the application of any person interested therein.

Duty of company and right of interested party as regards registration.

(2) Where the registration is effected on the application of some person other than the company, that person shall be entitled to recover from the company the amount of any fees properly paid by him to the registrar on the registration.

117. Every company shall cause a copy of every instrument creating any mortgage or charge requiring registration under section 109, to be kept at the registered office of the company: Provided that, in the case of a series of uniform debentures, a copy of one such debenture shall be sufficient.

Copy of instrument creating mortgage or charge to be kept at registered office.

118. (1) If any person obtains an order for the appointment of a receiver of the property of a company, or appoints such a receiver under any powers contained in any instrument, he shall, within fifteen days from the date of the order or of the appointment under the powers contained in the instrument, file notice of the fact with the registrar, and the registrar shall, on payment of the prescribed fee, enter the fact in the register of mortgages and charges.

Registration of appointment of receiver.

(2) If any person makes default in complying with the requirements of this section, he shall be liable to a fine not exceeding fifty rupees for every day during which the default continues.

119. (1) Every receiver of the property of a company who has been appointed under the powers contained in any instrument, and who has taken possession, shall once in every half-year while he remains in possession, and also on ceasing to act as receiver, file with the registrar an abstract in the prescribed form of his receipts and payments during the period to which the abstract relates, and shall also on ceasing to act as receiver file with the registrar notice to that effect, and the registrar shall enter the notice in the register of mortgages and charges.

Filing of accounts of receivers.

(2) Every receiver who makes default in complying with the provisions of this section shall be liable to a fine not exceeding five hundred rupees.

120. The Court, on being satisfied that the omission to register a mortgage or charge within the time required by section 109, or that the omission or mis-statement of any particular with respect to any such mortgage or charge, was accidental, or due to inadvertence or to some other sufficient cause, or is not of a nature to prejudice the position of creditors or shareholders of the company, or that on other grounds it is just and equitable to grant relief, may, on the application of the company or any person interested, and on such terms and conditions as seem to the Court just and expedient order that the time for registration be extended, or, as the case may be, that the omission or mis-statement be rectified, and may make such order as to the costs of the application as it thinks fit.

Rectification of register of mortgages.

121. The registrar may, on evidence being given to his satisfaction that the debt for which any registered mortgage or charge was given has been paid or satisfied, order that a memorandum of satisfaction be entered on the register, and shall if required furnish the company with a copy thereof.

Entry of satisfaction.

Sec. 120.—Under old S. 68 explanation when a charge specifically affecting the property of a company has been granted in favour of an officer of the company, he cannot avail himself of it unless it is registered under S. 68, though he has ceased to be an officer at the time when the charge is sought to be enforced. 12 I. W. 92 = 47 I. A. 33 = 28 M. L. T. 28 = (1920) M. W. N. 419 = 2 U. P. L. R. (P. C.) 118 = 56 I. C. 163 = 43 M. 550 = 38 M. L. J. 444 = 22 Bom. L. R. 568 = 18 A. L. J. 489 (P. C.). The words 'as such' are unnecessary though not insensible. (*Ibid.*) The construction of the explanation must depend on its terms and no theory of its purpose can be

entertained unless it is to be inferred from the language used. (*Ibid.*) Floating charge—Provision for cessation of authority to carry on business on default—Charge in favour of officers for salary—Non-registration. 32 I. C. 91. Mortgage of different dates—Later mortgage registered prior to earlier mortgage—Earlier mortgage registered after extension of time by order of Court—Priority of mortgages. 102 I. C. 592 = A. J. R. 1927 Oudh 300. See also 30 I. C. 286 = 29 M. L. J. 110, affirmed on appeal in 56 I. C. 163 (P. C.) = 43 Mad. 550, *supra*. On this section, see also A. I. R. 1927 Oudh 300 cited under S. 109. *supra*.

Penalties.

122. (1) If any company makes default in filing with the registrar for registration the particulars—

(a) of any mortgage or charge created by the company; or

(b) of the issues of debentures of a series,

requiring registration with the registrar under the foregoing provisions of this Act, then, unless the registration has been effected on the application of some other person, the company, and every officer of the company or other person who is knowingly a party to the default, shall, on conviction be liable to a fine not exceeding five hundred rupees for every day during which the default continues.

(2) Subject as aforesaid, if any company make default in complying with any of the requirements of this Act as to the registration with the registrar of any mortgage or charge created by the company, the company, and every officer of the company, who knowingly and wilfully authorizes or permits the default shall, without prejudice to any other liability, be liable on conviction to a fine not exceeding one thousand rupees.

(3) If any person knowingly and wilfully authorizes or permits the delivery of any debenture or certificate of debenture stock requiring registration with the registrar under the foregoing provisions of this Act without a copy of the certificate of registration being endorsed upon it, he shall, without prejudice to any other liability, be liable on conviction to a fine not exceeding one thousand rupees.

123. (1) Every limited company shall keep a register of mortgages and enter therein all mortgages and charges specifically affecting

Company's register of mortgages.

property of the company, giving in each case a short description of the property mortgaged or charged, the amount of the mortgage or charge and (except in the case of securities to bearer) the names of the mortgagees or persons entitled thereto.

(2) If any director, manager or other officer of the company knowingly and wilfully authorizes or permits the omission of any entry required to be made in pursuance of this section, he shall be liable to a fine not exceeding five hundred rupees.

124. (1) The copies kept at the registered office of the company in pursuance of S. 117 of instruments creating any mortgage or charge

Right to inspect copies of instruments creating mortgages and charges and company's register of mortgages.

requiring registration under this Act with the registrar and the register of mortgages kept in pursuance of section 123, shall be open at all reasonable times to the inspection of any creditor or member of the company without fee, and the register of mortgages shall also be open to the inspection of any other person on payment of such fee, not exceeding one rupee for each inspection, as the company may prescribe.

(2) If inspection of the said copies or register is refused, the company shall be liable to a fine not exceeding fifty rupees and a further fine not exceeding twenty rupees for every day during which the refusal continues, and every officer of the company who knowingly authorizes or permits the refusal shall incur the like penalty, and in addition to the above penalty, the Court may by order compel an immediate inspection of the copies or register.

125. (1) Every register of holders of debentures of a company shall, except

Right to inspect the register of debenture holders and to have copies of trust-deed.

when closed in accordance with the articles during such period or periods (not exceeding in the whole thirty days in any year) as may be specified in the articles be open to the inspection of the registered holder of any such debentures, and of any holder of shares in the company, but subject to such reasonable restrictions as the company may in general meeting impose, so that at least two hours in each day are appointed for inspection, and every such holder may require a copy of the register or any part thereof on payment of six annas for every one hundred words or fractional part thereof required to be copied.

Sec. 122.—As to penalties, see 29 M. L. J. 110.

Sec. 123.—See cases under S. 96.

Sec. 124.—Right to inspect is not an absolute

right. 4 M. L. J. 16 = 5 A. L. J. 463 = 8 C. L. J. 103 = 12 C. W. N. 825 (P. C.).

(2) A copy of any trust-deed for securing any issue of debentures shall be forwarded to every holder of any such debentures at his request on payment in the case of a printed trust-deed of the sum of one rupee or such less sum as may be prescribed by the company, or, where the trust-deed has not been printed, on payment of six annas for every one hundred words or fractional part thereof required to be copied.

(3) If inspection is refused, or a copy is refused or not forwarded, the company shall be liable to a fine not exceeding fifty rupees, and to a further fine not exceeding twenty rupees for every day during which the refusal continues, and every officer of the company who knowingly authorizes or permits the refusal shall incur the like penalty, and the Court may by order compel an immediate inspection of the register.

DEBENTURES AND FLOATING CHARGES.

126. A condition contained in any debentures or in any deed for securing any debentures, whether issued or executed before or after the passing of this Act, shall not be invalid by reason only that thereby the debentures are made irredeemable or redeemable only on the happening of a contingency, however remote, or on the expiration of a period however long.

127. (1) Where either before or after the commencement of this Act a company has redeemed any debentures previously issued, the company, unless the articles or the conditions of issue expressly otherwise provide, or unless the debentures have been redeemed in pursuance of any obligation on the company so to do (not being an obligation enforceable only by the person to whom the redeemed debentures were issued or his assigns) shall have power, and shall be deemed always to have had power, to keep the debentures alive for the purposes of re-issue, and where a company has purported to exercise such a power the company shall have power, and shall be deemed always to have had power, to re-issue the debentures either by re-issuing the same debentures or by issuing other debentures in their place, and upon such re-issue the person entitled to the debentures shall have, and shall be deemed always to have had, the same rights and priorities as if the debentures had not previously been issued.

(2) Where with the object of keeping debentures alive for the purpose of re-issue they have, either before or after the commencement of this Act, been transferred to a nominee of the company, a transfer from that nominee shall be deemed to be a re-issue for the purposes of this section.

(3) Where a company has, either before or after the commencement of this Act, deposited any of its debentures to secure advances from time to time on current account or otherwise, the debentures shall not be deemed to have been redeemed by reason only of the account of the company having ceased to be in debit whilst the debentures remained so deposited.

(4) The re-issue of a debenture or the issue of another debenture in its place under the power by this section given to, or deemed to have been possessed by, a company, whether the re-issue or issue was made before or after the commencement of this Act, shall be treated as the issue of a new debenture for the purposes of stamp-duty, but it shall not be so treated for the purposes of any provision limiting the amount or number of debentures to be issued :

Provided that any person lending money on the security of a debenture reissued under this section which appears to be duly stamped, may give the debenture in evidence in any proceedings for enforcing his security without payment of the stamp-duty or any penalty in respect thereof, unless he had notice or, but for his negligence, might have discovered, that the debenture was not duly stamped, but in any such case the company shall be liable to pay the proper stamp-duty and penalty.

(5) Nothing in this section shall prejudice—

(a) the operation of any decree or order of a Court of competent jurisdiction pronounced or made before the twenty-fifth day of February, 1910, as between the parties to the proceedings in which the decree or order was made, and any appeal from any such decree or order shall be decided as if this Act had not been passed ; or

(b) any power to issue debentures in the place of any debentures paid off or otherwise satisfied or extinguished, reserved to a company by its debentures or the securities for the same.

Specific performance of contract to subscribe for debentures.

128. A contract with a company to take up and pay for any debentures of the company may be enforced by a decree for specific performance.

129. (1) Where either a receiver is appointed on behalf of the holders of any debentures of company secured by a floating charge, or possession is taken by or on behalf of those debenture-holders of any property comprised in or subject to the charge, then, if the company is not at the time in course of being wound up, the debts which in every winding up

are under the provisions of Part V relating to preferential payments to be paid in priority to all other debts, shall be paid forthwith out of any assets coming to the hands of the receiver or other person taking possession as aforesaid in priority to any claim for principal or interest in respect of the debentures.

(2) The periods of time mentioned in the said provisions of Part V shall be reckoned from the date of the appointment of the receiver or of possession being taken as aforesaid, as the case may be.

(3) Any payments made under this section shall be recouped, as far as may be, out of the assets of the company available for payment of general creditors.

Statements, Books and Accounts.

Company to keep proper books of account.

130. Every company shall keep proper books of account in which shall be entered full, true and complete accounts of the affairs and transactions of the company.

131. (1) Every company shall, once at least in every year and at intervals of not more than fifteen months, cause the accounts of the company to be balanced and a balance-sheet to be prepared.

(2) The balance-sheet shall be audited by the auditor of the company as hereinafter provided, and the auditor's report shall be attached thereto, or there shall be inserted at the foot thereof a reference to the report, and the report shall be read before the company in general meeting and shall be open to inspection by any member of the company.

(3) Every company other than a private company shall send a copy of such balance-sheet so audited to the registered address of every member of the company at least seven days before the meeting at which it is to be laid before the members of the company, and shall deposit a copy at the registered office of the company for the inspection of the members of the company during a period of at least seven days before that meeting.

(4) If a company makes default in complying with the requirements of this section, it shall be liable to a fine not exceeding one thousand rupees, and every officer of the company who knowingly and wilfully authorises or permits the default before shall be liable to the like penalty.

132. (1) The balance-sheet shall contain a summary of the property and assets and of the capital and liabilities of the company giving

such particulars as will disclose the general nature of those liabilities and assets and how the value of the fixed assets has been arrived at.

Sec. 131.—See also Cases under S. 76. Summary trial—Jurisdiction. See 35 All. 173 = 11 A. L. J. 196 = 18 I. C. 665 = 14 Cr. L. J. 105. See also 15 Cr. L. J. 260 ; 37 P. L. R. 1914. As to revisional jurisdiction of High Court, see 8 I. C. 190 = 35 P. W. R. 1910 (Cr.).

Sec. 132.—Per *Curiam* : Primarily the expression 'book-debts' means debts owing to the company and so shown in the books of the com-

pany. A debt is none the less a debt though there may be little prospect of its recovery and though the creditor may have means of covering the deficit if it is not paid. It is always possible for the company to write off debts that in its opinion are entirely unrecoverable and that being done such debts would cease to be 'book debts.' 29 Bom. L. R. 722 = A. J. R. 1927 Bom. 414.

Quatre : Whether it is legitimate for a com-

(2) The balance-sheet shall be in the form marked F in the Third Schedule or as near thereto as circumstances admit.

Authentication of balance-sheet.

133. (1) Save as provided by sub-section (2) the balance-sheet shall—

(i) in the case of a banking company, be signed by the manager (if any) and, where there are more than three directors of the company, by at least three of those directors and, where there are not more than three directors, by all the directors ;

(ii) in the case of any other company, be signed by two directors or, when there are less than two directors, by the sole director and by the manager (if any) of the company.

(2) When the total number of directors of the company for the time being in British India is less than the number of directors whose signatures are required by sub-section (1), then the balance-sheet shall be signed by all the directors for the time being in British India, or, if there is only one director for the time being in British India, by such director, but in such a case there shall be sub-joined to the balance-sheet a statement signed by such directors or director explaining the reason for non-compliance with the provisions of sub-section (1).

(3) If any copy of a balance-sheet which has not been signed as required by this section is issued, circulated or published, the company and every officer of the company who is knowingly a party to the default shall be punishable with fine which may extend to five hundred rupees.

134. (1) After the balance-sheet has been laid before the company at the general meeting a copy thereof signed by the manager or secretary of the company shall be filed with the registrar at the same time as the copy of the annual list of members and summary prepared in accordance with the requirements of section 32.

Copy of balance-sheet and auditor's report to be forwarded to the registrar.

(2) If the general meeting before which a balance-sheet is laid does not adopt the balance-sheet, a statement of that fact and of the reasons therefor shall be annexed to the balance-sheet and to the copy thereof required to be filed with the registrar.

(3) This section shall not apply to a private company.

(4) If a company makes default in complying with the requirements of this section, the company and every officer of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty as is provided by section 32 for a default in complying with the provisions of that section.

135. Save as otherwise provided in this Act, any member of a company shall be entitled to be furnished with copies of the balance-sheet and the auditor's report at a charge not exceeding six annas for every hundred words or fractional part thereof.

Right of member of company to copies of the balance-sheet and the auditor's report.

Statement to be published by Banking and certain other Companies.

136. (1) Every company being a limited banking company or an insurance company or a deposit, provident or benefit society shall, before it commences business, and also on the first Monday in February and the first Monday in August in every year during which it carries on business, make a statement in the form marked G in the Third Schedule, or as near thereto as circumstances will admit.

Certain companies to publish statement in schedule

(2) A copy of the statement shall be displayed and, until the display of the next following statement, kept displayed in a conspicuous place in the registered office of the company, and in every branch office or place where the business of the company is carried on.

pany to have a secret reserve fund formed by deliberate under-valuation of some of its assets. 29 Bom. L. R. 722=102 I. C. 504=28 Cr. L. J. 568=8 A. I. C. R. 218=A. I. R. 1927 Bom. 414. **Sec. 134.**—See Cases under S. 76. Prior default is no plea to a charge under the section. 45 Cal.

486=22 C. W. N. 06=27 C. L. J. 85=41 I. C. 307=18 Cr. L. J. 787. A. director who has resigned is not liable. 23 I. C. 748=15 Cr. L. J. 380 (Punj.). On this Sec. see also 86 I. C. 431=26 Cr. L. J. 799=1924 Lah. 489.

(3) Every member and every creditor of the company shall be entitled to a copy of the statement on payment of a sum not exceeding eight annas.

(4) If a company makes default in complying with the requirements of this section, it shall be liable to a fine not exceeding fifty rupees for every day during which the default continues; and every officer of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty.

(5) This section shall not apply to a life assurance company or provident insurance society to which the provisions of the Indian Life Assurance Companies Act, 1912, or of the Provident Insurance Societies Act, 1912, as the case may be, as to the annual statements to be made by such company or society apply with or without modifications, if the company or society complies with those provisions.

Investigation by the Registrar.

137. (1) Where the registrar, on perusal of any document which a company is

Power of registrar to call for information or explanation.

required to submit to him under the provisions of this Act, is of opinion that any information or explanation is necessary in order that such document may afford full particu-

lars of the matter to which it purports to relate, he may, by a written order call on the company submitting the document to furnish in writing such information or explanation within such time as he may specify in his order.

(2) On the receipt of an order under sub-section (1), it shall be the duty of all persons who are or have been officers of the company to furnish such information or explanation to the best of their power.

(3) If any such person refuses or neglects to furnish any such information or explanation, he shall be liable to a fine not exceeding fifty rupees in respect of each offence.

(4) On receipt of such information or explanation the registrar may annex the same to the original document submitted to him; and any additional document so annexed by the registrar shall be subject to the like provisions as to inspection and the taking of copies as the original document is subject.

(5) If such information or explanation is not furnished within the specified time, or if after perusal of such information or explanation the registrar is of opinion that the document in question discloses an unsatisfactory state of affairs, or that it does not disclose a full and fair statement of the matters to which it purports to relate, the registrar shall report in writing the circumstances of the case to the Local Government.

Inspection and Audit.

Investigation of affairs of company by inspectors.

138. The Local Government may appoint one or more competent inspectors to investigate the affairs of any company and to report thereon in such manner as the Local Government may direct—

(i) in the case of a banking company having a share capital, on the application of members holding not less than one-fifth of the shares issued;

(ii) in the case of any other company having a share capital, on the application of members holding not less than one-tenth of the shares issued;

(iii) in the case of a company not having a share capital, on the application of not less than one-fifth in number, of the persons on the company's register of members;

(iv) in the case of any company, on a report by the registrar under section 137 sub-section (5).

139. An application by members of a company under section 138 shall be supported by such evidence as the Local Government may require for the purpose of showing that the applicants have good reason for, and are not actuated by malicious motives in, requiring the investigation; and the Local Government may, before

Application for inspection to be supported by evidence.

appointing an inspector, require the applicants to give security for payment of the costs of the inquiry.

Inspection of books and examination of officers.

140. (1) It shall be the duty of all persons who are or have been officers of the company to produce to the inspectors all books and documents in their custody or power relating to the company.

(2) An inspector may examine on oath any such person in relation to its business, and may administer an oath accordingly.

(3) If any person refuses to produce any book or document which under this section it is his duty to produce, or to answer any question relating to the affairs of the company, he shall be liable to a fine not exceeding fifty rupees in respect of each offence.

141. (1) On the conclusion of the investigation, the inspectors shall report their opinion to the Local Government, and a copy of the report shall be forwarded by the Local Government to the registered office of the company, and a further copy shall, at the request of the applicants for the investigation, be delivered to them.

Results of examination how dealt with.

(2) The report shall be written or printed, as the Local Government directs.

(3) All expenses of, and incidental to, the investigation shall be defrayed by the applicants unless the Local Government directs the same to be paid by the company, which the Local Government is hereby authorised to do.

Power of company to appoint inspectors.

142. (1) A company may by a special resolution appoint inspectors to investigate its affairs.

(2) Inspectors so appointed shall have the same powers and duties as inspectors appointed by the Local Government, except that, instead of reporting to the Local Government, they shall report in such manner and to such persons as the company in general meeting may direct.

(3) All persons who are or have been officers of the company shall incur the like penalties in case of refusal to produce any book or document required to be produced to inspectors so appointed, or to answer any question, as they would have incurred if the inspectors had been appointed by the Local Government.

143. A copy of the report of any inspectors appointed under this Act, authenticated by the seal of the company whose affairs they have investigated, shall be admissible in any legal proceeding as evidence of the opinion of the inspectors in relation to any matter contained in the report.

Report of inspectors to be evidence.

144. (1) No person shall be appointed or act as an auditor of any company other than a private company unless he holds a certificate from the Local Government entitling him to act as an auditor of companies :

Qualifications and appointment of auditors.

Provided that the Governor-General in Council may, by notification¹ in the Gazette of India, declare that the members of any institution or association specified in such notification shall be entitled to be appointed and to act as auditors of companies throughout British India.

(2) The Local Government shall, by notification in the local official Gazette, make rules providing for the grant of certificates entitling the holders thereof to act as auditors of companies, and may by such rules provide the conditions and restrictions on and subject to which such certificate shall be granted. The holder of such a certificate shall be entitled to act as an auditor of companies throughout British India unless such certificate restricts or limits the exercise of the right.

(3) Every company shall at each annual general meeting appoint an auditor or auditors to hold office until the next annual general meeting.

Sec. 140.—See 10 N. L. R. 98; 18 I. C. 997 = 13 M. L. T. 282. (Legal position of auditor).

Sec. 144 (1) (Prov.).—¹ For Notification de-

claring that the members of certain institutions and associations shall be entitled to act as auditors, see Gazette of India, 1914, Pt. I, p. 405.

(4) If an appointment of an auditor is not made at an annual general meeting, the Local Government may, on the application of any member of the company, appoint an auditor of the company for the current year, and fix the remuneration to be paid to him by the company for his services.

(5) The following persons : that is to say—

(i) a director or officer of the company ; and

(ii) a partner of such director or officer ; and

(iii) in the case of a company other than a private company, any person in the employment of such director or officer, shall not be appointed auditors of the company.

(6) A person, other than a retiring auditor, shall not be capable of being appointed auditor at an annual general meeting unless notice of an intention to nominate that person to the office of auditor has been given by a member of the company to the company not less than fourteen days before such annual general meeting, and the company shall send a copy of any such notice to the retiring auditor, and shall give notice thereof to its members either by advertisement or in any other mode allowed by the articles not less than seven days before the annual general meeting :

Provided that, if after notice of the intention to nominate an auditor has been given to the company, an annual general meeting is called for a date fourteen days or less after the notice has been given, the requirements of this section as to time in respect of such a notice shall be deemed to have been satisfied, and the notice to be sent or given by the company may, instead of being sent or given within the time required by this section, be sent or given at the same time as the notice of the annual general meeting.

(7) The first auditors of the company may be appointed by the directors before the statutory meeting, and if so appointed shall hold office until the first annual general meeting, unless previously removed by a resolution of the members of the company in general meeting, in which case such members at that meeting may appoint auditors.

(8) The directors may fill any casual vacancy in the office of auditor, but while any such vacancy continues, the surviving or continuing auditor or auditors (if any) may act.

(9) The remuneration of the auditors of a company shall be fixed by the company in general meeting, except that the remuneration of any auditors appointed before the statutory meeting, or to fill any casual vacancy, may be fixed by the directors.

145. (1) Every auditor of a company shall have a right of access at all times to the books and accounts and vouchers of the company, and shall be entitled to require from the directors and officers of the company such information and explanation as may be necessary for the performance of the duties of the auditors.

Powers and duties of auditors.

(2) The auditors shall make a report to the members of the company on the accounts examined by them, and on every balance-sheet laid before the company in general meeting during their tenure of office, and the report shall state :—

(a) whether or not they have obtained all the information and explanations they have required ; and

(b) whether, in their opinion, the balance-sheet referred to in the report is drawn up in conformity with the law ; and

(c) whether such balance-sheet exhibits a true and correct view of the state of the company's affairs according to the best of their information and the explanations given to them, and as shown by the books of the company.

(3) In the case of a banking company, if the company has branch banks beyond the limits of India, it shall be sufficient if the auditor is allowed access to such copies of and extracts from the books and accounts of any such branch as have been transmitted to the head office of the company in British India.

Sec. 145.— Auditor should satisfy himself whether the books submitted to him show a true state of affairs. Honesty does not exempt from liability. 23 A. L. J. 473 = 47 All. 669 = L. R. 6 All. 425 = 88 I. C. 785 = 1925 All. 519.

Rights of preference shareholders, etc., as to receipt and inspection of reports, etc.

by the holders of ordinary shares in the company.

(2) This section shall not apply to a private company, nor to a company registered before the commencement of this Act.

Carrying on business with less than the legal minimum of members.

147. If at any time the number of members of a company is reduced, in the case of a private company, below two, or in the case of any other company, below seven, and it carries on business for more than six months while the number is so reduced, every person who is a member of the company during the time that it so carries on business after those six months and is cognisant of the fact that it is carrying on business with fewer than two members or seven members, as the case may be, shall be severally liable for the payment of the whole debts of the company contracted during that time, and may be sued for the same without joinder in the suit of any other member.

Service and Authentication of Documents.

Service of documents on company.

148. A document may be served on a company by leaving it at, or sending it by post to the registered office of the company.

Service of documents on registrar.

149. A document may be served on the registrar by sending it to him by post, or delivering it to him, or by leaving it for him at his office.

150. A document or proceeding requiring authentication by a company may be signed by a director, secretary or other authorised officer of the company, and need not be under its common seal.

Tables, Forms and Rules as to prescribed matters.

Application and alteration of tables and forms, and power to make rules as to prescribed matters.

151. (1) The forms in the Third Schedule or forms as near thereto as circumstances admit shall be used in all matters to which those forms refer.

(2) The Governor-General in Council may alter any of the tables and forms in the First Schedule, so that he does not increase the amount of fees payable to the registrar in the said Schedule mentioned, and may alter or add to the forms in the Third Schedule.

(3) Any such table or form, when altered, shall be published in the Gazette of India, and on such publication shall have effect as if enacted in this Act, but no alteration made by the Governor-General in Council in Table A in the First Schedule shall affect any company registered before the alteration, or repeal, as respects that company, any portion of that table.

(4) In addition to the powers hereinbefore conferred by this section, the Governor-General in Council may make rules providing for all or any matters which by this Act are to be prescribed by his authority.

(5) Every such rule shall be published in the Gazette of India, and on such publication shall have effect as if enacted in this Act.

Arbitration and Compromise.

152. (1) A company may by written agreement refer to arbitration, in accordance with the Indian Arbitration Act, 1899, an existing or future difference between itself and any other company or person.

Sec. 148.—As to how summons is served, see 12 Bom. L. R. 730 = 7 I. C. 982.

Sec. 151 (1).—For rules under the section, see Gazette of India, 1914, Pt. I, p. 805.

Sec. 152.—Agreement as to submission to arbitration, though not under seal is valid. 37 All. 273 = 28 I. C. 384 = 13 A. L. J. 312.

(2) Companies, parties to the arbitration, may delegate to the arbitrator power to settle any terms or to determine any matter capable of being lawfully settled or determined by the companies themselves, or by their directors or other managing body.

(3) The provisions of the Indian Arbitration Act, 1899, other than those restricting the application of the Act in respect of the subject-matter of the arbitration, shall apply to all arbitrations between companies and persons in pursuance of this Act.

153. (1) Where a compromise or arrangement is proposed between a company and its creditors or any class of them or between the company

Power to compromise with creditors and members.

and its members or any class of them, the Court may, on the application in a summary way of the company or of any creditor or member of the company or, in the case of a company being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members of the company or class of members, as the case may be, to be called, held and conducted in such manner as the Court directs.

(2) If a majority in number representing three-fourths in value of the creditors or class of creditors, or members or class of members, as the case may be, present either in person or by proxy at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the Court, be binding on all the creditors or the class of creditors, or on all the members or class of members, as the case may be, and also on the company, or, in the case of a company in the course of being wound up, on the liquidator and contributories of the company.

(3) In this section the expression "company" means any company liable to be wound up under this Act.

Conversion of private company into public company.

154. (1) A private company may, subject to anything contained in its memorandum or articles, by a special resolution and by filing

Conversion of private into public company.

with the registrar a copy of such resolution and also such a statement in lieu of prospectus as the company, if a public company, would have had to file before allotting any of its shares or debentures, together with such a duly verified declaration as the company, if a public company, would have had to file before commencing business, turn itself into a public company.

(2) Upon the filing of the documents mentioned in sub-section (1), the registrar shall record the change in his books relating to the company.

PART V.

WINDING UP.

Preliminary.

155. (1) The winding up of a company may be either—

Mode of winding up.

(i) by the Court ; or

(ii) voluntary ; or

(iii) subject to the supervision of the Court.

(2) The provisions of this Act with respect to winding up apply, unless the contrary appears, to the winding up of a company in any of these modes.

Contributories.

156. (1) In the event of a company being wound up, every present and past member shall, subject to the provisions of this section, be

Liability as contributories of present and past members.

liable to contribute to the assets of the company to an amount sufficient for payment of its debts and liabilities

Sec. 153.—An unworkable scheme, or one which is not *bona fide* is not to be sanctioned by court. 30 I. C. 386. Compromise sanctioned by court takes effect from the date when it was arrived at. 36 M. L. J. 526 = 41 All. 566 = 17 A. L. J. 533 (P. C.) ; See also 40 I. C. 904 = 106 P. W. R. 1917. What constitutes a *majority* under cl. (2). See 4 O. L. J. 160 = 40 I. C. 57. On this Sec. see

also 27 Bom. L. R. 655 = 89 I. C. 108 = 1925 Bom. 442.

Sec. 155.—Winding up — Contributory — Application for allotment of shares under conditions—Non-compliance—Effect of. 40 All. 45 = 43 I. C. 134 = 15 A. L. J. 893. Either a compulsory or a voluntary winding up of a corporation does not dissolve it at the commencement. 42

and the costs, charges and expenses of winding up, and for the adjustment of the rights of the contributories among themselves, with the qualifications following (that is to say):—

(i) a past member shall not be liable to contribute if he has ceased to be a member for one year or upwards before the commencement of the winding up ;

(ii) a past member shall not be liable to contribute in respect of any debt, or liability of the company contracted after he ceased to be a member ;

(iii) a past member shall not be liable to contribute unless it appears to the Court that the existing members are unable to satisfy the contributions required to be made by them in pursuance of this Act ;

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

(v) in the case of a company limited by guarantee, no contribution shall be required from any member exceeding the amount undertaken to be contributed by him to the assets of the company in the event of its being wound up ;

(vi) nothing in this Act shall invalidate any provision contained in any policy of insurance or other contract whereby the liability of individual members on the policy or contract is restricted, or whereby the funds of the company are alone made liable in respect of the policy or contract ;

(vii) a sum due to any member of a company in his character of a member, by way of dividends, profits or otherwise, shall not be deemed to be a debt of the company payable to that member in a case of competition between himself and any other creditor not a member of the company ; but any such sum may be taken into account for the purpose of the final adjustment of the rights of the contributories among themselves.

(2) In the winding up of a company limited by guarantee which has a share capital, every member of the company shall be liable, in addition to the amount undertaken to be contributed by him to the assets of the company in the event of its being wound up, to contribute to the extent of any sums unpaid on any shares held by him.

157. In the winding up of a limited company any director whether past or present, whose liability is, in pursuance of this Act, unlimited,

Liability of directors whose liability is unlimited.

shall, in addition to his liability (if any) to contribute as an ordinary member, be liable to make a further contribution as if he were at the commencement of the winding up a member of an unlimited company :

Provided that—

(i) a past director shall not be liable to make such further contribution if he has ceased to hold office for a year or upwards before the commencement of the winding up ;

(ii) a past director shall not be liable to make such further contribution in respect of any debt or liability of the company contracted after he ceased to hold office ;

(iii) subject to the articles a director shall not be liable to make such further contribution unless the Court deems it necessary to require that contribution in order to satisfy the debts and liabilities of the company, and the costs, charges and expenses of the winding up.

158. The term “contributory” means every person liable to contribute to the

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

I. C. 455. Where a transaction by way of a compromise or alienation of the property of a company in liquidation is entered, into the court can set aside the transaction if it is detrimental to the interests of the creditors and contributories of the company. 48 I. C. 919=7 P. L. R. 1919.

Sec. 158.—As to who is a “contributory”. See 36 I. C. 980=9 P. R. 1917 ; 57 I. C. 223=1 Lah. 237 ; L. R. 6 All. 565=89 I. C. 994=23 A. L. J. 934. Debtor if a contributory. A. I. R. 1926 All. 101.

159. (1) The liability of a contributory shall create a debt accruing due from him at the time when his liability commenced, but payable at the times when calls are made for enforcing the liability.

Nature of liability of contributory.

(2) No claim founded on the liability of a contributory shall be cognizable by any Court of Small Causes sitting outside the Presidency towns.

160. (1) If a contributory dies either before or after he has been placed on the list of contributories, his legal representatives and his heirs shall be liable in a due course of administration to contribute to the assets of the company in discharge of his liability and shall be contributories accordingly.

Contributories in case of death of member.

(2) If the legal representatives or heirs make default in paying any money ordered to be paid by them, proceedings may be taken for administering the property of the deceased contributory, whether moveable or immoveable, or both, and of compelling payment thereof of the money due.

161. If a contributory is adjudged insolvent either before or after he has been placed on the list of contributories, then—

Contributories in case of insolvency of member.

(1) his assignees shall represent him for all the purposes of the winding up, and shall be contributories accordingly, and may be called on to admit to proof against the estate of the insolvent, or otherwise to allow to be paid out of his assets in due course of law, any money due from the insolvent in respect of his liability to contribute to the assets of the company; and

(2) there may be proved against the estate of the insolvent the estimated value of his liability to future calls as well as calls already made.

Winding up by Court.

Circumstances in which company may be wound up by Court.

162. A company may be wound up by the Court—

(i) if the company has by special resolution resolved that the company be wound up by the Court;

(ii) if default is made in filing the statutory report or in holding the statutory meeting;

(iii) if the company does not commence its business within a year from its incorporation, or suspends its business for a whole year;

(iv) if the number of members is reduced, in the case of a private company, below two or, in the case of any other company, below seven;

(v) if the company is unable to pay its debts;

(vi) if the Court is of opinion that it is just and equitable that the company should be wound up.

Company when deemed unable to pay its debts.

163 A company shall be deemed to be unable to pay its debts—

Sec. 162.—The power to wind up a company given to a Court by this section should not be exercised unless there is very strong ground for acting upon it. 39 All. 334 = 39 I. C. 570 = 15 A. L. J. 193. 5 R. 685. See also 21 L. W. 359 = 48 Mad. 489 = 86 I. C. 135 = 1925 Mad. 489 = 48 M. L. J. 118. As to the discretion of court, see 39 Bom. 16 = 16 Bom. L. R. 508; 31 P. R. 1914; 39 All. 334. As to compulsory winding up on creditors' petition, see 39 Bom. 47 = 16 Bom. L. R. 692. The principle of '*substratum gone*' cannot be applied to a case where it is not proved that the object of the company as set out in the memorandum cannot be fulfilled in other ways or by the employment of other agencies. 59 I. C. 542 = 47 C. 654; 58 I. C. 561 = 23 C. W. N. 844.

Appeal from order directing compulsory winding up, see 279 P. L. R. 1914. Companies are governed by a majority of their own members, and where there is a domestic tribunal which has powers to decide upon a question, it should, if possible, be left to that domestic tribunal alone. 39 All. 334 = 39 I. C. 570 = 15 A. L. J. 193. (32 B. 415 R.).

Sec. 162, Cl. (v).—Essentials, see 84 I. C. 1021 = 1925 Rang. 128.

Clause (6).—Scope—Winding up—When to be ordered. 13 Bur. L. T. 51 = 59 I. C. 524. Interference with internal management not justified. (*Ibid.*)

Sec. 163.—See 58 I. C. 561 = 23 C. W. N. 844; 5 R. 685.

(i) if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding five hundred rupees then due, has served on the company, by leaving the same at its registered office, a demand under his hand requiring the company to pay the sum so due and the Company has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor ; or

(ii) if execution or other process issued on a decree or order of any Court in favour of a creditor of the company is returned unsatisfied in whole or in part ; or

(iii) if it is proved to the satisfaction of the Court that the company is unable to pay its debts, and, in determining whether a company is unable to pay its debts, the Court shall take into account the contingent and prospective liabilities of the company.

164. Where the High Court makes an order for winding up a company under this Act, it may, if it thinks fit, direct all subsequent proceedings to be had in a District Court ; and thereupon such District Court shall, for the purpose of winding up the company, be deemed to be "the Court" within the meaning of this Act, and shall have, for the purposes of such winding up, all the jurisdiction and powers of the High Court.

165. If during the progress of a winding up in a District Court it is made to appear to the High Court that the same could be more conveniently prosecuted in any other District Court having jurisdiction to wind up companies, the High Court may transfer the same to such other Court, and thereupon the winding up shall proceed in such other District Court.

166. An application to the Court for the winding up of a company shall be by petition presented, subject to the provisions of this section, either by the company, or by any creditor or creditors (including any contingent or prospective creditor or creditors), contributory or contributories, or by all or any of those parties, together or separately :

Provided that—

(a) a contributory shall not be entitled to present a petition for winding up a company unless—

(i) either the number of members is reduced, in the case of a private company, below two, or, in the case of any other company, below seven ; or

(ii) the shares in respect of which he is a contributory or some of them either were originally allotted to him or have been held by him, and registered in his name, for at least six months during the eighteen months before the commencement of the winding up, or have devolved on him through the death of a former holder ;

(b) a petition for winding up a company on the ground of default in filing the statutory report or in holding the statutory meeting shall not be presented by any

Sec. 163 (i).—NOTICE.—The words 'under his hand' in S. 163 (i) are not complied with by a notice which is signed by somebody who is acting in the ordinary way as a solicitor of the petitioning creditors. 54 C. 345 = 103 I. C. 629 = A. I. R. 1927 Cal. 625. An advocate's notice is not good under the Sec. 5 R. 483.

CONSTRUCTION OF SEC.—Per Curiam.—"Where a particular right is created by legislative enactment in favour of one party which is restrictive of the rights of another party the words of the Act must be strictly construed. The party relying on the provisions of the statute will also have to show that he has strictly conformed to the statutory provisions." 5 R. 483 = 105 I. C. 534 = A. I. R. 1927 Rang. 306.

Sec. 164.—The additional District Judge has

jurisdiction to make all orders which the District Judge can make in the winding up of a company. 32 M. L. T. 15 = 27 C. W. N. 509 = 69 I. C. 356 = (1923) M. W. N. 388 = 1922 P. C. 361. Winding up—Reference to District Court—Contributories residing within jurisdiction of different High Courts. 54 I. C. 384 = 1 U. P. L. R. (H. C.) 182 ; 5 R. 685. Payment orders of the Bombay High Court on winding up proceedings—Application in the Madras High Court to give directions to the District Courts to enforce them—Proper procedure—Applicability of S. 164. See 38 M. L. T. (H. C.) 377 = 25 L. W. 113 = 100 I. C. 744 = A. I. R. 1927 Mad. 271.

Sec. 166.—See 1924 Rang. 108 = 2 Bur. L. J. 296.

person except a shareholder, nor before the expiration of fourteen days after the last day on which the meeting ought to have been held ;

(c) the Court shall not give a hearing to a petition for winding up a company by a contingent or prospective creditor until such security for costs has been given as the Court thinks reasonable and until a *prima facie* case for winding up has been established to the satisfaction of the Court.

167. An order for winding up a company shall operate in favour of all the creditors and of all the contributories of the company as if made on the joint petition of a creditor and of a contributory.

Effect of winding up order.

168. A winding up of a company by the Court shall be deemed to commence at the time of the presentation of the petition for the winding up.

Commencement of winding up by Court.

169. The Court may, at any time after the presentation of the petition for winding up a company under this Act, and before making an order for winding up the company, upon the application of the company or of any creditor or contributory of the company, restrain further proceedings in any suit or proceeding against the company, upon such terms as the Court thinks fit.

Court may grant injunction.

170. (1) On hearing the petition the Court may dismiss it with or without costs, or adjourn the hearing conditionally or unconditionally, or make any interim order or any other order that it deems just, but the Court shall not refuse to make a winding up order on the ground only that the assets of the company have been mortgaged to an amount equal to or in excess of those assets, or that the company has no assets.

Powers of Court on hearing petition.

(2) Where the petition is presented on the ground of default in filing the statutory report or in holding the statutory meeting, the Court may order the costs to be paid by any persons who, in the opinion of the Court, are responsible for the default.

171. When a winding up order has been made, no suit or other legal proceeding shall be proceeded with or commenced against the company except by leave of the Court, and subject to such terms as the Court may impose.

Suit stayed on winding up order.

Sec. 167.—Form of order for the dissolution of a company in compulsory liquidation, undistributed assets being in the hands of the liquidator. 47 Cal. 620. In a winding up order secured creditor is not affected. 3 Lah. 59 = 74 I. C. 187 = 24 P. W. R. 1922 = 5 L. L. J. 558 = 1922 Lah. 281.

Sec. 168.—Where a company went into voluntary liquidation during the pendency of a petition by the creditors for winding up, the liquidators appointed by the company *pendente lite* cannot contest the order directing the compulsory winding up, in pursuance of the petition. 73 P. R. 1914 = 25 I. C. 553 = 279 P. L. R. 1914.

Sec. 169.—Even in voluntary liquidation court has same power as under S. 169. See 28 O. C. 197 = 1925 Oudh 630. See also 91 I. C. 1052. Where a creditor's demand is in respect of a claim which the company honestly believes to be fraudulent and unsustainable in law, the court has to see whether the defence is a genuine one or is merely a cloak of the company's real inability to pay its first debts. 39 Bom. 47 = 27 I. C. 44 = 16 Bom. L. R. 692. A court should not allow a creditor to file a winding up petition, with a view to bring the pressure of insolvency proceedings to bear upon the company in order to make it pay cheaply and expeditiously, a heavy debt which

the company desires to dispute in the Civil Courts. Such a petition must be dismissed. (*Ibid.*) An appeal lies from an order refusing to wind up a company. *Ibid.* A Judge conducting the liquidation is not precluded from recalling a wrong order and rectifying a mistake. 51 I. C. 723 = 13 P. L. R. 1919. Where a company suspended business and is plainly commercially and technically insolvent, a court is justified in appointing a provisional liquidator. 337 P. L. R. 1913 = 206 P. W. R. 1913 = 21 I. C. 577 = 31 P. R. 1914.

Sec. 171.—Effect of Section prerogative of Crown as to collection of cess under Bengal Public Documents Recovery Act. See 53 Cal. 328 = 96 I. C. 37 = A. I. R. 1926 Cal 781. A court only, or with its leave, others, can institute suits or applications under the Act to wind up a company's business. 18 A. L. J. 296 = 58 I. C. 607. The principal court with original civil jurisdiction at the company's business place, is the court to deal with the matter. *Ibid.* Leave under S. 171 means leave by the winding up court and when once given includes all subsidiary legal proceedings. 41 All. 432 = 50 I. C. 115 = 17 A. L. J. 464. See also 15 I. C. 115. As to a suit by unsuccessful claimants against a company in liquidation. See 4 P. W. R. 1919 = 31 P. L. R. 1919 = 50 I. C. 645 = 70 P. R.

172. (1) On the making of a winding up order, it shall be the duty of the

Copy of winding up order to be filed with registrar.

company forthwith to file with the registrar a copy of the order, and the petitioner in the winding up proceedings may so file a copy.

(2) On the filing of a copy of a winding up order, the registrar shall make a minute thereof in his books relating to the company, and shall notify in the local official Gazette that such an order has been made.

(3) Such order shall be deemed to be notice of discharge to the servants of the company, except when the business of the company is continued.

173. The Court may at any time after an order for winding up, on the application

Power of Court to stay winding up.

of any creditor or contributory, and on proof to the satisfaction of the Court that all proceedings in relation to the winding up ought to be stayed, make an order staying the

proceedings, either altogether or for a limited time, on such terms and conditions as the Court thinks fit.

Court may have regard to wishes of creditors or contributories.

174. The Court may, as to all matters relating to a winding up, have regard to the wishes of the creditors or contributories as proved to it by any sufficient evidence.

Official Liquidators.

175. (1) For the purpose of conducting the proceedings in winding up a company and performing such duties in reference thereto as the

Appointment of official liquidator.

Court may impose, the Court may appoint a person or persons to be called an official liquidator or official

liquidators.

(2) The Court may make such an appointment provisionally at any time after the presentation of a petition and before the making of an order for winding up.

(3) If more persons than one are appointed to the office of official liquidator, the Court shall declare whether any act by this Act required or authorized to be done by the official liquidator is to be done by all or any one or more of such persons.

1919 ; 38 M. 535 ; 62 P. R. 1918. Under S. 171, leave to continue an action should as a general rule be given only where some question arises which cannot satisfactorily be determined in the winding-up proceedings. 93 P. R. 1918=101 P. L. R. 1918=47 I. C. 1005. An appeal or application brought by a company does not come within S. 171, and can be instituted or proceeded with, without the leave of the court. 62 P. R. 1918=47 I. C. 392=32 P. L. R. 1918 (F. B.) (91 P. R. 1916, Diss.) An order giving permission to continue a suit against a company, after the winding up order has been made, does not amount to a permission to institute the suit. 113 P. R. 1917=37 I. C. 791=29 P. L. R. 1917. Unless the lower courts order is altogether wrong, its discretion, in permitting an action to be continued against a company which is being wound up will not generally be disturbed by the Appellate Court. 13 P. R. 1917=37 I. C. 791=29 P. L. R. 1917. *Revision* against decree in favour of a bank which became insolvent pending revision—Leave of Court. See 91 P. R. 1916=36 I. C. 618=80 P. L. R. 1917. A Director of a company cannot institute proceedings for the company after a winding-up order has been made. 40 Mad. 706=(1916) 2 M. W. N. 250=36 I. C. 617=4 L. W. 226. Managing Director of a Company which has been wound up cannot appeal against an order appointing an Official Liquidator and an order refusing re-hearing of the appointment proceedings. (*Ibid.*) After a court's order for winding-up a Bank, no suit can be brought against the

voluntary and official liquidators without leave of the court conducting liquidation proceedings, under S. 171 of the Act which applies to such a case. 37 I. C. 427=3 O. L. J. 641. On this Sec. see also 29 C. W. N. 715=88 I. C. 754=A. I. R. (1925) Cal. 916.

PRACTICE.—The practice is that a heavy contested money claim against the company and its agents where the allegations are that the large debt in question was really a personal debt of the agents which they fraudulently attempted to foist on to the company and that the company are in no wise liable for that debt is usually, if not invariably, left to be decided by a suit in the ordinary way 29 Bom. L. R. 253=101 I. C. 144=A. I. R. 1927 Bom. 167.

UNSECURED CREDITOR.—Cannot be turned into a secured creditor after winding up. 29 Bom. L. R. 253=101 I. C. 144=A. I. R. 1927 Bom. 167.

Sec. 173.—Courts in India have the power to make an order for stay of the proceedings under a voluntary winding up. 49 I. C. 412=24 P. W. R. 1919. The court has to see whether a stay of the proceedings will be conducive or detrimental to commercial morality and to the interest of the public at large. 40 I. C. 412=24 P. W. R. 1919 (1903 2 Ch. 174, foll.)

Sec. 174.—The court has full discretion in appointing an Official Liquidator while trying a suit to wind up a business. The Appellate Court can interfere in special circumstances. 17 I. C. 835=5 Bur. L. T. 193. On this Sec. see also 97 I. C. 295=24 L. W. 35.

(4) The Court may determine whether any, and what, security is to be given by any official liquidator on his appointment.

(5) The acts of an official liquidator shall be valid notwithstanding any defect that may afterwards be discovered in his appointment : Provided that nothing in this sub-section shall be deemed to give validity to acts done by an official liquidator after his appointment has been shown to be invalid.

(6) A receiver shall not be appointed of assets in the hands of an official liquidator.

Resignations, removals, filling up vacancies and compensation.

176. (1) Any official liquidator may resign or be removed by the Court on due cause shown.

(2) Any vacancy in the office of an official liquidator appointed by the Court shall be filled up by the Court.

(3) There shall be paid to the official liquidator such salary or remuneration, by way of percentage or otherwise, as the Court may direct ; and, if more liquidators than one are appointed, such remuneration shall be distributed amongst them in such proportions as the Court directs.

177. The official liquidator shall be described by the style of the official liquidator of the particular company in respect of which he is appointed, and not by his individual name.

178. (1) The official liquidator shall take into his custody, or under his control, all the property, effects and actionable claims to which the company is or appears to be entitled.

(2) If no official liquidator is appointed, or during any vacancy in such appointment, all the property of the company shall be deemed to be in the custody of the Court.

179. The official liquidator shall have power, with the sanction of the Court, to do the following things :—

(a) to institute or defend any suit or prosecution, or other legal proceeding civil or criminal, in the name and on behalf of the company ;

(b) to carry on the business of the company so far as may be necessary for the beneficial winding up of the same ;

(c) to sell the immoveable and moveable property of the company by public auction or private contract, with power to transfer the whole thereof to any person or company, or to sell the same in parcels ;

(d) to do all acts and to execute, in the name and on behalf of the company, all deeds, receipts, and other documents, and for that purpose, to use, when necessary, the company's seal ;

(e) to prove, rank and claim in the insolvency of any contributory, for any balance against his estate, and to receive dividends in the insolvency, in respect of that balance, as a separate debt due from the insolvent, and rateably with the other separate creditors ;

(f) to draw, accept, make and indorse any bill of exchange, hundi or promissory note in the name and on behalf of the company, with the same effect with respect

Sec. 176.—An official liquidator cannot resign at will without securing the concurrence of the liquidating court. He cannot resign on caprice or resentment at enquiries regarding the nature of his past operations and if he does so, he is liable to forfeit pay. 53 I. C. 640 = 51 P. R. 1919.

Sec. 179 (c).—In the course of winding up a company the official liquidator found it convenient to let out a mill for a fixed period, and sell it when the market was favourable. Court may, in a proper case, sanction sale before expiry of lease. 69 I. C. 356 = 27 C. W. N. 509 = (1923) M. W. N. 388 = 32 M. L. T. 15 = A. I. R. 1922 P. C. 361 (P.C.)

LEAVE TO BID TO LIQUIDATOR.—A Court in which winding up proceedings are pending has jurisdiction to sanction the liquidator's applying to the Executing Court either in a particular case or generally in all cases in which he thinks it desirable, for leave to bid as a decree-holder under O. 21, R. 72, C. P. C., but has no jurisdiction to make an order giving the liquidator leave to bid. 25 A. L. J. 891 = 103 I. C. 293 = A. I. R. 1927 All. 681. Liquidation of company—Prior claim based on compromise decree—When liquidator may call for fresh proof of claim. See 49 All. 728 = 25 A. L. J. 450 = 102 I. C. 756 = A. I. R. 1927 All. 426.

to the liability of the company as if the bill, hundi, or note had been drawn, accepted, made or indorsed by or on behalf of the company in the course of its business ;

(g) to raise on the security of the assets of the company any money requisite ;

(h) to take out, in his official name, letters of administration to any deceased contributory, and to do in his official name any other act necessary for obtaining payment of any money due from a contributory or his estate which cannot be conveniently done in the name of the company and in all such cases the money due shall, for the purpose of enabling the liquidator to take out the letters of administration or recover the money, be deemed to be due to the liquidator himself : Provided that nothing herein empowered shall be deemed to affect the rights, duties and privileges of any Administrator-General ;

(i) to do all such other things as may be necessary for winding up the affairs of the company and distributing its assets.

180. The Court may provide by any order that the official liquidator may exercise any of the above powers without the sanction or intervention of the Court, and, where an official liquidator is provisionally appointed, may limit and restrict his powers by the order appointing him.

181. The official liquidator may, with the sanction of the Court, appoint an advocate, attorney or pleader entitled to appear before the Court to assist him in the performance of his duties : Provided that, where the official liquidator is an attorney, he shall not appoint his partner, unless the latter consents to act without remuneration.

182. The official liquidator of a company which is being wound up by the Court shall keep, in manner prescribed, proper books in which he shall cause to be made entries or minutes of proceedings at meetings, and of such other matters as may be prescribed, and any creditor or contributory may, subject to the control of the Court, personally or by his agent inspect any such books.

183. (1) Subject to the provisions of this Act the official liquidator of a company which is being wound up by the Court shall, in the administration of the assets of the company and in the distribution thereof among its creditors, have regard to any directions that may be given by resolution of the creditors or contributories at any general meeting.

(2) The official liquidator may summon general meeting of the creditors or contributories for the purpose of ascertaining their wishes, and it shall be his duty to summon meetings at such times as the creditors or contributories, by resolution, may direct, or whenever requested in writing to do so by one-tenth in value of the creditors or contributories, as the case may be.

(3) The official liquidator may apply to the Court in manner prescribed for directions in relation to any particular matter arising in the winding up.

(4) Subject to the provisions of this Act, the official liquidator shall use his own discretion in the administration of the assets of the company and in the distribution thereof among the creditors.

(5) If any person is aggrieved by any act or decision of the official liquidator, that person may apply to the Court, and the Court may confirm, reverse or modify the act or decision complained of, and make such order as it thinks just in the circumstances.

Sec. 179 (h).—Cause of action for liquidator to realise contributions from the contributories arise only on the appointment of Liquidator. 48

All. 580=95 I.C. 927=24 A. L. J. 691=A. I. R. 1926 All. 550

Ordinary powers of Court.

184. (1) As soon as may be after making a winding up order, the Court shall settle a list of contributories, with power to rectify the register of members in all cases where rectification is required in pursuance of this Act, and shall cause the assets of the company to be collected and applied in discharge of its liabilities.

Settlement of list of contributories and application of assets.

(2) In settling the list of contributories, the Court shall distinguish between persons who are contributories in their own right and persons who are contributories as being representatives of or liable for the debts of others.

185. The Court may, at any time after making a winding up order, require any contributory for the time being settled on the list of contributories and any trustee, receiver, banker, agent, or officer of the company to pay, deliver, surrender or transfer forthwith, or within such time as the Court directs, to the official liquidator any money, property or documents in his hands to which the company is *prima facie* entitled.

Power to require delivery of property.

186. (1) The Court may, at any time after making a winding up order, make an order on any contributory for the time being settled on the list of contributories to pay, in manner directed by the order, any money due from him or from the estate of

Power to order payment of debts by contributory.

Sec. 174.—In a suit by liquidator of a bank for recovery of a sum of money from the defendant, the latter claimed a set-off on account of a fixed deposit. *Held*, the set-off could be pleaded. 69 P.W.R. 1915=28 I. C. 975=89 P.L.R. 1915=63 P.R. 1915; 53 I.C. 653. If a person has been treated as a shareholder, though there may have been irregularities in the issue of shares to him and the shareholder has acted like a shareholder, such as attending meetings, accepting dividends he will be bound by his acts and will be estopped from denying that he was a shareholder. 22 P.L.R. 1915=54 P.R. 1915=28 I.C. 53=235 P.W.R. 1915. Order bringing the name of a person as contributory is final if not appealed against. 27 Punj. L. R. 842=8 L.L.J. 240=A.I.R. 1926 Lah. 414. A shareholder who seeks to be discharged, should have repudiated the contract and taken some proceedings before the commencement of the winding up order, to show his intention. (*Ibid.*) A person cannot be settled on the list of contributories if before the beginning of the winding up proceedings he has not only repudiated his shares but has asserted his right in an action by the company to enforce calls upon him. (*Ibid.*) The proposition, that before the appellant, who had agreed to purchase shares in the company under liquidation can be held liable as a contributory, the late Directors of the company should be called upon to liquidate the demands of the company's creditors is not based on any authority. 165 P.L.R. 1914=24 I. C. 236=69 P.R. 1914=113 P.W.R. 1914. Where shares are pledged with the company the legal owner thereof is the shareholder and not the company; he alone must be held liable for all unpaid calls thereon. (*Ibid.*)

Sec. 185.—An official liquidator is not entitled by summary order to refund of money realized by a creditor of the Bank before the order of winding up was passed but after the Bank had passed a resolution stopping payment of debts. 90 P.L.R. 1915=46 P.R. 1915=29 I.C. 265=71 P.W.R. 1915. The liquidator has to file

a regular suit like other claimants to recover the amount realized by such creditor of the Bank. (*Ibid.*)

Sec. 186.—The summary procedure under S. 186, Companies Act, can be resorted to to recover money from the firm, by selecting from among the partners one who is a contributory and calling upon him to liquidate the whole debt. The principle of S. 43, Contract Act, is applicable to such a case. 4 Lah. 239=77 I. C. 338=1924 Lah. 148. *See also* 53 I. C. 653. In order to make a contributory liable under S. 186 for payment of debts other than calls, the said debts must be due by the said contributory in his own personal capacity and not as contributory. 71 I. C. 724=1923 Lah. 85=4 Lah. 239. Where on liquidation of a company a shareholder is settled on the list of contributories he cannot, in proceedings under S. 186, plead that he was improperly so settled. (*Ibid.*) A transfer from the liquidator of a payment order made by a Court under S. 150 against the contributory can invoke the summary jurisdiction for recovering the money due from the latter. 3 Lah. L. J. 382. An application by the transferees of debts and calls due from contributories as the attorney of the liquidator is not one on behalf of the Company or for its benefit and is therefore incompetent. 18 P.W.R. 1921=59 I. C. 538=3 Lah. L. J. 80. In the case of orders of payment under S. 186 the person to apply for the enforcement of an order or decree is the person in whose favour the order or decree has been made or passed. 92 P.R. 1918=47 I.C. 997=168 P. W. R. 118. An assignee or transferee cannot make an application until his name has been substituted for that of the person in whose favour the decree or order has been passed or made. 92 P.R. 1918=47 I.C. 997. Ss. 200 and 201 must be held to be subject to the special provisions of R. 15 of O. 21, C.P. Code. (*Ibid.*) A transferee of an order under S. 186 must, in the first instance, apply to the Court which made the order. (*Ibid.*) The Court

the person whom he represents to the company exclusive of any money payable by him or the estate by virtue of any call in pursuance of this Act.

(2) The Court in making such an order may, in the case of an unlimited company, allow to the contributory by way of set-off any money due to him or to the estate which he represents from the company on any independent dealing or contract with the company, but not any money due to him as a member of the company in respect of any dividend or profit; and may in the case of a limited company, make to any director whose liability is unlimited or to his estate the like allowance:

Provided that in the case of any company, whether limited or unlimited when all the creditors are paid in full, any money due on any account whatever to a contributory from the company may be allowed to him by way of set-off against any subsequent call.

187. (1) The Court may, at any time after making a winding up order, and either before or after it has ascertained the sufficiency of the assets of the company, make calls on and order payment thereof by all or any of the contributories for the time being settled on the list of the contributories to the extent of their liability, for payment of any money which the Court considers necessary to satisfy the debts and liabilities of the company, and the costs, charges and expenses of winding up, and for the adjustment of the rights of the contributories among themselves.

(2) In making the call the Court may take into consideration the probability that some of the contributories may partly or wholly fail to pay the call.

188. The Court may order any contributory, purchaser or other person from whom money is due to the company to pay the same into the Bank of Bengal, the Bank of Madras, or the Bank of Bombay, as the case may be, or any branch thereof, respectively, to the account of the official liquidator instead of to the official liquidator, and any such order may be enforced in the same manner as if it had directed payment to the official liquidator.

189. All moneys, bills, hundis, notes and other securities paid and delivered into the Bank of Bengal, the Bank of Madras or the Bank of Bombay, or any branch thereof, respectively, in the event of a company being wound up by the Court, shall be subject in all respects to the orders of the Court.

has summary power to direct the contributory to pay all moneys due from him whether as a contributory or in his private capacity to the company. 36 P. R. 1910=31 I. C. 746. Debt due on a pro-note by contributory comes under this section. (*Ibid.*) The jurisdiction under the Act is permissive and ought not to be refused in the absence of cogent reasons, when a fit case is made out for its exercise. (*Ibid.*) A contributory can be required not only to meet calls made on him, but also to pay debts owing by him to the company, for recovery of which the court is not bound to proceed under section, but may direct the liquidator to sue for it. 59 P. R. 1915=31 I. C. 54. The section does not create new liabilities or confer new rights. It merely provides a summary procedure for enforcing existing legal liabilities. 4 Lah. 109=74 I. C. 600. The words "*at any time*" can only mean at any time in the courts of liquidation proceedings commencing from the date of the winding up order. The section creates a new machinery for bringing in debts due by a contributory to the company and nothing more. (*Ibid.*) Application for the enforcement of the order of contribution—Limitation. 3 O. W. N. 237=13 O. L. J. 49=A. L. R. 1926 Oudh 289.

Sec. 187.—The right enforced by a court in making calls from the contributories on the list prepared by the liquidator or an insolvent company is a statutory right of the creditors to enforce against the shareholders of the company, on its insolvency and not a right of the company being enforced by the liquidator. 14 A. L. J. 349=38 All. 347. The calls are recoverable even though they are time barred under Art. 112, Limitation Act. (*Ibid.*) A share holder contracts to contribute a certain amount, to be applied in payment of the debts and liabilities of the company and it is inconsistent with his position as a shareholder when he remains as such, to claim back any of that money, on the plea that the Managing Director falsely told him that the shares were sold. 42 Bom. 264=19 Bom. L. R. 615. The section is not restricted to original calls but includes also unpaid calls before the winding up. 67 P. R. 1011=12 I. C. 958. The balance of the price of shares for which a call has been made before liquidation, can be recovered by a summary action by the Official Liquidator. 67 P. R. 1911=12 I. C. 958.

Sec. 189—(1882) S. 153.—An arrangement, arrived at, in a meeting of three-fourths of the

190. (1) An order made by the Court on a contributory shall (subject to any right of appeal) be conclusive evidence that the money, if any, thereby appearing to be due or ordered to be paid is due.

Order on contributory conclusive evidence.

(2) All other pertinent matters stated in the order shall be taken to be truly stated as against all persons, and in all proceedings whatsoever.

191. The Court may fix a time or times within which creditors are to prove their debts or claims, or to be excluded from the benefit of any distribution made before those debts are proved.

Power to exclude creditors not proving in time.

192. The Court shall adjust the rights of the contributories among themselves, and distribute any surplus among the persons entitled thereto.

Adjustment of rights of contributories.

193. The Court may, in the event of the assets being insufficient to satisfy the liabilities, make an order as to the payment out of the assets of the costs, charges and expenses incurred in the winding up in such order of priority as the Court thinks just.

Power to order costs.

194. (1) When the affairs of a company have been completely wound up, the Court shall make an order that the company be dissolved from the date of the order, and the Company shall be dissolved accordingly.

Dissolution of company.

(2) The order shall be reported within fifteen days of the making thereof by the official liquidator to the registrar, who shall make in his books a minute of the dissolution of the company.

(3) If the official liquidator makes default in complying with the requirements of this section, he shall be liable to a fine not exceeding fifty rupees for every day during which he is in default.

Extraordinary powers of Court.

195. (1) The Court may, after it has made a winding up order, summon before it any officer of the company or person known or suspected to have in his possession any property of the company, or supposed to be indebted to the company, or any person whom the Court deems capable of giving information concerning the trade, dealings, affairs or property of the company.

Power to summon persons suspected of having property of company.

(2) The Court may examine him on oath concerning the same, either by word of mouth or on written interrogatories, and may reduce his answers to writing and require him to sign them.

creditors of a company and subsequently sanctioned by High Court, takes effect from the date of meeting and not the date of sanction. 18 O. C. 272 = 32 I. C. 451 Affd. O. A. by Privy Council. 50 I.C. 429 = 41 All. 566. See also 36 M. L. J. 526 (P. C.).

Sec. 193—(1882) S. 158.—A charge in equity was created where a lease provided for payment of arrears of rent with interest from buildings erected on land. Although not amounting to a transfer or a mortgage the charge gave a priority right to the landlord over the company's unsecured creditors. 27 I. C. 34 = 16 Bom. L. R. 643.

Sec. 194—(1882) S. 159.—The final dissolution of the company does not preclude the assignee of a payment order from the liquidation Court, from seeking relief from that Court nor does it render necessary for him to bring an action for the recovery of the money. 3 Lah. L.J. 382. See also 28 I. C. 286 = 40 P. R. 1915. When a company has been dissolved it ceases to exist for all purposes and its officers are *functus officio*; a liquidator is also an officer of the company and

becomes *functus officio*. But he can complete a formal act like giving a transfer in writing for a decree which has been already transferred even after he becomes *functus officio*. 27 L. W. 538 = A. I. R. 1928 Mad. 478 = 54 M. L. J. 663.

Sec. 195.—An order for the discovery and inspection of books, etc., and for the examination of its Directors will be made only if it is likely to lead to some benefit to the creditors. It is in the discretion of the court, but the discretion should be exercised judicially. 28 I. C. 286 = 40 P. R. 1915. An appeal lies against an order if the appellant can show that the order impugned is vexatious or oppressive so far as he is concerned and that it is not just or beneficial for the purpose of the winding up. (*Ibid.*) The examination under S. 195 is a private one and petitioning creditor should not be allowed to attend the same, particularly when the creditor who seeks to attend is engaged in litigation with the company in liquidation. 1 Rang. 382 = 1924 Rang. 24 = 83 I. C. 3.

(3) The Court may require him to produce any documents in his custody or power relating to the company ; but, where he claims any lien on documents produced by him, the production shall be without prejudice to that lien, and the Court shall have jurisdiction in the winding up to determine all questions relating to that lien.

(4) If any person so summoned, after being tendered a reasonable sum for his expenses, refuses to come before the Court at the time appointed, not having a lawful impediment (made known to the Court at the time of its sitting, and allowed by it) the Court may cause him to be apprehended and brought before the Court for examination.

196. (1) When an order has been made for winding up a company by the Court

Power to order public
examination of promoters,
directors, etc

and the official liquidator has applied to the Court stating that in his opinion a fraud has been committed by any person in the promotion or formation of the company or by any director or other officer of the company in relation

to the Company since its formation, the Court may, after consideration of the application, direct that any person who has taken any part in the promotion or formation of the company, or has been a director, manager or other officer of the company, shall attend before the Court on a day appointed by the Court for that purpose, and be publicly examined as to the promotion or formation or the conduct of the business of the company, or as to its conduct and dealings as director, manager or other officer thereof.

(2) The official liquidator shall take part in the examination, and for that purpose may, if specially authorized by the Court in that behalf, employ such legal assistance as may be sanctioned by the Court.

(3) Any creditor or contributory may also take part in the examination either personally or by any person entitled to appear before the Court.

(4) The Court may put such questions to the person examined as the Court thinks fit.

(5) The person examined shall be examined on oath, and shall answer all such questions as the Court may put or allow to be put to him.

(6) A person ordered to be examined under this section may at his own cost employ any person entitled to appear before the Court, who shall be at liberty to put to him such questions as the Court may deem just for the purpose of enabling him to explain or qualify any answers given by him : Provided that if he is, in the opinion of the Court, exculpated from any charges made or suggested against him, the Court may allow him such costs as in its discretion it may think fit.

(7) Notes of the examination shall be taken down in writing, and shall be read over to or by, and signed by, the person examined, and may thereafter be used in evidence against him in civil proceedings, and shall be open to the inspection of any creditor or contributory at all reasonable times.

(8) The Court may, if it thinks fit, adjourn the examination from time to time.

(9) An examination under this section may, if the Court so directs, and subject to any rules in this behalf, be held before any District Judge or before any officer of the High Court, being an official referee, master, registrar or deputy registrar, and the powers of the Court under this section as to the conduct of the examination, but not as to costs, may be exercised by the person before whom the examination, is held.

197. The Court, at any time either before or after making a winding up order on

Power to arrest absconding
contributory.

proof of probable cause for believing that a contributory is about to quit British India or otherwise to abscond, or to remove or conceal any of his property, for the

purpose of evading payments of calls or of avoiding examination respecting the affairs of the company, may cause the contributory to be arrested and his books and papers and moveable property to be seized, and him and them to be safely kept until such time as the Court may order.

Sec. 196 (5).—Scope and object of. *See* 6 Cr.R. 417=A. I. R. 1926 Lah. 385. Person examined under this sub-section is not protected under the

Evidence Act, S. 132 Proviso. (*Ibid.*)

Sec. 196 (7).—Section not intended to override provisions of the Evidence Act, S. 132. (*Ibid.*)

198. Any powers by this Act conferred on the Court shall be in addition to, and not in restriction of, any existing powers of instituting proceedings against any contributory or debtor of the company, or the estate of any contributory or debtor, for the recovery of any call or other sums.

Enforcement of and Appeal from Orders.

199. All orders made by a Court under this Act may be enforced in the same manner in which decrees of such Court made in any suit pending therein may be enforced.

200. Any order made by a Court for or in the course of the winding up of a company shall be enforced in any place in British India other than that in which such Court is situate, by the Court that would have had jurisdiction in respect of such company if the registered office of the company had been situate at such other place, and in the same manner in all respects as if such order had been made by the Court that is hereby required to enforce the same.

201. Where any order made by one Court is to be enforced by another Court, a certified copy of the order so made shall be produced to the proper officer of the Court required to enforce the same, and the production of such certified copy shall be sufficient evidence of such order having been made; and thereupon the last-mentioned Court shall take the requisite steps in the matter for enforcing the order, in the same manner as if it were the order of the Court enforcing the same.

202. Re-hearings of, and appeals from, any order or decision made or given in the matter of the winding up of a company by the Court may be had in the same manner and subject to the same conditions in and subject to which appeals may be had from any order or decision of the same Court in cases within its ordinary jurisdiction.

Sec. 198.—*See* 46 P. R. 1915.

Secs. 199 to 201.—Payment orders of the Bombay High Court in winding up proceedings—Application in the Madras High Court to give direction to District Courts to enforce them—Proper procedure. *See* 38 M. L. T. (H.C.) 377=25 L. W. 113=100 I. C. 744=A. I. R. 1927 Mad. 271. In the case of a transfer of a winding up order to another province for execution the Court contemplated by Ss. 199 to 201 is the High Court and not the District Court. 6 Pat. 132=8 Pat. L. T. 577=100 I. C. 750=A. I. R. 1927 Pat. 182. Procedure prescribed by the sections must be strictly followed. (*Ibid.*) Limitation for application for the enforcement of order of contribution. *See* 3 O. W. N. 237=13 O. L. J. 49=93 I. C. 631=A. I. R. 1926 Oudh 289.

Sec. 200.—This section is to be read subject to C. P. C., O. XXI, R. 16. *See* P2 P. R. 1918.

Sec. 202—(1882) S. 169.—SCOPE OF SECTION.—*See* 16 M. L. J. 537=30 Mad. 22; 13 P. L. R. 1919; 17 I. C. 85=5 Bur. L. T. 193. A right of appeal under S. 169 (Old Act) is equal and similar to that under C. P. C. 38 All. 537=14 A. L. J. 722. Appeals on the winding up of a company are governed by the same conditions in which appeals may be had from the decision or order of District Judge in cases within his ordinary original jurisdiction, the condition being that there is only one appeal. 34 P. R. 1913=22 I. C. 250. Where the liquidation of a limited company has begun before the Companies Act of 1913 came into force, all the proceedings in the winding up including the course of appeal are governed by the old law as provided for by

S. 284 of the Act. 113 P. L. R. 1915=183 P. L. R. 1915=28 I. C. 600=43 P. W. R. 1915; 43 I. C. 642=16 A. L. J. 70. An appeal, against an order in the matter of the winding up of the company, will not be heard without a notice as required by S. 169. 33 All. 641=10 I. C. 908=8 A. L. J. 719. Where no notice is given under S. 169 of an intention to appeal against an order in the winding up proceedings the Appellate Court will not hear the appeal. 35 All. 177=19 I. C. 53=11 A. L. J. 200. The sending of a memorandum of appeal to a respondent is not a proper notice, not being one given in the manner prescribed by the Civil Procedure Code; a right of objection to such a notice is not affected by the respondent filing cross-objections. 11 I. C. 562=13 Bom. L. R. 558. Section 169 in no way derogates from the provision in clause 15 of the Letters Patent, but it merely directs that an appeal from an order made in the matter of a winding up of a company, shall not be heard unless notice is given in a certain manner. (*Ibid.*) S. 169 is not applicable to an order of the Liquidating Judge reducing the remuneration of an employee of the Official Liquidators sanctioned by the predecessor of the Judge. No appeal from such an order can be entertained. 1 Lah. 73=55 I. C. 928=90 P. L. R. 1920. The re-hearing of any order made in the matter of winding up of a company can only take place before a court of appeal. But an order which has been obtained *ex parte* or which is in truth a nullity may be discharged by the court which made it. 1 Lah. 187=55 I. C. 820=2 Lah. L. J. 291. S. 169 has no application to petitions for the setting aside of *ex parte*

Voluntary winding up.

Circumstances in which company may be wound up voluntarily.

203. A company may be wound up voluntarily—

decrees. (*Ibid.*) 72 I. C. 106=1923 All. 429. A creditor or a contributory who has not complied with Rule 58 of the rules of the Chief Court under S. 254 (now R. 246) and had not in fact attended the proceedings, cannot appeal against an order sanctioning a compromise between the liquidator and debtor. 79 P. R. 1919=49 I. C. 381=12 P. W. R. 1919. The period of limitation of three weeks is to be completed from the date on which the order appealed against was actually pronounced though it might have been drawn up late. 11 I. C. 562=13 Bom. L. R. 558; 113 P. L. R. 1915=183 P. L. R. 1915=28 I. C. 600=43 P. W. R. 1915; 34 P. R. 1913=22 I. C. 250=45 P. L. R. 1914. Where a notice of appeal in the matter of the liquidation of a company was served upon respondents under Sec. 169 after the expiry of three weeks owing to inadvertence on the part of the pleader for the appellant, time for the service of notice of appeal may be extended. 48 I. C. 919=7 P. W. R. 1919. Carelessness or ignorance of the pleader is not a sufficient cause for extending the period of three weeks for the notice. 100 P. W. R. 1911=10 I. C. 433=176 P. L. R. 1911, 73 I. C. 211=1924 Lah. 379. Extension of time ought not to be granted except under special circumstances, the object of the Act being to secure speedy settlement of matters and to curtail prolongation of winding up proceedings. 5 P. W. R. 1916=31 I. C. 725=42 P. L. R. 1916; 97 I. C. 295=24 L. W. 35. Appeals under the Act ought to be filed with such promptitude as to render service of notice upon the respondent possible within three weeks prescribed by S. 169, and the Appellate Court will not extend the time for appealing unless the delay is caused either by the conduct of the respondent or by mistake of the officials of the Appellate Court. 73 I. C. 211 (2)=1924 Lah. 379. An appellant will not be granted an extension of time under S. 169 unless the court is satisfied that he was diligent in the prosecution of the appeal and that delay was due to respondent's conduct, or action or inaction of the Lower Court. (*Ibid.*) (95 P. R. 1908; 22 I. C. 795; 10 I. C. 433; 22 M. 291=19 M. L. J. 511, ref.) Where the appellant showed due diligence but failed on account of circumstances beyond his control such as the court being closed on account of the vacation extension may be granted. A respondent is entitled to contest an *ex parte* order excusing delay. 90 P. L. R. 1915=46 P. R. 1915=29 I. C. 265=71 P. W. R. 1915. Substantial and reasonable compliance with law enough for grant of extension of time—S. 169 not to be literally construed. 63 I. C. 607=19 A. L. J. 371. Once an appeal is presented within the prescribed period, the Appellate Court can extend the time; if required, for service of the notice. 113 P. L. R. 1915=183 P. L. R. 1915=28 I. C. 600=43 P. W. R. 1915; 13 P. L. R. 1915=28 I. C. 142=56 P. W. R. 1915. An appellant desiring to contest an order passed under the Companies Act must conform strictly to the provisions of S. 169 and should give notice of any appeal he may file within

three weeks after the order complained of has been made. 100 P. L. R. 1914=22 I. C. 795=68 P. R. 1914. The framing of issues by a court in a petition for the winding up of a company is not an 'order' within S. 169 of the Act and is not appealable. 16 I. C. 794. A question which has been settled by the liquidating court cannot be re-opened by a regular suit. 40 P. R. 1918=45 I. C. 84=60 P. W. R. 1918. Registrar declaring company dissolved—Application for restoration rejected—Order open to revision—Appeal treated as revision. See 26 Punj. L. R. 68=86 I. C. 652=1925 Lah. 443. Objection to attachment—Dismissal by District Judge—Appealability. 28 Punj. L. R. 209=A. I. R. 1927 Lah. 282.

Sec. 203.—A person applying for shares in a company on a particular condition cannot, when the condition is not fulfilled, be treated as a shareholder. 42 Bom. 595=46 I. C. 672=20 Bom. L. R. 692. In proceedings to wind up the affairs of a company, a shareholder is not entitled to have his name struck off the list of contributories on the ground that he was induced to purchase shares by false reports and balance-sheets issued by the company. 27 I. C. 505=17 Bom. L. R. 65; 38 I. C. 717=19 Bom. L. R. 186. To constitute a valid forfeiture of shares there must be power to forfeit, and intention to forfeit and a notice of that intention and further the intention should be actually carried into effect. A default in payment of calls by a shareholder does not *ipso facto* bring about a forfeiture nor does the intention to forfeit not carried into effect, and unless the option is exercised, the defaulter continues to be a member of the company. 31 P. W. R. 1915=99 P. L. R. 1915=28 I. C. 431=36 P. R. 1915. Even if the articles provide for a forfeiture to take place *ipso facto* on default in the payment of calls, the defaulting shareholder cannot insist on the clause being acted upon. (*Ibid.*) Liquidation—Security deposit mixed with funds by agreement—Payment of interest—Liquidation—Rights of depositors. 27 I. C. 343=16 Bom. L. R. 733. The Official Liquidator of a Bank cannot be looked upon as the Agent of the Bank. He is an officer of the court whose rights depend on the terms of his appointment. 47 I. C. 122. The landlord of a company is entitled to be paid rent and royalties accruing due subsequent to liquidation if the liquidators remained in possession but where the landlord acquiesces in the liquidator's possession, he cannot claim as a secured creditor any rent or royalties due before or after the liquidation. 17 I. C. 976=39 Cal. 810. The solvency of a company is established if surplus assets sufficient to pay up interest, accruing due after commencement of liquidation are left after satisfying the principal and interest up to the date of the winding up. 1 Lah. 154=56 I. C. 251=2 Lah. L. J. 558. Interest is payable upon debts carrying interest out of surplus assets, if the company in liquidation turns out to be solvent. (*Ibid.*) After the winding up, the creditor would get interest as incidental to his debts though not mentioned in

(1) when the period (if any) fixed for the duration of the company by the articles expires, or the event (if any) occurs, on the occurrence of which the articles provide that the company is to be dissolved and the company in general meeting has passed a resolution requiring the company to be wound up voluntarily ;

(2) if the company resolves by special resolution that the company be wound up voluntarily ;

(3) if the company resolves by extraordinary resolution to the effect that it cannot by reason of its liabilities continue its business, and that it is advisable to wind up.

Commencement of voluntary winding up.

204. A voluntary winding up shall be deemed to commence at the time of the passing of the resolution authorizing the winding up.

205. When a company is wound up voluntarily, the company shall, from the commencement of the winding up, cease to carry on its business, except so far as may be required for the beneficial winding up thereof :

Effect of voluntary winding up on status of company.

Provided that the corporate state and corporate powers of the company shall, notwithstanding anything to the contrary in its articles, continue until it is dissolved.

206. (1) Notice of any special resolution or extraordinary resolution for winding up a company voluntarily shall be given by the company within ten days of the passing of the same by advertisement in the local official Gazette, and also in some newspaper (if any) circulating in the district where the registered office of the company is situate.

Notice of resolution to wind up voluntarily.

(2) If a company makes default in complying with the requirements of this section, it shall be liable to a fine not exceeding fifty rupees for every day during which the default continues ; and every officer of the company who knowingly and wilfully authorizes or permits the default shall be liable to a like penalty.

Consequences of voluntarily winding up.

207. The following consequences shall ensue on the voluntary winding up of a company :—

order of adjudication ; no proof of it is necessary. (*Ibid.*) Liquidation—Company accepting pronote in lieu of premium-suit on pro-note dismissed on merits—*Res judicata*. 87 P. W. R. 1918=46 I. C. 586=86 P. L. R. 1918. A father purchasing shares in a company in his minor son's name is personally liable on the shares and, in the list of contributories, the latter's name can be substituted for the sons though the court has plenty of powers to rectify the list of contributories. 46 I. C. 432=51 P. R. 1918. A shareholder cannot have his contract to take shares, set aside, after the commencement of winding up proceedings of a company, unless he has repudiated and taken proceedings to repudiate them before such commencement. 46 I. C. 21=42 P. R. 1918. A liquidator is not bound to pay a dividend to any one or more of the joint holders of a fixed deposit receipt in favour of several persons not payable to 'either or survivor' without obtaining a discharge. 48 P. R. 1918=44 I. C. 848=47 P. W. R. 1918. The court must inquire into and decide the objections raised by the contributories as to their liabilities as such. 138 P. L. R. 1915=28 I. C. 142=56 P. W. R. 1915. An order passed by court bringing the name of a person as a contributory on the list of contributories, if not appealed against, is final and cannot be challenged, barring the question as to the liability of such person as contributory being reagitated. 227 P. W. R. 1915=28 I. C. 95

=41 P. L. R. 1915.

Sec. 203 (3).—If an extraordinary resolution passed under the section does not provide that, by reason of its liabilities, the company cannot continue its business and that it is advisable to wind up, the defect is very serious. 13 P. L. R. 1917=36 I. C. 943=35 P. R. 1917. If in passing an extraordinary resolution under the section directing a voluntary winding up the company, an irregularity is discovered after the supervision order has been made, the order may be discharged on application to the Appellate Court, and, if necessary, the time for filing the appeal may be extended. 13 P. L. R. 1917=38 I. C. 943=35 P. R. 1917. The property of a company of limited liability attached before its liquidation does not vest in the liquidator, but the property of an insolvent vests in the receiver under similar circumstances. 43 Cal. 586=34 I. C. 253=20 C. W. N. 358.

Sec. 207 (1).—S. 207 (1) does not bar execution proceedings against a company gone into voluntary liquidation, unless a competent court has granted leave for winding up or stay of proceedings. A liquidator, or dissatisfied creditor, can move the court. 36 I. C. 397=38 All. 407=14 A. L. J. 513. As to stay of proceedings, *see* 92 I. C. 144=A. I. R. 1925 Oudh 483. On this section, *see also* 2 O. W. N. 508=1925 Oudh 483 ; 28 O. C. 197=1925 Oudh 630.

(i) the assets of the company shall be applied in satisfaction of its liabilities *pari passu* and, subject thereto, shall, unless the articles otherwise provide, be distributed among the members according to their rights and interests in the company ;

(ii) the company in general meeting shall appoint one or more liquidators for the purpose of winding up the affairs and distributing the assets of the company, and may fix the remuneration to be paid to him or them ;

(iii) on the appointment of a liquidator all the powers of the directors shall cease, except so far as the company in general meeting, or the liquidator, sanctions the continuance thereof ;

(iv) the liquidator may, without the sanction of the Court, exercise all powers by this Act given to the official liquidator in a winding up by the Court ;

(v) the liquidator may exercise the powers of the Court under this Act of settling a list of contributories, and of making calls, and shall pay the debts of the company, and adjust the rights of the contributories among themselves ;

(vi) the list of contributories shall be *prima facie* evidence of the liability of the persons named therein to be contributories ;

(vii) when several liquidators are appointed, every power hereby given may be exercised by such one or more of them as may be determined by the company at the time of their appointment, or in default of such determination by any number not less than two ;

(viii) if from any cause whatever there is no liquidator acting, the Court may, on the application of a contributory, appoint a liquidator ; and

(ix) the Court may, on cause shown, remove a liquidator, and appoint another liquidator.

208. (1) The liquidator in a voluntary winding up

Notice by liquidator of his appointment.

shall, within twenty-one days after his appointment, file with the registrar a notice of his appointment in the form prescribed.

(2) If the liquidator fails to comply with the requirements of this section, he shall be liable to a fine not exceeding fifty rupees for every day during which the default continues.

209. (1) Every liquidator appointed by a company in a voluntary winding up

Rights of creditors in a voluntary winding up.

shall, within seven days from his appointment, send notice

by post to all persons who appear to him to be creditors of the company that a meeting of the creditors of the company will be held on a date, not being less than twenty-one days nor more than one month after his appointment, and at a place and hour, to be specified in the notice, and shall also advertise notice of the meeting once in the local official Gazette and once at least in some newspapers (if any) circulating in the district where the registered office or principal place of business of the company was situate.

(2) At the meeting to be held in pursuance of the foregoing provisions of this section the creditors shall determine whether an application shall be made to the Court for the appointment of any person as liquidator in the place of, or jointly with, the liquidator appointed by the company, and, if the creditors so resolve, an application may be made accordingly to the Court at any time not later than fourteen days after the date of the meeting, by any creditor appointed for the purpose at the meeting :

Provided that the Court may, by order at any time, extend the time for making an application under this sub-section for such period as the Court thinks proper.

Sec. 208.—When a person is appointed liquidator of a company, however imperfect he may consider his appointment to be, if he is nominally a liquidator and acts as such, he must carry out the duties or exercise the rights of a liquidator, and included in those duties is making a return of his appointment. 39 I.C. 478=15 A.L.J. 346=18 Cr. L. J. 510=39 All. 412. On acceptance of the appointment as liquidator he

must give notice of it according to law ; if he does not do so, then, unless there is some *bona fide* excuse he will be liable to a penalty. The penalty in the case was reduced to one anna. (*Ibid.*)

Sec. 209.—As to validity of appointment of joint liquidator without application to Court, in case of voluntary winding up of company, *see* 41 C.L.J. 521=88 I.C. 905=1925 Cal. 809.

(3) On any such application the Court may make an order either for the removal of the liquidator appointed by the company and for the appointment of some other person as liquidator or for the appointment of some other person to act as liquidator jointly with the liquidator appointed by the company, or such other order as, having regard to the interests of the creditors and contributories of the company, may seem just.

(4) The Court shall make such order as to the costs of the application as it may think fit, and, if it is of opinion that, having regard to the interests of the creditors in the liquidation, there were reasonable grounds for the application, may order the costs of the application to be paid out of the assets of the company, notwithstanding that the application is dismissed or otherwise disposed of adversely to the applicant.

210. (1) If a vacancy occurs by death, resignation or otherwise in the office of liquidator appointed by the company in a voluntary winding up, the company in general meeting may, subject to any arrangement with its creditors, fill the vacancy.

Power to fill vacancy in office of liquidator.

(2) For that purpose a general meeting may be called by any contributory or, if there were more liquidators than one, by the continuing liquidators.

(3) The meeting shall be held in manner prescribed by the articles, or in such manner as may, on application by any contributory or by the continuing liquidators be determined by the Court.

211. (1) A company about to be, or in course of being, wound up voluntarily may, by extraordinary resolution, delegate to its creditors, or to any committee of them, the power of appointing liquidators or any of them, and of supplying vacancies among the liquidators, or enter into any arrangement with respect to the powers to be exercised by the liquidators, and the manner in which they are to be exercised.

Delegation of authority to appoint liquidators.

(2) Any Act done by creditors in pursuance of any such delegated power shall have the same effect as if it had been done by the company.

212. (1) Any arrangement entered into between a company about to be, or in the course of being, wound up voluntarily and its creditors shall, subject to any right of appeal under this section, be binding on the company if sanctioned by an extraordinary resolution, and on the creditors if acceded to by three-fourths in number and value of the creditors.

Arrangement when binding on creditors.

(2) Any creditor or contributory may, within three weeks from the completion of the arrangement, appeal to the Court against it, and the court may thereupon, as it thinks just, amend, vary or confirm the arrangement.

213. (1) Where a company is proposed to be, or is in course of being, wound up altogether voluntarily, and the whole or part of its business or property is proposed to be transferred or sold to another company (in this section called the transferee company) the liquidator of the first mentioned company (in this section called the transferor company), may, with the sanction of a special resolution of that company conferring either a general authority on the liquidator or on authority in respect of any particular arrangement, receive, in compensation or part compensation for the transfer or sale, shares, policies or other like interests in the transferee company, for distribution among the members of the transferor company, or may enter into any other arrangement whereby the members of the transferor company may, in lieu of receiving cash, shares, policies or other like interests, or in addition thereto, participate in the profits of, or receive any other benefit from, the transferee company.

Power for liquidators to accept shares, etc., as a consideration for sale of property of company.

(2) Any sale or arrangement in pursuance of this section shall be binding on the members of the transferor company.

(3) If any member of the transferor company who did not vote in favour of the special resolution at either of the meetings held for passing and confirming the same expresses his dissent therefrom in writing addressed to the liquidator, and left at the registered office of the company within seven days after the confirmation of the special resolution, he may require the liquidator either to abstain from carrying the resolution into effect, or to purchase his interest at a price to be determined by agreement or by arbitration in manner hereinafter provided.

(4) If the liquidator elects to purchase the member's interest, the purchase-money must be paid before the company is dissolved, and be raised by the liquidator in such manner as may be determined by special resolution.

(5) A special resolution shall not be invalid for the purposes of this section by reason that it is passed before or concurrently with a resolution for winding up the company, or for appointing liquidators; but if an order is made within a year for winding up the company by or subject to the supervision of the Court, the special resolution shall not be valid unless sanctioned by the Court.

214. (1) The price to be paid for the purchase of the interest of any dissentient

Mode of determining price member may be determined by agreement. If the parties dispute about the same, such dispute shall be settled by arbitration.

(2) The provisions of the Indian Arbitration Act, 1899, other than those restricting the application of the Act in respect of the subject-matter of the arbitration, shall apply to all arbitrations in pursuance of this section.

215. (1) Where a company is being wound up voluntarily, the liquidator or any

Power to apply to Court. contributory or creditor may apply to the Court to determine any question arising in the winding up, or to exercise as respects the enforcing of calls, or any other matters, all or any of the powers which the Court might exercise if the company were being wound up by the Court.

(2) The Court, if satisfied that the determination of the question or the required exercise of power will be just and beneficial, may accede wholly or partially to the application on such terms and conditions as the Court thinks fit, or may make such other order on the application as the Court thinks just.

216. (1) Where a company is being wound up voluntarily, the liquidator may,

Power of liquidator to call from time to time, summon general meetings of the company for the purpose of obtaining the sanction of the company by special or extraordinary resolution, or for any other purposes he may think fit.

(2) In the event of the winding up continuing for more than one year, the liquidator shall summon a general meeting of the company at the end of the first year from the commencement of the winding up, and of each succeeding year, or as soon thereafter as may be convenient, and shall lay before the meeting a statement in the prescribed form containing the prescribed particulars with respect to the proceedings in and the position of the liquidation.

Sec. 215.—A voluntary liquidator is entitled to ask the court, under S. 215, to make an order for the public examination of Directors, etc., which the court may make on the application of an Official Liquidator under S. 190. 55 I. C. 831=44 Bom. 659=22 Bom. L. R. 219. The fact that a resolution for voluntary winding-up is passed does not like an order of winding up, by or under supervision of the Court, stay or invalidate any proceeding, execution, etc., or prevent actions being brought or continued against the company without the leave of the court. On application, however, the court can stay any action on such terms as it thinks fit. 30 I. C. 657=182 P. L. R. 1915=124 P. W. R. 1915; 92 I. C. 144=A. I. R. 1926 Oudh 483. *see also* 19 P. L. R. 1915=31 P. R. 1915=27 I. C. 685=243

P. W. R. 1915. A liquidator may obtain a supervision order to protect him against actions which are threatened and so save the expense of applying for the stay or restraint of proceedings against the company. (*Ibid.*) There is no reason why a person who has a claim which he has long ago put in the form of a proof of debt against a company and which the liquidators are willing to admit should not be allowed the benefit of the company's winding up proceedings. In those circumstances it is for the person disputing the debt to go to the court under S. 215 and have the decision set aside. 31 C. W. N. 894=103 I. C. 659=A. I. R. 1927 Cal. 689. Power of court to grant liquidator leave to bid *see* 25 A. L. J. 891=A. I. R. 1927 All. 681 cited under S. 179. *supra* *See also* 103 I. C. 293.

217. (1) In the case of every voluntary winding up, as soon as the affairs of the company are fully wound up, the liquidator shall make up an account of the winding up, showing how the winding up has been conducted and the property of the company has been disposed of; and thereupon shall call a general meeting of the company for the purpose of laying before it the account, and giving any explanation thereof.

(2) The meeting shall be called by advertisement, specifying the time, place and object thereof, and published one month at least before the meeting in the manner specified in section 206.

(3) Within one week after the meeting, the liquidator shall file with the registrar a return of the holding of the meeting, and of its date, and in default of so doing shall be liable to a fine not exceeding fifty rupees for every day during which the default continues.

(4) The registrar on the filing of the return shall forthwith register it, and, on the expiration of three months from the registration of return, the company shall be deemed to be dissolved:

Provided that the Court may, on the application of the liquidator or of any other person who appears to the Court to be interested, make an order deferring the date at which the dissolution of the company is to take effect for such time as the Court thinks fit.

(5) It shall be the duty of the person on whose application an order of the Court under sub-section (4) is made, within twenty-one days after the making of the order, to file with the registrar a certified copy of the order, and if that person fails so to do, he shall be liable to a fine not exceeding fifty rupees for every day during which the default continues.

218. All costs, charges and expenses properly incurred in the voluntary winding up of a company including the remuneration of the liquidator, shall be payable out of the assets of the company in priority to all other claims at the date of the winding up.

219. The voluntary winding up of a company shall not bar the right of any creditor or contributory to have it wound up by the Court, if the Court is of opinion, in the case of an application by a creditor that the rights of the creditor or, in the case of an application by a contributory, that the rights of the contributories will be prejudiced by a voluntary winding up.

220. Where a company is being wound up voluntarily, and an order is made for winding up by the Court, the Court may, if it thinks fit, by the same or any subsequent order, provide for the adoption of all or any of the proceedings in the voluntary winding up.

Winding up subject to supervision of Court.

221. When a company has by special or extraordinary resolution resolved to wind up voluntarily, the Court may make an order that the voluntary winding up shall continue, but subject to such supervision of the Court, and with such liberty for creditors, contributories or others to apply to the Court, and generally on such terms and conditions as the Court thinks just.

Sec. 219.—See 26 Punj. L. R. 654=89 I. C. 613 =6 Lah. 340=1925 Lah. 527.

Sec. 221.—Irregularity in the proceedings of a limited company is not a matter for the Court, but it is dealt with by the majority of the shareholders. 47 Bom. 915=25 Bom. L. R. 1083=1924 B. 102. The Courts will interfere only if the rights of the share holders are infringed or if a case of fraud or *ultra vires* is made out. 47 Bom. 915=25 Bom. L. R. 1083=1924 B. 102.

Courts do not generally interfere with internal management of a company at the instance of member unless there is something illegal, oppressive, fraudulent, or *ultra vires* on the part of the company. 46 P. R. 1911=179 P. L. R. 1911=10 I. C. 515=108 P. W. R. 1911. An individual shareholder of a company is not competent to make use of the name of the company as plaintiff in an action and the rule is similar with regard to a number of share holders. (*Ibid.*)

222. A petition for the continuance of a voluntary winding up subject to the supervision of the Court shall, for the purpose of giving jurisdiction to the Court over suits, be deemed to be a petition for winding up by the Court.

223. The Court may, in deciding between a winding up by the Court and a winding up subject to supervision, in the appointment of liquidators, and in all other matters relating to the winding up subject to supervision, have regard to the wishes of the creditors or contributories as proved to it by any sufficient evidence.

Effect of petition for winding up subject to supervision.

Court may have regard to wishes of creditors and contributories.

Power for Court to appoint or remove liquidators.

224. (1) Where an order is made for a winding up subject to supervision, the Court may by the same or any subsequent order appoint any additional liquidator.

(2) A liquidator appointed by the Court under this section shall have the same powers, be subject to the same obligations, and in all respects stand in the same position as if he had been appointed by the company.

(3) The Court may remove any liquidator so appointed by the Court or any liquidator continued under the supervision order, and fill any vacancy occasioned by the removal, or by death or resignation.

225. (1) Where an order is made for a winding up subject to supervision, the liquidator may, subject to any restrictions imposed by the Court, exercise all his powers, without the sanction or intervention of the Court, in the same manner as if the company were being wound up altogether voluntarily.

(2) Except as provided in sub-section (1), and save for the purposes of section 196, any order made by the Court for a winding up subject to the supervision of the Court shall for all purposes, including the staying of suits and other proceedings, be deemed to be an order of the Court for winding up the company by the Court, and shall confer full authority on the Court to make calls, or to enforce calls made by the liquidators, and to exercise all other powers which it might have exercised if an order had been made for winding up the company altogether by the Court.

(3) In the construction of the provisions whereby the Court is empowered to direct any act or thing to be done to or in favour of the official liquidator, the expression "official liquidator" shall be deemed to mean the liquidator conducting the winding up subject to the supervision of the Court.

226. Where an order has been made for the winding up of a company subject to supervision, and an order is afterwards made for winding up by the Court, the Court may, by the last-mentioned order or by any subsequent order appoint the voluntary liquidators or any of them, either provisionally or permanently, and either with or without the addition of any other person, to be official liquidator in the winding up by the Court.

Appointment in certain cases of voluntary liquidators to office of official liquidators.

Supplemental Provisions.

227. (1) In the case of voluntary winding up every transfer of shares, except transfers made to or with the sanction of the liquidator, and every alteration in the status of the members of the company made after the commencement of the winding up shall be void.

(2) In the case of a winding up by or subject to the supervision of the Court, every disposition of the property (including actionable claims) of the company, and every transfer of shares, or alteration in the status of its members, made after the commencement of the winding up shall, unless the Court otherwise orders, be void.

228. In every winding up (subject in the case of insolvent companies to the application in accordance with the provisions of this Act of the law of insolvency) all debts payable on a contingency, and all claims against the company, present or

Avoidance of transfers, etc. after commencement of winding up.

Debts of all descriptions to be proved.

future, certain or contingent, shall be admissible to proof against the company, a just estimate being made, so far as possible, of the value of such debts or claims as may be subject to any contingency or for some other reason do not bear a certain value.

229. In the winding up of an insolvent company the same rules shall prevail and be observed with regard to the respective rights of secured

Application of insolvency rules in winding up of insolvent companies.

and unsecured creditors and to debts proveable and to the valuation of annuities and future and contingent liabilities as are in force for the time being under the law of insol-

vency with respect to the estates of persons adjudged insolvent; and all persons who in any such case would be entitled to prove for and receive dividends out of the assets of the company may come in under the winding up, and make such claims against the company as they respectively are entitled to by virtue of this section.

230. (1) In a winding up there shall be paid in

Preferential payments.

priority to all other debts—

(a) all revenue, taxes, cesses and rates, whether payable to the Crown or to a local authority, due from the company at the date hereinafter mentioned and having become due and payable within the twelve months next before that date;

(b) all wages or salary of any clerk or servant in respect of service rendered to the company within the two months next before the said date, not exceeding one thousand rupees for each clerk or servant; and

(c) all wages of any labourer or workman, not exceeding five hundred rupees for each, whether payable for time or piecework, in respect of services rendered to the company within the two months next before the said date.

(2) The foregoing debts shall—

(a) rank equally among themselves and be paid in full, unless the assets are insufficient to meet them, in which case they shall abate in equal proportion; and

(b) so far as the assets of the company available for payment of general creditor are insufficient to meet them, have priority over the claims of holders of debentures under any floating charge created by the company, and be paid accordingly out of any property comprised in or subject to that charge.

(3) Subject to the retention of such sums as may be necessary for the costs and expenses of the winding up, the foregoing debts shall be discharged forthwith so far as the assets are sufficient to meet them.

(4) In the event of a landlord or other person distraining or having distrained on any goods or effects of the company within three months next before the date of a winding up order, the debts to which priority is given by this section shall be a first charge on the goods or effects so distrained on, or the proceeds of the sale thereof:

Provided that in respect of any money paid under any such charge the landlord or other person shall have the same rights of priority as the person to whom the payment is made.

(5) The date hereinbefore in this section referred to is—

(a) in the case of a company ordered to be wound up compulsorily which had not previously commenced to be wound up voluntarily, the date of the winding up order; and

(b) in any other case, the date of the commencement of the winding up.

231. (1) Any transfer, delivery of goods, payment, execution or other act relating to property which would, if made or done by or against an individual, be deemed in his insolvency a fraudulent

Fraudulent preference.

Sec. 229.—Mutual dealings, what constitute—Moneys dealt with in different capacities. See 8 Lah. 105.

Secs. 229 and 230.—Priority as regards Crown debts are not confined to the debts specifically mentioned in S. 230, but extends to all debts by virtue of S. 229 of that Act read with S. 49 of the Presidency Towns Insolvency Act. 29 Bom. L. R. 1446.

Per Curiam.—“Having regard to the different and various activities of Government in this coun-

try of a commercial nature, the legislature might well consider whether the law in India should not be brought in line with the law prevailing in England and by express enactment confine the preferential treatment of Crown debts to the debts mentioned in S. 230.” 29 Bom. L. R. 1446 = A. I. R. 1927 Bom. 606.

Sec. 230.—See 24 A. L. J. 347 = 93 I. C. 93 = A. I. R. 1926 All. 397.

Sec. 231.—See 10 S. L. R. 123 = 37 I. C. 250; 2 L. 102; 45 P. R. 1919.

preference, shall, if made or done by or against a company, be deemed, in the event of its being wound up, a fraudulent preference of its creditors, and be invalid accordingly.

(2) For the purposes of this section the presentation of a petition for winding up in the case of a winding up by or subject to the supervision of the Court and a resolution for winding up in the case of a voluntary winding up, shall be deemed to correspond with the act of insolvency in the case of an individual.

(3) Any transfer or assignment by a company of all its property to trustees for the benefit of all its creditors shall be void.

232. (1) Where any company is being wound up by or subject to the supervision of the Court, any attachment, distress or execution put in force without leave of the Court against the estate or effects of the company after the commencement of

Avoidance of certain attachments, executions, etc.

winding up shall be void.

(2) Nothing in this section applies to proceedings by the Government.

233. Where a company is being wound up a floating charge on the undertaking or property of the company created within three months of the commencement of the winding up shall, unless it

Effect of floating charge.

is proved that the company immediately after the creation of the charge was solvent, be invalid except to the amount of any cash paid to the company at the time of, or subsequently to the creation of, and in consideration for, the charge, together with interest on that amount at the rate of five per cent. per annum.

234. (1) The liquidator may, with the sanction of the Court when the company

General scheme of liquidation may be sanctioned.

is being wound up by the Court or subject to the supervision of the Court, and with the sanction of an extraordinary resolution of the company in the case of a voluntary

winding up, do the following things or any of them :

(i) pay any classes of creditors in full ;

(ii) make any compromise or arrangement with creditors or persons claiming to be creditors or having or alleging themselves to having any claim, present or future whereby the company may be rendered liable ;

(iii) compromise all calls and liabilities to calls, debts and liabilities capable of resulting in debts, and all claims, present or future, certain or contingent subsisting or supposed to subsist between the company and a contributory or alleged contributory or other debtor or person apprehending liability to the company, and all questions in any way relating to or affecting the assets or the winding up of the company, on such terms as may be agreed, and take any security for the discharge of any such call, debt, liability or claim, and give a complete discharge in respect thereof.

(2) The exercise by the liquidator of the powers of this section shall be subject to the control of the Court, and any creditor or contributory may apply to the Court with respect to any exercise or proposed exercise of any of these powers.

235. (1) Where, in the course of winding up a company, it appears that any

Power of Court to assess damages against delinquent directors, etc.

person who has taken part in the formation or promotion of the company, or any past or present director, manager or liquidator, or any officer of the company has misapplied or retained or become liable or accountable for any money

Sec. 232.—A sale of the assets of a company after the winding-up order, in execution of decree passed before the order, without permission of court is voidable at the instance of the Liquidator 2 Pat. L. J. 77=1 Pat. L. W. 241=38 f. C. 91=1917 Pat. 315. An execution sale of immoveable property of company held long before applying for winding-up is valid as against the Official Liquidator. 19 A. L. J. 262=60 I. C. 763=43 All. 433. If a liquidator appears in a case without the permission of the winding-up Court, he runs the risk of having to pay the costs in case of failure. (*Ibid.*)

Sec. 234.—See 4 Lah. 239=77 I. C. 338=1924 Lah. 148 ; 77 I. C. 724=1923 Lah. 85.

Sec. 235.—(1882) 8. 214—Section does not apply to recover rent due, from a director who rented company's premises in his private capacity. 85 I. C. 126=1925 Lah. 104. Scope of. See Application against representative of deceased director if valid—Remedy by separate suit where application is barred—Analogy of English Law, 8 Lah. 549. A claim for compensation for misfeasance under S. 235 is governed by Art. 36 of the Lim. Act, 69 I. C. 255=1924 Lah. 285. On this section see also 23 A. L. J. 473=47

or property of the company, or been guilty of any misfeasance or breach of trust in relation to the company, the Court may, on the application of the liquidator, or of any creditor or contributory, examine into the conduct of the promoter, director, manager, liquidator or officer, and compel him to repay or restore the money or property or any part thereof respectively with interest at such rate as the Court think just, or to contribute such sum to the assets of the company by way of compensation in respect of the misapplication, retainer, misfeasance or breach of trust, as the Court thinks just.

(2) This section shall apply notwithstanding that the offence is one for which the offender may be criminally responsible.

(3) The Indian Limitation Act, 1908, shall apply to an application under this section as if such application were a suit.

236. If any director, manager, officer or contributory of any company being wound up destroys, mutilates, alters or falsifies or fraudulently secretes any books, papers or securities, or makes, or is privy to the making of, any false or fraudulent entry in any register book of account or document belonging to the company with intent to defraud or deceive any person, he shall be liable to imprisonment for a term which may extend to seven years, and shall also be liable to fine.

237. (1) If it appears to the Court in the course of a winding up by or subject to the supervision of the Court that any past or present director, manager, officer or member of the company has been guilty of any offence in relation to the company for which he is criminally responsible, the Court may, on the application of any person interested in the winding up, or of its own motion, direct the official liquidator or the liquidator (as the case may be) to prosecute for the offence, and may order the costs and expenses to be paid out of the assets of the company.

(2) If it appears to the liquidator in the course of a voluntary winding up that any past or present director, manager, officer or member of the company has been

All. 669=88 I. C. 785=1925 All. 519, 41 C. L. J. 443=88 I. C. 672=1925 Cal. 852; 1925 Lah. 194; 2 O. W. N. 920, and the English cases cited therein. S. 235 does not create any new right or liability and time begins to run from the date of the misfeasance for which compensation is sought. 69 I. C. 255=1924 Lah. 285. *See also* S. Lah. 167. Before taking any proceedings against the Directors of a company under Ss 214 and 216 it must be shown that the company was prejudiced by the act of Directors. 28 P. L. R. 1917=39 I. C. 769. Where the Managing Director of a Bank induces the share-holders to pay a dividend partly out of what was really capital, he "misapplied" the company's money and is guilty of misfeasance and breach of trust and could be compelled by the court to contribute a reasonable sum by way of compensation. 16 Cr. L. J. 473=29 I. C. 105=28 P. R. (Cr.) 1915. *See also* 92 I. C. 50=A. I. R. 1926 Oudh 153; "wilful neglect or default", meaning of. A. I. R. 1926 Oudh 243. A Director is not a trustee of loans advanced by a company before his acceptance of office, as such. 27 I. C. 594=60 P. R. 1915. General Board of a Bank delegating its powers of sanctioning loans to a Committee of Directors—Committee sanctioning loans to a man of no means—Personal liability of Directors of General Board—Misfeasance—Wilful neglect or default, meaning of—Breach of trust. 13 O. L. J. 568=1 Luck. 334. S. 214 (now S. 235) applies to the conduct of the Director as such and anything done by him during that period in his capacity as a debtor cannot be made a ground of liability under the section. 59

P. L. R. 1915=46 P. W. R. 1915=27 I. C. 594=60 P. R. 1915. Application against representative of deceased director not valid. 8 Lah. L. J. 376=97 I. C. 783=27 Punj. L. R. 676=A. I. R. 1926 Lah. 624. Whether the auditors of a company are its officers within S. 214 must be decided with reference to the particulars facts, and especially to the articles of association dealing with the duties of auditors and their relationship to the company. 18 I. C. 997=13 M. L. T. 282. An auditor doing the work of audit under an appointment as such by the company cannot be heard to say that his appointment was invalid and improper. 18 I. C. 997=13 M. L. T. 282. Position of secretary of company, *see* (1918) M. W. N. 1=6 L. W. 520. Where an auditor was appointed at a general meeting of share-holders without proper quorum, it is a mere irregularity and does not vitiate the appointment; so they are not only de-facto but also de-jure auditors and are liable for misfeasance. 7 Bur. L. T. 230=24 I. C. 431; [(1897) 1 Ch. 617; 66 L. J. Ch. 354; 76 L. T. 239; 45 W. R. 418 Foll.].

Secs. 235 and 237.—Application of official liquidator for examination of company's servants—Court calling for further particulars—Non-compliance—Criminal complaint pending application—Maintainability. 1 Luck. C. 653.

Sec. 237.—The fact that one of the members of a firm acting as managing agents of a company was punished in his individual capacity as a director of the company is no ground for not punishing him in his capacity as a member of the managing firm. 18 P. R. (Cr.) 1916=35 I. C. 482=17 Cr. L. J. 306.

guilty of any offence in relation to the company for which he is criminally responsible, the liquidator, with the previous sanction of the Court, may prosecute the offender, and all expenses properly incurred by him in the prosecution shall be payable out of the assets of the company in priority to all other liabilities.

238. If any person, upon any examination upon oath authorized under this Act, or in any affidavit, deposition or solemn affirmation, in or about the winding up of any company under this Act, intentionally gives false evidence, he shall be liable to imprisonment for a term which may extend to seven years, and shall also be liable to fine.

239. (1) Where by this Act the Court is authorized in relation to winding up to have regard to the wishes of creditors or contributories, as proved to it by any sufficient evidence, the Court may, if it thinks fit for the purpose of ascertaining those wishes, direct meetings of the creditors or contributories to be called, held and conducted in such manner as the Court directs, and may appoint a person to act as chairman of any such meeting and to report the result thereof to the Court.

(2) In the case of creditors, regard shall be had to the value of each creditor's debt.

(3) In the case of contributories, regard shall be had to the number of votes conferred on each contributory by the articles.

240. Where any company is being wound up, all documents of the company and of the liquidators shall, as between the contributories of the company, be *prima facie* evidence of the truth of all matters purport to be therein recorded.

241. After an order for a winding up by or subject to the supervision of the Court, the Court may make such order for inspection by creditors and contributories of the company of its documents as the Court thinks just, and any documents in the possession of the company may be inspected by creditors or contributories accordingly, but not further or otherwise.

242. (1) When a company has been wound up and is about to be dissolved, the documents of the company and of the liquidators may be disposed of as follows (that is to say):—

(a) in the case of a winding up by or subject to the supervision of the Court, in such way as the Court directs;

(b) in the case of a voluntary winding up, in such way as the company by extraordinary resolution directs.

(2) After three years from the dissolution of the company, no responsibility shall rest on the company or the liquidators, or any person to whom the custody of the documents has been committed, by reason of the same not being forthcoming to any person claiming to be interested therein.

243. (1) Where a company has been dissolved, the Court may at any time within two years of the date of the dissolution, on an application being made for the purpose by the liquidator of the company or by any other person who appears to the Court to be interested, make an order, upon such terms as the Court thinks fit, declaring the dissolution to have been void, and there upon such proceedings may be taken as might have been taken if the company had not been dissolved.

(2) It shall be the duty of the person on whose application the order was made, within twenty-one days after the making of the order, to file with the registrar a certified copy of the order, and if that person fails so to do, he shall be liable to a fine not exceeding fifty rupees for every day during which the default continues.

Sec. 243.—Even after the dissolution of a company the liquidator can take action in respect of the assets realized after the dissolution of the company. 28 P. L. R. 1917=39 I. C. 769.

244. (1) Where a company is being wound up, if the winding up is not concluded within one year after its commencement, the liquidator shall, at such intervals as may be prescribed, until the winding up is concluded, file with the registrar a statement in the prescribed form and containing the prescribed particulars with respect to the proceedings in and position of the liquidation.

(2) Any person stating himself in writing to be a creditor or contributory of the company shall be entitled, by himself or by his agent, at all reasonable times, on payment of the prescribed fee, to inspect the statement, and to receive a copy thereof or extract therefrom; but any person untruthfully so stating himself to be a creditor or contributory shall be deemed to be guilty of an offence under section 182 of the Indian Penal Code, and shall be punishable accordingly on the application of the liquidator.

(3) If a liquidator fails to comply with the requirements of this section, he shall be liable to a fine not exceeding five hundred rupees for each day during which the default continues.

245. (1) Any affidavit required to be sworn under the provisions or for the purposes of this part may be sworn in British India, or elsewhere within the dominions of His Majesty, before any Court, Judge or person lawfully authorized to take and receive affidavits, or in any part of India other than British India before any Court authorized or continued by the Governor-General in Council, or in any place outside His Majesty's dominions before any of His Majesty's Consuls or Vice-Consuls.

(2) All Courts, Judges, Justices, Commissioners, and persons acting judicially in British India shall take judicial notice of the seal or stamp or signature (as the case may be) of any such Court, Judge, Person, Consul or Vice-Consul, attached, appended or subscribed to any such affidavit or to any other document to be used for the purposes of this Part.

Rules.

246. (1) The High Court may, from time to time, make rules consistent with this Act and with the Code of Civil Procedure, 1908, concerning the mode of proceedings to be had for winding up a company in such Court and in the Courts subordinate thereto, and for giving effect to the provisions hereinbefore contained as to the reduction of the capital and the sub-division of the shares of a company, [and shall make rules providing for all matters relating to the winding up of Companies which by this Act are to be prescribed]*

(2) Without prejudice to the generality of the foregoing power, the High Court may by such rules enable or require all or any of the powers and duties conferred and imposed on the Court by this Act, in respect of the matters following, to be exercised or performed by the official liquidator, and subject to the control of the Court, that is to say, the powers and duties of the Court in respect of—

(a) holding and conducting meetings to ascertain the wishes of creditors and contributories;

(b) settling lists of contributories and rectifying the register of members where required, and collecting and applying the assets;

(c) requiring delivery of property or documents to the liquidator;

(d) making calls;

(e) fixing a time within which debts and claims must be proved;

Sec. 246 (1882) S. 254.—The power of the High Court to make rules relating to company is limited to making rules concerning the mode of proceeding to be had for winding up a company and for giving effect to the provisions contained as to the reduction of capital and the sub-division of shares of company. 39 Bom. 383=17 Bom. L. R. 207. For the purpose of regulating

costs in other proceedings in company matters, recourse must be had to rules framed by the High Court under its general powers. (*Ibid.*) Company—Liquidation—Call on contributories—Notice—Necessity for. 44 I. C. 139=1 P. R. 1918.

*The words "and shall—prescribed" were added by Act XI of 1915.

Provided that the official liquidator shall not, without the special leave of the Court, rectify the register of members, and shall not make any call without the special leave of the Court.

Removal of defunct Companies from Register.

247. (1) Where the registrar has reasonable cause to believe that a company is not carrying on business or in operation, he shall send to the company by post a letter inquiring whether the company is carrying on business or in operation.

Registrar may strike defunct company off register.

(2) If the registrar does not within one month of sending the letter receive any answer thereto, he shall within fourteen days after the expiration of the month send to the company by post a registered letter referring to the first letter, and stating that no answer thereto has been received and that, if an answer is not received to the second letter within one month from the date thereof, a notice will be published in the local official Gazette with a view to striking the name of the company off the register.

(3) If the registrar either receives an answer from the company to the effect that it is not carrying on business or in operation, or does not within one month after sending the second letter receive any answer he may publish in the local official Gazette, and send to the company by post a notice, that, at the expiration of three months from the date of the notice, the name of the company mentioned therein will, unless cause is shown to the contrary, be struck off the register and the company will be dissolved.

(4) if, in any case where a company is being wound up, the registrar has reasonable cause to believe either that no liquidator is acting or that the affairs of the company are fully wound up, and the returns required to be made by the liquidator have not been made for a period of six consecutive months after notice by the registrar demanding the returns has been sent by post to the company, or to the liquidator at his last known place of business, the registrar may publish in the local official Gazette and send to the company a like notice as is provided in the last preceding sub-section.

(5) At the expiration of the time mentioned in the notice the registrar may unless cause to the contrary is previously shown by the company, strike its name off the register, and shall publish notice thereof in the local official Gazette and, on the publication in the local official Gazette of this notice, the company shall be dissolved: Provided that the liability (if any) of every director and member of the company shall continue and may be enforced as if the company had not been dissolved.

(6) If a company or any member or creditor thereof feels aggrieved by the company having been struck off the register, the Court, on the application of the company or member or creditor, may, if satisfied that the company was at the time of the striking off carrying on business or in operation, or otherwise that it is just that the company be restored to the register, order the name of the company to be restored to the register, and thereupon the company shall be deemed to have continued in existence as if its name had not been struck off; and the Court may by the order give such directions and make such provisions as seem just for placing the company and all other persons in the same position as nearly as may be as if the name of the company had not been struck off.

(7) A letter or notice under this section may be addressed to the company at its registered office, or, if no office has been registered, to the care of some director, manager or other officer of the company, or, if there is no director, manager or other officer of the company whose name and address are known to the registrar, may be sent to each of the persons who subscribed the memorandum, addressed to him at the address mentioned in the memorandum.

PART VI.

REGISTRATION OFFICE AND FEES.

248. (1) For the purposes of the registration of companies under this Act, there shall be offices at such places as the Local Government thinks fit, and no company shall be registered except at an office within the province in which, by the memorandum, the registered office of the company is declared to be established.

Registration offices.

(2) The Local Government may appoint such registrars and assistant registrars as it thinks necessary for the registration of companies under this Act, and may make regulations with respect to their duties.

(3) The salaries of the persons appointed under this section shall be fixed by the Local Government.

(4) The Local Government may direct a seal or seals to be prepared for the authentication of documents required for or connected with the registration of companies.

(5) Any person may inspect the documents kept by the registrar on payment of such fees as may be appointed by the Local Government, not exceeding one rupee for each inspection ; and any person may require a certificate of the incorporation of any company, or a copy or extract of any other document or any part of any other document, to be certified by the registrar on payment for the certificate, certified copy or extract, of such fees as the Local Government may appoint, not exceeding three rupees for a certificate of incorporation and not exceeding six annas for every hundred words or fractional part thereof required to be copied.

(6) Whenever any act is by this Act directed to be done to or by the registrar it shall, until the Local Government otherwise directs, be done to or by the existing registrar of joint-stock companies or in his absence to or by such persons as the Local Government may for the time being authorize ; but, in the event of the Local Government altering the constitution of the existing registry offices or any of them, any such act shall be done to or by such officer and at such place with reference to the local situation of the registered offices of the companies to be registered as the Local Government may appoint.

249. (1) There shall be paid to the registrar in respect of the several matters mentioned in Table B in the First Schedule the several fees therein specified, or such smaller fees as the Governor-General in Council may direct.

(2) All fees paid to the registrar in pursuance of this Act shall be accounted for to the Crown.

PART VII.

APPLICATION OF ACT TO COMPANIES FORMED AND REGISTERED UNDER FORMER COMPANIES ACTS.

250. In the application of this Act to existing companies, it shall apply in the same manner in the case of a limited company, other than a company limited by guarantee, as if the company had been formed, and registered under this Act as a company limited by shares ; in the case of a company limited by guarantee as if the company had been formed and registered under this Act as a company limited by guarantee ; and, in the case of a company other than a limited company, as if the company had been formed and registered under this Act as an unlimited company ;

Provided that—

(1) nothing in Table A in the First Schedule shall apply to a company formed and registered under Act XIX of 1857 and Act VII of 1860, or either of them, or under the Indian Companies Act, 1866, or the Indian Companies Act, 1882 ;

(2) reference, express or implied, to the date of registration shall be construed as a reference to the date at which the company was registered under Act No. XIX of 1857 and Act No. VII of 1860, or either of them, or under the Indian Companies Act, 1866, or the Indian Companies Act, 1882, as the case may be.

251. This Act shall apply to every company registered but not formed under Act No. XIX of 1857 and Act No. VII of 1860 or either of them, or under the Indian Companies Act, 1866, or the Indian Companies Act, 1882, in the same manner as it is hereinafter in this Act declared to apply to companies registered but not formed under this Act :

Provided that reference, express or implied, to the date of registration shall be construed as a reference to the date at which the company was registered under the said Acts or any of them.

252. A company registered under Act XIX of 1857 and Act VII of 1860 or either of them may cause its shares to be transferred in the manner hitherto in use, or in such other manner as the company may direct.

PART VIII.

COMPANIES AUTHORIZED TO REGISTER UNDER THIS ACT.

253. (1) With the exceptions and subject to the provisions mentioned and contained in this section,—

(i) any company consisting of seven or more members, which was in existence on the first day of May, eighteen hundred and eighty-two, including any company registered under Act No. XIX of 1857 and Act No. VII of 1860 or either of them, and

(ii) any company formed after the date aforesaid whether before or after the commencement of this Act, in pursuance of any Act of Parliament or Act of the Governor-General in Council other than this Act, or of Letters Patent, or being otherwise duly constituted according to law, and consisting of seven or more members ; may at any time register under this Act as an unlimited company or as a company limited by shares, or as a company limited by guarantee ; and the registration shall not be invalid by reason that it has taken place with a view to the company being wound up :

(2) Provided as follows:—

(a) a company having the liability of its members limited by Act of Parliament or Act of the Governor-General in Council or by Letters Patent, and not being a joint-stock company as hereinafter defined shall not register in pursuance of this section ;

(b) a company having the liability of its members limited by Act of Parliament or Act of the Governor-General in Council or by Letters Patent shall not register in pursuance of this section as an unlimited company or as a company limited by guarantee ;

(c) a company that is not a joint-stock company as hereinafter defined shall not register in pursuance of this section as a company limited by shares ;

(d) a company shall not register in pursuance of this section without the assent of a majority of such of its members as are present in person or by proxy (in cases where proxies are allowed by the articles) at a general meeting summoned for the purpose ;

(e) where a company not having the liability of its members limited by Act of Parliament or Act of the Governor-General in Council or by Letters Patent is about to register as a limited company, the majority required to assent as aforesaid shall consist of not less than three-fourths of the members present in person or by proxy at the meeting ;

(f) where a company is about to register as a company limited by guarantee, the assent to its being so registered shall be accompanied by a resolution declaring that each member undertakes to contribute to the assets of the company, in the event of its being wound up while he is a member, or within one year afterwards, for payment of the debts and liabilities of the company contracted before he ceased to be a member, and of the costs and expenses of winding up, and for the adjustment of the rights of the contributories among themselves such amount as may be required not exceeding a specified amount.

(3) In computing any majority under this section when a poll is demanded regard shall be had to the number of votes to which each member is entitled according to the articles.

(4) A company registered under the Indian Companies Act, 1882, shall not be registered in pursuance of this section.

254. For the purposes of this Part as far as relates to registration of companies as companies limited by shares, a joint-stock company

Definition of " joint-stock company."

means a company having a permanent paid up or nominal share capital of fixed amount divided into shares, also of

fixed amount, or held and transferable as stock, or divided and held partly in one way and partly in the other, and formed on the principle of having for its members the holders of those shares or that stock, and no other persons; and such a company, when registered with limited liability under this Act, shall be deemed to be a company limited by shares.

255. Before the registration in pursuance of this part of a joint-stock company there shall be delivered to the registrar the following documents (that is to say):—

(1) a list showing the names, addresses and occupations of all persons who on a day named in the list, not being more than six clear days before the day of registration were members of the company, with the addition of the shares or stock held by them respectively, distinguishing, in cases where the shares are numbered, each share by its number;

(2) a copy of any Act of Parliament, Act of the Governor-General in Council, Royal Charter, Letters Patent, deed of settlement, contract of co-partnery or other instrument constituting or regulating the company; and

(3) if the company is intended to be registered as a limited company, a statement specifying the following particulars (that is to say):—

(a) the nominal share capital of the company and the number of shares into which it is divided or the amount of stock of which it consists;

(b) the number of shares taken and the amount paid on each share;

(c) the name of the company, with the addition of the word "Limited" as the last word thereof; and

(d) in the case of a company intended to be registered as a company limited by guarantee, the resolution declaring the amount of the guarantee.

Requirements for registration by other than joint stock companies.

256. Before the registration in pursuance of this Part of the company not being a joint stock company, there shall be delivered to the registrar—

(1) a list showing the names, addresses and occupations of the directors of the company; and

(2) a copy of any Act of Parliament, Act of the Governor-General in Council, Letters Patent, deed of settlement, contract of copartnery or other instrument constituting or regulating the company; and

(3) in the case of a company intended to be registered as a company limited by guarantee, a copy of the resolution declaring the amount of the guarantee.

257. The lists of members and directors and any other particulars relating to the company required to be delivered to the registrar shall be duly verified by the declaration of any two or more directors or other principal officers of the company.

Authentication of statement of existing companies.

258. The registrar may require such evidence as he thinks necessary for the purpose of satisfying himself whether any company proposing to be registered is or is not a joint-stock company as hereinbefore defined.

Registrar may require evidence as to nature of company.

259. (1) Where a banking company, which was in existence on the first day of May eighteen hundred and eighty-two proposes to register as a limited company, it shall at least thirty days before so registering, give notice of its intention so to register to every person who has a banking account with the company, either by delivery of the notice to him, or by posting it to him at, or delivering it at, his last known address.

On registration of banking company with limited liability, notice to be given to customers.

(2) If the company omits to give the notice required by this section, then as between the company and the person for the time being interested in the account in respect of which the notice ought to have been given, and so far as respects the account down to the time at which notice is given, but not further or otherwise, the certificate of registration with limited liability shall have no operation.

260. No fees shall be charged in respect of the registration in pursuance of this Part of a company if it is not registered as a limited company, or if before its registration as a limited company the liability of the shareholders was limited by some Act of Parliament or Act of the Governor-General in Council or by Letters Patent.

261. When a company registers in pursuance of this Part with limited liability, the word "Limited" shall form and be registered as part of its name.

262. On compliance with the requirements of this Part with respect to registration, and on payment of such fees, if any, as are payable under Table B in the First Schedule, the registrar shall certify under his hand that the company applying for registration is incorporated as a company under this Act, and in the case of a limited company that it is limited, and thereupon the company shall be incorporated, and shall have perpetual succession and a common seal.

263. All property, moveable and immoveable, including all interests and rights in, to and out of property, moveable and immoveable, and including obligations and actionable claims as may belong to or be vested in a company at the date of its registration in pursuance of this Part, shall, on registration, pass to and vest in the company as incorporated under this Act for all the estate and interest of the company therein.

264. The registration of a company in pursuance of this Part shall not affect the rights or liabilities of the company in respect of any debt or obligation incurred or any contract entered into, by, to, with, or on behalf of, the company before registration.

265. All suits and other legal proceedings which at the time of the registration of a company in pursuance of this Part are pending by or against the company, or the public officer or any member thereof, may be continued in the same manner as if the registration had not taken place; nevertheless execution shall not issue against the effects of any individual member of the company on any decree or order obtained in any such suit or proceeding; but, in the event of the property and effects of the company being insufficient to satisfy the decree or order, an order may be obtained for winding up the company.

266. When a company is registered in pursuance of this Part—

(i) all provisions contained in any Act of Parliament, Act of the Governor-General in Council, deed of settlement, contract of copartnership, Letters Patent, or other instrument constituting or regulating the company, including, in the case of a company registered as a company limited by guarantee, the resolution declaring the amount of the guarantee, shall be deemed to be conditions and regulations of the company, in the same manner and with the same incidence as if so much thereof as would, if the company had been formed under this Act, have been required to be inserted in the memorandum, were contained in a registered memorandum, and the residue thereof were contained in registered articles.

(ii) all the provisions of this Act shall apply to the company and the members, contributories and creditors thereof, in the same manner in all respects as if it had been formed under this Act, subject as follows (that is to say):—

(a) the regulations in Table A in the First Schedule shall not apply unless adopted by special resolution;

(b) the provisions of this Act relating to the numbering of shares shall not apply to any joint-stock company whose shares are not numbered;

(c) subject to the provisions of this section, the company shall not have power to alter any provision contained in any Act of Parliament or Act of the Governor-General in Council relating to the company;

(d) subject to the provisions of this section, the company shall not have power, without the sanction of the Governor-General in Council, to alter any provision contained in any Letters Patent relating to the company ;

(e) the company shall not have power to alter any provision contained in a Royal Charter or Letters Patent with respect to the objects of the company .

(f) in the event of the company being wound up, every person shall be a contributory, in respect of the debts and liabilities of the company contracted before registration, who is liable to pay or contribute to the payment of any debt or liability of the company contracted before registration, or to pay or contribute to the payment of any sum for the adjustment of the rights of the members among themselves in respect of any such debt or liability ; or to pay or contribute to the payment of the cost and expenses of winding up the company, so far as relates to such debts or liabilities as aforesaid; and every contributory shall be liable to contribute to the assets of the company, in the course of the winding up, all sums due from him in respect of any such liability aforesaid; and in the event of the death or insolvency of any contributory, the provisions of this Act with respect to the legal representatives and heirs of deceased contributories and with reference to the assignees of insolvent contributories, shall apply;

(iii) the provisions of this Act with respect to—

(a) the registration of an unlimited company as limited ;

(b) the powers of an unlimited company on registration as a limited company to increase the nominal amount of its share capital and to provide that a portion of its share capital shall not be capable of being called up except in the event of winding up;

(c) the power of a limited company to determine that a portion of its share capital shall not be capable of being called up except in the event of winding up ; shall apply notwithstanding any provisions contained in any Act of Parliament, Act of the Governor-General in Council, Royal Charter, deed of settlement, contract of co-partnery, Letters Patent or other instrument constituting or regulating the company;

(iv) nothing in this section shall authorize the company to alter any such provisions contained in any deed of settlement, contract of co-partnery, Letters Patent or other instrument constituting or regulating the company, as would, if the company had originally been formed under this Act, have been required to be contained in the memorandum and are not authorised to be altered by this Act ;

(v) Nothing in this act shall derogate from any lawful power of altering its constitution or regulations which may by virtue of any Act of Parliament, Act of the Governor-General in Council, deed of settlement, contract of co-partnery, Letters Patent or other instrument constituting or regulating the company, be vested in the company.

Power to substitute memorandum and articles for deed of settlement

267. (1) Subject to the provisions of this section, a company registered, in pursuance of this Part may by special resolution alter the form of its constitution by substituting a memorandum and articles for a deed of settlement.

(2) The provisions of this Act with respect to confirmation by the Court and registration of an alteration of the objects of a company shall, so far as applicable, apply to an alteration under this section with the following modifications :—

(a) there shall be substituted for the printed copy of the altered memorandum required to be filed with the registrar a printed copy of the substituted memorandum and articles; and

(b) on the registration of the alteration being certified by the registrar, the substituted memorandum and articles shall apply to the company in the same manner as if it were a company registered under this Act with that memorandum and those articles, and the company's deed of settlement shall cease to apply to the company.

(3) An alteration under this section may be made either with or without any alteration of the objects of the company under this Act.

(4) In this section the expression "deed of settlement" includes any contract of co-partnery or other instrument constituting or regulating the company, not being an

Act of Parliament, an Act of the Governor-General in Council, a Royal Charter or Letters patent.

268. The provisions of this Act with respect to staying and restraining suits and legal proceedings against a company at any time after the presentation of a petition for winding up and before the making of a winding up order shall, in the case of a company registered in pursuance of this Part, where the application to stay or restrain is by a creditor, extend to suits and legal proceedings against any contributory of the company.

269. Where an order has been made for winding up a company registered in pursuance of this part, no suit or other legal proceeding shall be commenced or proceeded with against the company or any contributory of the company in respect of any debt of the company, except by leave of the Court, and subject to such terms as the Court may impose.

PART IX.

WINDING UP OF UNREGISTERED COMPANIES.

270. For the purposes of this Part, the expression "unregistered company" shall not include a railway company incorporated by Act of Parliament or by an Act of the Governor-General in Council, nor a company registered under the Indian Companies Act, 1866, or under any Act repealed thereby, or under the Indian Companies Act, 1882, or under this Act, but, save as aforesaid, shall include any partnership, association or company consisting of more than seven members.

271. (1) Subject to the provisions of this Part, any unregistered company may be wound up under this Act, and all the provisions of this Act with respect to winding up shall apply to an unregistered company, with the following exceptions and additions.—

(i) an unregistered company shall, for the purpose of determining the Court having jurisdiction in the matter of the winding up, be deemed to be registered in the province where principal place of business is situate or, if it has a principal place of business situate in more than one province, then in each province, where it has a principal place of business; and the principal place of business situate in that province in which proceedings are being instituted shall, for all the purposes of the winding up, be deemed to be the registered office of the company ;

(ii) no unregistered company shall be wound up under this Act voluntarily or subject to supervision :

(iii) the circumstances in which an unregistered company may be wound up are as follows (that is to say) :—

(a) if the company is dissolved, or has ceased to carry on business or is carrying on business only for the purpose of winding up its affairs ;

(b) if the company is unable to pay its debts ;

(c) if the Court is of opinion that it is just and equitable that the company should be wound up ;

(iv) an unregistered company shall, for the purposes of this Act, be deemed to be unable to pay its debts—

(a) if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding five hundred rupees then due, has served on the company, by leaving at its principal place of business, or by delivering to the secretary, or some director, manager or principal officer of the company, or by otherwise serving in such manner as the Court may approve or direct, a demand under his hand requiring the company to pay the sum so due, and the company has for three weeks after the service of the demand neglected to pay the sum, or to secure or compound for it to the satisfaction of the creditor ;

Sec. 269, (1882) S. 242.—The dismissal of a suit against a registered company after liquidation is no bar to the maintenance of the claim before the Official Liquidator. 24 I. C. 99.

(b) if any suit or other legal proceeding has been instituted against any member for any debt or demand due or claimed to be due, from the company or from him, in his character of member, and notice in writing of the institution of the suit or other legal proceeding having been served on the company by leaving the same at its principal place of business or by delivering it to the secretary, or some director, manager or principal officer of the company or by otherwise serving the same in such manner as the Court may approve or direct, the company has not within ten days after service of the notice paid, secured or compounded for the debt or demand, or procured the suit or other legal proceeding to be stayed, or indemnified the defendant to his reasonable satisfaction against the suit or other legal proceeding, and against all costs, damages and expenses to be incurred by him by reason of the same ;

(c) if execution or other process issued on a decree or order obtained in any Court in favour of a creditor against the company, or any member thereof as such, or any person authorized to be sued as nominal defendant on behalf of the company, is returned unsatisfied ; and

(d) if it is otherwise proved to the satisfaction of the Court that the company is unable to pay its debts.

(2) Nothing in this Part shall affect the operation of any enactment which provides for any partnership, association or company being wound up, or being wound up as a company or as an unregistered company, under any enactment repealed by this Act, except that references in any such first-mentioned enactment to any such repealed enactment shall be read as references to the corresponding provision (if any) of this Act.

272. (1) In the event of an unregistered company being wound up, every person

Contributories in winding up of unregistered companies.

shall be deemed to be a contributory who is liable to pay or contribute to the payment of any debt or liability of the company, or to pay or contribute to the payment of any sum for the adjustment of the rights of the members among themselves, or to pay or contribute to the payment of the costs and expenses of winding up the company, and every contributory shall be liable to contribute to the assets of the company all sums due from him in respect of any such liability as aforesaid.

(2) In the event of any contributory dying or being adjudged insolvent, the provisions of this Act with respect to the legal representatives and heirs of deceased contributories, and to the assignees of insolvent contributories shall apply.

273. The provisions of this Act with respect to staying and restraining suits and

Power to stay or restrain Proceedings.

legal proceedings against a company at any time after the presentation of a petition for winding up and before the making of a winding up order shall, in the case of an unregistered company, where the application to stay or restrain is by a creditor, extend to suits and legal proceedings against any contributory of the company.

274. Where an order has been made for winding up an unregistered company,

Suits stayed on winding up order.

no suit or other legal proceedings shall be proceeded with or commenced against and contributory of the company in respect of any debt of the company, except by leave of

the Court, and subject to such terms as the Court may impose.

275. If an unregistered company has no power to sue and be sued in a common

Directions as to property in certain cases.

name, or if for any reason it appears expedient, the Court may by the winding up order, or by any subsequent order, direct that all or any part of the property, moveable or

immoveable, including all interests and rights in, to and out of property, moveable and immoveable, and including obligations and actionable claims as may belong to the company or to trustees on its behalf, is to vest in the official liquidator by his official name, and thereupon the property or the part thereof specified in the order shall vest accordingly ; and the official liquidator may, after giving such indemnity (if any) as the Court may direct, bring or defend in his official name any suit or other legal proceeding

relating to that property, or necessary to be brought or defended for the purposes of effectually winding up the company and recovering its property.

276. The provisions of this Part with respect to unregistered companies shall be in addition to, and not in restriction of, any provisions hereinbefore in this Act contained with respect to winding up companies by the Court, and the Court or official liquidator may exercise any powers or do any act in the case of unregistered companies which might be exercised or done by it or him in winding up companies formed and registered under this Act; but an unregistered company shall not, except in the event of its being wound up be deemed to be a company under this Act, and then only to the extent provided by this Part.

PART X.

COMPANIES ESTABLISHED OUTSIDE BRITISH INDIA.

277. (1) Every company incorporated outside British India which at the commencement of this Act has a place of business in British India, and every such company which after the commencement of this Act establishes such a place of business within British India shall, within six months from the commencement of this Act or within one month from the establishment of such place of business, as the case may be, file with the registrar in the province in which such place of business is situated,—

(a) a certified copy of the charter, statutes or memorandum and articles of the company, or other instrument constituting or defining the constitution of the company, and, if the instrument is not written in the English language, a certified translation thereof;

(b) the full address of the registered or principal office of the company;

(c) a list of the directors and managers (if any) of the company;

(d) the names and addresses of some one or more persons resident in British India authorized to accept on behalf of the company service of process and any notices required to be served on the company;

and, in the event of any alteration being made in any such instrument or in such address or in the directors or managers or in the names or addresses of any such persons as aforesaid, the company shall, within the prescribed time, file with the registrar a notice of the alteration.

(2) Any process or notice required to be served on the company shall be sufficiently served, if addressed to any person whose name has been so filed as aforesaid and left at or sent by post to the address which has been so filed.

(3) Every company to which this section applies shall in every year file with the registrar of the province in which the company has its principal place of business—

(i) in a case where by the law, for the time being in force, of the country in which the company is incorporated such company is required to file with the public authority an annual balance sheet,—a copy of that balance sheet; or

(ii) in a case where no such provision is made by the law, for the time being in force, of the country in which the company is incorporated,—such a statement in the form of a balance-sheet as such company would if it were a company formed and registered under this Act, be required to file in accordance with the provisions of this Act:

Provided that the Governor-General in Council may, by notification¹ in the Gazette of India subject to such restrictions and conditions, if any, as he may therein prescribe, exempt any such company or any class of such companies from this requirement.

(4) Every company to which this section applies and which uses the word "Limited" as part of its name, shall—

¹ See. 277 (3) (Prov.).—¹ For notification exemptions of sub-section (3), see Gazette of India, 1914, Pt. I, p. 258.

(a) in every prospectus inviting subscriptions for its share or debentures in British India state the country in which the company is incorporated ; and

(b) conspicuously exhibit on every place where it carries on business in British India the name of the company and the country in which the company is incorporated in letters easily legible in English characters and also, if any place where it carries on business is beyond the local limits of the ordinary original civil jurisdiction of a High Court, in the characters of one of the vernacular languages used in that place ; and

(c) have the name of the company and of the country in which the company is incorporated mentioned in legible English characters in all bill heads and letter paper, and in all notices, advertisements and other official publications of the company.

(5) If any company to which this section applies fails to comply with any of the requirements of this section, the company, and every officer or agent of the company, shall be liable to a fine not exceeding five hundred rupees or, in the case of a continuing offence, fifty rupees for every day during which the default continues.

(6) For the purposes of this section—

(a) the expression “certified” means certified in the prescribed manner to be a true copy or a correct translation ;

(b) the expression “place of business” includes a share transfer or share registration office ;

(c) the expression “director” includes any person occupying the position of director, by whatever name called ; and

(d) the expression “prospectus” means any prospectus, notice, circular, advertisement or other invitation, offering to the public for subscription or purchase any shares or debentures of the company.

(7) There shall be paid to the registrar for registering any document required by this section to be filed with him a fee of five rupees or such smaller fee as may be prescribed.

PART XI.

SUPPLEMENTAL.

Legal proceedings, offences, etc.

Cognizance of offences.

278. (1) No Court inferior to that of a Presidency Magistrate or a Magistrate of the first class shall try any offence against this Act.

(2) If any offence which by this Act is declared to be punishable by fine only is committed by any person within the local limits of the ordinary original civil jurisdiction of the High Courts of Judicature at Fort William, Madras and Bombay, such offence shall be punishable upon summary conviction by any Presidency Magistrate of the place at which such Court is held.

(3) Notwithstanding anything in the Code of Criminal Procedure, 1898, every offence against this Act shall, for the purposes of the said Code, be deemed to be non-cognizable.

279. The Court imposing any fine under this Act may direct that the whole or any part thereof be applied in or towards payment of the costs of the proceedings, or in or towards the rewarding of the person on whose information the fine is recovered.

280. Where a limited company is plaintiff or petitioner in any suit or other legal proceeding, any Court having jurisdiction in the matter may, if it appears that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs, and may stay all proceedings until the security is given.

281. If in any proceeding before any Court against a director of a company for negligence or breach of trust it appears to such Court that the director is or may be liable in respect of the negligence or breach of trust, but has acted honestly and reasonably, and ought fairly to be excused for the negligence or breach of trust, that

Power to require limited company to give security for costs.

Power of Court to grant relief in certain cases.

Court may relieve him, either wholly or partly, from his liability on such terms as the Court may think proper.

282. Whoever in any return, report, certificate, balance-sheet or other document,

Penalty for false statement. required by or for the purposes of any of the provisions of this Act wilfully makes a statement false, in any material particular, knowing it to be false, shall be punishable with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

283. If any person or persons trade or carry on business under any name or title of which "Limited" is the last word, that person, or

Penalty for improper use of word, "Limited." those persons shall, unless duly incorporated with limited liability, be liable to a fine not exceeding fifty rupees for every day upon which that name or title has been used.

284 The provisions of this Act with respect to winding up shall not apply to

Saving of pending proceedings for winding up.

any company of which the winding up has commenced before the commencement of this Act, but every such company shall be wound up in the same manner and with the same incidents as if this Act had not been passed, and, for the purpose of the winding up, the Indian Companies Act, 1882, shall be deemed to remain in full force.

285. Every instrument of transfer of other document made before the commence-

Saving of document.

ment of this Act in pursuance of any enactment hereby repealed, shall be of the same force as if this Act had not been passed, and for the purposes of that instrument or document the repealed enactment shall be deemed to remain in full force.

Former registration offices, registers and registrars, continued.

286. (1) The offices existing at the commencement of this Act for registration of joint-stock companies shall be continued as if they had been established under this Act.

(2) Registers of companies kept in any such existing offices shall respectively be deemed part of the registers of companies to be kept under this Act.

(3) The existing registrars, assistant registrars and officers in those offices shall, during the pleasure of the Local Government, hold the offices and receive the salaries hitherto held and received by them, but subject to any regulations of the Local Government with regard to the execution of their duties.

Savings for Indian Life Assurance Companies Act, 1912, and Provident Insurance Societies Act, 1912.

287. Nothing in this Act shall affect the provisions of the Indian Life Assurance Companies Act, 1912, or of the Provident Insurance Societies Act, 1912.

Construction of "registrar of joint-stock companies" in Act XXI of 1860.

288. In sections 1 and 18 of Act No. XXI of 1860 (for the registration of Literary Scientific and Charitable Societies), the words "registrar of joint-stock companies" shall be construed to mean the registrar under this Act.

Sec. 282—False Balance Sheet.—Bad or doubtful debts not shown under the head of book debt.—Secret reserve fund not entered under liabilities is offence, 29 Bom. L.R. 722.

Sec. 284—SCOPE AND EFFECT OF SECTION. 43 I.C. 642. Winding up under former Act—Application for leave of court for suit against company—Procedure. 18 A.L.J. 296=58 I.C. 607; See also 20 P.R. 1915=29 I.C. 272; 28 I.C. 70=40 P.L.R. 1915. Winding up commenced before new Act came into force—Procedure is that under the old Act. 68 I.C. 792=1923 Lah. 98. See also 97 I.C. 295=24 L. W. 35. When proceedings in winding up were commenced Act VIII of 1913 came into force. S. 284 lays down that for all purposes connected with the winding up, the old Act should be re-

garded as in force. 68 I.C. 792=1923 Lah. 98. An appeal against the order of District Judge must be filed and notice served in such a case within 3 weeks of the order as laid down in S. 169 of the old Act. 68 I.C. 792=1923 Lah. 98. The plain and rational meaning of S. 284 is that the new Act operates on proceedings arising out of the windings up which commenced after its enforcement (*i. e.*, April 1, 1914) and that no part of the Act applies to pending liquidations. 20 P.R. 1915=29 I.C. 272 See also 28 I.C. 90=40 P.L.R. 1915. Appeal—Notice not served in three weeks—Second appeal—Procedure—Old Law. 28 I.C. 90=40 P.L.R. 1915. See also cases on the point under S. 202, Costs, See 39 Bom. 383.

Act not to apply to Banks of Bengal, Madras or Bombay.

289. Save as provided in sections 188 and 189, nothing in this Act shall be deemed to apply to the Bank of Bengal, the Bank of Madras and the Bank of Bombay.

290. (1) The enactments mentioned in the Fourth Schedule are hereby repealed to the extent specified in the fourth column thereof :

Provided that the repeal shall not affect—

(a) the incorporation of any company registered under any enactment hereby repealed ; nor

(b) Table B in the Schedule annexed to Act No. XIX of 1857, or any part thereof, so far as the same applies to any company existing at the commencement of this Act ; nor

(c) Table A in the First Schedule annexed to the Indian Companies Act, 1882, or any part thereof so far as the same applies to any company existing at the commencement of this Act.

(2) All fees directed, resolutions passed and other things duly done under any enactment hereby repealed, shall be deemed to have been directed, passed or done under this Act.

(3) The mention of particular matters in this section or in any other section of this Act shall not prejudice the general application of section 6 of the General Clauses Act, 1897, with regard to the effect of repeals.

SCHEDULES.

THE FIRST SCHEDULE.

(See sections 2, 17, 18, 79, 266.)

TABLE A.

REGULATIONS FOR MANAGEMENT OF A COMPANY, LIMITED BY SHARES.

Preliminary.

1. In these regulations, unless the context otherwise requires, expressions defined in the Indian Companies Act, 1913, or any statutory modification thereof in force at the date at which these regulations become binding on the company, shall have the meaning so defined ; and words importing the singular shall include the plural, and *vice versa*, and words importing the masculine gender shall include females, and words importing persons shall include bodies corporate.

Business.

2. The directors shall have regard to the restrictions on the commencement of business imposed by section 103 of the Indian Companies Act, 1913, if, and so far, as those restrictions are binding upon the company.

Shares.

3. Subject to the provisions, if any, in that behalf of the memorandum of association of the company, and without prejudice to any special rights previously conferred on the holders of existing shares in the company, any share in the company may be issued with such preferred, deferred or other special rights, or such restrictions, whether in regard to dividend, voting, return of share capital, or otherwise, as the company may from time to time by special resolution determine.

4. If at any time the share capital is divided into different classes of shares the rights attached to any class (unless otherwise provided by the terms of issue of the shares of that class) may be varied with the consent in writing of the holders of three-fourths of the issued shares of that class, or with the sanction of an extraordinary resolution passed at a separate general meeting of the holders of the shares of the class. To every such separate general meeting the provisions of these regulations relating to general meetings shall *mutatis mutandis* apply, but so that the necessary quorum shall be two persons at least holding or representing by proxy one third of the issued shares of the class.

5. No share shall be offered to the public for subscription except upon the terms that the amount payable on application shall be at least five per cent. of the nominal amount of the share ; and the directors shall, as regards any allotment of shares, duly comply with such of the provisions of sections 101 and 104 of the Indian Companies Act, 1913, as may be applicable thereto.

6. Every person whose name is entered as a member in the register of members shall, without payment, be entitled to a certificate under the common seal of the company specifying the share or shares held by him and the amount paid up thereon : Provided that, in respect of a share or shares held jointly by several persons the company shall not be bound to issue more than one certificate, and delivery of a certificate for a share to one of several joint holders shall be sufficient delivery to all.

7. If a share certificate is defaced, lost or destroyed, it may be renewed on payment of such fee, if any, not exceeding eight annas, and on such terms, if any, as to evidence and indemnity as the directors think fit.

8. No part of the funds of the company shall be employed in the purchase of, or in loans upon the security of, the company's shares.

Lien.

9. The company shall have a lien on every share (not being a fully-paid share) for all moneys (whether presently payable or not) called or payable at a fixed time in respect of that share, and the company shall also have a lien on all shares (other than fully-paid shares) standing registered in the name of a single person, for all moneys presently payable by him or his estate to the company; but the directors may at any time declare any share to be wholly or in part exempt from the provisions of this clause. The company's lien, if any, on a share shall extend to all dividends payable thereon.

10. The company may sell, in such manner as the director thinks fit, any share on which the company has lien, but no sale shall be made unless some sum in respect of which the lien exists is presently payable, nor until the expiration of fourteen days after a notice in writing, stating and demanding payment of such part of amount in respect of which the lien exists as is presently payable has been given to the registered holder for the time being of the share, or the person entitled by reason of his death or insolvency to the share.

11. The proceeds of the sale shall be applied in payment of such part of the amount in respect of which the lien exists as is presently payable, and the residue shall (subject to a like lien for sums not presently payable as existed upon the shares prior to the sale) be paid to the person entitled to the shares, at the date of the sale. The purchaser shall be registered as the holder of the shares, and he shall not be bound to see to the application of the purchase-money, nor shall his title to the shares be affected by any irregularity or invalidity in the proceedings in reference to the sale.

Calls on shares.

12. The directors may, from time to time make calls upon the members in respect of any moneys unpaid on their shares, provided that no call shall exceed one-fourth of the nominal amount of the share, or be payable at less than one month from the last call; and each member shall (subject to receiving at least fourteen days' notice specifying the time or times of payments) pay to the company at the time or the times so specified the amount called on his shares.

13. The joint-holders of a share shall be jointly and severally liable to pay all calls in respect thereof.

14. If a sum called in respect of a share is not paid before or on the day appointed for payment thereof, the person from whom the sum is due shall pay interest upon the sum at the rate of five per cent. per annum from the day appointed for the payment thereof to the time of the actual payment, but the directors shall be at liberty to waive payment of that interest wholly or in part.

15. The provisions of these regulations as to payment of interest shall apply in the case of non-payment of any sum which, by the terms of issue of a share, becomes payable at a fixed time, whether on account of the amount of the share, or by way of premium, as if the same had become payable by virtue of a call duly made and notified.

16. The directors may make arrangements on the issue of shares for a difference between the holders in the amount of calls to be paid and in the times of payment.

17. The directors may, if they think fit, receive from any member willing to advance the same, all or any part of the moneys uncalled and unpaid upon any shares held by him; and upon all or any of the moneys so advanced may until the same would, but for such advance, become presently payable, pay interest at such rate (not exceeding, without the sanction of the company in general meeting, six per cent.) as may be agreed upon between the member paying the sum in advance and the directors.

Transfer and transmission of shares.

18. The instrument of transfer of any share in the company shall be executed both by the transferor and transferee, and the transferor shall be deemed to remain holder of the share until the name of the transferee is entered in the register of members in respect thereof.

19. Shares in the company shall be transferred in the following form, or in any usual or common form which directors shall approve.

I, A B of _____, in consideration of the sum of rupees _____ paid to me by C D of _____ (hereinafter called "the said transferee"), do hereby transfer to the said transferee the share [or shares] numbered _____ in the undertaking called the _____

Company, Limited, to hold unto the said transferee, his executors, administrators and assigns, subject to the several conditions on which I held the same at the time of the execution thereof, and I, the said transferee, do hereby agree to take the said share [or shares] subject to the conditions aforesaid. As witness our hands the day of _____

Witness to the signatures of, etc.

20. The director may decline to register any transfer of shares, not being fully paid shares, to a person of whom they do not approve, and may also decline to register any transfer of shares on which the company has a lien. The directors may also suspend the registration of transfers during the fourteen days immediately preceding the ordinary general meeting in each year. The directors may decline to recognize any instrument of transfer unless—

(a) a fee not exceeding two rupees is paid to company in respect thereof; and

(b) the instrument of transfer is accompanied by the certificate of the shares to which it relates, and such other evidence as the directors may reasonably require to show the right of the transferor to make the transfer.

21. The executors or administrators of a deceased sole holder of a share shall be the only persons recognized by the company as having any title to the share. In the case of a share registered in the names of two or more holders, the survivors or survivor, or the executors or administrators of

the deceased survivor, shall be the only persons recognized by the company as having any title to the share.

22. Any person becoming entitled to a share in consequence of the death or insolvency of a member shall, upon such evidence being produced as may from time to time be required by the directors, have the right, either to be registered as a member in respect of the share or, instead of being registered himself, to make such transfer of the share as the deceased or insolvent person could have made; but the directors shall, in either case, have the same right to decline or suspend registration as they would have had in the case of a transfer of the share by the deceased or insolvent person before the death or insolvency.

23. A person becoming entitled to a share by reason of the death or insolvency of the holder shall be entitled to the same dividends and other advantages to which he would be entitled if he were the registered holder of the share, except that he shall not, before being registered as a member in respect of the share, be entitled in respect of it to exercise any right conferred by membership in relation to meetings of the company.

Forfeiture of shares.

24. If a member fails to pay any call or instalment of a call on the day appointed for payment thereof, the directors may, at any time thereafter during such time as any part of such call or instalment remains unpaid, serve a notice on him requiring payment of so much of the call or instalment as is unpaid, together with any interest which may have accrued.

25. The notice shall name a further day (not earlier than the expiration of fourteen days from the date of the notice) on or before which the payment required by the notice is to be made and shall state that, in the event of non-payment at or before the time appointed, the shares in respect of which the call was made will be liable to be forfeited.

26. If the requirements of any such notice as aforesaid are not complied with, any share in respect of which the notice has been given may at any time thereafter, before the payment required by the notice has been made, be forfeited by a resolution of the directors to that effect.

27. A forfeited share may be sold or otherwise disposed of on such terms and in such manner as the directors think fit, and at any time before a sale or disposition the forfeiture may be cancelled on such terms as the directors think fit.

28. A person whose shares have been forfeited shall cease to be a member in respect of the forfeited shares, but shall, notwithstanding, remain liable to pay to the company all moneys which, at the date of forfeiture, were presently payable by him to the company in respect of the shares, but his liability shall cease if and when the company received payment in full of the nominal amount of the shares.

29. A duly verified declaration in writing that the declarant is a director of the company, and that a share in the company has been duly forfeited on a date stated in the declaration, shall be conclusive evidence of the facts therein stated as against all persons claiming to be entitled to the share, and that declaration, and the receipt of the company for the consideration, if any given for the share on the sale or disposition thereof, shall constitute a good title to the share, and the person to whom the share is sold or disposed of shall be registered as the holder of the share and shall not be bound to see to the application of the purchase-money (if any), nor shall his title to the share be affected by any irregularity or invalidity in the proceedings in reference to the forfeiture, sale or disposal of the share.

30. The provisions of these regulations as to forfeiture shall apply in the case of non-payment of any sum which, by the terms of issue of a share, becomes payable at a fixed time, whether on account of the amount of the share, or by way of premium, as if the same had been payable by virtue of a call duly made and notified.

Conversion of shares into stock.

31. The directors may, with the sanction of the company previously given in general meeting, convert any paid-up shares into stock, and may with the like sanction re-convert any stock into paid-up shares of any denomination.

32. The holders of stock may transfer the same, or any part thereof in the same manner, and subject to the same regulations, as, and subject to which the shares from which the stock arose might previously to conversion have been transferred, or as near thereto as circumstances admit; but the directors may from time to time fix the minimum amount of stock transferable, and restrict or forbid the transfer of fractions of that minimum, but the minimum shall not exceed the nominal amount of the shares from which the stock arose.

33. The holders of stock shall, according to the amount of the stock held by them have the same rights, privileges and advantages as regards dividends, voting at meetings of the company, and other matters, as if they held the shares from which the stock arose, but no such privilege or advantage (except participation in the dividends and profits of the company) shall be conferred by any such aliquot part of stock as would not, if existing in shares, have conferred that privileges or advantage.

34. Such of the regulations of the company (other than those relating to share-warrants), as are applicable to paid-up shares shall apply to stock, and the words "share" and "shareholder" therein shall include "stock" and "stockholder."

Share-warrants.

35. The Company may issue share-warrants, and accordingly the directors may in their discretion, with respect to any share which is fully paid up, on application in writing signed by the person registered as holder of the share, and authenticated by such evidence (if any) as the directors

may from time to time require as to the identity of the person signing the request, and on receiving the certificate (if any) of the share, and the amount of the stamp duty on the warrant and such fee as the directors may from time to time require, issue under the company's seal a warrant, duly stamped, stating that the bearer of the warrant is entitled to the shares therein specified, and may provide by coupons or otherwise for the payment of dividends, or other moneys on the shares included in the warrant.

36. A share-warrant shall entitle the bearer to the shares included in it and the share shall be transferred by the delivery of the share-warrant, and the provisions of the regulations of the company with respect to transfer and transmission of shares shall not apply thereto.

37. The bearer of a share-warrant shall, on surrender of the warrant to the company for cancellation, and on payment of such sum as the directors may from time to time prescribe, be entitled to have his name entered as a member in the register of members in respect of the shares included in the warrant.

38. The bearer of a share warrant may at any time deposit the warrant at the office of the company, and so long as the warrant remains so deposited, the depositor shall have the same right of signing a requisition for calling a meeting of the company, and of attending and voting and exercising the other privileges of a member at any meeting held after the expiration of two clear days from the time of deposit, as if his name were inserted in the register of members as the holder of the shares included in the deposited warrant. Not more than one person shall be recognized as depositor of the share-warrant. The company shall, on two days' written notice, return the deposited share-warrant to the depositor.

39. Subject as herein otherwise expressly provided, no person shall, as bearer of a share-warrant, sign a requisition for calling a meeting of the company or attend, or vote or exercise any other privilege of a member at a meeting of the company, or be entitled to receive any notices from the company; but the bearer of a share-warrant shall be entitled in all other respects to the same privileges and advantages as if he were named in the register of members as the holder of the shares included in the warrant, and he shall be a member of the company.

40. The directors may from time to time make rules as to the terms on which (if they shall think fit) a new share warrant or coupon may be issued by way of renewal in case of defacement, loss or destruction.

Alteration of Capital.

41. The directors may, with the sanction of an extraordinary resolution of the company increase the share capital by such sum, to be divided into shares of such amount, as the resolution shall prescribe.

42. Subject to any direction to the contrary that may be given by the resolution sanctioning the increase of share capital, all new shares shall, before issue be offered to such persons as at the date of the offer are entitled to receive notices from the company of general meetings in proportion, as nearly as the circumstances admit, to the amount of the existing shares to which they are entitled. The offer shall be made by notice specifying the number of shares offered, and limiting a time within which the offer, if not accepted, will be deemed to be declined, and after the expiration of that time, or on the receipt of an intimation from the person to whom the offer is made that he declines to accept the shares offered, the directors may dispose of the same in such manner as they think most beneficial to the company. The directors may likewise so dispose of any new shares which by reason of the ratio which the new shares bear to shares held by persons entitled to an offer of new shares, cannot, in the opinion of the directors, be conveniently offered under this article.

43. The new shares shall be subject to the same provisions with reference to the payment of calls, lien, transfer, transmission, forfeiture and otherwise as the shares in the original share capital.

44. The company may, by special resolution,—

(a) consolidate and divide its share capital into shares of larger amount than its existing shares;

(b) by sub-division of its existing shares or any of them, divide the whole or any part of its share capital into shares of smaller amount than is fixed by the memorandum of association, subject, nevertheless, to the provisions of paragraph (d) of sub-section (1) of section 50 of the Indian Companies Act, 1913;

(c) cancel any shares which, at the date of the passing of the resolution have not been taken or agreed to be taken by any person;

(d) reduce its share capital in any manner and with, and subject to, any incident authorized, and consent required by law.

General Meetings.

45. The statutory general meeting of the Company shall be held within the period required by section 77 of the Indian Companies Act, 1913.

46. A general meeting shall be held once in every year at such time (not being more than fifteen months after the holding of the last preceding general meeting) and place as may be prescribed by the company in general meeting, or, in default, at such time in the month following that in which the anniversary of the company's incorporation occurs, and at such place as the directors shall appoint. In default of a general meeting being so held, a general meeting shall be held in the month next following, and may be called by any two members in the same manner as nearly as possible as that in which meetings are to be called by the directors.

47. The above mentioned general meetings shall be called ordinary meetings; all other general meetings shall be called extraordinary.

48. The directors may, whenever they think fit, call an extraordinary general meeting, and extraordinary general meetings shall also be called on such requisition, or in default, may be called

by such requisitionists, as provided by section 78 of the Indian Companies Act, 1913. If at any time there are not within British India sufficient directors capable of acting to form a quorum, any director or any two members of the company may call an extraordinary general meeting in the same manner as nearly as possible as that in which meetings may be called by the directors.

Proceedings at General Meeting.

49. Fourteen days' notice at the least (exclusive of the day on which the notice is served or deemed to be served, but inclusive of the day for which notice is given) specifying the place, the day and the hour of meeting and, in case of special business, the general nature of that business, shall be given in manner hereinafter mentioned, or in such other manner, if any, as may be prescribed by the company in general meeting, to such persons as are, under the regulations of the company, entitled to receive such notices from the company; but the non-receipt of the notice by any member shall not invalidate the proceedings at any general meeting.

50. All business shall be deemed special that is transacted at an extraordinary meeting, and all that is transacted at an ordinary meeting with the exception of sanctioning a dividend, the consideration of the accounts, balance-sheets and the ordinary report of the directors, and auditors, the election of directors and other officers in the place of those retiring by rotation and the fixing of the remuneration of the auditors.

51. No business shall be transacted at any general meeting unless a quorum of members is present at the time when the meeting proceeds to business; save as herein otherwise provided, three members personally present shall be a quorum.

52. If within half an hour from the time appointed for the meeting a quorum is not present, the meeting if called upon the requisition of members, shall be dissolved; in any other case, it shall stand adjourned to the same day in the next week at the same time and place, and, if at the adjourned meeting a quorum is not present within half an hour from the time appointed for the meeting, the members present shall be a quorum.

53. The chairman, if any, of the board of directors shall preside as chairman at every general meeting of the company.

54. If there is no such chairman or if at any meeting he is not present within fifteen minutes after the time appointed for holding the meeting, or is unwilling to act as chairman, the members present shall choose some one of their number to be chairman.

55. The chairman may, with the consent of any meeting at which a quorum is present (and shall if so directed by the meeting), adjourn the meeting from time to time and from place to place, but no business shall be transacted at any adjourned meeting other than the business left unfinished at the meeting from which the adjournment took place. When a meeting is adjourned for ten days or more, notice of the adjourned meeting shall be given as in the case of an original meeting. Save as aforesaid, it shall not be necessary to give any notice of an adjournment or of the business to be transacted at an adjourned meeting.

56. At any general meeting a resolution put to the vote of the meeting shall be decided on a show of hands, unless a poll is (before or on the declaration of the result of the show of hands) demanded by at least three members, and unless a poll is so demanded, a declaration by the chairman that a resolution has, on a show of hands, been carried, or carried unanimously, or by a particular majority or lost, and an entry to that effect in the book of the proceedings of the company shall be conclusive evidence of the fact, without proof of the number or proportion of the votes recorded in favour of, or against, that resolution.

57. If a poll is duly demanded, it shall be taken in such manner as the chairman directs, and the result of the poll shall be deemed to be the resolution of the meeting at which the poll was demanded.

58. In the case of an equality of votes, whether on a show of hands or on a poll, the chairman of the meeting at which the show of hands takes place or at which the poll is demanded, shall be entitled to a second or casting vote.

59. A poll demanded on the election of a chairman or on a question of adjournment shall be taken forthwith. A poll demanded on any other question shall be taken at such time as the chairman of the meeting directs.

Votes of Members.

60. On a show of hands every member present in person shall have one vote. On a poll every member shall have one vote for each share of which he is the holder.

61. In the case of joint-holders, the vote of the senior who tenders a vote, whether in person or by proxy, shall be accepted to the exclusion of the votes of the other joint-holders; and for this purpose seniority shall be determined by the order in which the names stand in the register of members.

62. A member of unsound mind, or in respect of whom an order has been made by any Court having jurisdiction in lunacy, may vote, whether on a show of hands or on a poll, by his committee or other legal guardian and any such committee or guardian may, on a poll, vote by proxy.

63. No member shall be entitled to vote at any general meeting unless all calls or other sums presently payable by him in respect of shares in the company have been paid.

64. On a poll votes may be given either personally or by proxy: Provided that no company shall vote by proxy as long as a resolution of its directors in accordance with the provisions of section 80 of the Indian Companies Act, 1913, is in force.

65. The instrument appointing a proxy shall be in writing under the hand of the appointor or of his attorney duly authorized in writing, or, if the appointor is a corporation, either under the common seal, or under the hand of an officer or attorney so authorized. No person shall act as a proxy

unless either he is entitled on his own behalf to be present and vote at the meeting at which he acts as proxy, or he has been appointed to act at that meeting as proxy for a corporation.

66. The instrument appointing a proxy and the power-of-attorney or other authority (if any), under which it is signed or a notarially certified copy of that power or authority shall be deposited at the registered office of the company not less than seventy-two hours before the time for holding the meeting at which the person named in the instrument purposes to vote, and in default the instrument of proxy shall not be treated as valid.

67. An instrument appointing a proxy may be in the following form or in any other form which the directors shall approve :—

Company, Limited.

" I of in the district of , being a member of the
Company, Limited, hereby appoint of
as my proxy to vote for me and on my behalf at the [ordinary or extraordinary, as the
case may be] general meeting of the company to be held on the day of and
at any adjournment thereof."

Signed this day of

Directors.

68. The number of the directors and the names of the first directors shall be determined in writing by a majority of the subscribers of the memorandum of association.

69. The remuneration of the directors shall from time to time be determined by the company in general meeting.

70. The qualification of a director shall be the holding of at least one share in the company, and it shall be his duty to comply with the provisions of section 85 of the Indian Companies Act, 1913.

Powers and duties of Directors.

71. The business of the company shall be managed by the directors, who may pay all expenses incurred in getting up and registering the company, and may exercise all such powers of the company as are not, by the Indian Companies Act, 1913, or any statutory modification thereof for the time being in force, or by these articles, required to be exercised by the company in general meeting, subject nevertheless to any regulation of these articles, to the provisions of the said Act, and to such regulations being not inconsistent with the aforesaid regulations or provisions, as may be prescribed by the company in general meeting; but no regulation made by the company in general meeting shall invalidate any prior act of the directors which would have been valid if that regulation had not been made.

72. The directors may from time to time appoint one or more of their body to the office of managing director or manager for such term and at such remuneration (whether by way of salary, or commission, or participation in profits, or partly in one way and partly in another) as they may think fit, and a director so appointed shall not, while holding that office, be subject to retirement by rotation, or taken into account in determining the rotation of retirement of directors, but his appointment shall be subject to determination *ipso facto* if he ceases from any cause to be a director, or if the company in general meeting resolve that his tenure of the office of managing director or manager be determined.

73. The amount for the time being remaining undischarged of moneys borrowed or raised by the directors for the purposes of the company (otherwise than by the issue of share capital) shall not at any time exceed the issued share capital of the company without the sanction of the company in general meeting.

74. The directors shall duly comply with the provisions of the Indian Companies Act, 1913, or any statutory modification thereof for the time being in force, and in particular with the provisions in regard to the registration of the particulars of the mortgages and charges affecting the property of the company or created by it, and to keeping a register of the directors, and to sending to the registrar an annual list of members, and a summary of particulars relating thereto and notice of any consolidation or increase of share capital, or conversion of shares into stock, and copies of special resolutions and a copy of the register of directors and notifications of any changes therein.

75. The director shall cause minutes to be made in books provided for the purpose—

(a) of all appointments of officers made by the directors;

(b) of the names of the directors present at each meeting of the directors and of any committee of the directors;

(c) of all resolutions and proceedings at all meetings of the company, and, of the directors and of committee of directors;

and every director present at any meeting of directors or committee of directors shall sign his name in a book to be kept for that purpose.

The Seal.

76. The seal of the company shall not be affixed to any instrument except by the authority of a resolution of the board of directors, and in the presence of at least two directors and of the secretary or such other person as the directors may appoint for the purpose; and those two directors and secretary or other person as aforesaid shall sign every instrument to which the seal of the company is so affixed in their presence.

Disqualifications of Directors.

77. The office of director shall be vacated if the director—

(a) ceases to be a director by virtue of section 85 of the Indian Companies Act, 1913, or

- (b) holds or any partner of his, or the firm of which he is a member, holds any other office of profit under the company except that of managing director or manager ; or
 (c) is adjudged insolvent ; or
 (d) is found lunatic or becomes of unsound mind ; or
 (e) is concerned or participates in the profits of any contract with the company ; or
 (f) is punished with imprisonment for a term exceeding six months :

Provided, however, that no director shall vacate his office by reason of his being a member of any company which has entered into contracts with, or done any work for, the company of which he is director, but a director shall not vote in respect of any such contract or work, and if he does so vote, his vote shall not be counted.

Rotation of Directors.

78. At the first ordinary meeting of the company, the whole of the directors shall retire from office, and at the ordinary meeting in every subsequent year, one-third of the directors for the time being or, if their number is not three or a multiple of three, then the number nearest to one-third shall retire from office.

79. The directors to retire in every year shall be those who have been longest in office since their last election but as between persons who became directors on the same day those to retire shall (unless they otherwise agree among themselves) be determined by lot.

80. A retiring director shall be eligible for re-election.

81. The company at the general meeting at which a director retires in manner aforesaid may fill up the vacated office by electing a person thereto.

82. If at any meeting at which any election of directors ought to take place, the places of the vacating directors are not filled up, the meeting shall stand adjourned till the same day in next week at the same time and place, and, if at the adjourned meeting the places of the vacating directors are not filled up, the vacating directors or such of them as have not had their places filled up shall be deemed to have been re-elected at the adjourned meeting.

83. The company may from time to time in general meeting increase or reduce the number of directors, and may also determine in what rotation the increased or reduced number is to go out of office.

84. Any casual vacancy occurring on the board of directors may be filled up by the directors, but the person so chosen shall be subject to retirement at the same time as if he had become a director on the day on which the director in whose place he is appointed was last elected a director.

85. The directors shall have power at any time, and from time to time, to appoint a person as an additional director who shall retire from office at the next following ordinary general meeting, but shall be eligible for election by the company at that meeting as an additional director.

86. The company may by extraordinary resolution remove any director before the expiration of his period of office, and may by ordinary resolution appoint another person in his stead ; the person so appointed shall be subject to retirement at the same time as if he had become a director on the day on which the director in whose place he is appointed was last elected a director.

Proceedings of Directors.

87. The directors may meet together for the despatch of business, adjourn and otherwise regulate their meetings, as they think fit. Questions arising at any meeting shall be decided by a majority of votes. In case of an equality of votes, the chairman shall have a second or casting vote. A director may, and the secretary on the requisition of a director shall, at any time, summon a meeting of directors.

88. The quorum necessary for the transaction of the business of the directors, may be fixed by the directors, and unless so fixed shall (when the number of directors exceeds three) be three.

89. The continuing directors may act notwithstanding any vacancy in their body, but if and so long as their number is reduced below the number fixed by or pursuant to the regulations of the company as the necessary quorum of directors, the continuing directors may act for the purpose of increasing the number of directors to that number, or of summoning a general meeting of the company, but for no other purpose.

90. The directors may elect a chairman of their meetings and determine the period for which he is to hold office ; but if no such chairman is elected, or if at any meeting the chairman is not present within five minutes after the time appointed for holding the same the directors present may choose one of their number to be chairman of the meeting.

91. The directors may delegate any of their powers to committees consisting of such member or members of their body as they think fit ; any committee so [formed]¹ shall, in the exercise of the powers so delegated, conform to any regulations that may be imposed on them by the directors.

92. A committee may elect a chairman of their meetings ; if no such chairman is elected or if at any meeting the chairman is not present within five minutes after the time appointed for holding the same, the members present may choose one of their number to be chairman of the meeting.

93. A committee may meet and adjourn as they think proper. Questions arising at any meeting shall be determined by a majority of votes of the members present, and in case of an equality of votes, the chairman shall have a second or casting vote.

94. All acts done by any meeting of the directors or of a committee of directors, or by any person acting as a director, shall, notwithstanding that it be afterwards discovered that there was some defect in the appointment of any such directors or persons acting as aforesaid, or that they or

¹ In para 91, the word "formed" was substituted for "found" by the Repealing and Amending Act X of 1914 Sch. I.

any of them were disqualified, be as valid as if every such person had been duly appointed and was qualified to be a director.

Dividends and Reserve.

95. The company in general meeting may declare dividends, but no dividends shall exceed the amount recommended by the directors.

96. The directors may from time to time pay to the members such interim dividends as appear to the directors to be justified by the profits of the company.

97. No dividends shall be paid otherwise than out of profits.

98. Subject to the rights of persons (if any) entitled to shares with special rights as to dividends, all dividends shall be declared and paid according to the amounts paid on the shares, but if and so long as nothing is paid up on any of the shares in the company, dividends may be declared and paid according to the amounts of the shares. No amount paid on a share in advance of calls shall while carrying interest, be treated for the purposes of this article as paid on the share.

99. The directors may, before recommending any dividend, set aside out of the profits of the company such sums as they think proper as a reserve or reserves which shall, at the discretion of the directors, be applicable for meeting contingencies, or for equalizing dividends, or for any other purpose to which the profits of the company may be properly applied, and pending such applications may, at the like discretion, either be employed in the business of the company or be invested in such investments (other than shares of the company) as the directors may from time to time think fit.

100. If several persons are registered as joint-holders of share any one of them may give effectual receipts for any dividend payable on the share.

101. Notice of any dividend that may have been declared shall be given in manner herein-after mentioned to the persons entitled to share therein.

102. No dividend shall bear interest against the company.

Accounts.

103. The directors shall cause true accounts to be kept—

(a) of the sums of money received and expended by the company, and the matter in respect of which such receipt and expenditure takes place; and

(b) of the assets and liabilities of the company.

104. The books of account shall be kept at the registered office of the company, or at such other place or places as the directors think fit, and shall always be open to the inspection of the directors.

105. The director shall from time to time determine whether and to what extent and at what times and places and under what conditions or regulations the accounts and books of the company or any of them shall be open to the inspection of members not being directors, and no member (not being a director) shall have any right of inspecting any account or book or document of the company except as conferred by law or authorized by the directors or by the company in general meeting.

106. Once at least in every year the directors shall lay before the company in general meeting a profit and loss account for the period since the preceding account or (in the case of the first account) since the incorporation of the company, made up to a date not more than six months before such meeting.

107. The profit and loss account shall show, arranged under the most convenient heads, the amount of gross income, distinguishing the several sources from which it has been derived, and the amount of gross expenditure distinguishing the expenses of the establishment, salaries and other like matters. Every item of expenditure fairly chargeable against the year's income shall be brought into account, so that a just balance of profit and loss may be laid before the meeting, and, in cases where any item of expenditure which may in fairness be distributed over several years has been incurred in one year, the whole amount of such item shall be stated, with the addition of the reasons why only a portion of such expenditure is charged against the income of the year.

108. A balance sheet shall be made out in every year and laid before the company in general meeting made up to a date not more than six months before such meeting. The balance-sheet shall be accompanied by a report of the directors as to the state of the company's affairs, and the amount which they recommend to be paid by way of dividend, and the amount (if any) which they propose to carry to a reserve fund.

109. A copy of the balance-sheet and report shall, seven days previously to the meeting, be sent to the persons entitled to receive notices of general meetings in the manner in which notices are to be given hereunder.

110. The directors shall in all respects comply with the provisions of sections 130 to 135 of the Indian Companies Act, 1913, or any statutory modification thereof for the time being in force.

Audit.

111. Auditors shall be appointed and their duties regulated in accordance with sections 144 and 145 of the Indian Companies Act, 1913, or any statutory modification thereof for the time being in force.

Notices.

112. (1) A notice may be given by the company to any member either personally or by sending it by post to him to his registered address or (if he has no registered address in British India) to the address, if any, within British India supplied by him to the company for the giving of notices to him.

(2) Where a notice is sent by post, service of the notice shall be deemed to be effected by properly addressing, prepaying and posting a letter containing the notice and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.

113. If a member has no registered address in British India, and has not supplied to the company an address within British India for the giving of notices to him, a notice addressed to him and advertised in a newspaper circulating in the neighbourhood of the registered office of the company shall be deemed to be duly given to him on the day on which the advertisement appears.

114. A notice may be given by the company to the joint-holders of a share by giving the notice to the joint-holder named first in the register in respect of the share.

115. A notice may be given by the company to the persons entitled to a share in consequence of the death or insolvency of a member by sending it through the post in a prepaid letter addressed to them by name, or by the title of representatives of the deceased, or assignee of the insolvent or by any like description, at the address (if any) in British India supplied for the purpose by the persons claiming to be so entitled, or (until such an address has been so supplied) by giving the notice in any manner in which the same might have been given if the death or insolvency had not occurred.

116. Notice of every general meeting shall be given in some manner hereinbefore authorized to (a) every member of the company (including bearers of share-warrants) except those members who (having no registered address within British India) have not supplied to the company an address within British India for the giving of notices to them, and also to (b) every person entitled to a share in consequence of the death or insolvency of a member, who but for his death or insolvency would be entitled to receive, notice of the meeting. No other persons shall be entitled to receive notices of general meetings.

TABLE B.

(See sections 249 and 262.)

TABLE OF FEES TO BE PAID TO THE REGISTRAR.

I.—By a company having a share capital.

	RS. A. P
1. For registration of a company whose nominal share capital does not exceed Rs. 20,000, a fee of	40 0 0
2. For registration of a company whose nominal share capital exceeds Rs. 20,000 the above fee of forty rupees, with the following additional fees regulated according to the amount of nominal capital (that is to say)—	
For every 10,000 rupees of nominal share capital, or part of 10,000 rupees, after the first 20,000 rupees up to 50,000 rupees	20 0 0
For every 10,000 rupees of nominal share capital, or part of 10,000 rupees, after the first 50,000 rupees up to 1,00,000 rupees	5 0 0
For every 10,000 rupees of nominal share capital, or part of 10,000 rupees, after the first 1,00,000 rupees	1 0 0
3. For registration of any increase of share capital made after the first registration of the company, the same fees per 10,000 rupees or, part of 10,000 rupees, as would have been payable if such increased capital had formed part of the original share capital at the time of registration :	...
Provided that no company shall be liable to pay in respect of nominal share capital on registration, or afterwards, any greater amount of fees than 1,000 rupees taking into account, in the case of fees payable on an increase of share capital after registration, the fees paid on registration.	
4. For registration of any existing company, except such companies as are by this Act, exempted from payment of fees in respect of registration under this Act, the same fee as is charged for registering a new company	...
5. For filing any document by this Act required or authorized to be filed, other than the memorandum of the abstract required to be filed with the registrar by a receiver or the statement required to be filed with the registrar by the liquidator in a winding up	5 0 0
6. For making a record of any fact by this Act authorized or required to be recorded by the registrar, a fee of	5 0 0

II.—By a company not having a share capital.

1. For registration of a company whose number of members, as stated in the articles of association, does not exceed 20	40 0 0
2. For registration of a company whose number of members as stated in the articles of association, exceeds 20, but does not exceed 100	100 0 0
3. For registration of a company whose number of members, as stated in the articles of association, exceeds 100, but is not stated to be unlimited, the above fee of Rs. 100 with an additional Rs. 5 for every 50 members, or less number than 50 members, after the first 100.	...
4. For registration of a company in which the number of members is stated in the articles of association to be unlimited, a fee of	400 0 0

11.—By a company not having a share capital—cont.

	RS. A. P.
5. For registration of any increase on the number of members made after the registration of the company, the same fees as would have been payable if such increase had been stated in the articles of association at the time of registration	5 0 0
Provided that no one company shall be liable to pay on the whole a greater fee than Rs. 400 in respect of its number of members, taking into account the fees paid on the first registration of the company	....
6. For registration of any existing company except such companies as are by this Act exempted from payment of fees in respect of registration under this Act the same fee as is charged for registering a new company	....
7. For filing any document by this Act required or authorized to be filed, other than the memorandum or the abstract required to be filed with the registrar by a receiver or the statement required to be filed with the registrar by the liquidator in a winding up	5 0 0
8. For making a record of any fact by this Act authorized or required to be recorded by the registrar, a fee of	5 0 0

THE SECOND SCHEDULE.

(See section 98.)

STATEMENT IN LIEU OF PROSPECTUS.

filed by

pursuant to section 98 of the Indian Companies Act, 1913.

Presented for filing by

THE INDIAN COMPANIES ACT, 19

LIMITED,

LIMITED.

STATEMENT IN LIEU OF PROSPECTUS.

The nominal share capital of the company	..	Rs.	
Divided into	..	..	Shares of Rs. each.
			" " "
			" " "
Names, descriptions and addresses of directors or proposed directors and of the managers or proposed managers.	..		
Minimum subscription (if any) fixed by the memorandum or articles of association on which the company may proceed to allotment	..	..	
Number and amount of shares and debentures agreed to be issued as fully or partly paid up otherwise than in cash	..	1. Rs.	shares of fullaid
The consideration for the intended issue of those shares and debentures	..	..	2. Shares upon which Rs per share credited as paid.
			3. Debenture Rs.
			4. Consideration.
Names and addresses of (a) vendors of property purchased or acquired, (b) or proposed to be purchased or acquired by the company	..	..	
Amount (in cash, shares or debentures) payable to each separate vendor	..	..	
Amount (if any) paid or payable (in cash or shares or debentures) for any such property, specifying amount (if any) paid or payable for goodwill	..	..	Total purchase price .. Rs. Cash .. " Shares .. " Debentures .. " Goodwill .. Rs.

(a) For definition of vendor, see section 91 of the Indian Companies Act, 1913.

(b) See section 95 of the Indian Companies Act, 1913.

Amount (if any) paid or payable as commission for subscribing or agreeing to subscribe or procuring or agreeing to procure subscriptions for any shares or debentures in company of	Amount paid. ,, payable.
Rate of the commission	Rate per cent.
Estimated amount of preliminary expenses	Rs.
Amount paid or intended to be paid to any promoter. Consideration for the payment	Name of promoter Amount Rs. Consideration :—
Dates of, and parties to every material contract (other than contracts entered into in the ordinary course of the business intended to be carried on by the company or entered into more than two years before the filing of this statement)	
Time and place at which the contracts or copies thereof may be inspected	
Names and addresses of the auditors of the company (if any)	
Full particulars of the nature and extent of the interest of every director in the promotion of or in the property proposed to be acquired by the company, or, where the interest of such a director consists in being a partner in a firm, the nature and extent of the interest of the firm, with a statement of all sums paid or agreed to be paid to him or to the firm in cash or shares, or otherwise by any person either to induce him to become, or to qualify him as a director, or otherwise for services rendered by him or by the firm in connection with the promotion or formation of the company.	
Whether the articles contain any provisions precluding holders of shares or debentures receiving and inspecting balance sheets or reports of the auditors or other reports.	Nature of the provisions.

(Signature of the persons above-named as directors or proposed directors, or of their agents authorized in writing.)

THE THIRD SCHEDULE.

FORM A.

(See sections 6 and 151.)

MEMORANDUM OF ASSOCIATION OF A COMPANY, LIMITED BY SHARES.

- 1st.—The name of the company is "The Eastern Steam Packet Company, Limited."
- 2nd.—The registered office of the company will be situate in the Province of Bombay.
- 3rd.—The objects for which the company is established are "the conveyance of passengers and goods in ships or boats between such places as the company may from time to time determine, and the doing all such other things as are incidental or conducive to the attainment of the above object."
- 4th.—The liability of the members is limited.

5th.—The share capital of the company is two hundred thousand rupees, divided into one thousand shares of two hundred rupees each.

We, the several persons whose names and addresses are subscribed, are desirous of being formed into a company in pursuance of this memorandum of association, and we respectively agree to take the number of shares in the capital of the company set opposite our respective names.

Names, addresses and descriptions of subscribers.						Number of shares taken by each subscriber.
1. A B	of merchant	..	..	..		200
2. C D	"	..	..	..		25
3. E F	"	..	..	..		30
4. G H	"	..	..	..		40
5. I J	"	..	..	..		15
6. K L	"	..	..	..		5
7. M N	"	..	..	..		10
TOTAL SHARES TAKEN.						325

Dated the day of
Witness to the above signatures.

19 .

X. Y. of

FORM B.

(See sections 7 and 151.)

MEMORANDUM AND ARTICLES OF ASSOCIATION OF A COMPANY, LIMITED BY GUARANTEE,
AND NOT HAVING A SHARE CAPITAL.*Memorandum of Association.*

1st.—The name of the company is "The mutual Calcutta Marine Association, Limited"

2nd.—The registered office of the company will be situate in Calcutta.

3rd.—The objects for which the company is established are "the mutual insurance of ship belonging to members of the company and the doing all such other things as are incidental or conducive to the attainment of the above object."

4th.—The liability of the members is limited.

5th.—Every member of the company undertakes to contribute to the assets of the company in the event of its being wound up while he is a member, or within one year afterwards, for payment of the debts and liabilities of the company contracted before he ceases to be a member, and the costs, charges and expenses of winding up and for the adjustment of the rights of the contributories among themselves, such amount as may be required not exceeding one hundred rupees.

We, the several persons whose names and addresses are subscribed, are desirous of being formed into a company, in pursuance of this memorandum of association.

Names, Addresses and Descriptions of Subscribers.

- " 1. A B of
- " 2. C D of
- " 3. E F of
- " 4. G H of
- " 5. I J of
- " 6. K L of
- " 7. M N of

Dated the day of
Witness to the above signatures.

19 .

X. Y. of

ARTICLES OF ASSOCIATION TO ACCOMPANY PRECEDING MEMORANDUM OF ASSOCIATION.

Number of Members.

1. The company for the purpose of registration is declared to consist of five hundred members.
2. The directors hereinafter mentioned may, whenever the business or the association requires it, register an increase of members.

Definition of Members.

3. Every person shall be deemed to have agreed to become a member of the company who insures any ship or share in a ship in pursuance of the regulations hereinafter contained.

General Meetings.

4. The first general meeting shall be held at such time not being less than one month nor more than three months after the incorporation of the company, and at such place, as the directors may determine.

5. A general meeting shall be held once in every year at such time (not being more than fifteen months after the holding of the last preceding general meeting) and place as may be prescribed by the company in general meeting, or, in default, at such time in the month following that in which the anniversary of the company's incorporation occurs, and at such place, as the directors shall appoint. In default of a general meeting being so held, a general meeting shall be held, in the month next following and may be called by any two members in the same manner as nearly as possible as that in which meetings are to be called by the directors.

6. The above-mentioned general meetings shall be called ordinary meetings; all other general meetings shall be called extraordinary.

7. The directors may, whenever they think fit, and shall, on a requisition made in writing by five or more members, call an extraordinary general meeting.

8. Any requisition made by the members must state the object of the meeting proposed to be called, and must be signed by the requisitionists and deposited at the registered office of the company.

9. On receipt of the requisition the directors shall forthwith proceed to call a general meeting if they do not proceed to cause a meeting to be held within twenty-one days from the date of the requisition being so deposited, the requisitionists or any other five members may themselves call a meeting.

Proceedings at general meetings.

10. Fourteen days' notice at the least, specifying the place, the day and the hour of meeting and in case of special business the general nature of the business, shall be given to the members in manner hereinafter mentioned, or in such other manner (if any) as may be prescribed by the company in general meeting; but the non-receipt of such a notice by any member shall not invalidate the proceedings at any general meeting.

11. All business shall be deemed special that is transacted at an extraordinary meeting, and all that is transacted at an ordinary meeting, with the exception of the consideration of the accounts, balance-sheets and the ordinary report of the directors and auditors, the election of directors and other officers in the place of those retiring by rotation, and the fixing of remuneration of the auditors.

12. No business shall be transacted at any meeting except the declaration of a dividend, unless a quorum of members is present at the commencement of the business. The quorum shall be ascertained as follows (that is to say):—If the members of the company at the time of the meeting do not exceed ten in number, the quorum shall be five; if they exceed ten, there shall be added to the above quorum one for every five additional members with this limitation, that no quorum shall in any case exceed ten.

13. If within one hour from the time appointed for the meeting a quorum of members is not present, the meeting, if called on the requisition of the members, shall be dissolved; in any other case it shall stand adjourned to the same day in the following week at the same time and place; and if at such adjourned meeting a quorum of members is not present, it shall be adjourned *sine die*.

14. The chairman (if any) of the directors shall preside as chairman at every general meeting of the company.

15. If there is no such chairman, or if at any meeting he is not present at the time of holding the same, the members present shall choose some one of their number to be chairman of that meeting.

16. The chairman may, with the consent of the meeting, adjourn the meeting from time to time and from place to place, but no business shall be transacted at any adjourned meeting other than the business left unfinished at the meeting from which the adjournment took place.

17. At any general meeting, unless a poll is demanded by at least three members, a declaration by the chairman that the resolution has been carried, and an entry to that effect in the book of proceedings of the company, shall be conclusive evidence of the fact without proof of the number or proportion of the votes recorded in favour of or against the resolution.

18. If a poll is demanded in manner aforesaid, the same shall be taken in such manner as the chairman directs, and the result of the poll shall be deemed to be the resolution of the meeting at which the poll was demanded.

Votes of Members.

19. Every member shall have one vote and no more.

20. If any member is a lunatic or idiot, he may vote by his committee or other legal guardian.

21. No member shall be entitled to vote at any meeting unless all moneys due from him to the company have been paid.

22. On a poll votes may be given either personally or by proxy: Provided that no company shall vote by proxy as long as a resolution of its directors in accordance with the provisions of section 80 of the Indian Companies Act, 1913, is in force. A proxy shall be appointed in writing under the hand of the appointor, or, if such appointor is a corporation, under its common seal.

23. (1) No person shall act as a proxy unless he is a member, or unless he is appointed to act at the meeting as proxy for a corporation.

(2) The instrument appointing him shall be deposited at the registered office of the company not less than forty-eight hours before the time of holding the meeting at which he proposes to vote.

24. Any instrument appointing a proxy shall be in the following form:—

I, _____, of _____, being a Member of the
 _____ Company, Limited, hereby appoint _____ of _____
 as my proxy, to vote for me and on my behalf at the [ordinary or extraordinary as the case
 may be] general meeting of the company to be held on the _____ day of _____
 and at any adjournment thereof.
 Signed this _____ day of _____

Directors.

25. The number of the directors and the names of the first directors shall be determined by the subscribers of the memorandum of association.

26. Until directors are appointed, the subscribers of the memorandum of association shall, for all the purposes of the Indian Companies Act, 1913, be deemed to be directors.

Powers of Directors.

27. The business of the company shall be managed by the directors, who may exercise all such powers of the company as are not by the Indian Companies Act, 1913, or by any statutory modification thereof for the time being in force, or by these articles, required to be exercised by the company in general meeting; but no regulation made by the company in general meeting shall invalidate any prior act of the directors which would have been valid if that regulation had not been made.

Elections of Directors.

28. The directors shall be elected annually by the company in general meeting.

Business of Company.

(Here insert rules as to mode in which business of insurance is to be conducted.)

Audit.

29. Auditors shall be appointed and their duties regulated in accordance with sections 144 and 145 of the Indian Companies Act, 1913, or any statutory modification thereof for the time being in force, and for this purpose the said sections shall have effect as if the word "members" were substituted for "shareholders," and as if "first general meeting" were substituted for "statutory meeting."

Notices.

30. A notice may be given by the company to any member either personally or by sending it by post to him to his registered address.

31. Where a notice is sent by post, service of the notice shall be deemed to be effected by properly addressing, pre-paying and posting a letter containing the notice and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.

Names, Addresses and Descriptions of Subscribers.

- "1. A. B. of
- "2. C. D. of
- "3. E. F. of
- "4. G. H. of
- "5. I. J. of
- "6. K. L. of
- "7. M. N. of

Dated the day of 19 .
Witness to the above signatures.
X. Y., of

FORM C.

(See Sections 7 and 151.)

MEMORANDUM AND ARTICLES OF ASSOCIATION OF A COMPANY, LIMITED BY GUARANTEE, AND HAVING A SHARE CAPITAL.

Memorandum of Association.

1st.—The name of the company is "The Snowy Range Hotel Company, Limited."

2nd.—The registered office of the company will be situate in the province of Bengal.

3rd.—The objects for which the company is established are "the facilitating travelling in the Snowy Range, by providing hotels and conveyances by sea and by land for the accommodation of travellers and the doing all such other things as are incidental or conducive to the attainment of the above object."

4th.—The liability of the members is limited.

5th.—Every member of the company undertakes to contribute to the assets of the company in the event of its being wound up while he is a member, or within one year afterwards, for payment of the debts and liabilities of the Company, contracted, before he ceases to be a member, and the costs, charges and expenses of winding up the same and for the adjustment of the rights of the contributors amongst themselves, such amount as may be required, not exceeding fifty rupees.

6th.—The share capital of the company shall consist of five hundred thousand rupees, divided into five thousand shares of one hundred rupees each.

We, the several persons whose names and addresses are subscribed, are desirous of being formed into a company, in pursuance of this memorandum of association, and we respectively agree to take the number of shares in the capital of the company set opposite our respective names.

Names, Addresses and Descriptions of Subscribers.					Number of shares taken by each Subscriber.
" 1.	A. B. of	..	..	..	200
" 2.	C. D. of	..	..	..	25
" 3.	E. F. of	..	..	..	30
" 4.	G. H. of	..	..	..	40
" 5.	I. J. of	..	..	..	15
" 6.	K. L. of	..	..	..	5
" 7.	M. N. of	..	..	..	10
TOTAL SHARES TAKEN ..					325

Dated the .. day of

19 .

Witness to the above signatures.

X. Y., of

Articles of Association to accompany preceding Memorandum of Association.

1. The share capital of the company is five hundred thousand rupees, divided into five thousand shares of one hundred rupees each.
2. The directors may, with the sanction of the company in general meeting, reduce the amount of shares in the company.
3. The directors may, with the sanction of the company in general meeting, cancel any shares belonging to the company.
4. All the articles of Table A of the Indian Companies Act, 1913, shall be deemed to be incorporated with these articles and to apply to the company.

Names, Addresses and Descriptions of Subscribers.

- " 1. A. B. of .., merchant
- " 2. C. D. of
- " 3. E. F. of
- " 4. G. H. of
- " 5. I. J. of
- " 6. K. L. of
- " 7. M. N. of

Dated the .. day of

19 .

Witness to the above signatures.

X. Y., of

FORM D.

(See Sections 8 and 151.)

MEMORANDUM AND ARTICLES OF ASSOCIATION OF AN UNLIMITED COMPANY
HAVING A SHARE CAPITAL.

Memorandum of Association.

- 1st.—The name of the company is "The Patent Stereotype Company."
 - 2nd.—The registered office of the company will be situate in the Province of Bombay.
 - 3rd.—The objects for which the company is established are "the working of a patent method of founding and casting stereotype plates of which method P.Q. of Bombay is the sole patentee."
- We, the several persons whose names are subscribed, are desirous of being formed into a company in pursuance of this memorandum of association, and we, respectively, agree to take the number of shares in the capital of the company set opposite our respective names.

Names, Addresses and Descriptions of Subscribers.					Number of shares taken by each Subscriber.
" 1.	A. B. of	..	..	..	3
" 2.	C. D. of	..	..	..	2
" 3.	E. F. of	..	..	..	1
" 4.	G. H. of	..	..	..	2
" 5.	I. J. of	..	..	..	2
" 6.	K. L. of	..	..	..	1
" 7.	M. N. of	..	..	..	1
TOTAL SHARES TAKEN ..					12

Dated the _____ day of _____ 19 _____

Witness to the above signatures.

X. Y., of

Articles of Association to accompany the preceding Memorandum of Association.

1. The share capital of the company is twenty thousand rupees, divided into twenty shares of one thousand rupees each.

2. All the articles of Table A of the Indian Companies Act, 1913, shall be deemed to be incorporated with these articles and to apply to the company.

Names, Addresses and Descriptions of Subscribers.

" 1. A. B. of	, merchant.
" 2. C. D. of	
" 3. E. F. of	
" 4. G. H. of	
" 5. I. J. of	
" 6. K. L. of	
" 7. M. N. of	

Dated the _____ day of _____

19 _____

Witness to the above signatures.

X. Y., of

FORM E.

AS REQUIRED BY PART II OF THE ACT.

(See Section 32.)

Summary of Share Capital and shares of the Company, Limited, made up to the day of _____ 19 _____ (being the day of the first ordinary general meeting in 19 _____).

Nominal share capital Rs.	divided into ¹	{ shares of Rs.	each.
		{ shares of Rs.	each.
Total number of shares taken up ¹ to the	day of _____ 19 _____		
which number must agree with the total shown in the list as held by			
existing members			
Number of shares issued subject to payment wholly in cash			
Number of shares issued as fully paid up otherwise than in cash			
Number of shares issued as partly paid up to the extent of			
otherwise than in cash			
² There has been called up on each—of shares			Rs.
There has been called up on each—of shares			Rs.
There has been called up on each—of shares			Rs.
³ Total amount of calls received, including payments on application and allotment			Rs.
Total amount (if any) agreed to be considered as paid on shares which have been issued as fully paid up otherwise than in cash			Rs.
Total amount (if any) agreed to be considered as paid on shares which have been issued as partly paid up to the extent of			Rs.
Total amount of calls unpaid			Rs.
Total amount (if any) of sums paid by way of commission in respect of shares or debentures or allowed by way of discount since date of last summary			Rs.
Total amount (if any) paid on ⁴ shares forfeited			Rs.
Total amount of shares and stock for which share-warrants are outstanding			Rs.
Total amount of share-warrants issued and surrendered respectively since date of last summary			Rs.
Number of shares or amount of stock comprised in each share-warrant			Rs.
Total amount of debt due from the company in respect of all mortgages and charges which are required to be registered with the registrar under this Act			Rs.

List of persons holding shares in the _____ Company, Limited, on the _____ day of _____ 19 _____, and of persons who have held shares therein at any time since the date of the last return, showing their names and addresses and on account of the shares so held,

¹ When there are shares of different kinds or amounts (e.g., Preference and Ordinary or Rs. 200 or Rs. 100) state the numbers and nominal values separately.

² Where various amounts have been called or there are shares of different kinds, state them

separately.

³ Include what has been received or forfeited as well as on existing shares.

⁴ State the aggregate number of shares forfeited.

Folio in register ledger containing particulars.	NAMES, ADDRESSES AND OCCUPATION.				ACCOUNT OF SHARES.				REMARKS.		
	Name in full.	Father's name.	Address.	Occupation or caste.	¹ Number of shares held by existing Members at Date of Return.		⁴ Particulars of shares transferred since the date of the last return by persons who are still members.			⁴ Particulars of shares transferred since the date of the last return by persons who have ceased to be members.	
					Number. ²	Date of Registration of Transfer.	Number. ³	Date of Registration of Transfer.			

Names and addresses of the persons who are the Directors of the _____, Limited, on the day of _____ 19 _____.

Names.	Addresses.

Names and addresses of the persons who are the managers of the _____, Limited, on the day of _____ 19 _____.

Names.	Addresses.

NOTE.—Banking companies must add a list of all their places of business.

I, _____, do hereby certify that the above list and summary truly and correctly states the facts as they stood on _____ day of _____ 19 _____.

(Signature) —

(State whether director, manager or secretary.)

¹ State the aggregate number of shares forfeited (if any).

² The aggregate number of shares held, and not the distinctive numbers, must be stated and the column must be added up throughout so as to make one total to agree with that stated in the summary to have been taken up.

³ When the shares are of different classes, these columns may be sub-divided so that the number of each class held or transferred may be shown separately.

⁴ The date of registration of each transfer should be given as well as the number of shares transferred on each date. The particulars should be placed opposite the name of the transferor and not opposite that of the transferee, but the name of the transferee may be inserted in the remarks column immediately opposite the particulars of each transfer.

CAPITAL AND LIABILITIES.	RS. A. P.			PROPERTY AND ASSETS.			RS. A. P.		
	RS.	A.	P.	RS.	A.	P.	RS.	A.	P.
LOANS UNSECURED	..			(Distinguishing in the case of a Bank between those considered good and in respect of which the Bank is fully secured and those considered good for which the Bank holds no security other than the debtor's personal security, and distinguishing in all cases between debits considered good and debits considered doubtful or bad. Debits due by directors or other officers of the company or any of them either severally or jointly with any other persons to be separately stated in all cases.)					
INTEREST	..								
(Accrued on Mortgages, Debentures or other Secured Loans.)	..								
UNCLAIMED DIVIDENDS	..								
LIABILITIES	..								
For Goods supplied	..	..	..	ADVANCES			..	..	..
" Expenses	..	..	..	(Recoverable in cash or in kind or for value to be received, e.g., Rates, Taxes, Insurance, etc.)			..	..	..
" Acceptances	..	..	..						
" Other Finance	..	..	..						
ADVANCE PAYMENTS AND UNEXPIRED DISCOUNTS	..			INVESTMENTS			..	..	..
(For the portion for which value has still to be given, e.g., in the case of the following classes of companies—Newspaper, Fire Insurance, Theatre, Club, Banking, Steamship Companies, etc.)	..			(Nature of Investment and mode of valuation, e.g., cost or market value)			..	..	..
PROFIT AND LOSS	..			INTEREST ACCRUED ON INVESTMENTS			..	..	..
Balance as per previous Balance-sheet	..	..	..	CASH AND OTHER BALANCES			..	..	..
Less—Appropriation thereof	..	..	..	Amount in hand			..	..	..
Balance brought forward	..	..	..	Balances with Agents and Bankers (in detail showing whether on deposit or current account, etc.)			..	..	..
Profit since last Balance-sheet	..	..	..				..	..	..
(N.B.—These details need not be given if the same be contained in a Profit and Loss account attached to the Balance-sheet.)	..			Profit and Loss (giving, in the case of a debit balance, details as far as possible as in the case of a credit balance).			..	..	..
CONTINGENT LIABILITIES—									
Claims against the Company not acknowledged as debts.	..	..	..				..	..	..
Moneys for which the Company is contingently liable.	..	..	..				..	..	..
Arrears of Cumulative Preference Dividends ..	..	..	..				..	..	..

FORM G.

(See Section 136.)

FORM OF STATEMENT TO BE PUBLISHED BY BANKING AND INSURANCE
COMPANIES AND DEPOSIT, PROVIDENT, OR BENEFIT SOCIETIES.

¹ The share capital of the company is Rs. divided into
shares of Rs. each.
The number of shares issued is . Calls to the amount of Rs.
per share have been made, under which the sum of Rs.
has been received.

The liabilities of the company on the thirty-first day of December (or thirtieth of June) were:—

Debts owing to sundry persons by the company :

Under decree, Rs.

On mortgages or bonds, Rs.

On notes, bill or hundis, Rs.

On other contracts, Rs.

On estimated liabilities, Rs.

The assets of the company on that day were :

Government securities [stating them], Rs.

Bills of exchange, hundis and promissory notes, Rs.

Cash at the Bankers, Rs.

Other securities, Rs.

THE FOURTH SCHEDULE.

(See Section 290.)

ENACTMENTS REPEALED.

Year.	No.	Subject or short title.	Extent of repeal.
1	2	3	4
1882 .	VI	The Indian Companies Act, 1882 .	So much as has not been re- pealed.
1887 .	VI	The Indian Companies Act (1882) Amend- ment Act, 1887.	The whole.
1891 .	XII	The Amending Act, 1891 .	So much of the Second Schedule as relates to the Indian Companies Act, 1882.
1895 .	XII	The Indian Companies (Memorandum of As- sociation) Act, 1895.	The whole.
1899 .	IX	The Indian Arbitration Act, 1899 .	The second proviso to S. 3 relating to the Indian Companies Act, 1882.
1900 .	IV	The Indian Companies (Branch Registers) Act, 1900.	The whole.
1910 .	IV	The Indian Companies (Amendment) Act, 1910.	The whole.

THE COMPANIES (FOREIGN INTERESTS) ACT (XX OF 1918).

PREFATORY NOTE.—The following is the Statement of Objects and Reasons appended to the Bill (see *Fort St. George Gazette*, Part III, 15th October 1918, p. 589).

"It is considered desirable that companies which, during the war, have been reconstituted in India on lines approved by the Government of India and that new companies, whose business is of importance to the security of India and of the British Empire as a whole, should be restrained from altering their articles of association, in such a way as to bring them under the control of foreign

¹ If the company has no capital divided into shares, the portion of the statement relating to capital and share must be omitted.

interests. It is therefore proposed that the provisions in the articles of association of such companies, which are designed to restrict the shares or interests to be held or the powers to be exercised by persons other than British subjects, should not be altered without the consent of the Governor-General in Council. Similar legislation in the United Kingdom has resulted in the Companies (Foreign Interests) Act, (7 and 8 Geo. 5, Ch. 18), which prohibits the alteration of restrictive articles of this nature without the permission of the Board of Trade. Clauses 3 and 4 (1) of the Bill are designed to give effect to this proposal, and the remaining sub-clauses of clause 4 have been inserted to prevent evasion of this provision by voluntary liquidation on the part of the companies concerned."

THE COMPANIES (FOREIGN INTERESTS) ACT (XX OF 1918).

[25th September, 1918.

An Act to take power to prohibit the alteration, except with the sanction of the Governor-General in Council, of articles of association which restrict foreign interests in certain Companies, and to provide for other purposes connected therewith.

WHEREAS it is expedient to take power to prohibit the alteration, except with the sanction of the Governor-General in Council, of articles of association which restrict foreign interests in certain companies, and to provide for other purposes connected therewith ; It is hereby enacted as follows :—

Short title. 1. This Act may be called THE INDIAN COMPANIES (FOREIGN INTERESTS) ACT, 1918.

Definitions. 2. (1) In this Act—

(a) the expression " British subject " has the same meaning as in section 27 of the British Nationality and Status of Aliens Act, 1914, but shall include any person who holds a certificate of naturalization as a British subject granted under any Act of the Governor-General in Council for the time being in force, and any association incorporated in any part of His Majesty's Dominions : Provided that the said expression shall, for the purposes of this Act, be deemed to apply to any subject of a State in India ;

(b) the expression " restrictive provision " means any provision in the articles of association of a company which, in the opinion of the Governor-General in Council, is designed to restrict or limit or has the effect of restricting or limiting the share or shares or interests which may be held, or the rights, powers or authority which may be conferred upon or exercised by or on behalf of persons other than British subjects in the company, or in respect of the control, management or direction of the affairs thereof.

(2) All words and expressions used in this Act and defined in the Indian Companies Act, 1913, shall be deemed to have the meanings respectively attributed to them by that Act.

3. This Act shall apply to such companies as the Governor-General in Council may, by notification in the *Gazette of India*, declare to be companies with restrictive provisions, and any such notification shall specify the restrictive provisions.

Alterations in restrictive provisions and winding up. 4. So long as a notification issued under section 3 is in force in respect of any company, notwithstanding anything to the contrary in any other Act—

(1) no alteration of the articles of association of the company affecting either directly or indirectly any restrictive provision shall be of any effect until it has received the consent in writing of the Governor-General in Council ;

(2) a resolution for the voluntary winding up of the company shall be of no effect unless the Governor-General in Council authorizes or ratifies it by a written consent ;

(3) any Court which has jurisdiction to wind up the company may, in its discretion, refuse to make a winding up order. In the exercise of its discretion the Court shall be guided by the consideration whether the winding up is *bona fide* with a view to the discontinuance of the undertaking, or is with a view to continuing the undertaking freed either wholly or in part from any restrictive provision ;

(4) The Governor-General in Council in giving consent, or the Court in making a winding up order, as the case may be, may impose such terms or conditions for giving effect to the purposes of this Act as he or it thinks fit.

THE CONTEMPT OF COURTS ACT (XII OF 1926).

PREFATORY NOTE.—The following is the Statement of Objects and Reasons, annexed to the Bill :—

"The several High Courts of Judicature established by Letters Patent are superior courts of record, and as such they have power to attach and commit for acts amounting to contempt of their own proceedings as contempt of court, and without reference to whether the acts alleged constitute an offence under the Indian Penal Code. Different views, have, however, been held by the various High courts in regard to their power to punish for such contempts committed in regard to proceedings in courts which are subordinate to them. The Madras High Court in the case of *In re Venkata Rao* (21 M. L. J. 832) and the Bombay High Court in the case of *King Emperor v. P. G. Kulkarni*, (24 B. L. R. 16) have held that they possess this power to protect their subordinate courts against such contempts. The Calcutta High Court, on the other hand, in the case of *King Emperor v. Girindra Mohan Das and others* (17 Cal. W. N. 1285) and the *Legal Remembrancer v. Moti Lal Ghose* (I. L. R. 4 Cal. 173) has taken a contrary view. In cases in which it is held that the power to attach and commit exists the powers of the courts are as unrestricted as are the powers of superior courts of record in England. It has not been decided whether the Court of Judicial Commissioners of the Central Provinces, Oudh and Sindh have these general powers either in regard to contempt of their own proceedings or of the proceedings of courts subordinate to them. In England, in addition to the powers of the superior courts of record to attach and commit for contempt of court, contempts of courts are also indictable misdemeanors at common law. In India, on the other hand, though the Indian Penal Code makes certain acts which would be punishable as contempts of court in England specific offences, it does not provide generally for the punishment of contempts of the authority of judicial officers not committed in their presence.

2. The condition of the law in India as summarised above has long been regarded as unsatisfactory, and in 1914 a Bill was introduced in the Indian Legislative Council which would have increased the classes of cases of contempts of court punishable as offences under the Indian Penal Code, but it was not proceeded with owing to the war. The present Bill proposes to declare and amend the law on other lines. Instead of increasing the classes of cases punishable as contempts of court after trial by Magistrates, the Bill restricts the power to protect subordinate courts against contempts which are not already provided for in the Indian Penal Code to the High Courts themselves. The Bill resolves any doubts as to the powers of the High Courts of Judicature in regard to the protection of their subordinate courts from such contempts. It will show clearly that the Courts of the Judicial Commissioners of the Central Provinces, Oudh and Sindh, will have the same powers of punishing for contempts committed in regard to their own proceedings or of the proceedings of courts subordinate to them. In lieu of the existing unrestricted powers of the High Courts of Judicature it will define the nature of the offence of contempt of court and the extent of the punishment which may be awarded. Finally it bars the inherent powers of the High Courts to deal with such offences."

Fort St. George Gazette, 1925, Part III, March 3rd, 1925, pp. 52-53.

[8th March, 1926.]

An Act to define and limit the powers of certain Courts in punishing contempts of courts.

WHEREAS doubts have arisen as to the powers of a High Court of Judicature to punish contempts of subordinate Courts ;

AND WHEREAS it is expedient to resolve these doubts and to define and limit the powers exercisable by High Courts and Chief Courts in punishing contempts of court ; It is hereby enacted as follows :—

Short title, extent and commencement.

1. (1) This Act may be called THE CONTEMPT OF COURTS ACT, 1926.

(2) It shall extend to the whole of British India.

(3) It shall come into force on such date as the Governor-General in Council may, by notification in the Gazette of India, appoint.

Sec. 1.—The publication of comments on a case which is pending trial in a court amounts to a contempt of court if the comments are such as are likely to prejudice the administration of justice in the case. In the absence of an express provision allowing him to do so, no person can contract out of a responsibility imposed upon

him by law in the case of a contempt of court for publication of prejudicial comments on a case pending trial and a printer as well as a publisher cannot escape responsibility for matter printed and published. 6 R. 39 = A. I. R 1928 R. 115

2. (1) Subject to the provisions of sub-section (3), the High Courts of Judicature established by Letters Patent shall have and exercise the same jurisdiction, powers and authority, in accordance with the same procedure and practice, in respect of contempt of courts subordinate to them as they have and exercise in respect of contempt of themselves.

(2) Subject to the provisions of sub-section (3), a Chief Court shall have and exercise the same jurisdiction, powers and authority, in accordance with the same procedure and practice, in respect of contempt of itself as a High Court referred to in sub-section (1).

(3) No High Court shall take cognizance of a contempt alleged to have been committed in respect of a Court subordinate to it where such contempt is an offence punishable under the Indian Penal Code.

3. Save as otherwise expressly provided by any law for the time being in force, a Limit of punishment for contempt of court may be punished with simple imprisonment for a term which may extend to six months, or with fine, which may extend to two thousand rupees, or with both :

Provided that the accused may be discharged or the punishment awarded may be remitted on apology being made to the satisfaction of the Court.

THE INDIAN CONTRACT ACT (IX OF 1872).

PREFATORY NOTE.—A contract may be defined as an arrangement between competent parties, supported by a legal consideration, and in the form, if any, prescribed by law, creating an obligation on the part of one or both to do or refrain from doing some lawful thing.

The Bill which afterwards became the Contract Act was drawn in 1866 in England by the Indian Law Commissioners. In the following year it was introduced into the Council of the Governor-General during the absence of Mr. (afterwards Sir Henry) Maine by the Right Hon. W. N. Massey, referred to a Select Committee, and published and circulated to the Local Governments. Thereupon, a controversy arose between the Secretary of State and the Commissioners on the one side, the Home and the Indian authorities on the other, as to Commissioner's proposals that all penalties should be treated as liquidated damages, and that the ownership of goods may be acquired by buying them from any person who is in possession of them, if the buyer acts in good faith, and under circumstances which do not raise a presumption that the possessor has no right to sell them ; in other words, that every place in India should become a market overt. The result was that the Secretary of State permitted the Government of India to take their own course as to altering the Bill ; the Commissioners resigned and the Bill (whose early enactment was directed by the Secretary of State) was carried through the Council with some important amendment, by Mr. (afterwards Sir Fitzjames) Stephen. Whiteley Stokes' Anglo Indian Codes, Vol. I, p. 534.

"The first draft of a law of Contract for India was prepared in England by the Indian Law Commissioners. Some points in the original Bill gave rise to prolonged discussion, and portions of the measure were re-cast in this country. It consists almost exclusively of the rules which govern the English Courts, thrown into the form of legal enactment. Whenever these rules have been departed from, it has been on account of some difference between the circumstances of the two countries which rendered it unsafe, in the opinion of those upon whom the responsibility of passing the measure ultimately devolved, to enact the English Law without modification. Some special and subsidiary chapters of the law of Contract, such, for instance, as the law of Master and Servant. Consignor and Carrier, the law regulating Promissory Notes and Bills of Exchange, were intentionally omitted, inasmuch as, when the Act was passed, they had not received that elaborate consideration which their importance deserved, and because in the case of some matters of principle had to be decided, the discussion of which was still unripe. The last of these subjects has been subsequently provided for in the Negotiable Instruments Act of 1881. The law of Contracts specially affecting land sales, mortgages, leases and other forms of alienations of immovable property, was also left aside, as being of so special and technical a character and so diverse in its aspects in different parts of the Empire as to render it unsafe to deal with it in a general enactment. It has now been dealt with in the Transfer of Property Act of 1882, without however any modification of the general principles laid down in the present Act as applicable to all contracts. The subject of specific performance was also omitted, no doubt because intimate as is its connection with the Law of Contracts, it lies somewhat beyond the pale of contract in its strict sense and involves the consideration of other topics than those with which the law of Contract is, strictly speaking, concerned. For this, too, special provision has been made in Act I of 1877." See Introduction to Shepard and Cunningham's Contract Act.

The drafting of this Code has been the subject of strong adverse criticism by several very eminent judges and jurists.

"Not only the work of different hands, but work done from quite different points of view has been pieced together with an incongruous effect... Another source of unequal workmanship, and sometimes of positive error, is that the framers of the Indian Codes, and of the Contract Act, in parti-

cular, were tempted to borrow a section here and a section there from the draft Civil Code of New York, an inflection which the sounder lawyers of that State have been happily successful so far in averting from its citizens. This Code is, in our opinion, and we believe in that of most competent lawyers who have examined it, about the worst piece of codification ever produced. It is constantly defective and inaccurate, both in the apprehending the rules of law which it purports to define and in expressing the draftsman's more or less not satisfactory understanding of them. The clauses on fraud and misrepresentation in contracts—which are rather worse, if anything than the average badness of the whole—were most unfortunately adopted in the Indian Contract Act. Whenever this Act is revised everything taken from Mr. Dundley Field's Code should be struck out, and the sections carefully recast after independent examination of the best authorities." In fact, the Contract Act passed through not less than three distinct stages. First, there was the draft prepared in England by the Indian Law Commission uniform in style and possessing great merit as an elementary statement of the combined effect of the common law and equity doctrine as understood about forty years ago. Next this was revised and in parts elaborated by the Legislative Department in India. The borrowing from the New York draft Code seems to belong to this phase. Lastly, Sir James Stephen made or supervised the final revision and added the introductory definitions, which are in a wholly different style and not altogether in harmony with the body of the work. Evidently this process could not satisfy the conditions of a model Code. It is much to the credit of the workman that the result after allowing for all drawbacks, was a generally sound and useful one. See Preface to the first edition of Pollock's Contract Act.

Mr. Whiteley Stokes wrote as early as 1887 as follows:—Unfortunately it (the Contract Act Bill) had been sent out to India in a very crude form: it never underwent the patient, penetrating revision by a skilled draftsman necessary in the case of such a measure: and though the Indian Judges have loyally endeavoured to give effect to its provisions, these are so incomplete and sometimes so inaccurately worded that the time seems to have come for repealing the Act, and re-enacting it with the amendments in arrangement, wording and substance suggested by the cases decided upon it during the last fourteen years. Should this be done it would be well to incorporate the existing laws relating to negotiable instruments, to exchanges and to sales and mortgages and leases of immovable property and to add chapters on Carriers and Insurance." Whiteley Stokes' Anglo Indian Codes, Vol. I, p. 534.

V. B.—The several criticisms on this Act offered by Sir Frederick Pollock and Sir William Anson in their books on the law of Contracts are also to the same effect.

The Indian Contract Act, 1872, endeavours to codify—that is to say—arrange clearly and systematically the chief rules relating to the formation, ratification and discharge of all agreements enforceable by law, made between two or more persons by which rights are acquired by one or more of them to acts or forbearances on the part of the other or others. It also deals specially with the following classes of those agreements, *viz.*, Sale of Goods: Indemnity and Guarantee: Bailment including Pledge: Warranty: Agency and Private Partnership (Public Partnerships are dealt with by the Indian Companies Act, 1882). It deals, lastly, with the quasi-contracts implied when *A* pays something which *B* ought to pay, or *B* receives something which *A* ought to receive. The obligation arising from breach of contract is partly dealt with by the section of the Contract Act relating to compensation. The law relating to the Specific Performance and Rescission of Contracts was substantially codified by the Specific Relief Act, 1877, chapters II and IV. Then came the codification of the law of Negotiable Instruments (Act XXVI of 1881) which deals with the most important branch of the law relating to the assignment of contractual rights. The rules relating to the assignment by operation of law of obligations on the transfer of land to Sale, Mortgage and Lease of Immoveables: to Exchange and Gift of every kind of property, and to the assignment of contractual rights not comprised in Act XXVI of 1881, were codified by the Transfer of Property Act, 1882, chapters III, IV, V and VI.

Special contracts of Carriage, Master and Servant and Insurance have also been subsequently dealt with by the Indian Legislature. (Whiteley Stokes' Anglo-Indian Codes, Vol. I, p. 491.

THE INDIAN CONTRACT ACT (IX OF 1872).

Rep. in pt. Act I of 1877.

Rep. in pt. and am. Act 6 of 1899.

Am., Act 4 of 1886, 12 of 1891.

S. 1 rep. in pt. and sched. rep., Act 10 of 1914, Am. Act XXIV of 1917.

Declared in force—

in the Santhal Parganas, Reg. 3 of 1872, s. 3, as amended by Reg. 3 of 1899, s. 3 in the Arakan Hill District, Reg. 1 of 1916, s. 2 in Upper Burma (Except the Shan States) Act 13 of 1898, s. 4; in British Baluchistan, Reg. 3 of 1913, s. 3.

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265. Winding up by Court on dissolution or after termination.

266. Limited liability partnerships, incorporated partnerships, and joint stock companies.

SCHEDULE.—ENACTMENTS REPEALED.

THE INDIAN CONTRACT ACT (IX OF 1872).¹

[25th April, 1872.

Preamble.

WHEREAS it is expedient to define and amend certain parts of the law relating to contracts ; it is hereby enacted as follows :—

Preliminary.

Short title.

1. This Act may be called THE INDIAN CONTRACT ACT, 1872.

Extent. Commencement.

It extends to the whole of British India² ; and it shall come into force on the 1st day of September, 1872.

[* * * * *]³ nothing herein con-

Enactments repealed.

tained shall affect the provisions of any Statute, Act or Regulation not hereby expressly repealed, nor any usage or custom of trade, nor any incident of any contract, not inconsistent with the provisions of this Act.

2. In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the

Interpretation-clause.

context :—

¹For the Statement of Objects and Reasons for the Bill which was based on a report of Her Majesty's Commissioners appointed to prepare a body of substantive law for India, dated July 6th, 1866, see Gazette of India, 1867, Extraordinary, p. 34 ; for the Report of the Select Committee, see *ibid.*, Extraordinary, dated 28th March, 1872 ; for discussions in Council, see *ibid.*, 1867, Supplement p. 1064 ; *ibid.*, 1871, p. 313 ; and *ibid.*, 1872, p. 527.

The chapters and sections of the Transfer of Property Act (IV of 1882), which relate to contracts are, in places in which that Act is in force, to be taken as part of Act IX of 1872—see Act IV of 1882, S. 4.

Sec. 1.—²Act IX of 1872 has been declared in force in—

the Santhal Parganas—see the Santhal Parganas Settlement Regulation (III of 1872), as amended by the Santhal Parganas Justice and Laws Regulation (III of 1899), S. 3 [Ben. Code] ;

the Arakan Hill District—see the Arakan Hill District Laws Regulation (IX of 1874), S. 3 [Bur. Code] ;

Upper Burma generally (except the Shan States)—see the Burma Laws Act (XIII of 1898), S. 4 (1) [Bur. Code] ;

British Baluchistan—see the British Baluchistan Laws Regulation (I of 1890), S. 3, Bal. Code.

It has been declared by notification under S. 3 (a) of the Scheduled Districts Act (XIV of 1874) [*infra*], to be in force in—

the Tarai of the Province of Agra—see *Gazette of India*, 1876, Pt. I, p. 505 ;

the Districts of Hazaribagh, Lohardaga and Manbhum, and Pargana Dhalbhum and the Kolhan in the District of Singhbhum—see *Gazette of India*, 1881, Pt. I, p. 504. (The District of Lohardaga included at this time the present District of Palamau which was separated in 1894. The District of Lohardaga is now called the Ranchi District—see *Calcutta Gazette*, 1899, Pt. I, p. 44.)

³The words "The enactments specified in the Third Schedule are repealed to the extent specified in the fourth column thereof ;

but" repealed by Act X of 1914, Sch. II.

CONTRACT ACT.—Act is not retrospective. 5 M.I.A. 109 ; 12 Bom. L.R. 451 (458, 472). It is an amending as well as a consolidating Act. 40 B. 630 (P.C.)=31 M. L. J. 541. Act is not exhaustive. It does not purport to be a complete Code dealing with the law relating to contracts, but defines and amends certain parts of that law. 40 I.C. 194=19 Bom. L.R. 370 ; 35 M. 728=21 M.L.J. 600. S. 1 saves from its operation all Statutes, Acts and Regulations not expressly repealed by this Act, and also special usages and trade customs. 18 Cal. 620=18 I.A. 121 (P.C.). This Act does not affect the following usages and custom:—Pre-emption. 18 Cal. 620 ; Arbitrator's lien ; Attorney's lien (6 Cal. 1) ; Mercantile custom as to Hundis, Common Carriers and Maritime Law, etc. 18 Cal. 620 (P.C.) ; 98 I. C. 759= A. I. R. 1927 Nag. 89. The Contract Act is not exhaustive so far as the law relating to common carriers is concerned. 9 I. C. 966=32 P. W. R. 1911 (30 C. 530 ; 18 Cal. 623, Ref.). Although the Contract Act purports to deal only with certain parts of the law relating to contracts, yet it should be regarded as exhaustive and binding on the Courts in India when it treats a subject in a way at variance with the English Law. 38 I. C. 915=12 N. L. R. 177. Applicability of Act to contracts regarding land. See 19 S. L. R. 337 ; Principle of the Act applicable to all transfers. 25 A. L. J. 708=103 I. C. 370=A. I. R. 1927 All. 693. A mercantile custom in contravention of the written terms of a contract can be of no avail in a suit under the contract, but evidence of custom not consistent with the contract can be admitted. 41 Bom. 518=18 Bom. L. R. 532. Where there is reliance on custom there is necessarily a variation from the written contract, but the variation need not be in contradiction of or repugnant to it. 41 Bom. 518=18 Bom. L. R. 532. English common law principles can be applied so far as they apply to Indian circumstances and are not inconsistent with this Act. See 4 I. A. 23.

Sec. 2. GENERAL.—There is no universal rule that a stranger to a contract can in no circumstance claim a benefit thereunder. 77 Ind. Cas.

(a) When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal :

(b) When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted¹ becomes a promise :

(c) The person making the proposal is called the "promisor," and the person accepting the proposal is called the 'promisee' ;

(d) When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to

261 = 35 C. L. J. 493 = 1923 Cal. 25 (32 A. 410 ; 41 Ind. Cas. 737 ; 46 Cal. 160, Rel.). See also notes under S. 37 *infra*. It is competent to a tenant to invoke the benefit of a contract between the Government and the settlement holder even though he may not be a party thereto. (*Ibid.*) (11 C. L. J. 68 ; 37 C. 449 ; 3 Pat. L. J. 397 ; 17 C.L.J. 70, Ref.).

Sec. 2 (a).—An offer must be distinguished from an invitation for an offer. 65 I.C. 282 = 1922 Lah. 100. Catalogue of goods is not offer, but only invitation for offer. 12 O.C. 17 ; so also statement of lowest price in answer to enquiry. 8 I.C. 601. A letter from a prospective buyer asking for quotations from a merchant is an invitation for an offer. 65 I.C. 282 = 1922 Lah. 100. If the merchant sent his quotations and the buyer accepts them and orders goods that constitutes the proposal which the seller may or may not accept. (*Ibid.*) A quotation submitted by a trader as the basis of a possible order from customers is distinct from an offer to sell which if accepted creates a contract for the breach of which damages may be recovered. 37 M.L.J. 712 = 54 I.C. 550. But see also 7 Bur. L.T. 136 = 23 Ind. Cas. 322. A bid at an auction is nothing more than an offer and can be withdrawn like all other offers before it is accepted by the fall of the hammer. 43 M.L.J. 132 = 45 M. 799 = 70 I.C. 977 = 1922 M. 485 ; 19 I.C. 904 = 18 C. L. J. 53. An offer to sell and to keep the offer open till a certain time is *nudum pactum* and can, at any time before acceptance, be recalled. 31 I.C. 890. Where there was a completed contract, reduction to writing is merely incidental to the completion of the contract. 21 M. L. J. 182 = 9 I. C. 104 = (1911) 1 M. W. N. 17. Letter of request for a loan is only a proposal. 71 I. C. 968. See also 13 Bom. 669 ; 16 Mad. 283. It cannot be sued on as a promissory note. 71 I. C. 968. Boy running away from home.—Boy's father advertising reward to any one tracing him and bringing him home.—Taking boy to Police Station, making report and sending telegram to boy's father are substantial performance of condition, for which reward may be claimed. See 23 A. L. J. 655 = 88 I. C. 908 = 1925 All. 539.

Sec. 2 (b).—¹ As to when communication of acceptance becomes complete, see S. 4, ill. (h), *infra*. As to contract by offer and acceptance, see 20 I. C. 282 = 277 P. L. R. 1913 ; 36 Bom. 557 = 14 Bom. L. R. 648. Offer by letter—Acceptance in minute—Terms of, partly incorporated therein—Variance between letter and minute. 27 M. L. J. 74 = 18 C. W. N. 1185 = 24 I. C. 506 = 10 N. L. R. 108 (P. C.). Where a contract is made by letters, the place where the final assent is given to the offer is the place where the contract is made. 6 A. L. J. 213 ; 27 Mad. 535 ; 12 O. C. 17. A promise need not be

in writing. 23 Mad. 94. What is proposal and promise in auction sales. 14 Mad. 235. Incomplete negotiation, not being complete contract cannot be sued upon. 39 Bom. 529. Reward, offered for the search of a missing boy, for whose search a servant was already sent, cannot be claimed by the servant though he found the boy out ; the servant did not undertake the search after the offer nor on its strength and hence the finding out by him does not amount to acceptance by conduct. 19 I. C. 576 = 11 A. L. J. 489.

Sec. 2 (d).—"Consideration" as defined in this section is wider than the meaning of the term in English law. See 41 Cal. 137. Consideration may move from a third party. 6 Mad. 351. Thus broker's undertaking to pay the premium is good consideration in marine insurance contract. 27 Bom. L.R. 1310 = 91 I.C. 419 = 1926 Bom. 82. Old debts from good consideration for a mortgage or transfer of property. 50 I. C. 117 ; 12 A. L. J. 629 = 23 I. C. 900 = 36 A. 365. So also a compromise of disputed claim. 3 Cal. 602 ; 90 I. C. 766 = 2 O.W.N. 849 ; 2 O. C. 300 ; 1925 Pat. 68. So also promise of marriage is good consideration for a settlement. 9 L.W. 132. Time-barred debts may be valid consideration. 1925 Oudh 267. A subscription gratuitously promised to an institution cannot be recovered even if the promisor is the treasurer thereof. 36 A. 268 = 12 A. L. J. 351. See also 14 Cal. 64. A gift in consideration of the donee performing certain religious services at a temple is a transfer for valuable consideration. 46 I.C. 19 = 20 Bom L.R. 441. If the promisee does some act from which a third person is benefited which he would not have done but for the promise, the consideration is sufficient. 45 C. 774 = 22 C.W.N. 188. See also 89 I.C. 819 (Benefit to one co promisor is enough. A compromise is an agreement to put an end to disputes and to terminate or avoid litigation. The real consideration is not the sacrifice of a right but the abandonment of a claim. 20 C. W. N. 210 = 32 I. A. 468 (P. C.). But see also 53 I. C. 497 = 137 P. R. 1919 ; 1925 Pat. 68. Whether an agreement by a landlord to accept rent at a lower rate is unenforceable for want of consideration is doubtful. 32 I. C. 185 = 20 C.W.N. 680. Payment and acceptance of rent at a reduced rate may be adduced as evidence to show that the parties never intended that the stipulation to pay the full rent was to be acted upon or in the alternative that there had been a waiver. (*Ibid.*) Release of original debtor may be a consideration for liability of another. 31 I. C. 29 = 22 C. L. J. 235. Agreement by creditor to give up a part of his claim—No consideration is necessary. See 1925 Mad. 660 = 48 M. L. J. 721 ; 89 I. C. 174 = 1925 Nag. 455. Where the members of a community, who had rendered some help to the defendant, stipulated for payment by him of a certain

abstain from doing, something, such act or abstinence or promise is called a consideration for the promise ;

(e) Every promise and every set of promises, forming the consideration for each other, is an agreement ;

(f) Promises which form the consideration or part of the consideration for each other are called reciprocal promises ;

(g) An agreement not enforceable by law is said to be void ;

(h) An agreement enforceable by law is a contract ;

(i) An agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others, is a voidable contract ;

(j) A contract which ceases to be enforceable by law becomes void when it ceases to be enforceable.

CHAPTER I.

OF THE COMMUNICATION, ACCEPTANCE AND REVOCATION OF PROPOSALS.

3. The communication of proposals, the acceptance of proposals, and the revocation of proposals and acceptances, respectively, are

Communication, acceptance and revocation of proposals.

deemed to be made by any act or omission of the party proposing, accepting or revoking by which he intends to communicate such proposal, acceptance or revocation, or which has the effect of communicating it.

sum of money to the community as a whole, and he promised to do so. *Held*, that the promise was for consideration and was enforceable. 44 M. L. J. 240 ; 72 I. C. 95=1923 Mad. 434. A forbearance to sue a debtor on his pro-note is a good consideration for the latter executing a security bond for payment of the debt. An agreement for forbearance need not be for any definite or particular time. It is enough if an implied request for forbearance be inferred. 51 I. C. 963 =36 M.L.J. 618. *See also* 23 A.L.J. 561=88 I.C. 768=47 All. 637=1925 All. 503. Any detriment suffered by defendant on the faith of the promise of the plaintiff will be sufficient consideration to make the plaintiff's promise enforceable. 44 I. C. 479=(1918) M.W.N. 173 (14 Cal. 64 and 36 All. 268, Foll.). Consideration may consist in abstention from taking legal proceedings. 32 I. C. 416 ; 65 I. C. 52=1922 Lah. 269. *See also* 17 Bom. 457. The release of a claim by one person is a consideration for guarantee of payment by another only when that claim is given up and not when there is a mere promise. (1916) 2 M. W. N. 264=29 I. C. 422=4 L. W. 553. An agreement not to appeal, the consideration for which is the mutual consent of the parties to refer the matter in dispute to the Court itself is binding on the parties. 26 I. C. 355. A consideration in law must be 'good' and 'valuable'. 16 M.L.T. 194=27 M. L. J. 249=25 I. C. 726 (1 A. 309, Foll.). A consideration paid to one joint promisor is legally sufficient to support a promise made by others. 38 M. 680=22 I. C. 1=26 M. L. J. 113 ; 26 M. L. J. 127=23 I. C. 951=38 M. 753. *See also* (1912) M.W.N. 930. An agreement in pursuance of which a member of a Hindu family declines to take share in the family property at a partition on the consideration that the others shall maintain their sister forms a good consideration for the sister to enforce her rights of maintenance against her brothers. 14 I.C. 517 ; 36 M. 157=13 I.C. 458=22 M. L. J. 231 (4 M. 137, rel. on). As to when a third party can sue upon a contract, *see* 32 C.W.N. 634=47 C.L.J. 587. A

mere Ruzu Khata unsupported by oral agreement or consideration does not form a fresh contract. 58 I.C. 30. Forbearance to continue an appeal against a person on that person's brother agreeing to pay the amount claimed is a good consideration. 17 I.C. 466=15 O.C. 314 ; 74 I.C. 316 =26 O.C. 204. Creditor's forbearance to sue the debtor was sufficient consideration for promise by third party. 11 I.C. 773 ; 4 Bur. L.T. 156. Promise by agent without consideration is not enforceable either against agent or principal. 105 I.C. 214.

EVIDENCE.—Recitals as to consideration in documents is *prima facie* evidence thereof as between the parties. 27 All. 71 ; 23 Cal. 950 (P.C.) ; but can be rebutted by other evidence, oral or documentary. 5 Mad. 6 ; 8 All. 641 ; 27 I.A. 93. Evidence Act, S. 92 is no bar. (*Ibid.*)

Sec. 2 (e).—*See* 86 I. C. 509=1925 Mad. 943.

Sec. 2 (g).—Where a contract is illegal only in part, if such part is separable from the rest, the illegal portion alone is void ; but, if it is not so separable, the whole is void. 9 Bom. 176.

Sec. 2 (h).—A representation of fact is a contract and the party misrepresenting is bound to make good the representation. 31 I. C. 708=17 Bom. L. R. 783.

Sec. 3.—Offer must be intended to create legal relations. 23 Bom. 420. Thus mere invitation to dinner is no offer. (*Ibid.*) A promise to keep an offer open for a certain time is binding if supported by consideration. 2 M. L. J. 52. Acceptance must be absolute and correspond with the offer. 24 Bom. 510. Else it is only a contra offer. (*Ibid.*). (*See also* notes under S. 7). Though a contract implies two parties, a contract in writing does not require the signature of both parties. 22 C. L. J. 311=20 C. W. N. 408. A bond executed and delivered by one party which is accepted by another is a contract in writing. (*Ibid.*) Revocation of contract requires concurrence of both parties. A. I. R. 1925 P. C. 232 (P. C.). Evidence of completion of contract. *See* 16 I.C. 75 (P. C.).

Communication when complete.

4. The communication of a proposal is complete when it comes to the knowledge of the person to whom it is made.

The communication of an acceptance is complete,—

as against the proposer, when it is put in a course of transmission to him, so as to be out of the power of the acceptor ;

as against the acceptor, when it comes to the knowledge of the proposer.

The communication of a revocation is complete,—

as against the person who makes it, when it is put into a course of transmission to the person to whom it is made, so as to be out of the power of the person who makes it ;

as against the person to whom it is made, when it comes to his knowledge.

Illustrations.

(a) *A* proposes, by letter, to sell a house to *B* at a certain price.

The communication of the proposal is complete when *B* receives the letter.

(b) *B* accepts *A*'s proposal by a letter sent by post.

The communication of the acceptance is complete,—

as against *A*, when the letter is posted ;

as against *B*, when the letter is received by *A*.

(c) *A* revokes his proposal by telegram.

The revocation is complete as against *A* when the telegram is despatched. It is complete as against *B* when *B* receives it.

B revokes his acceptance by telegram. *B*'s revocation is complete as against *B* when the telegram is despatched, and as against *A* when it reaches him.

Revocation of proposals and acceptances.

5. A proposal may be revoked at any time before the communication of its acceptance is complete as against the proposer, but not afterwards.

An acceptance may be revoked at any time before the communication of the acceptance is complete as against the acceptor, but not afterwards.

Illustrations.

A proposes, by a letter sent by post, to sell his house to *B*.

B accepts the proposal by a letter sent by post.

A may revoke his proposal at any time before or at the moment when *B* posts his letter of acceptance, but not afterwards.

B may revoke his acceptance at any time before or at the moment when the letter communicating it reaches *A*, but not afterwards.

Revocation how made.

6. A proposal is revoked—

(1) by the communication of notice of revocation by the proposer to the other party ;

(2) by the lapse of the time prescribed in such proposal for its acceptance, or, if no time is so prescribed, by the lapse of a reasonable time, without communication of the acceptance ;

(3) by the failure of the acceptor to fulfil a condition precedent to acceptance ; or

(4) by the death or insanity of the proposer, if the fact of his death or insanity comes to the knowledge of the acceptor before acceptance.

Acceptance must be absolute.

7. In order to convert a proposal into a promise, the acceptance must—

Sec. 4.—An offer is made not at the place from which it is sent but at the place where it reaches the acceptor. 37 M. L. J. 712 = 54 I. C. 550. *See also* 4 Bom. L. R. 215 (Proposal made through agent) ; 16 Cal. 702 (Revocation of proposal when can be made).

Secs. 4-5.—*See* 30 Bom. L. R. 570.

Sec. 5.—Where there is no unqualified acceptance before revocation which does not reach the person owing to his own misrepresentation about his address, the offeror must be deemed to have validly revoked his proposal. 51 I. C. 860.

Secs. 7-9.—To convert a proposal into a promise

the acceptance must be unqualified and without condition. A.I.R. 1922 P. 24. When once a proposal is practically refused it does not hold good and no acceptance after the refusal could convert the proposal into a promise so as to create a contract. 1922 P. 24. The acceptance of a proposal must be unqualified and proposer cannot impose on the party to whom it is addressed the obligation to refuse it under the penalty of imputed assent or attach to his silence the legal result that he must be deemed to have accepted it. 54 I. C. 437 = 18 A. L. J. 73. *See also* 37 I. C. 792 = 5 L. W. 149 = (1917) M.W.N. 91 ; 18 A. L. J. 73 ; 24

(1) be absolute and unqualified ;
 (2) be expressed in some usual and reasonable manner, unless the proposal prescribes the manner in which it is to be accepted. If the proposal prescribes a manner in which it is to be accepted, and the acceptance is not made in such manner, the proposer may, within a reasonable time after the acceptance is communicated to him, insist that his proposal shall be accepted in the prescribed manner, and not otherwise ; but if he fails to do so, he accepts the acceptance.

Acceptance by performing conditions, or receiving consideration.

8. Performance of the conditions of a proposal, or the acceptance of any consideration for a reciprocal promise which may be offered with a proposal, is an acceptance of the proposal.

9. In so far as the proposal or acceptance of any promise is made in words, the promise is said to be express. In so far as such proposal or acceptance is made otherwise than in words, the promise is said to be implied.

Promises, express and implied.

CHAPTER II.

OF CONTRACTS, VOIDABLE CONTRACTS AND VOID AGREEMENTS.

10. All agreements are contracts¹ if they are made by the free consent of parties competent to contract, for a lawful consideration² and with a lawful object, and are not hereby expressly declared to be void.

What agreements are contracts.

Bom. 510. Acceptance of a proposal may be made without express communication, by conduct of the acceptor. 54 I. C. 437=18 A. L. J. 73. See also 92 P.R. 1913=22 Ind. Cas. 811 ; 49 All. 674=100 I. C. 1023=25 A. L. J. 372=A. I. R. 1927 All. 407 (English and Indian law compared and discussed). (*Ibid.*) A written offer to take goods accompanied by a sum of money representing the price is acceptance, if the purchaser credits the money received to his account. 54 I. C. 437=18 A. L. J. 73. Acceptance of an offer with a variation is no acceptance at all ; it is simply a counter-proposal which should be accepted by the original promisor before a contract can be made and such an acceptance need not be in writing. 92 P. R. 1913=22 I. C. 811. See also 1922 P. 24. Acceptance is not conditional, merely by an immaterial addition, or by the mere fact that some other terms are discussed in subsequent letters. 5 Bom. L. R. 9=36 Bom. 110. A qualified acceptance of a proposal is but a counter-proposal, omission to reply to which would not be an acceptance of it. 5 L. W. 149=37 I. C. 792=(1917) M. W. N. 91. See also 18 A. L. J. 73 ; 45 Bom. 8=57 I. C. 971=22 Bom. L. R. 872.

Secs. 7 and 8.—A contract is concluded as soon as all the essential terms are settled though the formal documents have yet to be executed., 54 I. C. 550=37 M. L. J. 712 ; 21 M. L. J. 182. Mistake of telegraph officials in transmitting terms of proposal will prevent the proposal from maturing into a contract. (1910) M. W. N. 513. If a contract has to be made out from the correspondence between the parties, the whole of the correspondence is to be seen in order to determine whether there was a completed contract. 54 I. C. 550=37 M. L. J. 712. [(1916) 2 Ch. 187, Ref ; (1879) L. R. 4 A. C. 311, Dist.]. When the proposal and acceptance are made by means of letters the contract must be deemed to have been made at the place where the letter of acceptance is posted. 73 I. C. 205=1923 Lah. 427. See also 39 Mad. 509 (P. C.).

Sec. 8.—Prospectus of Company in case of insurance policy, railway receipts, etc., are deemed part of the contract. 25 Mad. 183 ; 21 Mad. 172. Acceptance may be implied from conduct. 49 All. 674=A. I. R. 1927 All. 407.

AUCTION SALES.—In the absence of any restriction to the contrary in the conditions of sale, a person may bid as benamidar for another and the fact that the bidder did not disclose his character of benamidar does not entitle the principal to revoke the auction sale. 29 I. C. 12=28 M. L. J. 617. When an amin holding an auction sale accepts the highest bid on behalf of his principal subject to the principal's giving his assent to it, there is a valid and enforceable contract when that assent has been given. (*Ibid.*)

Sec. 9.—Implied contracts are as much binding as express contracts on the parties. 16 I. C. 609 ; 31 I. C. 783=29 M. L. J. 749 ; 49 All. 674=A. I. R. 1927 All. 407. See also 9 M.I.A. 256 (contract to pay interest implied from mercantile usage). Agreement to pay compound interest may be inferred from course of business for a long period 38 M. L. J. 387=18 A. L. J. 359=22 Bom. L. R. 545=44 Bom. 474=47 I. A. 17 (P. C.). Agent's claim for extra remuneration on implied contract is enforceable. 31 I. C. 783=29 M. L. J. 749.

Sec. 10.—¹See S. 2, cl. (A), *supra*.

²See S. 25, expln. 2, and S. 102, *infra*.

CONSTRUCTION OF CONTRACT.—Each contract must be construed with reference to its own terms, and not by reference to any other contract. 19 C. W. N. 623. Evidence of what took place after the contract is not good evidence as to construction of contract. 36 Bom. 387 (P.C.). In case of conflict between printed portion of a contract and the written portion, the written portion prevails. 19 Bom. L.R. 845. But see 30 Bom. 1.

ILLUSTRATIVE CASES.—A mortgage without consideration is a nullity and inoperative. 35 I.C. 455. An agreement to give time to judgment

Nothing herein contained shall affect any law in force in British India, and not hereby expressly repealed, by which any contract is required to be made in writing¹ or in the presence of witnesses, or any law relating to the registration of documents.

11. Every person is competent to contract who is of the age of majority according to the law to which he is subject,² and who is of

Who are competent to contract.

sound mind, and is not disqualified from contracting by any law to which he is subject.

debtor like all other agreements must be supported by consideration. 24 I.C. 391. An entry by a broker embodying the terms of the contract signed by the broker is a written intimation by the broker to each party that a contract has been effected. 19 I.C. 925 = 6 S.L.R. 278. See also 39 Bom. 528 = 29 I.C. 943 = 17 Bom. L.R. 566.

¹ See e.g. S. 25, *infra*; the Indian Copyright Act (XX of 1847), S. 5, General Acts, Vol. I; the Apprentices Act (XIX of 1850), S. 8, *ibid.*; the Conveyance of Land Act (XXXI of 1854), Ss. 14 and 18, *ibid.*; the Workman's Breach of Contract Act (XIII of 1859), S. 4, *ibid.*; the Carriers Act (III of 1865), Ss. 6 and 7, General Acts, Vol. I; Merchant Shipping Act, 1894 (57 & 58 Vict., c. 60), S. 24 [Coll. Stat., Vol. II]; the Presidency Banks Act (XI of 1876), S. 9, *infra*; the Indian Companies Act (VI of 1882, now VII of 1913) Ss. 6, 39, 46 and 67.

² Sec. 11.—² See the Indian Majority Act (IX of 1875). For an exception to this rule in the case of emigrants, see S. 9 of the Assam Labour and Emigration Act (VI of 1901), Ben. Code, E. B. and A. Code, U. P. Code.

CONTRACT BY MINOR.—A minor is not estopped from pleading his minority at the time of a contract and the minor is not liable on the contract. 21 C. W. N. 257 = 19 Bom. L. R. 157 = 39 I. C. 401 = 43 I. A. 256 (P. C.). See also 54 I. C. 876 = 162 P. R. 1919 (38 M. 1071; 9 I. C. 124; 9 I. C. 543, Foll.); 1924 Lah. 294; 66 P. W. R. 1921. Minority at the time of contract must be proved beyond reasonable doubt by the party pleading the same. 89 I. C. 108 = 1925 Oudh 487. A mortgage made by a minor is wholly void and the mortgagee is not entitled to enforce his security created under the mortgage. 162 P. R. 1919 = 54 I. C. 876. A promissory note executed by a person for whom a guardian of person has been appointed by the Court before he attained eighteen years is a void contract if it was executed by him before he attained twenty-one years. 57 I. C. 678 = 11 L. W. 596 (30 C. 539, Ref.). Estoppel cannot overrule a plain provision of law or form the basis of a cause of action for a suit upon a contract when the contract itself is void. 57 I. C. 678 = 11 L. W. 596 (38 Mad. 1071, Foll.). Where a person under the Court of Wards borrows money, debt comes into existence though the person is not liable and a subsequent bond by his son for that debt is not merely ratification of a former void contract but is a fresh contract. 46 I. C. 974 = 142 P. W. R. 1918. A judgment-debtor to whom Sch. III, para. 11, C. P. Code, applies is a person disqualified within the meaning of S. 11 to the extent stated in the paragraph and any transaction entered with him in contravention thereof is a mere nullity incapable of subsequent ratification or of enforcement in equity. 42 I. C. 200 = 13 N.L.R. 130 (F.B.).

MINOR BENEFICIARY.—A person competent to contract may validly create a trust by purchasing property in the name of a minor. If a minor is not a contracting party himself but is the beneficiary under a sale, the transaction will be upheld. 18 I. C. 963 = 24 M.L.J. 352. When a contract by the minor is not a necessary condition for upholding the rights of the minor in the property, his rights should be maintained; when it is a necessary condition preliminary to the transaction or contractual obligations flow from the transaction, the transaction is void. 18 I. C. 963 = 24 M.L.J. 352.

MINOR COPARCENER.—Minor member of a joint Hindu family of whose person a guardian is appointed cannot contract. 57 I. C. 678 = 11 L. W. 596.

MINOR PARTNER.—A minor coparcener cannot sue as partner for dissolution of a partnership. 38 I. C. 111. A minor in India cannot become a partner in his own rights, as he is incapable of contracting under S. 11. 38 I. C. 111.

MINOR PROMISEE.—A contract of sale negotiated by a minor who settled the terms, paid consideration and got a sale-deed executed in his name is altogether void *ab initio* and no title passes thereby to the minor. 27 I. C. 733 = 13 A. L. J. 185; 10 I. C. 906. See also 32 I. C. 636. There is a fundamental difference between a contract of sale and a completed conveyance. 27 I. C. 733 = 13 A. L. J. 185; 10 I. C. 906; 32 I. C. 636 (39 C. 232; 33 M. 12; 33 A. 657; 31 A. 68, Ref.). A sale in favour of a minor is valid. 33 All. 657 = 11 I. C. 20 = 8 A. L. J. 670; 18 O. C. 115 = 30 I. C. 200 = 2 O. L. J. 200. See also 18 I. C. 451. Where a certificated guardian sells his property to his ward there is a presumption that the guardian accepts the sale on behalf of his ward. (*Ibid.*) A mortgage bond executed by a person of full age in favour of minors as a security for a loan is not void and is enforceable at their instance. 33 I. C. 994 = 22 C. W. N. 130. An infant can purchase property. 39 I. C. 444; 18 I. C. 451 (33 A. 657; 38 A. 62; 35 A. 154; 18 I. C. 451; 30 I. C. 200; 24 M. L. J. 352, Ref.; 33 M. 312, disapp.). There is nothing in the Contract Act that prevents an infant from being a promisee. When consideration passes from a minor he can enforce the contract. 40 Mad. 308 = 31 M. L. J. 575 = 36 I. C. 921 (F. B.). A purchase of property for the benefit of a minor by his maternal uncle is valid and if the property is alienated by the minor's father the minor can recover. 26 I. C. 195 = 37 Mad. 390; 24 I. C. 927 = 1 L. W. 379. A contract creating only rights in favour of a minor and not involving any contractual obligation on his part is valid. 18 I. C. 968 = 24 M. L. J. 363. A pronote executed in favour of a minor is valid though he does not incur liability by endorsing it. 18 I. C. 968 = 24 M. L. J. 363. See also 76 I. C. 810 = 1924 R. 136.

- 12.** A person is said to be of sound mind for the purpose of making a contract if, at the time when he makes it, he is capable of understanding it and of forming a rational judgment as to its effect upon his interests.

What is a sound mind for the purposes of contracting.

A person who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind.

A person who is usually of sound mind, but occasionally of unsound mind, may not make a contract when he is of unsound mind.

Illustrations.

(a) A patient in a lunatic asylum, who is at intervals of sound mind, may contract during those intervals.

(b) A same man, who is delirious from fever or who is so drunk that he cannot understand the terms of a contract or form a rational judgment as to its effect on his interests, cannot contract whilst such delirium or drunkenness lasts.

- 13.** Two or more persons are said to consent when they agree upon the same thing in the same sense.

"Consent" defined.

- 14.** Consent is said to be free when it is not caused by—

"Free consent" defined.

- (1) coercion, as defined in section 15, or
- (2) undue influence, as defined in section 16, or
- (3) fraud, as defined in section 17, or
- (4) misrepresentation, as defined in section 18, or
- (5) mistake subject to the provisions of sections 20, 21 and 22.

A mortgage in favour of a minor is valid and enforceable by him for there is no contract by the minor which still remains to be performed. 4 Pat. L. J. 682=52 I. C. 338=1919 Pat. 343 (30 Cal. 539=40 M. 308; 39 Cal. 232 and 46 I. C. 670, Foll.). A lease in a minor's favour imposing a liability on him is null and void. 5 Pat. L.W. 147=3 Pat. L. J. 518=46 I. C. 670=1918 Pat. 241 [30 C. 539 (P. C.), Foll.].

MINOR PROMISOR.—Where a minor purports to contract, his alleged contract is void and not merely voidable; he is a person who is not competent to contract. 32 C. L. J. 214=18 A. L. J. 335=22 Bom. L. R. 531=38 M. L. J. 353 (P.C.) (30 Cal. 539, Rel.). A minor cannot make a valid contract of sale of land. He can sue for recovery of the property on attaining majority. 33 I. C. 133; 21 A. L. J. 596=45 All. 644=1924 All. 156 (30 C. 539 (P. C.), followed). A contract by a minor is void not merely voidable. Case-law discussed. 26 I. C. 195=37 Mad. 390. *See also* 33 I. C. 132. Execution of bond—Consideration—Suit for cancellation of bond—Duty to restore benefit. 9 O. L. J. 404=69 I. C. 888=25 O. C. 237=1922 Oudh 271.

MUTUALITY.—It is not within the competence of the guardian of a minor or the manager of his estate, to bind the minor or his estate by a contract for the purchase of immoveable property. If the guardian or manager of the minor's estate enters into such a contract for the minor, there is no mutuality in the contract as the minor is not bound by it; and the minor cannot, on attaining majority, obtain specific performance of the contract. 39 Cal. 232=39 I. A. 1=16 C. W. N. 74=21 M. L. J. 1156=13 I. C. 331 (P. C.). A contract for the minor's benefit may be specifically enforced against him. 13 I. C. 673=16 C. W. N. 297.

ESTOPPEL.—A deed executed by a minor is a nullity and incapable of founding a plea of

estoppel. 47 C. L. J. 628=A. I. R. 1928 P. C. 152 (P. C.).

RATIFICATION.—A contract by a minor is void and cannot be ratified by him after attaining majority. 46 I. C. 765; 53 I. C. 123; 8 Lah. L. J. 539=99 I. C. 318=A. I. R. 1927 Lah. 24. Fresh bond on attaining majority ratifying previous bond while minor is unenforceable. 49 All. 137=25 A. L. J. 132=100 I. C. 748=A. I. R. 1927 All. 242. *See also* 51 I. C. 140. A contract of exchange made by a minor is void and as such cannot be ratified by him after attaining majority or by his mother. 51 I. C. 410=38 P. R. 1919 (30 Cal. 539, ref.). A minor has no right to enforce a fraudulent contract of his guardian. 65 I. C. 459=11 L. B. R. 83. As to refunding of benefit received by minor, *see* 85 I. C. 79=1924 All. 156.

Sec. 12. SCOPE.—The contract of a lunatic is also void. 17 M. L. J. 78. Original presumption is in favour of sanity. 1 M. H. C. R. 214. Test of soundness of mind. 68 I. C. 372=4 P. L. T. 7; *see also* 27 All. 1 (P. C.). As to validity of mortgage in favour of lunatic, *see* 27 O. C. 214=1925 Oudh 37. Unsoundness, to render a contract invalid must exist at the time of contract. 104 I. C. 527=A. I. R. 1927 Cal. 889. Proof of unsoundness of mind. *See (Ibid.)* Unsoundness of mind and undue influence are totally different things. (*Ibid.*) Effect of deep drunkenness leading to frequent insobriety and unsoundness of mind. *See* 13 O. L. J. 574=2 Luck. 226. Old age—Loss of vigour owing to old age is not sufficient to invalidate contract. 104 I. C. 527=A. I. R. 1927 Cal. 889.

Secs. 14 to 17.—Fraud, undue influence and coercion are separate and separable categories in law. Specific allegations and particulars must be given in respect of each. 39 Bom. 441=13 A. L. J. 570=19 C. W. N. 729=17 Bom. L. R. 527=27 M. L. J. 34=42 I. A. 135 (P. C.).

Consent is said to be so caused when it would not have been given but for the existence of such coercion, undue influence, fraud, misrepresentation or mistake.

15. "Coercion" is the committing, or threatening to commit, any act forbidden by the Indian Penal Code, or the unlawful detaining, or threatening to detain, any property to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement.

Explanation.—It is immaterial whether the Indian Penal Code is or is not in force in the place where the coercion is employed.

Illustrations.

A, on board an English ship on the high seas, causes *B* to enter into an agreement by an act amounting to criminal intimidation under the Indian Penal Code.

A afterwards sues *B* for breach of contract at Calcutta.

A has employed coercion, although his act is not an offence by the law of England, and although S. 506 of the Indian Penal Code was not in force at the time when or place where the act was done.

16. (1) A contract is said to be induced by "undue influence" where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.

Sec. 15.—Every conceivable form of improper pressure falls under S. 15. 25 Bom. 10; 4 All. 352; 22 All. 224; (as) threat of suicide. 41 Mad. 33. S. 15 does not control S. 72 and coercion in S. 72 is not the same as defined in S. 15. 40 Cal. 598=40 I. A. 56=17 C. W. N. 541=25 M. L. J. 104 (P. C.). Coercion—Plea of, and proof. 39 Bom. 149=28 I. C. 921=17 Bom. L. R. 157. A suspicion or mere probability is not sufficient to support a plea of coercion. (*Ibid.*) A mortgagee who refuses to reconvey the mortgaged properties to the mortgagor except on certain terms is not guilty of coercion. 45 I. C. 738=27 C. L. J. 78. In dealing with a case of 'coercion' as invalidating a contract, the court should decide whether the alleged act of coercion amounts to an offence under the I. P. C. 34 I. C. 578=3 L. W. 490. A threat to commit suicide to induce a document to be executed by a person is a threat to commit an act forbidden by the Indian Penal Code and amounts to 'coercion' and the document executed in pursuance of that threat is invalid and inoperative though suicide itself is not punishable though its attempt is. 41 Mad. 33=32 M. L. J. 494 (F. B.). *Per* Wallis, C. J. and Seshagiri Aiyar, J. (Oldfield, J., dissenting).—The 'coercion' need not proceed from a party to the contract or be immediately directed against the party whom, it is intended to coerce, to enter into the contract or specifically prejudice him or his property. 3 L. W. 490=34 I. C. 578=(1916) 1 M. W. N. 368. A threat even from a third person amounts to coercion. 16 I. C. 344=15 O. C. 192. The law of Duress of English Common Law is not applicable in India, as the law laid down in S. 15 is other than that contained in English Law texts. 16 I. C. 344=15 O. C. 192. In order to establish coercion, a person must prove (1) the utterance of threat, (2) of an act forbidden by law, (3) with the intention of compelling the plaintiff to make the agreement complained of. (*Ibid.*) (1927) M. W. N. 761. Mere threat of bringing a criminal charge does not amount to coercion as defined in the Act, as it is not *per se* forbidden by Penal Code. But the case is different when the threat is bringing false charge. (*Ibid.*) Coercion may consist in the unlawful detaining or threaten-

ing to detain property. 55 I. C. 741=12 Bur. L. T. 195; (1927) M. W. N. 761. Release deed executed by principal to agent under coercion is not valid. 39 M. L. T. 240=A. I. R. 1927 Mad. 852=53 M. L. J. 606.

Sec. 16.—¹ This section was substituted for the original S. 16 by the Indian Contract Act Amendment Act (VI of 1899), S. 2. Section whether exhaustive. *See* 29 A. 303 (307); 32 B. 208 (211 & 212).

ESSENTIALS OF OFFENCE.—To establish a plea of undue influence it must be shown that plaintiff (mortgagee) was in a position to dominate the will of the defendants (mortgagors) and secondly that he used that position to obtain an unfair advantage. If the terms of the contract appear on the face of them to be unconscionable or are shown to be so, the second point may be presumed. 38 M. L. J. 349=18 A. L. J. 344=43 Mad. 546=47 I. A. 1 (P. C.); 48 A. 666=96 I. C. 684=24 A. L. J. 822 (3 Pat. 279=51 I. A. 101, foll.). In the category of cases of undue influence might be covered cases where the party to a transaction exercised that influence in conspiracy with or through the agency of others. 38 M. L. J. 349 (P. C.). To avoid contract for undue influence the promisee must have used his dominating position to obtain an unfair advantage. 24 I. C. 67=7 Bur. L. T. 90. *See* also 32 Bom. 37; 11 O. C. 295; 10 Lah. L. J. 27.

CONFIDENTIAL RELATIONS GIVING RISE TO UNDUCE INFLUENCE.—The following involves confidential relations:—

(1) **PARENT AND CHILD**, 30 Mad. 169; *see* also 53 M. L. J. 842.

(2) **GUARDIAN AND WARD**, 6 C. W. N. 716; 36 Cal. 493; 5 M. L. J. 234; 38 M. L. T. 353=53 M. L. J. 842.

(3) **SOLICITOR AND CLIENT**, (*Ibid.*) 21 Bom. 699.

(4) *also* **ATTORNEY'S CLERK AND CLIENT**, 21 Bom. 699.

(5) **PATIENT AND DOCTOR**, 30 Bom. 578.

(6) **TRUSTEE AND BENEFICIARY**. (*Ibid.*)

(7) **SPIRITUAL ADVISOR AND CLIENT**, 12 All. 523.

(2) In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another—

(8) HUSBAND AND WIFE do not necessarily and always stand in such relation. 33 Cal. 773 (P. C.).

(9) PRINCIPAL AND AGENT.—Release deed by principal to agent—Agent in possession of documents, account books and cash refusing to hand over the same to new agent till release was executed constitutes coercion and undue influence—Release deed not enforceable. 50 Mad. 786 = 39 M. L. T. 240 = 26 L. W. 465 = 105 I. C. 5 = A. I. R. 1927 Mad. 852 = 53 M. L. J. 606

(10) As to LENDING MONEY to a profligate young man, *see* 7 Lah. L. J. 208 = 90 I. C. 39 = 26 Punj. L. R. 506 = 1925 Lah. 430.

(11) HEAVY INTEREST is not by itself sufficient to bring the contract under S. 16. 101 I. C. 759 = A. I. R. 1927 All. 538; 100 I. C. 679 = A. I. R. 1927 All. 315; A. I. R. 1927 All. 44; A. I. R. 1928 Oudh 330 = 5 O. W. N. 435. Nor mere need of money by borrower. 25 A. L. J. 314 = 31 C. W. N. 693 = 26 L. W. 147 = 101 I. C. 29 = A. I. R. 1927 P. C. 84 (P. C.). But *see also* 102 I. C. 707 = A. I. R. 1927 Lah. 536.

Secs. 16 and 19.—Where undue influence is alleged it is necessary to examine very closely all the circumstances of the case. 65 I. C. 380 = 8 O. L. J. 681.

ILLUSTRATIVE CASES.—Blindness by itself, unaccompanied by other circumstances, will not lead to a presumption of undue influence. 11 I. C. 775 = 4 Bur. L. T. 157. But *see* 147 P. L. R. 1913 = 20 I. C. 8; 58 I. C. 13 = 24 C. W. N. 769 = 16 N. L. R. 94 (P. C.); *see also* 66 I. C. 642 = 8 O. L. J. 358.

ILLITERACY.—If the contents of a written contract are not fully explained to or understood by a party who is an illiterate man, it is not binding on him. Reading audibly is not sufficient. 39 I. C. 177 = 21 C. W. N. 979. *See also* 18 Cal. 575; 83 I. C. 239 = 1925 Nag. 211 (Ignorant agriculturist).

FEAR OF PUNISHMENT.—A mere fear of a punishment in a criminal case does not constitute undue influence and the money cannot be refunded unless the circumstances disclose pressure or undue influence. 46 I. C. 424; 28 I. C. 438 (42 C. 286, *rel. on*). The term "Fraud" has a very wide meaning. 33 I. C. 396 = 18 Bom. L. R. 134.

HARD TERMS.—[*See also* Notes under S. 74, *infra*.] Court's power to give relief from hard terms as to interest and compound interest when money-lender is not shown to have taken undue advantage of his position. 101 P. R. 1918 = 23 C. W. N. 130 = 48 I. C. 933 (P. C.); 29 O. C. 253 = 96 I. C. 413 = 1926 Oudh 408. *See also* A. I. R. 1925 Pat. 326. It is difficult for a Court of Justice to give relief on grounds of simple hardship in the absence of any evidence to show that the money-lender had unduly taken advantage of his position even when the transaction appeared to be undoubtedly improvident. (*Ibid.*) In a case of a mortgage bond the Court should not infer undue influence from the mere fact that the rate of interest stipulated for is heavy and there is a provision in the bond for capitalizing the interest in arrears. 47 I. C. 11; 10 I. C. 249; 54 I. C. 785; 54 I. C. 558. In the case of an agreement reduced to writing, a Court cannot, in the absence of

fraud or undue influence, refuse to enforce its terms however unreasonable they may be. Under such circumstances, the Court has no discretion. 15 I. C. 377 = (1912) M. W. N. 416; *see also* 10 I. C. 249; 54 I. C. 985 (28 A. 570, *Ref.*) *See now* the Usurious Loans Act, 1918. The fact that the borrower failed to realise what the rate of compound interest would work out in a few years would not entitle him to relief from a court of justice on the ground of hardship. 54 I. C. 558. There is nothing inherently wrong or oppressive in an agreement to pay compound interest. 4 Lah. 76 = 72 I. C. 765 = 1924 Lah. 21; 1923 Lah. 634; 56 I. C. 74 = 2 Lah. L. J. 393; 130 P. L. R. 1912 = 16 I. C. 119; 55 I. A. 85 = A. I. R. 1928 P. C. 64 = 54 M. L. J. 427 (P. C.). Inequitable and unconscionable conditions such as one providing for oppressive rate of interest, should not be enforced against the mortgagor or his successor in title. 128 P. L. R. 1911 = 11 I. C. 519. *See also* 73 P. L. R. 1914 = 22 I. C. 528. Where a contract provides for a high rate of interest, courts cannot interfere to cut down the same unless there is satisfactory evidence of the exercise of undue influence. 22 I. C. 769 = 36 Mad. 533. Neither prior indebtedness nor a high rate of interest would by itself be sufficient to prove undue influence by the mortgagee on the mortgagor. 77 I. C. 383 = 1924 Oudh 118 (2). It is not a universal proposition of law that wherever there is a security for the debt a rate of interest over ten per cent. per annum is penal. 9 O. L. J. 612 = 74 I. C. 346 = 1923 Oudh 139. In cases where there is no proof of undue influence a court has no power to reduce the contract rate of interest merely on the ground that it is very high. 69 I. C. 657 = 9 O. L. J. 442 = 1923 Oudh 8 (1) (28 A. 570 (P. C.)); 20 O. C. 318; 8 O. L. J. 418; 24 O. C. 313, *fol.*) This is not now good law. (*See the Usurious Loans Act, 1918*). But the court disallowed costs on the ground that the interest decreed was high. 69 I. C. 657 = 9 O. L. J. 442 = 1923 Oudh 8 (1). The rate of interest, however exorbitant, cannot be abrogated unless the agreement was tainted by undue influence, fraud or misrepresentation such as are mentioned in the Contract Act. 2 Pat. 488 = 4 Pat. L. T. 707 = 74 I. C. 695. *See also* 2 P. L. J. 212 = 39 I. C. 352; 2 O. W. N. 248 = 95 I. C. 1019 = 1926 Oudh 273. A high rate of interest cannot always be regarded objectionable as a penalty within S. 74. But when the contract provides a special condition for a change in the rate of mode of calculation of interest as a punishment for some default, that special condition is a penalty. 1 P. L. W. 300 = 39 I. C. 352 = 2 P. L. J. 212. But 2 per cent. compound interest was held unconscionable 1925 All. 31.

LONG INDEBTEDNESS.—The mere fact that one of the parties to a contract was antecedently indebted to the other is not by itself sufficient proof of undue influence. 68 I. C. 597 = 1922 Nag. 219. But *see* 11 I. C. 198 = 213 P. L. R. 1911; 48 P. L. R. 1914 = 22 I. C. 406 = 87 P. W. R. 1914; 20 I. C. 47 = 20 C. L. J. 424. *See also* 83 I. C. 1019 = 27 O. C. 374 = 1924 Oudh 423; 2 O. L. J. 379 = 89 I. C. 348 = 1925 Oudh 535.

(a) where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other ; or

MENTAL DISTRESS.—It is not enough to prove undue influence that a vendor of property was in a distressed state of mind and anxious to dispose of his property at the time of sale. 72 I. C. 1032=1924 Lah. 337. As to mental distress, see also 22 All. 224 ; 28 Bom. 639 ; 10 All. 535 ; 11 Bom. 566 ; 13 Mad. 214.

OLD AGE.—Mere loss of vigour and infirmity on account of old age is not sufficient to invalidate a contract. 104 I. C. 527=A. I. R. 1927 Cal. 889 ; nor that an old man did not make provision in his settlement for his wife's maintenance. 38 M. L. T. (H. C.) 1=25 L. W. 550=99 I. C. 571=A. I. R. 1927 Mad. 255=52 M. L. J. 20.

UNCONSCIONABLE BARGAIN—BURDEN OF PROOF.—Where an ignorant, illiterate and a poor young man, on whom a right to the inheritance of his deceased relation had devolved and who is a fool, executes a sale-deed in favour of persons offering their help to recover the inheritance for him as volunteers and making the bargain with him which is entirely on their side, and wholly unconscionable, the conclusion is that the vendees were in a position to dominate the will of the vendor and exercised undue influence. 1 Luck. 144=13 O. L. J. 42=95 I. C. 995=3 O. W. N. 260. Once this is established, subsection (3) of this section will apply and the burden of proving that the contract was not induced by undue influence lies upon the person who was in a position to dominate the will of the other person (*Ibid*) 38 M. L. J. 349=18 A. L. J. 344=43 Mad. 546=47 I. A. 1 (P. C.) ; 104 I. C. 527=A. I. R. 1927 Cal. 889 ; 100 I. C. 679=A. I. R. 1927 All. 315 ; A. I. R. 1927 All. 44 ; see also 11 O. C. 295. If such person does not discharge the onus, the sale must be set aside subject to payment of compensation to the vendee. 1 Luck. 144=13 O. L. J. 42=1927 Oudh 92 ; 35 M. L. J. 614=23 C. W. N. 233=124 P. R. 1918=48 I. C. 1=21 Bom. L. R. 558 (P. C.). See also 65 I. C. 380=8 O. L. J. 681 (43 Mad. 546 ; 18 Cal. 545, Ref.) ; 83 I. C. 239=1925 Nag. 211 ; 90 I. C. 463=29 C. W. N. 1029 ; A. I. R. 1927 All. 44. Question of undue influence depends on circumstances. 85 I. C. 169=1925 Lah. 196. When the contract is *prima facie* unconscionable, the party seeking to enforce it must prove that the contract was not induced by undue influence. 2 Pat. L. J. 663=41 I. C. 337=1917 Pat. 342 ; 1 Pat. L. J. 604=38 I. C. 235=2 Pat. L. W. 415. The Courts have ample power under the amended Contract Act to go behind hard and unconscionable bargains on the ground that where there is ample security, the exaction of excessive and usurious interests in itself raises a presumption of undue influence which it requires very little evidence to substantiate. Where there is no security, no rate of interest can be considered excessive. 42 Cal. 690=19 C. W. N. 809. See also 45 I. C. 778=8 A. L. J. 407. There can be no standard rate on personal loans. (*Ibid*) Where the parties are reasonably on terms of equality, a judge cannot do better than adopt what they themselves have agreed upon. (*Ibid*) The Dicta of English Judges under the English Money Lenders Act can safely be accepted in India since the Indians lean more

in favour of the debtors. (*Ibid*.) Extortionate and inequitable agreement not enforceable. 56 I. C. 272=1 Lah. 124. Compound interest at 24 per cent. with half-yearly rests enforced in absence of undue influence. 50 Mad. 614=25 L. W. 699=38 M. L. T. (H. C.) 323=A. I. R. 1927 Mad. 620=52 M. L. J. 612. The actual value of the land in dispute at the time of agreement, determines if it is extortionate and inequitable. 56 I. C. 272=1 Lah. 124. A Court of Justice is not a blind and humble instrument of the creditor to plunder the debtor. 25 I. C. 719=149 P. L. R. 1914. A creditor who got securities at a very high rate of interest (30 per cent.) from an expectant heir, who was a very inefficient clerk in a Court, is guilty of undue influence. (*Ibid*.) Champertous bargains not having been held in the country contrary to public policy stand on the same footing as any other contract. 65 I. C. 129=24 O. C. 313. Apart from the Usurious Loans Act, the mere fact that a bargain is unconscionable in the sense that the rate of interest charged is excessive, is not in itself a sufficient ground for interference. 48 I. C. 17=5 O. L. J. 579 ; 22 I. C. 132=16 O. C. 267.

URGENCY AND INADEQUACY OF CONSIDERATION.—Urgent need of money on the part of the borrower does not of itself place the lender in a position to dominate his will within S. 16. 29 C. L. J. 488=49 I. C. 794=23 C. W. N. 609 ; 29 O. C. 253=96 I. C. 413=1926 Oudh 408. See also 26 M. L. J. 315=1 L. W. 276 ; 1922 Oudh 268 ; 42 Cal. 652=21 C. L. J. 79 ; 18 I. C. 965=17 C. L. J. 221. The mere fact of the existence of an urgent necessity on the part of the borrower is not sufficient to raise the presumption that undue influence was exercised. Nor does the existence of urgent need accompanied by a high rate of interest establish such a presumption. In ordinary circumstances, the more pressing the necessity, the higher the rate of interest is likely to be, for the borrowers have no time to make such inquiries as will ensure that they are borrowing at the cheapest rate obtainable. 66 I. C. 687=8 O. L. J. 418 (34 C. 150 ; 8 O. C. 193, Rel.) ; 9 O. L. J. 439=69 I. C. 667 ; 48 I. C. 32=5 O. L. J. 572 ; 26 I. C. 26=1 O. L. J. 518 ; 69 I. C. 697=1 P. 263. Where the creditors are in a position to take advantage of the embarrassment of their debtors the bargain is unconscionable. 42 Cal. 652=21 C. L. J. 79. The mere fact that one party is in a position to dominate the will of another is not enough to avoid a contract between them in the absence of proof that the transaction is also unconscionable. 18 I. C. 965=17 C. L. J. 221. A transaction may be unconscionable in many ways and a Court should see in each case whether according to its sense of justice it is really so. (*Ibid*.) Excess of interest and charges may, if unexplained, of itself be evidence of a harsh and unconscionable bargain. (*Ibid*.) Inadequate consideration may lead to inference of fraud or undue influence. 96 I. C. 468=1926 Pat. 539. But the inadequacy of consideration must be apparent and must not be left to be spelled out by dexterous arguments as to value. 96 I. C. 468=1926 Patna 539. The mere fact that properties had to be parted for

(b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.

(3) Where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was

an unduly low price owing to pressure of necessity will not indicate undue influence. 26 M.L.J. 315=23 I. C. 72=1 L. W. 276. Where the bargain is fair and reasonable the plea of undue influence collapses. 24 I. C. 67=7 Bur. L.T. 90.

PARDANASHIN WOMAN AND YOUNG PERSONS.—Where a deed of gift by a pardanashin lady is impeached on the ground of undue influence, the questions that arise are (1) was the transaction a righteous transaction? (2) was it an improvident act? (3) was it a matter requiring advice? (4) did the intention of making the act originate with the donor? 65 I. C. 380=8 O. L. J. 681. If a family settlement or the award of panchayat is impeached by a pardanashin lady on the ground that her consent was obtained by fraud, practised by her kinsmen, whose interests conflicted with hers and who, therefore, misled her and the woman is shown to be illiterate and lacking in business capacity, the Court has to consider not whether she knew what she was doing, had done or proposed to do, but how her intention to act was produced. Fraud cannot be condoned unless there is full knowledge of the facts and the rights arising therefrom and the parties are at arm's length. 35 M. L. J. 362=20 C. W. N. 957=34 I. C. 37=14 A. L. J. 1236 (P. C.). See also 35 I. C. 395; 23 I. C. 401=18 C. W. N. 133. The donee a priest, worked on the religious feelings of a lady when she was in mental distress and illness. The lady was not rich but made a substantial gift to the priest. *Held*, the transaction should be set aside. 39 Cal. 933=16 C. W. N. 649. When a deed is executed by a pardanashin lady or a boy of tender years, mere reading over is not sufficient. The language should be thoroughly explained especially when it is vague and ambiguous. 38 I. C. 454=3 O. L. J. 746; 10 O. L. J. 86=74 I. C. 547. See also 29 Cal. 749 (P. C.); 24 Cal. 664; 31 Bom. 165; 13 I. A. 215; 39 I. A. 156; 18 I. A. 545; 3 Cal. 324; 28 Cal. 546; 16 Bom. L. R. 147 (P. C.); 36 All. 81; 4 Bom. L. R. 146; 7 Cal. 245; 5 Bom. 450; 11 Bom. 636; 33 Cal. 773. The principles of law applicable to a pardanashin woman will not be extended to a person said to be old and not in robust health. 10 O. L. J. 86=74 I. C. 517=1923 Oudh 254. A knowledge of letters and of figures and a capacity of dealing at first hand to some extent with her tenants will not convert a pardanashin lady into a woman of the world so as to rebut the presumption. The burden of proving *bona fides* of the transaction lies on the party affirming it. 35 I. C. 395.

PRINCIPAL AND AGENT.—Even in a case where an agent was the object of the bounty of his principal there is nothing to prevent this and if an agent can clearly show that a gift was made in his favour by a donor who was in a position to exercise a free and unfettered judgment with full knowledge of what he was doing, the gift will be upheld. 10 O. L. J. 86=74 I. C. 517. See also 1923 Lah. 634; 20 I. C. 812=195 P. W.

R. 1913; 50 Mad. 786=39 M. L. T. 240=26 I. W. 465=A. I. R. 1927 Mad. 852=53 M. L. J. 606.

POSITION OF PARTIES.—The fact that one party to a contract stands in the relation of a debtor to the other is not by itself sufficient to prove undue influence. 68 I. C. 597=1922 Nag. 219; 42 All. 230=18 A. L. J. 100; 102 I. C. 707=A. I. R. 1927 Lah. 536. A creditor can ask his debtor to execute documents in a particular form and where a creditor writes to his debtor's servant to get his master's signature to such a form, no inference that undue influence was used can arise. 42 All. 230=18 A. L. J. 100. A Karinda who is a servant of very minor status cannot be presumed without very distinct evidence to be in a position to dominate the will of his employer. 48 I. C. 17=5 O. L. J. 579. When a Buddhist lady made a gift to her nephew who was also acting as her agent, *held*, that the relationship was not such a fiduciary one as would lead the Court to infer undue influence. 46 I. C. 738. Undue influence might proceed from a third person. 23 I. C. 401=18 C. W. N. 1133. There is no presumption of undue influence in India as well as in England in the case of a gift to a son, grandson or son-in-law during the donor's last illness. 26 I. C. 39=8 Bur. L. T. 75; 68 I. C. 372=4 Pat. L. T. 17 (33 C. 733, Foll.). As to presumption in cases of dealing with pardanashin woman, see 39 I. A. 156; 29 Cal. 749; 13 I. A. 215; 31 Bom. 165; 36 All. 81; 18 I. A. 545; 33 Cal. 773; 23 All. 137.

PLEADINGS—WHO CAN PLEAD UNDUE INFLUENCE.—A man of mature age and of some intelligence and activity managing his affairs previous to a transaction, cannot resort to the plea of undue influence. 42 All. 422=24 C. W. N. 529=47 I. A. 116 (P. C.). See also 26 I. C. 67=7 Bur. L. T. 90 (petition writer). A speculator who purchases the equity of redemption on the chance of getting redemption on easy terms cannot be allowed to set up the plea, as his vendor might have done, that the bargain was brought about by the exercise of undue influence. 305 P. L. R. 1913=20 I. C. 812. See also 1923 Lah. 634. Nor contest by aggrieved party disentitles other defendants to any relief. 84 I. C. 124=1925 Cal. 94.

PROOF.—A deed cannot be treated as void for undue influence merely because it is unreasonable or its terms are prejudicial to the donor. 44 I. C. 483=7 L. W. 339; 1 Luck. 144=A. I. R. 1927 Oudh 92; 102 I. C. 707=A. I. R. 1927 Lah. 536; A. I. R. 1927 All. 44. Undue influence is not a matter always capable of direct proof, and must depend in its very nature on the circumstances in which the transaction had its origin. 44 I. C. 483=7 L. W. 339. To establish undue influence it must appear that there was something unconscionable either in the original dealing or in the subsequent stages of the transaction. 52 I. C. 335.

not induced by undue influence shall lie upon the person in a position to dominate the will of the other.

Nothing in this sub-section shall affect the provisions of section 111 of the Indian Evidence Act, 1872.

Illustrations.

(a) *A* having advanced money to his son, *B*, during his minority, upon *B*'s coming of age obtains, by misuse of parental influence, a bond from *B* for a greater amount than the sum due in respect of the advance. *A* employs undue influence.

(b) *A*, a man enfeebled by disease or age, is induced, by *B*'s influence over him as his medical attendant, to agree to pay *B* an unreasonable sum for his professional services. *B* employs undue influence.

(c) *A*, being in debt to *B*, the money-lender of his village, contracts a fresh loan on terms which appear to be unconscionable. It lies on *B* to prove that the contract was not induced by undue influence.

(d) *A* applies to a banker for a loan at a time when there is stringency in the money market. The banker declines to make the loan except at an unusually high rate of interest. *A* accepts the loan on these terms. This is a transaction in the ordinary course of business, and the contract is not induced by undue influence.

17. "Fraud" means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent,¹

"Fraud" defined. with intent to deceive another party thereto or his agent, or to induce him to enter into the contract :—

(1) the suggestion, as to a fact, of that which is not true by one who does not believe it to be true ;

(2) the active concealment of a fact by one having knowledge or belief of the fact ;

(3) a promise made without any intention of performing it ;

(4) any other act fitted to deceive.

(5) any such act or omission as the law specially declares to be fraudulent.

Explanation.—Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak,² or unless his silence is in itself, equivalent to speech.

Sec. 17.—¹ Compare S. 238, *infra*.

To prove a case of fraud, it must be proved that representations were made which were false to the knowledge of the party making them. 45 A. 624 = 21 A. L. J. 571 = 1924 A. 17. If a contract is obtained by fraud or cheating, it is voidable at the instance of the person defrauded or cheated. But where a performance has been obtained by fraud or cheating, the contract cannot be avoided. 23 Bom. L. R. 1144 = 46 Bom. 489. In order to avoid a contract fraud must be in the making of the contract and not in its performance. 15 Bom. L. R. 92 = 37 Bom. 158 ; and the fraud must be committed by party to contract or his agent or with his connivance. 28 Bom. 639. A party cannot set up his own fraud to avoid the contract. 15 W. R. 273 ; 31 Bom. 495. A plea of fraud is not sustainable where there is no misleading on any question of fact or law. 20 I. C. 47 = 20 C. L. J. 424 ; 31 P. R. 1918 = 45 I. C. 101. Fraud in contract of service—Concealment of contract forbidding service elsewhere. 66 I. C. 441.

Where a person orders and obtains possession of goods with the deliberate intention of not paying for them, he commits fraud. He must then be considered to be the agent of the vendor and his possession as that of the vendor. If vendee tries to dispose of the goods before payment by transfer of the invoices to a third party's name, the third party gets no title to the goods. 14 P. L. R. 1917

= 39 I. C. 169. Seller selling property already sold by him to a third person is fraud, and the buyer can recover back the price, in spite of agreement that seller could not be responsible for defect of title. 25 A. L. J. 708 = 103 I. C. 310 = A. I. R. 1927 All. 693. Such conduct on the part of seller would amount to active concealment of a material fact. (*Ibid.*) Mere failure to fulfil a promise is not fraud unless from the outset the promisee did not intend to fulfil it. 42 I. C. 113 (L. B.). The making of promises without the intention of keeping them is fraud under the section, though under the English rule such a thing is not fraud. 33 I. C. 396 = 18 Bom. L. R. 134. A plaintiff who relies upon fraud must both plead and prove it, and must give the particulars of the alleged fraud and can succeed upon proof of the fraud as alleged and not of any other kind of fraud. 10 I. C. 922 = 4 Bur. L. T. 18. That a party misreads a document (the acceptance memo.) and believed it to be something different from what it was, would not vitiate the contract. 1923 Sind 25. A Court should not declare a decree a nullity on the ground of fraud unless it can define in clear terms the fraudulent acts by which the decree was obtained. But it will not take fraud in the narrow sense of S. 17. 25 I. C. 789 = 8 S. L. R. 3. On this section, see also 1925 Cal. 555.

² See S. 143, *infra*.

Illustrations.

(a) *A* sells, by auction, to *B*, a horse which *A* knows to be unsound. *A* says nothing to *B* about the horse's unsoundness. This is not fraud in *A*.

(b) *B* is *A*'s daughter and has just come of age. Here, the relation between the parties would make it *A*'s duty to tell *B* if the horse is unsound.

(c) *B* says to *A*—"If you do not deny it, I shall assume that the horse is sound." *A* says nothing. Here, *A*'s silence is equivalent to speech.

(d) *A* and *B*, being traders, enter upon a contract. *A* has private information of a change in prices which would affect *B*'s willingness to proceed with the contract. *A* is not bound to inform *B*.

"Misrepresentation" defined.

18. "Misrepresentation" means and includes—

(1) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true ;

(2) any breach of duty which, without an intent to deceive, gains an advantage to the person committing it, or any one claiming under him, by misleading another to his prejudice or to the prejudice of any one claiming under him ;

(3) causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement.

19. When consent to an agreement is caused by coercion, [* * * * *],¹ fraud or misrepresentation, the agreement is a

contract voidable at the option of the party whose consent was so caused.

Voidability of agreements without free consent.

Sec. 18.—As to what amounts to misrepresentation, see 4 C. W. N. 369 = 29 Bom. L. R. 1535. Fraud and misrepresentation distinguished. See 3 Bom. 242. Misrepresentation as to part may make the whole contract voidable. 17 Cal. 296 (P.C.). Silence will in equity, in some cases, be equivalent to misrepresentation. 24 I. C. 193 = 42 Cal. 28 (40 Eng. Rep. 108, Rel. on). Failure to make such inquiries as an ordinary prudent man would make, may under certain circumstances be evidence that the person to whom misrepresentation was made was not actually deceived. 71 I. C. 161 = 16 S. L. R. 112 = 1923 Sind 5 (F. B.).

Sec. 18 (2).—There is no misrepresentation, if there are means of discovering truth with ordinary diligence. 112 P. L. R. 1916 = 36 I. C. 34 ; 46 I. C. 21 = 42 P. R. 1918 ; 38 I. C. 500. As to misrepresentation by agent, see 6 Bom. 309 ; 14 Bom. 241. Document signed by blind man—Contents of document misrepresented—Rights of bona fide purchaser for value. See 1925 Pat. 140.

Sec. 19.—¹ The words "undue influence" were repealed by the Indian Contract Act (Amendment Act) (VI of 1899), S. 3.

The right to avoid a transfer or a conveyance executed under undue influence or fraud is not a mere personal right but can be exercised by the heirs or legal representatives of the person unduly influenced or defrauded unless the person has indicated his election to stand by the transaction. 43 Bom. 173 = 20 Bom. L. R. 911. Though 'undue influence' and 'fraud' are separately dealt with in Contract Act, 'undue influence' is a kind of 'fraud' in equity and invites the same relief as fraud. 33 I. C. 576 = 18 Bom. L. R. 27. A misrepresentation should in fact materially induce the contract in order to give a right of avoidance. 55 I. C. 817 = 31 C. L. J. 158 ; 29 Bom. L. R. 1535. If a transaction which is voidable is admitted by the person who is entitled to avoid it, it cannot be questioned by a third party. 34 I. C. 956 = 23 C. L. J. 122. See also 43 Bom. 173 ; 36 Bom. 37 ; 28 Bom. 639. The section does not apply where the object of the agreement was illegal to the

knowledge of both parties at the time it was made and both parties are in *pari delicto*. 9 I. C. 161 = 15 C. W. N. 408. A person is not liable on an acknowledgment, where the money has been paid and his signature to the acknowledgment had been obtained by intimidation. 59 I. C. 781 = 24 P. W. R. 1921. A contract voidable on the ground of fraud or misrepresentation can be ratified by the person at whose option it is voidable. 46 I. C. 21 = 42 P. R. 1918 ; 38 I. C. 500 = 43 P. W. R. 1917 ; 28 Bom. 639. As to what is ordinary diligence, see 4 Cal. 801. As to effect of *laches* on right of avoidance of contract, see 4 C. W. N. 369.

Secs. 19 and 19-A. RIGHT OF SUIT.—A right to have a contract set aside on the ground of fraud or undue influence does not cease on the death of the contracting party who was deceived, but passes on to his representatives. 51 Bom. 133 = 29 Bom. L. R. 115 = 100 I. C. 932 = A. I. R. 1927 Bom. 384.

Secs. 19 and 23.—The Civil Court is not prevented from enforcing a contract *inter partes*, which is in itself in no way illegal or fraudulent *qua* those parties merely because a third person may have a right to refuse to give effect to that contract. 48 P. L. R. 1913 = 18 I. C. 5 = 58 P. R. 1913. Dishonest concealment of identity of contracting party—Agent secretly procuring a running contract with his principal—Contract voidable. 43 M. L. J. 444 = 69 I. C. 927 = 45 M. 1005.

ILLUSTRATION (B) is not exhaustive of the class of cases which could come under the explanation. 13 L. W. 525 = 62 I. C. 764 = (1921) M. W. N. 340. A finding on the question whether a misrepresentation induced the consent of the party who relied on it is one of the fact and the High Court will not interfere with it in second appeal, though the finding may not be quite satisfactory. (*Ibid.*) Where one of the parties to a contract says : "I am well known to the National Bank in your city." It is not a statement of fact but only his own opinion, as to the state of his credit though it may be false. Such a statement

A party to a contract, whose consent was caused by fraud or misrepresentation, may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representations made had been true.

Exception.—If such consent was caused by misrepresentation or by silence, fraudulent within the meaning of section 17, the contract, nevertheless, is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence.

Explanation.—A fraud or misrepresentation which did not cause the consent to a contract of the party on whom such fraud was practised, or to whom such misrepresentation was made, does not render a contract voidable.

Illustrations.

(a) *A*, intending to deceive *B*, falsely represents that five hundred maunds of indigo are made annually at *A*'s factory, and thereby induces *B* to buy the factory. The contract is voidable at the option of *B*.

(b) *A*, by a misrepresentation, leads *B* erroneously to believe that five hundred maunds of indigo are made annually at *A*'s factory. *B* examines the accounts of the factory, which shows that only four hundred maunds of indigo have been made. After this *B* buys the factory. The contract is not voidable on account of *A*'s misrepresentation.

(c) *A* fraudulently informs *B* that *A*'s estate is free from incumbrance. *B* thereupon buys the estate. The estate is subject to a mortgage. *B* may either avoid the contract, or may insist on its being carried out and the mortgage-debt redeemed.

(d) *B*, having discovered a vein of ore on the estate of *A*, adopts means to conceal, and does conceal, the existence of the ore from *A*. Through *A*'s ignorance *B* is enabled to buy the estate at an under-value. The contract is voidable at the option of *A*.

(e) *A* is entitled to succeed to an estate at the death of *B*; *B* dies. *C*, having received intelligence of *B*'s death, prevents the intelligence reaching *A*, and thus induces *A* to sell him his interest in the estate. The sale is voidable at the option of *A*.

1[19-A. When consent to an agreement is caused by undue influence, the agreement is a contract voidable at the option of the party whose consent was so caused.

Power to set aside contract induced by undue influence.

Any such contract may be set aside either absolutely or, if the party who was entitled to avoid it has received any benefit thereunder, upon such terms and conditions as to the Court may seem just.

Illustrations.

(a) *A*'s son has forged *B*'s name to a promissory note. *B*, under threat of prosecuting *A*'s son, obtains a bond from *A* for the amount of the forged note. If *B* sues on this bond, the Court may set the bond aside.

(b) *A*, a money-lender, advances Rs. 100 to *B*, an agriculturist, and, by undue influence, induces *B* to execute a bond for Rs. 200 with interest at 6 per cent. per month. The Court may set the bond aside, ordering *B* to repay the Rs. 100 with such interest as may seem just.]

Agreement void where both parties are under mistake as to matter of fact.

20. Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void.

is not one of fact and even if false, does not avoid the contract under S. 19. 29 I. C. 575.

Secs. 19 and 65.—A rescinded contract becomes a void contract and the person who has received any advantage under it, is bound to restore it to the other party. 27 I. C. 130.

Sec. 19-A.—1S. 19-A was inserted by the Indian Contract Act (Amendment Act) (VI of 1899), S. 3.

Undue influence must be pleaded with precision and unless a case is made out in the pleadings, the Court will not investigate it. 2 Pat. L. T. 115 = 5 Pat. L. J. 744 = 60 I. C. 282 = 1921 Pat. 107. Power of Court to grant relief on certain terms. See 31 Bom. 348. See also 84 I. C. 124 = 1925 Cal. 94; 47 All. 932 = 23 A. L. J. 856 = 88 I. C. 1013 = L. R. 6 All. 483 = 1925 A. 783.

Sec. 20.—Reason of the rule in the section explained in 28 Rom. 420. Application of prin-

ciple of *Caveat Emptor*. 40 Bom. 638 = 34 I. C. 515 = 18 Bom. L. R. 201. Relief can be granted if there is mistake as to existing facts, not on account of mistaken expectations, which are not realized. (*Ibid.*) See also 5 I. A. 61; 4 Bom. 473; 3 Bom. 154. Mistake as to collateral circumstances do not avoid a contract. 30 Mad. 284; 35 Cal. 955; 33 Cal. 713; nor mistake as to immaterial terms. 100 I. C. 730 = A. I. R. 1927 Oudh 198. S. 20 deals with the question of common mistake; the general principle of frustration may govern such cases. 70 I. C. 379 = 26 C. W. N. 573; 50 Cal. 615 = 27 C. W. N. 639; 40 Bom. 638 = 18 Bom. L. R. 201. See also 3 Rang. 477. Terms understood by parties in different sense—Contract is void. 95 I. C. 614 = 1926 Nag. 435. Compromise under mistake of fact—Setting aside. See 51 I. C. 955 = 29 C. L. J. 526; 4 Cal. 687. Compromise under mutual mistake

Explanation.—An erroneous opinion as to the value of the thing which forms the subject-matter of the agreement is not to be deemed a mistake as to a matter of fact.

Illustrations.

(a) *A* agrees to sell to *B* a specific cargo of goods supposed to be on its way from England to Bombay. It turns out that, before the day of the bargain, the ship conveying the cargo had been cast away and the goods lost. Neither party was aware of the facts. The agreement is void.

(b) *A* agrees to buy from *B* a certain horse. It turns out that the horse was dead at the time of the bargain, though neither party was aware of the fact. The agreement is void.

(c) *A*, being entitled to an estate for the life of *B*, agrees to sell it to *C*. *B* was dead at the time of the agreement, but both parties were ignorant of the fact. The agreement is void.

21. A contract is not voidable because it was caused by a mistake as to any law in force in British India ; but a mistake as to a law not in force in British India has the same effect as a mistake of fact.

Effect of mistakes as to law.

Illustrations.

A and *B* make a contract grounded on the erroneous belief that a particular debt is barred by the Indian Law of Limitation : the contract is not voidable.

[* * * * *

Contract caused by mistake of one party as to matter of fact.

22. A contract is not voidable merely because it was caused by one of the parties to it being under a mistake as to a matter of fact.

What considerations and objects are lawful and what not.

23. The consideration or object of an agreement is lawful, unless—it is forbidden by law² ; or

as to terms which are not material will not be set aside. 100 I. C. 730=A. I. R. 1927 Oudh 198. Mutual mistake—Effect of. 25 C. I. J. 459=21 C. W. N. 404. A mistaken assumption which has reference to the motive which induced the execution of a document is not 'a mistake as to his rights' which would justify a Court in passing a decree for its cancellation. 32 M. L. J. 439=40 I. C. 205. Where both parties to a reference to arbitration are under a mistake of fact as to something which is not essential to the agreement, the agreement of reference is not void and cannot be set aside. 47 I. C. 783=12 S. I. R. 41. But see 57 I. C. 481=7 O. L. J. 312. Pleadings. 9 Bom. 351.

Sec. 21.—¹ Second illustration was repealed by Act XXIV of 1917, S. 2 Applicability of section—Payment of surcharge to railway—Pure error of law—Suit to recover money paid—Maintainability. (1928) M. W. N. 385.

Sec. 22.—A contract entered into under a mistake of fact is only voidable and is binding until it is avoided. 10 I. C. 343 ; 58 I. C. 591=14 S. L. R. 22 ; 21 Bom. L. R. 986=44 Bom. 631. See also 16 Bom. 561 ; 3 Rang. 477. Contract cannot be avoided on the ground of its becoming more onerous than was originally supposed. See 86 I. C. 364=1925 Sind 8c.

Sec. 23.—² See Ss. 26, 27, 28, 30, *infra*.

MEANING OF WORDS.—The words "consideration" and "object" of an agreement do not mean the same thing. 33 Cal. 702. Burden of proof. See 107 I. C. 903.

UNLAWFUL OBJECT.—A promissory note executed by a minor under the Court of Wards though void, is not unlawful consideration for a bond executed by his son after his death and after the estate had ceased to be under the Court of Wards. 21 A. L. J. 446=73 I. C. 458=1923 A. 590. An agreement by a Parsi husband with his

wife that they should live separately is lawful and a reference to arbitration on the question as to the amount of maintenance to be paid to the wife is quite legal. 45 Bom. 318=22 Bom. L. R. 1293 (23 Bom. 279, Foll.). Unlawful object --Government Servants' Conduct Rules, R. 14 --Debt contracted by the father for trading purposes—Liability of sons. 17 Bom. L. R. 955=40 B. 126. Suit to recover money on a hundi drawn to cover betting losses. 27 C. W. N. 442=1923 Cal. 445. Where a pleader is appointed by Court in a suit as Commissioner the work done by the Commissioner is no work done for the party but for the Court. 27 C. W. N. 430=37 C. L. J. 406. Consequently where a commissioner who had been appointed at the instance of a party to a suit took a bond from that party for a certain sum of money and subsequently sued upon it, *held*, that the consideration for the bond was illegal and that it represented an improper advantage obtained by an officer of Court by abuse of his position as such. Consequently the bond was unenforceable. (*Ibid.*) Money lent for assisting the borrower to visit brothels and bring in prostitutes cannot be legally recovered. 39 I. C. 767. Alienation of service inam lands unlawful. 45 M. 620=42 M. L. J. 477=1922 M. 197 (F. B.). When a transaction has been entered into for unlawful or immoral purpose and that purpose has been achieved, the Court would not interfere as the instance of a *particeps criminis* to relieve him from the legal effect of the transaction. 44 Mad. 329=39 M. L. J. 525=59 I. C. 1003. A hundi passed for an illegal consideration is unenforceable. 40 Mad. 285=34 I. C. 401=31 M. L. J. 264 (15 I. C. 253, 26 I. C. 181 ; (1892) 1 Ch. 173, Followed).

COLLATERAL CONTRACT.—An agreement by a Government tenant with plaintiff to the effect that if the plaintiff helped the former in bringing

is of such a nature that, if permitted, it would defeat the provisions of any law ; or is fraudulent ; or

the land under cultivation the former would give to the plaintiff one-half of whatever rights he might acquire in the land is not opposed to public policy. 3 Lah. 92=64 I. C. 18=1922 L. 287. The sale of a share in a chance in the Turf Club sweep is not a wager and is not opposed to public policy. 25 I. C. 355=258 P. L. R. 1914. No suit lies for recovering money lent and used for an illegal object as bribe. 24 I. C. 692=185 P. L. R. 1914 (8 C. 24. Foll.). Collateral contracts—Right of agent to recover gambling debt paid for principal if opposed to public policy. 13 I. C. 319=79 P. L. R. 1912. A bond for payment of a loan was taken by the creditor in the name of his concubine's mother. The debtor cannot plead that the consideration for the bond is tainted with immorality and that the bond therefore is unenforceable. 56 I. C. 616. The concubine's mother or her assignee can sue as banamidar and it cannot be treated as involving the enforcement of an immoral contract. 56 I. C. 616. Collateral contract for gambling debts—Money lent for gambling—Recovery of. 29 I. C. 573.

Ss. 23 and 65.—If an agreement is void but not illegal, plaintiff can recover from a third party money which the latter has received on his behalf under the void agreement. 51 I. C. 530=12 Bur. L. T. 9.

PARTIES TO ILLEGAL ACTS.—Where the assistance of equity was not being asked to carry out an illegal agreement, defendants could recover on their counter-claim. 44 Bom. 631=21 Bom. L. R. 986; (1923) M. W. N. 335=72 I. C. 735=1923 Mad. 626. *See also* 1925 Lah. 65. If the illegality of a transaction is brought to the notice of the Court and the person invoking the aid of the Court is himself implicated in the illegality, the Court will not assist him. 72 I. C. 653=1924 P. 321. A party cannot recover money paid in respect of a contract which is tainted with criminality or immorality, even though the contract has not been performed. 51 I. C. 280=4 Pat. L. J. 542 (43 C. 115; 1 C. L. J. 261, Ref.). Where the illegal portion of an agreement has been wholly carried into effect, the whole matter is outlawed and the Court will not aid either party to retrieve if he is not able to show that he has been less to blame than the other. 20 C. W. N. 760=1 Pat. L. J. 48=33 I. C. 711.

ILLUSTRATIVE CASES, ACTS DEFEATING STATUTE.—No man can exclude himself from the protection of Courts by a contract entered into with another. 42 Bom. 380=22 C. W. N. 601=16 A. L. J. 513=35 M. L. J. 262=45 I. A. 61 (P. C.). A sale-deed which tends to defeat the provisions of the Tenancy Act is void and unenforceable. *See also* 39 All. 645=15 A. L. J. 656; 15 A. L. J. 150=32 M. L. J. 383=21 C. W. N. 616=44 I. A. 54=39 I. C. 454=39 All. 173 (P. C.). Contract though unenforceable will not vitiate a transfer merely because the contract is unenforceable. 38 All. 232=14 A. L. J. 270; 27 I. C. 503=13 A. L. J. 6. As to the effect of invalidity of terms of contract intended to defeat provisions of an Act of the Legislature, *see* 25 I. C. 503=13 A. L. J. 6; 35 All. 19=10 A. L. J. 416; 16 I. C. 42; 24 Bom. L. R. 449=1922 B. 84. A contract to prepare

by printing and to supply copies of a picture produced in England is not unlawful or against policy. 44 Bom. 720=22 Bom. L. R. 808. Act defeating statute—Public policy—Speculation in gold against Government Notification. 44 Bom. 6=21 Bom. L. R. 788. Loan for gambling is not one forbidden by law unless it be proved that the gambling was in a public place. 100 I. C. 345=A. I. R. 1927 Nag. 155. Dicta of English Judges on public policy, how far to be considered by judges in India. 44 Bom. 6. Public policy should not be interpreted under S. 23 as comprehending all the political policies of the Government of India. (*Ibid.*) Government Servants' Conduct Rules are rules of conduct and not a statutory prohibition. Hence a disregard of these does not taint Government servant's transactions with immorality or illegality. 40 Bom. 126=17 Bom. L. R. 955. Agreement to share profits with the forest licensee though not allowed by the terms of license, is not void. 40 Bom. 64=17 Bom. L. R. 701. An option by purchaser to resell the property to the vendor on certain terms and conditions is valid. The purchaser is bound to fulfil if the conditions are complied with strictly. 35 I. C. 631. Hatchita executed by insolvent-debtor to plaintiff—Suit upon—Consideration—Illegality—Transferability. 14 I. C. 519=16 C. L. J. 162. Act defeating statute—One of several judgment debtors getting assignment of decree is not against law. 44 Mad. 334=39 M. L. J. 692=60 I. C. 127. A promise to abstain from raising the plea of limitation in a suit is void as it defeats the provisions of Law of Limitation. 40 Mad. 701=35 I. C. 575=31 M. L. J. 231. The sale of palanquin bearing service inam is not opposed to public policy. 13 I. C. 190=(1911) 2 M. W. N. 588. Benami purchase by police officer while in service is not void as being opposed to public policy. 52 I. C. 153=16 N. L. R. 25. Where land which is not transferable under a special statute is transferred in contravention thereof, a suit by the vendee for damages for breach of covenant for title is maintainable. 45 I. C. 669; 47 I. C. 32=14 N. L. R. 125. A purchase made benami by a Government servant in contravention of executive orders and rules governing the conduct of public servants is void on the ground of public policy and the real purchaser does not get a title under the purchase. 47 I. C. 694. A pronote payable to "so and so or order or bearer" contravenes the provisions of S. 24 of the Paper Currency Acts and is therefore void. It is a contract forbidden by law and nothing can be recovered on the document. 24 I. C. 721=(1914) 11 U. B. R. 13.

ACTS PROHIBITED BY STATUTE.—A transfer of property to Kanungo is not against public policy. 14 A. L. J. 969=36 I. C. 319=39 All. 58. Assignment of mortgage in the name of a patwari's mother is not against public policy, though the patwari cannot engage in trade or money lending according to rules framed by Revenue Board. 14 A. L. J. 962=39 All. 51. A patwari acquiring land in his own circle is against public policy and illegal. A. I. R. 1927 Lah. 18=27 Punj. L. R. 740=7 Lah. 463. An agreement to do an act which is prohibited by

involves or implies injury to the person or property of another ; or the Court regards it as immoral, or opposed to public policy.

the Rules framed under the Motor Vehicles Act is illegal and void, though the parties did not know of the prohibition. 91 I. C. 1029=A. I. R. 1926 Nag. 259. Agreements which have been held to be void under this section include a sub-lease of an excise contract, a transfer of a share in an excise contract, a transfer of occupancy rights declared by statute to be non-transferable and a transfer by a disqualified proprietor and a transfer in contravention of S. 8 of the Punjab Tenants Act. 3 P. R. 1915 (Rev.)=6 P. W. R. 1915 (Rev.)=31 I. C. 400. A Municipal Council has no power to farm out the right to collect slaughtering fees. A lease of such a right is void. 36 Mad. 113=21 M. L. J. 790=11 I. C. 669. Agreement in contravention of S. 257-A, old C. P. Code, is not opposed to public policy. 21 M. L. J. 709=9 I. C. 875=35 Mad. 75. Pledger advancing loan to a person not his client is not opposed to public policy. 39 I. C. 135=20 O. C. 67.

SLAVERY BOND, or any other bond approaching this is void as forbidden by laws. 103 I. C. 96=A. I. R. 1927 Mad. 818. See also 106 I. C. 803=A. I. R. 1928 Nag. 89 (2).

AGREEMENT TO ADOPT OR NOT TO ADOPT.—Where a Hindu widow having authority from her husband to adopt agrees in consideration of a pecuniary advantage to herself, not to adopt, the agreement is void as being opposed to public policy. The authority is given not for her but for her husband's benefit. 49 I. C. 929=(1919) M. W. N. 52. Compromise in a suit providing that the plaintiff should adopt the son of one of the defendants and giving the plaintiff certain rights on condition of his so adopting was held to be a *bona fide* family settlement and not opposed to public policy. 24 L. W. 716=97 I. C. 232=A. I. R. 1926 Mad. 1093=51 M. L. J. 366.

AGREEMENT TO PREVENT BIDDING.—An agreement by a person promising to pay money to another if the latter would not compete for the purchase of certain property with the former is legal. 10 I. C. 627; 10 M. L. T. 338. An agreement to abstain from bidding at an excise auction is not void under S. 3 as being against public policy. 44 I. C. 223 (18 Bom. 342; 16 Cal. 194; 6 C. L. J. 111, Rel.). Agreement between two or more persons not to bid against one another at a public auction if not unlawful or against public policy. 56 I. C. 963=12 Bur. L. T. 241; 44 I. C. 223; 46 I. C. 755. But see 28 I. C. 40=8 S. L. R. 247 *contra*.

BRIBE FOR PERJURY.—See 1 L. W. 300=23 I. C. 540=(1914) M. W. N. 322; 10 I. C. 801=4 Bur. L. T. 95.

BRIBE TO PUBLIC OFFICERS.—A Court will not assist a party who has entered into a contract involving moral turpitude. 43 Cal. 115=19 C. W. N. 919=29 I. C. 625.

CHAMPARTY AND MAINTENANCE.—An agreement to finance a litigation and to share the fruits thereof ought to be carefully watched and when found to be extortionate and unconscionable or made not with the *bona fide* object of assisting a claim believed to be just and of obtaining a reasonable recompense therefor, but for improper object so as to be contrary to public policy, effect ought not to be given to it. 43 I. C.

74 (2 Cal. 233, Foll.). See also 48 Mad. 230=1924 P. C. 162; 1925 Oudh 71; 89 I. C. 229. An agreement to transfer property for financing a suit is valid provided that the agreement is fair and equitable and not extortionate or unconscionable or for an improper purpose. 33 All. 626=8 A. L. J. 652; 16 S. L. R. 278=1923 Sind 50; 70 I. C. 904; 93 I. C. 959. Champerty is not void in India, unless the transaction is not a *bona fide* one for the acquisition of an interest in the subject of litigation, but an illegitimate transaction got up for the purpose merely of spoil or of litigation disturbing the peace of families and carried on from an improper and corrupt motive. 59 I. C. 10; 1 R. 565=77 I. C. 372=1924 Rang. 48. The English Law of Champerty is not in force in India. 1 Lah. 124=56 I. C. 272. See also 1923 Nag. 214; 55 I. C. 635; 1 R. 565=2 Bur. L. J. 177 [20 Cal. 145 (P.C.); 15 All. 35 (P.C.), Foll.]; (1928) M. W. N. 5. A transfer of a right of a reversioner is illegal and opposed to public policy as stimulating gambling in litigation. 41 I. C. 347=135 P. L. R. 1917. There is nothing illegal in a plaintiff agreeing to sell the suit property to a third person if the suit prove successful. 98 P. L. R. 1913=18 I. C. 485. Champerty—Agreement to finance litigation—Suit for moneys advanced are maintainable. 47 I. C. 563. An agreement, to obtain for a nominal sum the right to carry on a litigation with a very poor chance of success, is champertous and cannot be given effect to on principles of equity and good conscience. 63 I. C. 356; 61 I. C. 884. Purchase of interest in the property for the purpose of litigation for its realisation is unlawful. 55 I. C. 635.

EXCISE CONTRACT.—An agreement to sub-lease salt pan in contravention of terms of licence is not specifically enforceable. 24 Bom. L. R. 111=46 B. 651=66 I. C. 393=1922 B. 78. Contract infringing Abkari laws is void. 18 S. L. R. 16=87 I. C. 353=1925 Sind 55. A contract to sub-let or assign a license is one to evade the excise rules and is void and illegal. 12 Cr. L. J. 11=9 I. C. 115=15 C. W. N. 169; 29 I. C. 480; 37 Bom. 390=19 I. C. 442=15 Bom. L. R. 227 (31 C. 798, Foll.); 8 Lah. 310=100 I. C. 846=28 Punj. L. R. 161=A. I. R. 1927 Lah. 333. A lease to a person not licensed under the Madras Abkari Act for tapping toddy is not illegal and can be enforced. 61 I. C. 537=14 L. W. 226. The taking of a partner by an Abkari licensee is in effect a sale to him of a portion of the business and making him an agent for the sale of liquor contrary to the terms of the license and the partnership is consequently illegal. 43 Mad. 141=38 M. L. J. 123=54 I. C. 45 [35 M. 582; 26 M. 430; 24 Mad. 401, Foll.]; 27 Bom. 320 and (1910) M. W. N. 549, Dist.]. But see 8 Lah. 310=100 I. C. 846=A. I. R. 1927 Lah. 333 holding that though the state may refuse to recognise such partnership, the parties cannot wriggle out of it. An agreement sub-letting the right to vend *ganja* is illegal and unenforceable, where one of the conditions of an Abkari license prohibits vending, transferring or sub-letting of the license. 34 I. C. 927. A promissory note given in consideration of the transfer of a right to sell toddy

In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

prohibited under S. 22 of the Madras Abkari Act is unenforceable, as being for an illegal consideration. 27 I. C. 919=(1915) M. W. N. 25. The provisions of the Abkari and Opium Acts are not merely intended to guard the Government revenue, but they are based on public policy. No suit will lie to enforce rights that are inconsistent with the spirit of the Acts. 35 Mad. 582=21 M. L. J. 425. An agreement in partnership to start a business for the sale of drugs the lease for which was obtained in the plaintiff's name is not illegal. 25 I. C. 146=17 O. C. 193.

INDEMNIFYING SURETY.—Where a bail bond is forfeited owing to the failure of the accused to appeal, the surety cannot sue a third person who had agreed to indemnify the surety for recovery of the amount forfeited, as such a contract is illegal. 56 I. C. 539=24 C. W. N. 368; 28 I. C. 560=19 C. W. N. 329; 65 I. C. 137.

MASTER AND SERVANT.—Agreement between parties that master may impose fine—Fine imposed—Suit claiming refund of fine is not barred. See 6 P. L. T. 762=3 Pat. L. R. 84=87 I. C. 739=1925 Pat. 487.

MARRIAGE CONTRACT.—An ante-nuptial agreement whereby a suitable maintenance is provided for the wife in case the husband ill-treated or behaved improperly towards her, or capriciously turned her out, is not opposed to S. 23 and is enforceable. 19 A. L. J. 675=43 A. 650=63 I. C. 883=L. R. 3 A. 21. A contract that parent of either the boy or the girl who is a party to the marriage shall pay a certain sum of money if and when the marriage is celebrated is not void *ab initio* as being opposed to public policy. 51 I. C. 856=1 U. P. L. R. (H.C.) 119. See also 5 P. 646=A. I. R. 1926 P. 582=7 Pat. L. J. 821=99 I. C. 782. An agreement between a Mahomedan husband and his wife, providing for a certain maintenance to the wife in the event of a future separation between them, is void as being opposed to public policy. 37 Bom. 280=17 I. C. 946=14 Bom. L. R. 1178. It is as much the policy of the Mahomedan Law as of the English Law that people who are married should live together and not apart. (*Ibid.*) Advancing money to compensate husband willing to divorce his wife—If legal. See 1925 Nag. 111. A contract by a Hindu to maintain as wife a woman, who is not his lawfully wedded wife, is opposed to public policy and consequently unlawful. 16 I. C. 133=14 Bom. L. R. 547. An agreement whereby a guardian, natural or appointed, consents to give his ward in marriage for his own pecuniary benefit is void under S. 23 and the fact that no injury resulted thereby to the ward is irrelevant. 9 I. C. 652=15 C. W. N. 447 (22 B. 658; 32 M. 185; 10 C. 1054, Foll.; 5 L. B. R. 395; 25 P. W. R. 32, Dist.; 1 C. L. J. 201, Diss.). **Marriage contract—Money paid under—Suit for recovery—Contract not performed.** See 106 I. C. 803=A. I. R. 1928 Nag. 89 (2); 53 I. C. 407=113 P. R. 1919; 16 I. C. 1004=10 A. L. J. 159. A breach of betrothal agreement gives rise to a claim for damages. 224 P. W. R. 1915=27 I. C. 1008=27 P. L. R. 1915. A contract by A to give his daughter in marriage to D's son and in case of breach to pay a certain

sum as damages is unenforceable. 37 Mad. 393=24 M. L. J. 310=18 I. C. 515=(1913) M. W. N. 200. An ante-nuptial agreement by a Mahomedan husband not to contract a second marriage is not illegal nor invalid or immoral or opposed to public policy or in restraint of marriage. 10 L. B. R. 194=59 I. C. 804=13 Bur. L. T. 89. An agreement to pay a sum of money for persuading a woman to marry the person paying the sum is opposed to the public policy and unenforceable. 50 I. C. 551=(1918) 3 U. B. R. 119.

RESTRAINT OF TRADE.—An agreement to form a combination of ginning factories to fix rates and to divide the profits in a certain manner is not either in restraint of trade or opposed to public policy. 10 A. L. J. 117=16 I. C. 631=34 All. 587. The action of the Government restricting, by the issue of licenses, admission of brokers into a market allowed to be held on Government land is neither illegal nor opposed to public policy. 18 C. W. N. 1104=24 I. C. 387=19 C. L. J. 313. A person purchasing goods for himself cannot claim commission the claim being opposed to public policy. 50 I. C. 975=16 P. W. R. 1919 (91 P. R. 1910, Dist.).

STIFLING PROSECUTION.—An agreement to withdraw an application for sanction to prosecute under S. 195, Cr. P. Code, is opposed to public policy. 46 I. C. 424. See 2 O. W. N. 791; 90 I. C. 463=29 C. W. N. 1029; 29 C. W. N. 855=89 I. C. 200=42 C. L. J. 90, 1925 Oudh 120. An agreement to stifle a prosecution in respect of an offence of a public nature is against public policy and is illegal. 1 O. L. J. 553=25 I. C. 409=17 O. C. 213. But where the offence involves harm to an injured party, he can settle or compromise his private damage though the offence is of a public nature. (*Ibid.*) Where the consideration for a bond is the withdrawal of a non-compoundable case, the bond is unenforceable. 74 I. C. 843=1924 P. 305; 1 O. L. J. 553=25 I. C. 409; 17 O. C. 213; 16 I. C. 555=8 N. L. R. 97; 46 I. C. 424; 26 I. C. 181=37 Mad. 385; 92 I. C. 503=A. I. R. 1926 All. 270. An agreement to drop a prosecution for criminal breach of trust in consideration of a mortgage for a portion of the embezzled money and cash is opposed to public policy. 53 Cal. 51=A. I. R. 1926 Cal. 59. A contract arising out of the composition of a compoundable offence is not against public policy. 62 I. C. 70. A bond otherwise supported by good consideration, but under which a criminal prosecution is also withdrawn is good in law and legally enforceable. 28 Punj. L. R. 388=A. I. R. 1927 Lah. 530; 91 I. C. 624=1926 Cal. 519. Reference by all partners of their dispute to arbitration, while a criminal complaint under S. 406, Penal Code, is pending against one of the partners and the prosecution is consequently dropped is not against public policy and is therefore enforceable. 101 I. C. 786=A. I. R. 1927 Lah. 465. Where the withdrawal of a criminal prosecution is only a motive for and not the object of the consideration for an agreement, such agreement is not void under this section. 49 All. 540=25 A. L. J. 495=101 I. C. 499=A. I. R. 1927 All. 318.

Illustrations.

(a) *A* agrees to sell his house to *B* for 10,000 rupees. Here *B*'s promise to pay the sum of 10,000 rupees is the consideration for *A*'s promise to sell the house, and *A*'s promise to sell the house is the consideration for *B*'s promise to pay the 10,000 rupees. These are lawful considerations.

(b) *A* promises to pay *B* 1,000 rupees at the end of six months, if *C*, who owes that sum to *B*, fails to pay it. *B* promises to grant time to *C* accordingly. Here the promise of each party is the consideration for the promise of the other party and they are lawful considerations.

(c) *A* promises, for a certain sum paid to him by *B*, to make good to *B* the value of his ship if it is wrecked on a certain voyage. Here *A*'s promise is the consideration for *B*'s payment, and *B*'s payment is the consideration for *A*'s promise, and these are lawful considerations.

(d) *A* promises to maintain *B*'s child and *B* promises to pay *A* 1,000 rupees yearly for the purpose. Here the promise of each party is the consideration for the promise of the other party. They are lawful considerations.

(e) *A*, *B* and *C* enter into an agreement for the division among them of gains acquired, or to be acquired, by them by fraud. The agreement is void, as its object is unlawful.

Agreement not to prosecute for non-compoundable offence is not enforceable. 2 P. L. W. 140 = 41 I. C. 812 = 2 P. L. J. 630. A contract founded on the illegal consideration of compounding a non-compoundable offence is wholly void. 1 P. L. J. 48 = 3 P. L. W. 405 = 33 I. C. 711 = 20 C. W. N. 760; 38 M. L. T. (H.C.) 56.

INFLUENCING COURSE OF LITIGATION.—Agreement to perform puja for a consideration in order to help a person in obtaining success in a pending litigation is opposed to public policy and is unenforceable, as intended to exercise unauthorized influence or the proper course of litigation. 49 All. 705 = 100 I. C. 1040 = 25 A. L. J. 518 = A. I. R. 1927 All. 406.

PROSTITUTION.—Where the past cohabitation is the consideration for a transfer of property, transfer, how far valid. 22 Bom. L. R. 762 = 57 I. C. 472 = 44 Bom. 542; 25 Bom. L. R. 252 = 1924 Bom. 135. *See also* 23 A. L. J. 376 = L. R. 6 All. 331 = 47 All. 619 = 1925 All. 437; 86 I. C. 741 = 23 A. L. J. 201 = 1925 All. 358. Agreement to pay maintenance to mistress not illegal or immoral. 2 O. W. N. 503 = 12 O. L. J. 510 = 89 I. C. 573 = 1925 Oudh 536. Where the consideration for a bond was future adulterous cohabitation, the agreement is void under S. 23. 45 M. L. J. 551 = (1923) M. W. N. 566 = 76 I. C. 306 = 19 L. W. 617 = 1924 Mad. 15. Where it is no part of the contract between the lender and the borrower that the money lent should be utilised for immoral purposes and the lender has no control over the application of the money, he is not prevented from recovering the money. (1922) M. W. N. 450 = 15 L. W. 705 = 69 I. C. 939 = 43 M. L. J. 605 = 45 M. 778 = 1922 Mad. 481.

RELIGIOUS PURPOSES.—An agreement between the panda and parival of a temple to participate in the offerings made by pilgrims is not contrary to public policy. 20 A. L. J. 807 = L. R. 3 A. 474 = 70 I. C. 124 = 45 A. 79 = 1923 A. 56; 24 I. C. 86. Agreement to perform puja for obtaining success in litigation being intended to exercise unauthorized influence on court is opposed to public policy and unenforceable. 49 All. 705 = 25 A. L. J. 518 = A. I. R. 1927 All. 406. An agreement to pay bribe to procure the adoption of a boy is one against public policy, and cannot be enforced. 26 I. C. 779 = 27 M. L. J. 416 = 1 L. W. 926 (37 M. 393, Foll.). Religious purposes.—Agreement by a Gayawal to pay part of his earnings from certain ceremonies to an Acharya.—Validity of the agreement. 1 Pat. L. J. 539 = 38 I. C. 116 = 3 P. L. W. 161. Agreement between two temples restricting and regulating each

other's rights to take out procession is void. 24 L. W. 58 = 24 A. L. J. 801 = 96 I. C. 179 = A. I. R. 1926 P. C. 64 (P. C.).

PARTIAL ILLEGALITY.—It is settled that if one of the several distinct promises is illegal it will not prevent the rest from being enforced. 10 I. C. 475. In an illegal contract even though a part of the consideration may be legal yet if the legal part cannot be severed from the illegal, the whole contract is vitiated. 20 C. W. N. 760 = 1 Pat. L. J. 48 = 33 I. C. 711; 3 Pat. L. T. 386 = 67 I. C. 49; 15 I. C. 836.

MISCELLANEOUS.—A withdrawal of a suit by the landlord for rent against the tenant is a lawful consideration for a note executed by the tenant to the landlord. 25 I. C. 80 = 12 A. L. J. 331. An agreement by a sub-overseer in the service of a Nawab contrary to the conditions of his service is illegal and opposed to public policy. 11 I. C. 2. A clause in an insurance policy cutting down limitation period for bringing suit for rejection of claim is enforceable. 27 C. W. N. 935 = 1924 C. 186. If the illegality of a transaction is brought to the notice of a Court, the Court will not assist the person invoking its aid, even though the defendant has not pleaded the illegality and does not wish to raise objection. 24 C. W. N. 306 = 53 I. C. 773 = 30 C. L. J. 241. The form of risk-note exonerating Railway Company from liability except for loss of complete package is not contrary to public policy. 40 I. C. 626 = 21 C. W. N. 815. Agreement to pay remuneration for settlement of civil dispute is valid in law. 14 I. C. 31 = 16 C. W. N. 480. A contract to pay brokerage is neither immoral nor opposed to public policy. 60 I. C. 727. Whether judgment-debtor's objection to transfer of decree can be enforced. *See* 18 L. W. 453 = 76 I. C. 845 = 1924 M. 189. Contract opposed to law or public policy is legal according to French Law, but not according to law in British India. 45 M. L. J. 59 = 18 I. W. 314 = 74 I. C. 1066 = 1923 M. 708. An agreement to pay a vakil's clerk for special attention to his case is void being opposed to public policy. 41 Mad. 471 = 33 M. L. J. 724 = 42 I. C. 911 (F. B.). An illegal business may be prohibited lawfully and such prohibition gives no right of action. 39 Mad. 781 = 31 I. C. 224 = 29 M. L. J. 280. Maha Brahmans' offerings.—Validity of agreement as to right to reside from agreement. 42 I. C. 704 = 20 O. C. 265. Purchase of house by a Buddhist monk, the same being forbidden by Buddhist Law.—Transaction is void and suit by monk for ejectment is not maintainable. 5 Rang. 626.

(f) *A* promises to obtain for *B* an employment in the public service, and *B* promises to pay 1,000 rupees to *A*. The agreement is void, as the consideration for it is unlawful.

(g) *A*, being agent for a landed proprietor, agrees for money, without the knowledge of his principal, to obtain for *B* a lease of land belonging to his principal. The agreement between *A* and *B* is void, as it implies a fraud by concealment by *A*, on his principal.

(h) *A* promises *B* to drop a prosecution which he has instituted against *B* for robbery, and *B* promises to restore the value of the things taken. The agreement is void as its object is unlawful.

(i) *A*'s estate is sold for arrears of revenue under the provisions of an Act of the Legislature, by which the defaulter is prohibited from purchasing the estate. *B*, upon an understanding with *A*, becomes the purchaser, and agrees to convey the estate to *A* upon receiving from him the price which *B* has paid. The agreement is void, as it renders the transactions, in effect, a purchase by the defaulter, and would so defeat the object of the law.

(j) *A*, who is *B*'s mukhtar, promises to exercise his influence, as such, with *B* in favour of *C*, and *C* promises to pay 1,000 rupees to *A*. The agreement is void, because it is immoral.

(k) *A* agrees to let her daughter to hire to *B* for concubinage. The agreement is void, because it is immoral, though the letting may not be punishable under the Indian Penal Code.

Void Agreements.

24. If any part of a single consideration for one or more objects, or any one or any part of any one of several considerations for a single object, is unlawful, the agreement is void.

Illustrations.

A promises to superintend, on behalf of *B*, a legal manufacture of indigo, and an illegal traffic in other articles. *B* promises to pay to *A* a salary of 10,000 rupees a year. The agreement is void, the object of *A*'s promise and the consideration for *B*'s promise being in part unlawful.

Agreement without consideration, void.

25. An agreement made without consideration is void, unless—

Sec. 24.—Where a usufructuary mortgage of an occupancy holding is void, a personal covenant to that effect is also void and unenforceable. 20 A. L. J. 318=44 A. 486=67 I. C. 792. See also 13 O. L. J. 449=5 Bur. L. J. 36=1926 Rang. 186. Where the mortgage consideration constitutes an independent transaction of loan, the mortgagee would be entitled to the return of the money. 3 O. W. N. 217=93 I. C. 310=1926 Oudh 270. Section does not apply to an out-and-out transfer. 85 I. C. 459=1925 All. 474. S. 24 does not apply to a case where the plaintiff is seeking to enforce an equity in respect of a perfectly valid security. 39 All. 539=39 I. C. 785=15 A. L. J. 544. For a case where the legal part of an agreement was upheld, see 15 B. L. K. App. 5. In a contract where one of several considerations is unlawful the whole agreement is void. 20 O. C. 155=39 I. C. 540=4 O. L. J. 380; 18 I. C. 9; 35 All. 558=21 I. C. 878; 11 A. L. J. 854; 39 All. 539=39 I. C. 785=15 A. L. J. 544; 86 I. C. 515=1925 Nag. 302; 47 All. 780=23 A. L. J. 521=88 I. C. 431=L. R. 6 All. 183=1925 All. 543. Where a woman agrees to serve both as a house-keeper as also by living in adultery, suit cannot be maintained even for services rendered as house-keeper. 27 All. 266. Pronote by two persons—One executant foregoing signature of the other—Plaintiff consenting—No intention to cheat—Plaintiff can succeed against real executant. 21 L. W. 532=87 I. C. 48=1925 Mad. 929. If the various promises of the two parties are quite interdependent the fact that one large part of the contract is void must vitiate the whole. 70 I. C. 881=1 Bur. L. J. 72. Contracts in violation of the personal laws of parties, (as) the Hindu or Mahomedan laws are also void. 28 Mad. 413. Covenant opposed to law is illegal. 83 I. C. 19=1924 All. 89.

Sec. 25.—The word 'debt' in S. 25 is held in

its ordinary meaning of a sum payable in respect of a loan recoverable by action. 40 Mad. 31=32 M. L. J. 422=39 I. C. 220 (F. B.). Acknowledgment can form basis of suit. 1925 Nag. 9. A promise to pay the amount which might be found due by the arbitrator on taking the accounts is not a promise to pay a 'debt' within S. 25 of the Act. (*Ibid.*) An agreement in respect of a barred debt is valid under S. 25 although the promisor did not at the time of the agreement know that it was barred. 25 I. C. 36=16 M. L. T. 122 (23 M. 94; 33 M. 159, Foll.). Adequacy of consideration is not a matter to be taken into consideration in deciding whether an agreement is valid. 45 A. 590=21 A. L. J. 446=1923 All. 590. An agreement to take less than what is really due and also to give time for payment is not valid unless supported by consideration. 6 Rang. 191. The forbearance to enforce in a Court of law a claim *bona fide* believed to exist and to be enforceable, would be a good consideration for a contract. 44 All. 424=20 A. L. J. 285=1922 All. 260. Promise to defend a suit would be good consideration. 99 I. C. 752=2 Lah. L. J. 306. Simply acknowledging indebtedness without any promise to pay is not an agreement under S. 25. 17 I. C. 722=14 Bom. I. R. 1020. There is a difference between acknowledgment sufficient for Limitation Act, S. 19 and Contract Act, S. 25. In order to create a new contract as required by the latter the promise to pay must be expressed. 6 Pat. L. J. 121=60 I. C. 514=2 Pat. L. T. 303. Pledger if authorised to admit liability under the section. 21 A. L. J. 713=75 I. C. 309=1924 A. 12. Agreement by a creditor with co-debtor not to sue him if he helps in realisation is not valid. 57 I. C. 844. In the absence of a contract by the promisee for rendering future services a promise to pay for services is without consideration and therefore void.

- (1) it is expressed in writing and registered under the law for the time being in force for the registration of [documents],¹ and is made on account of natural love and affection between parties standing in a near relation to each other; or unless
- Unless it is in writing and registered,
- (2) it is a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor, or something which the promisor was legally compellable to do; or unless
- or is a promise to compensate for something done,
- (3) it is a promise, made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorized in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits.
- or is a promise to pay a debt barred by limitation law.

In any of these cases, such an agreement is a contract.

46 I. C. 282 = 23 C. W. N. 639. The promise of the vendee to defend a suit to be brought by a collateral of the vendors constitutes a legal consideration for the contract of sale. 2 Lah. L. J. 306. The withdrawal of proceedings under S. 523 of Act XIV of 1882 is a sufficient consideration for a compromise by the parties. 20 I. C. 817 = 20 P. R. 1914. A contract entered into by heirs of deceased to settle disputes and doubtful rights is valid and binds the minor members as adult members acted as *de facto* guardians for their benefit. 20 P. R. 1913 = 19 I. C. 411 = 185 P. L. R. 1913; 14 M. L. T. 491 = 21 I. C. 768 = (1914) M. W. N. 108. Forbearance to litigate a legal claim is good consideration. 22 O. C. 163 = 6 O. L. J. 404 = 53 I. C. 104. Promissory note for barred debts is valid. 41 M. L. J. 567 = 45 Mad. 345 = 66 I. C. 155. A promise to pay something which the promisor is already under an obligation to pay is a promise without consideration and cannot be enforced. Any separate promise made to pay the amount at any particular place must be supported by a consideration. 9 L. B. R. 75 = 39 I. C. 132 (8 M. I. A. 291; 8 Bur. L. T. 101 = 30 M. 438, Rel.). A composition with the debtor on the assurance of the joint debtor for payment of the balance amount is unenforceable. 15 I. C. 363 = 5 Bur. L. T. 81. What is natural love and affection to support a promise, *see* 4 C. W. N. 488 (nearness of relation does not necessarily mean that (*Ibid.*) An agreement to pay maintenance to a wife entered into after the marriage is not supported by any consideration the marriage not being affected thereby. 11 I. C. 833 = 245 P. L. R. 1911.

Sec. 25.—¹“Documents” was substituted for “assurances” by the Repealing and Amending Act (XII of 1891), Sch.

Sec. 25, Cl. (1). “PARTIES STANDING IN NEAR RELATION.”—Must not be narrowed down to mean only near relatives. Wife’s parents of a Mahomedan would come under the expression. 100 I. C. 350 = 4 O. W. N. 195 = A. I. R. 1927 Oudh 146.

BENAMI TRANSACTION.—Purchaser under a sham transaction gets no interest in the property. A. I. R. 1928 Mad. 541.

Sec. 25, Cl. (2).—An agreement by a person of full age to compensate a promisee for something voluntarily done for the promisor at the time

when the promisor was a minor, falls within S. 25, Cl. 2 and is enforceable. But no interest can be recovered upon such an agreement. 2 Lah. 263 = 64 I. C. 121; 54 I. C. 436 = 20 P. L. R. 1920; 31 P. R. 1911 = 192 P. L. R. 1911 = 11 I. C. 321.

Sec. 25, Cl. (3).—A judgment-debt comes under the meaning of S. 25 (3). 50 Cal. 974 = 28 C. W. N. 322 = 79 I. C. 489. *See also* 4 Cal. 500; 3 All. 761; 26 All. 363; 14 Bom. 300. A promise in writing to pay a barred debt is valid even if the promisor is not aware that the debt is barred. 20 I. C. 809 = 18 C. L. J. 269; 21 I. C. 254 = 18 C. L. J. 329 [(1910) M. W. N. 547, Diss.]; 49 All. 496 = 100 I. C. 593 = 25 A. L. J. 403 = A. I. R. 1927 All 677. Oral promise not sufficient. 86 I. C. 942 = 1925 Mad. 1147. Where the debtor promised to pay by a share of the profits of a business, *held*, that the plaintiff could not recover in any other way. 14 I. C. 133 = 16 C. W. N. 636. The promise may be absolute or conditional. The whole of the promise whether free or clogged with a condition gives the cause of action. (*Ibid.*) The new promise is the measure of the creditor’s right. 14 I. C. 134 = 16 C. W. N. 636. A suit lies on a written promise to pay a barred debt under S. 25 (3). 73 I. C. 652 = 1923 Lah. 481; 14 I. C. 133 = 16 C. W. N. 636; 20 I. C. 809 = 18 C. L. J. 269; 66 P. R. 1917 = 41 I. C. 915 (23 Mad. 91, foll.).

JOINT HINDU FAMILY.—Debt by Manager Promissory note by junior members, validity of. 41 M. L. J. 567 = 66 I. C. 155 = 45 Mad. 345. *See also* 6 Pat. L. J. 121 = 2 Pat. L. T. 203. S. 25 (3) applies to the case of a minor executing a promise in writing to pay a debt of his guardian. 5 N. L. J. 178 = 65 I. C. 716 = 1922 Nag. 250. A barred debt is a good consideration for a sale. 21 I. C. 69. In order that a valid contract may be constituted under S. 25 (3) it is necessary that the statement should be in writing and should be signed by the person charged therewith or by the agent generally or specially authorized. 21 A. L. J. 713 = 75 I. C. 309 = 1924 All. 12; 61 P. R. 1893. Mortgage of partnership property by one partner—Binding character of mortgage disputed by the other partner—Compromises—Subsequent declaration of invalidity of mortgage as regards the disputing mortgagor’s share—Effect of. 17 Bom. L. R. 404 = 19 C. W. N. 193 = 11 N. L. R. 53 = 28 M. L. J. 448 = 26 I. C. 924 (P. C.).

Explanation 1.—Nothing in this section shall affect the validity, as between the donor and donee, of any gift actually made.

Explanation 2.—An agreement to which the consent of the promisor is freely given is not void merely because the consideration is inadequate ; but the inadequacy of the consideration may be taken into account by the Court in determining the question whether the consent of the promisor was freely given.

Illustrations.

- (a) A promises, for no consideration, to give to B Rs. 1,000. This is a void agreement.
- (b) A, for natural love and affection, promises to give his son, B, Rs. 1,000. A puts his promise to B into writing and registers it. This is a contract.
- (c) A finds B's purse and gives it to him. B promises to give A Rs. 50. This is a contract.
- (d) A supports B's infant son. B promises to pay A's expenses in so doing. This is a contract.
- (e) A owes B Rs. 1,000, but the debt is barred by the Limitation Act. A signs a written promise to pay B Rs. 500 on account of the debt. This is a contract.
- (f) A agrees to sell a horse worth Rs. 1,000 for Rs. 10. A's consent to the agreement was freely given. The agreement is a contract notwithstanding the inadequacy of the consideration
- (g) A agrees to sell a horse worth Rs. 1,000 for Rs. 10. A denies that his consent to the agreement was freely given.

The inadequacy of the consideration is a fact which the Court should take into account in considering whether or not A's consent was freely given.

Agreement in restraint of marriage void.

26. Every agreement in restraint of the marriage of any person, other than a minor, is void.

Agreement in restraint of trade void.

27. Every agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void.

Exception 1.—One

Saving of agreement not to carry on business of which goodwill is sold ;

who sells the goodwill of a business may agree with the buyer to refrain from carrying on a similar business, within specified local limits, so long as the buyer, or any person deriving title to the goodwill from him, carries on a like business therein : Provided that such limits appear to Court reasonable, regard being had to the nature of the business.

Sec. 26 — An agreement to pay a woman certain annual allowance only ' until ' death or re-marriage or ' during widowhood ' is not illegal. 16 I. C. 13=10 A. L. J. 185. A Kabinnamah by which a Mahomedan husband authorizes his wife to divorce herself from him in the event of his marrying a second wife, is not void under S. 26. A Mahomedan husband may delegate to his wife power to divorce on certain conditions. 31 I. C. 562=19 C. W. N. 1226. A custom to pay a bride price, while marrying a major girl is immoral and in restraint of marriage and is therefore unenforceable. 58 I. C. 167=1 Lah. 574. An agreement for payment of money spent on the boy's education if he married another during the lifetime of his wife is void. 7 L. B. R. 304=21 I. C. 777. Sec. 26 is not restricted to the case of the first marriage only but also applies to a person already married. 7 L. B. R. 304=24 I. C. 777. Contract by husband to live with wife and not take another wife—Breach—Damages recoverable by suit. 15 I. C. 915=(1912) 1 U.B.R. 108.

Sec. 27.—Construction of terms of a document relating to sale of goodwill. See 47 M. L. J. 657=26 C. W. N. 345=48 C. 1030=48 I. A. 508 (P. C.). See also 39 I. C. 177. Where the two branches of the profession, *viz.*, barristers and solicitors are amalgamated in a place, an agreement by a barrister not to practise for a reasonable time is valid and its breach can be restrained by an injunction. 19 I. C. 822=17 C. W. N. 215 (P. C.).

The right of free contract cannot be ignored by Courts of law without an express statutory prohibition. 34 I. C. 441. An agreement between the neighbouring landowners that market for sale of cattle shall not be held on the same day on the lands of both is not void under S. 27. 37 All. 212=27 I. C. 871=13 A. L. J. 281.

EXCEPTION (1).—Goodwill, what is—Restraint of trade, what amounts to. 39 I. C. 177=21 C. W. N. 979. A contract by a theatrical party with the plaintiff not to play anywhere else or in any other theatre in any town till the termination of the period in question, is void as being one in restraint of trade and no injunction can be issued against the company restraining performance in any other place. 14 I. C. 215=16 C. W. N. 534. Where one of two rival cooly-suppliers agreed not to supply coolies in consideration of the latter paying Rs. 50 monthly to the former, the agreement was void as being in restraint of trade. 21 I. C. 768=(1914) M. W. N. 108. Contract in restraint of trade is void. 70 I. C. 881=1 Bur. L. J. 72 ; 33 I. C. 238.

CONTRACT OF PERSONAL SERVICE.—Provision against service elsewhere valid. 64 I. C. 794=11 L. B. R. 26. The agreement of a plaintiff not to set up a business in consideration of which the defendant promised to pay a certain sum for life was held to be void as in restraint of trade. 33 I. C. 238=8 L. B. R. 389.

Exception 2.—Partners may, upon or in anticipation of a dissolution of the partnership, agree that some or all of them will not carry on a business similar to that of the partnership within such local limits as are referred to in the last preceding exception.

Exception 3.—Partners may agree that some one or all of them will not carry on any business, other than that of the partnership, during the continuance of the partnership.

28. Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent.

Exception 1.—This section shall not render illegal a contract by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred.

*[When such a contract has been made, a suit may be brought for its specific performance, and if a suit, other than for such specific performance, or for the recovery of the amount so awarded, is brought by one party to such contract against any other such party in respect of any subject which they have so agreed to refer, the existence of such contract shall be a bar to the suit.]*¹

Exception 2.—Nor shall this section render illegal any contract in writing, by which two or more persons agree to refer to arbitration any question between them which has already arisen, or affect any provision of any law in force for the time being as to references to arbitration.²

29. Agreements, the meaning of which is not certain, or capable of being made certain, are void.

Sec. 28.—Agreements ousting jurisdiction of Courts are not valid. 1 All. 267. Compromise of doubtful rights arising out of a previous contract is valid. 94 I. C. 371 = 1926 Sind 202. Contract for purchasing and sending goods from one place to another—Clause treating all legal disputes as having arisen at one place only—Not an agreement in restraint of legal proceedings. 49 M. L. J. 189 = 90 I. C. 1019 = 1925 Mad. 1145. Clause cutting down period of limitation for suit is enforceable. 27 C. W. N. 955 = 1924 Cal. 186; 16 I. C. 1001 = 14 Bom. L. R. 741; 38 Bom. 344 = 15 Bom. L. R. 948; but see 11 I. C. 756; 32 I. C. 937. Agreement to refer to arbitration before going to Court may be given effect to by stay of proceedings in Civil Court. See 34 Bom. 13; but see 11 Cal. 282. An agreement that the parties to an arbitration will not raise any objections whatever to the award is opposed to the spirit of S. 28. 117 P. R. 1916 = 34 I. C. 192; see also 6 Mad. 368. Agreement to be bound by award beyond the scope of the dispute, whether on a private reference or one made through the court in a pending suit would be void. 102 I. C. 183 (11 S. L. R. 43; 13 S. L. R. 75, Foll. A. I. R. 1925 P. C. 293, Rel. on). Agreement not to appeal, when valid. See 8 Cal. 455; 1 All. 267; 6 Mad. 368; 6 Bom. 528; 33 Cal. 1169; 1

Cal. 466. Restraint on execution of decree is void. 44 Mad. 919 = 41 M. L. J. 316 = 69 I. C. 337 (F. B.). But see 7 All. 124. A condition in a Life Insurance Policy that no suit shall be brought on the policy after one year from the death of the assured, if void. See 11 I. C. 756 = 4 Bur. L. T. 173; 38 Bom. 344 = 21 I. C. 694 = 15 Bom. L. R. 948; 91 I. C. 622 = 1926 Rang. 3; but see also 14 Bom. L. R. 741; 38 Bom. 353; 3 Rang. 383.

¹ The second clause of **Exception 1** is repealed by the Specific Relief Act (I of 1877) throughout British India. The clause is, however, printed here in italics, because the Contract Act is in force in certain Scheduled Districts to which the Specific Relief Act does not apply.

EXCEPTION (2).—An agreement that award will not be opposed or objected to is void being a contract not to enforce rights conferred by the Arbitration Act in respect of the contract to refer. 42 I. C. 706 = 11 S. L. R. 43.

² Cf. the Code of Civil Procedure (Act V of 1898), S. 89 and Sch. II, the Indian Arbitration Act (IX of 1899), and the Indian Companies Act (VI of 1882), Ss. 206-211.

Sec. 29—A contract is not indefinite by reason of the omission to fix maximum limit of purchase, and the Court will reject the dishonest claim for damages on the alleged failure to comply with

Illustrations.

(a) *A* agrees to sell to *B* "a hundred tons of oil." There is nothing whatever to show what kind of oil was intended. The agreement is void for uncertainty.

(b) *A* agrees to sell to *B* one hundred tons of oil of a specified description, known as an article of commerce. There is no uncertainty here to make the agreement void.

(c) *A*, who is a dealer in cocoanut-oil only, agrees to sell to *B* "one hundred tons of oil." The nature of *A*'s trade affords an indication of the meaning of the words, and *A* has entered into a contract for the sale of one hundred tons of cocoanut-oil.

(d) *A* agrees to sell to *B* "all the grain in my granary at Ramnagar". There is no uncertainty here to make the agreement void.

(e) *A* agrees to sell to *B* "one thousand maunds of rice at a price to be fixed by *C*." As the price is capable of being made certain, there is no uncertainty here to make the agreement void.

(f) *A* agrees to sell to *B* "my white horse for rupees five hundred or rupees one thousand." There is nothing to show which of the two prices was to be given. The agreement is void.

30. Agreements by way of wager are void ; and no suit shall be brought for recovering anything alleged to be won on any wager, or entrusted to any person to abide the result of any game or other uncertain event on which any wager is made.

Agreements by way of wager void.

large and unreasonable orders. Where there is a continuing contract to supply goods as orders are received, the obligor can withdraw from the transaction before any particular order is received after giving notice to the other party. 34 I. C. 520=18 Bom. L. R. 217. Terms for renewal of lease—Vague and uncertain—Inoperative in law. 33 I. C. 448=20 C. W. N. 948 ; 1 Pat. L. J. 238=34 I. C. 482=2 Pat. L. W. 333. A covenant of partnership giving one party the right of specifying the share of profits to be assigned to the other and affording not the slightest indication as to the proportion of losses which one party is to bear in the partnership is void for uncertainty. 31 I. C. 632=185 P. W. R. 1915 (11 M. 200. Foll. ; 27 M. 382 ; 5 C. 932, Dist.). An instrument is not void if it is capable of being made certain. 305 P. L. R. 1913=20 I. C. 812. A contract to execute a deed (*kobala*) "containing the necessary stipulations" is not void for uncertainty. 105 I. C. 527=A. I. R. 1927 Cal. 889. Such a contract only means that the deed should contain the stipulations for sale implied by law and enumerated in the Transfer of Property Act. A. I. R. 1927 Cal. 889 (20 C. W. N. 66, Dist. ; A. I. R. 1923 P. C. 47, Rel. on). An agreement to pay rent in cash without the rate being definitely fixed, is void for uncertainty. 55 I. C. 78=(1920) M. W. N. 15. Agreement to pay something for collection of old debts without specifying amount—Whether enforceable. 31 I. C. 783=29 M. L. J. 749. Where a document is capable of two contrary interpretations or practically incapable of interpretation at all, and therefore it is not possible for the Court to allow the document to be enforced, it is void for uncertainty. 63 I. C. 48=4 N. L. J. 67. A personal covenant to convey land which is too vague and indefinite in its nature is invalid and inoperative in law. 1 Pat. L. J. 238=34 I. C. 482=2 Pat. L. W. 333. For other illustrative cases, see 22 Mad. 26 ; 11 Mad. 200 ; 5 Cal. 175 ; 31 Cal. 667.

Sec. 30.—Section applies only to prevent a case based on contract. A. I. R. 1928 Mad. 434 and cases referred to therein. "Wager" means what is indicated by the words "gaming and wagering" in English law. 29 Cal. 461 (P.C.). As to the meaning of the word, see also 9 Bom. 358 ; 7 Bom. 1 R. 154 ; 94 I. C. 371=A. I. R. 1926 Sind 202. Speculation does not necessarily involve a contract

by way of wager. To constitute such a contract, a common intention to wager is essential. 42 Bom. 373=34 M. L. J. 305=4 Pat. L. W. 229=16 A. L. J. 241=20 Bom. L. R. 561=45 I. A. 29 (P.C.) ; 4 Bur. L. J. 131=1925 Rang. 284 ; 64 I. C. 809=34 C. L. J. 533. The transaction must wholly depend upon the risk in contemplation. 9 Bom. 358. If one of the parties has the event in his hands it is not wager. (*Ibid.*) Betting transactions, legality of. See 52 Cal. 677=1925 Cal. 1037. Chit fund whether amounts to lottery. See conflict of rulings in 48 Mad. 661=90 I. C. 420=1925 Mad. 870 ; 1925 Mad. 281=47 M. L. J. 876 ; (1925) M. W. N. 857=49 M. L. J. 791=92 I. C. 968=1926 Mad. 168 ; 50 Mad. 696=26 L. W. 796=1927 M. W. N. 545=103 I. C. 318=38 M. L. T. (H.C.) 390=A. I. R. 1927 Mad. 583=52 M. L. J. 687 (F. B.). Even in the case of wagering contracts, S. 30 does not prevent a person who is employed as agent in connection with the same, from recovering sums due to him by his principal. 73 I. C. 477=45 A. 503=1923 All 585. The question whether the contracts between the parties are of a wagering nature is really a question of fact, that is to say, the party disputing that he was liable under the contracts would have to show that at the time the contracts were entered into the parties did not intend to carry on the contracts but agreed to abide by the prices at the due dates, when difference would be received. 25 Bom. L. R. 520=1923 Bom. 458 ; 36 All. 426=12 A. L. J. 817 ; 43 All. 585=19 A. L. J. 522 ; 21 A. L. J. 153=1923 All. 273. There must be proof that the contract was entered into upon the terms that performance of the contract should not be demanded, but that differences only should become payable. It is not enough that the parties contemplated that delivery would not be likely to be demanded. 47 C. L. J. 144=A. I. R. 1928 P. C. 30=54 M. L. J. 130 (P. C.). Common intention of both parties neither to give nor receive delivery but merely to pay or receive differences must be proved. Such common intention can be inferred from the surrounding circumstances. 37 Bom. 347=14 Bom. L. R. 807. See also 7 Lah. 442=94 I. C. 304=A. I. R. 1926 Lah. 318 ; 23 L. W. 105=93 I. C. 169=1926 Mad. 326. A Court should scrutinize the evidence of the defendant when he accepts payments when the dealings are successful but pleads wagering contract when the transaction ends in loss. 64 I. C. 809=33 C. L. J.

This section shall not be deemed to render unlawful a subscription, or contribu-

Exception in favour of certain prizes for horse-racing.

upwards, to be awarded to the winner or winners of any horse race.¹

Section 294-A of the Indian Penal Code not affected.

Nothing in this section shall be deemed to legalize any transaction connected with horse-racing, to which the provisions of section 294-A of the Indian Penal Code apply.

CHAPTER III.

OF CONTINGENT CONTRACTS.

"Contingent contract" defined.

31. A "contingent contract" is a contract to do or not to do something, if some event, collateral to such contract, does or does not happen.

533. Contract to pay difference when a wagering contract. 20 I. C. 882=15 Bom. L. R. 750; 38 Bom. 204=15 Bom. L. R. 716; 19 I. C. 29=15 Bom. L. R. 85; 37 Bom. 347; 14 Bom. L. R. 807; 25 I. C. 747; 64 I. C. 809=33 C. L. J. 533; 37 Bom. 264=14 Bom. L. R. 617; 45 M. L. J. 716=76 I. C. 893=1924 Mad. 378. Oral Evidence if admissible to prove that transaction is wager. See 17 Mad. 480; 24 Bom. 227. Burden of proof—as to whether transaction is wager or not. See 9 Bom. 355; 23 All. 165; 24 Bom. L. R. 115=1922 Bom. 81. Defence of wager—Onus on defendant to prove that both parties agreed neither to ask for nor to give delivery—*Tejmandi* transactions. 65 I. C. 682=24 Bom. L. R. 60. *Tejmandi* contracts when void as a wager. 24 Bom. L. R. 812=1922 Bom. 408. The transactions known as *tejmandi*, *teji* and *mandi* explained and discussed. 65 I. C. 682=24 Bom. L. R. 60. See also 24 I. C. 441=7 Bur. L. T. 54. 51 Bom. 1=44 C. L. J. 509=38 M. L. T. (P.C.) 16=26 L. W. 844 (P.C.). *Pakka adatia* contracts when wagering contracts. 57 I. C. 129=22 Bom. L. R. 406; See also 39 Bom. 1=16 Bom. L. R. 203; 105 C. I. 739=A. I. R. 1927 All. 617; 29 Bom. L. R. 147=100 I. C. 993=A. I. R. 1927 Bom. 125. Contract of *Cutchi adatia* agency is not a wagering one. 28 Bom. L. R. 1376=98 I. C. 338=1926 P.C. 119=51 M. L. J. 809 (P.C.). An agreement by way of wager though sanctioned by Government is void. 42 Bom. 676=19 Bom. L. R. 697. The effect of the sanction of the Government of the lottery is that no prosecution would lie in respect thereof but that sanction did not affect the Civil Law on the subject of lotteries, as the Government had no power to overrule an Act of the legislature by correspondence. 42 Bom. 676=19 Bom. L. R. 697. No injunction could be granted in support of a void contract. *Ibid.* Forward contracts—No passing of goods—Dealing in difference in prices alone—*Pakka adatia*—If enforceable. 39 Bom. 1=16 Bom. L. R. 213. See also 85 I. C. 177=1925 Bom. 115; 27 Bom. L. R. 941=49 Bom. 689; 85 I. C. 613=1925 Bom. 79; A. I. R. 1927 Bom. 125. Insurance on the life of another, when wager. 28 Bom. 616; 30 Bom. 83. See also 37 Cal. 342. Where an agent enters into a wagering contract he cannot claim to be indemnified by the principal for losses incurred thereby. In the case of a commission agent the onus is on him to show that he entered into the contract as agent and not principal. 67 I. C. 959=1922 Lah. 408. *Kurri* as

such in Malabar is not wagering contract. 37 M. L. J. 209=52 I. C. 989. Agent appointed to carry on wagering contracts with other persons—Contract between principal and agent is not necessarily wagering. 50 A. 115=103 I. C. 218=25 A. L. J. 736 (A. I. R. 1926 P.C. 119 fol.; A. I. R. 1926 All. 238 ref.); 49 All. 438=25 A. L. J. 223=A. I. R. 1927 All. 238; 49 A. 926=102 I. C. 605=25 A. L. J. 693 (A. I. R. 1926 P.C. 119; A. I. R. 1926 All. 238 and 585 fol.). Money paid as security for performance of wagering contract—Suit for recovery, if maintainable. 34 M. L. J. 561=44 I. C. 319=7 L. W. 518. The essence of gaming and wagering is that one party is to win and the other to lose on a future event, which at the time of the contract, is of an uncertain nature. 19 N. L. R. 21=65 I. C. 324=1923 Nag. 291; see also 69 I. C. 769=1922 P. 220. The sale of growing crop for cash is not gaming or wagering though the consideration is to be paid in kind out of the proceeds of the harvest. 19 N. L. R. 21=65 I. C. 324=1923 Nag. 291. [*Richards v. Storck* (1911) 1 K. B. 296 foll.] S. 30 does not affect agreements or transactions collateral to wager s. 69 I. C. 186=1923 Nag. 48; 38 I. C. 566=9 Bur. L. T. 228. Wagering contract—Speculative contract—Distinction between. 73 I. C. 309=1924 Oudh 186. 29 Bom. L. R. 147=100 I. C. 993=A. I. R. 1927 Bom. 125. A suit to recover money by the defendant as agent for plaintiff on account of plaintiff's winnings in a lottery is not prohibited by S. 30. 51 I. C. 530=12 Bur. L. T. 9; 38 I. C. 566=9 Bur. L. T. 228. Lottery is a game of chance. See 19 Bom. L. R. 697; 42 Bom. 676. Money paid under an illegal contract may be recovered before the contract is carried out but not afterwards. 46 I. C. 755. Money deposited with a stakeholder to abide the result of a race may be recovered if demanded before payment over to the winner. 3 Rang. 543=4 Bur. L. J. 209=93 I. C. 105=1926 Rang. 48. Where a plea of wager is set up, in defence the onus of proof is on defendant. The question of common intention is one of fact in every case. 66 I. C. 489=15 S. L. R. 193; 70 I. C. 864=15 S. L. R. 5; 60 I. C. 944=14 S. L. R. 227. Where both parties are members of stock exchange onus of proving transaction to be wager is on defendant. 85 I. C. 410=1925 Mad. 330.

Sec. 30.—¹*Cf.* the Gaming Act (8 & 9 Vict., c. 109), s. 18.

Sec. 31.—See 34 Mad. 453 (P. C.) (A contract with a condition precedent to acceptance of

Illustration.

A contracts to pay B Rs. 10,000 if B's house is burnt. This is a contingent contract.

Enforcement of contracts contingent on an event happening.

32. Contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened.

If the event becomes impossible, such contracts become void.

Illustration.

(a) *A* makes a contract with *B* to buy *B*'s horse if *A* survives *C*. This contract cannot be enforced by law unless and until *C* dies in *A*'s lifetime.

(b) *A* makes a contract with *B* to sell a horse to *B* at a specified price, if *C*, to whom the horse has been offered, refuses to buy him. The contract cannot be enforced by law unless and until *C* refuses to buy the horse.

(c) *A* contracts to pay *B* a sum of money when *B* marries *C*. *C* dies without being married to *B*. The contract becomes void.

Enforcement of contracts contingent on an event not happening.

33. Contingent contracts to do or not to do anything if an uncertain future event does not happen can be enforced when the happening of that event becomes impossible, and not before.

Illustration.

A agrees to pay *B* a sum of money if a certain ship does not return. The ship is sunk. The contract can be enforced when the ship sinks.

When event on which contract is contingent to be deemed impossible, if it is the future conduct of a living person.

34. If the future event on which a contract is contingent is the way in which a person will act at an unspecified time, the event shall be considered to become impossible when such person does anything which renders it impossible that he should so act within any definite time, or otherwise than under further contingencies.

Illustration.

A agrees to pay *B* a sum of money if *B* marries *C*.

C marries *D*. The marriage of *B* to *C* must now be considered impossible, although it is possible that *D* may die and that *C* may afterwards marry *B*.

When contracts become void which are contingent on happening of specified event within fixed time.

35. Contingent contracts to do or not to do anything if a specified uncertain event happens within a fixed time become void if, at the expiration of the time fixed, such event has not happened, or if, before the time fixed, such event becomes impossible.

When contracts may be enforced which are contingent on specified event not happening within fixed time.

Contingent contracts to do or not to do anything if a specified uncertain event does not happen within a fixed time may be enforced by law when the time fixed has expired and such event has not happened, or before the time fixed has expired, if it becomes certain that such

event will not happen.

Illustrations.

(a) *A* promises to pay *B* a sum of money if a certain ship returns within a year. The contract may be enforced if the ship returns within the year, and becomes void if the ship is burnt within the year.

(b) *A* promises to pay *B* a sum of money if a certain ship does not return within a year. The contract may be enforced if the ship does not return within the year, or is burnt within the year.

36. Contingent agreements to do or not to do anything, if an impossible event happens, are void, whether the impossibility of the event is known or not to the parties to the agreement at the time when it is made.

Agreement contingent on impossible events void.

goods, of examination and approval by a servant or subordinate is good as a contingent contract). On this Section see also 12 Cal. 154; 23 A. L. J. 608=89 I. C. 438=1925 All. 658.

Secs. 32-34.—A contingent contract is dependent for its performance on a future event and falls through if the future event on which it was

dependent becomes impossible. 34 I. C. 46=12 N. L. R. 69. On this Section see also 23 A. L. J. 60=1025 All. 658.

Sec. 35.—Death of judgment-debtor before date fixed for payment—Surety not discharged. 8 I. C. 985.

Illustrations.

(a) *A* agrees to pay *B* 1,000 rupees if two straight lines should enclose a space. The agreement is void.

(b) *A* agrees to pay *B* 1,000 rupees if *B* will marry *A's* daughter *C*. *C* was dead at the time of the agreement. The agreement is void.

CHAPTER IV.

OF THE PERFORMANCE OF CONTRACTS.

Contracts which must be performed.

37. The parties to a contract must either perform, or offer to perform, their respective promises, unless such performance is dispensed with or excused under the provisions of this Act, or of any other law.

Promises bind the representatives of the promisors in case of the death of such promisors before performance, unless a contrary intention appears from the contract.

Illustrations.

(a) *A* promises to deliver goods to *B* on a certain day on payment of Rs. 1,000. *A* dies before that day. *A's* representatives are bound to deliver the goods to *B*, and *B* is bound to pay the Rs. 1,000 to *A's* representatives.

(b) *A* promises to paint a picture for *B* by a certain day at a certain price. *A* dies before the day. The contract cannot be enforced either by *A's* representatives or by *B*.

38. Where a promisor has made an offer of performance to the promisee, and the offer has not been accepted, the promisor is not responsible for non-performance, nor does he thereby lose his rights under the contract.

Effect of refusal to accept offer of performance.

Sec. 37.—Where there is a contract to deliver goods in instalments spread over a number of months, the sellers cannot postpone the delivery of the whole until the last month as the buyers have the right to demand delivery in instalments. 43 Cal. 305=23 C. L. J. 62=20 C. W. N. 240. If person reaps the benefit of a contract without being party to it he must pay the money due under it. The doctrine that no stranger can enforce a contract though made for his benefit does not universally apply in India. 41 Mad. 488=34 M. L. J. 193=43 I. C. 625. A tender of performance must satisfy all the requirements of the contract. 45 I. C. 497=11 Bur. L. T. 9. Vendor is not bound to see that purchaser takes delivery within time. Where it is necessary for vendee to take samples before delivery, the vendor is bound to deliver goods some time before the specified date so as to give him time to satisfy himself. 32 I. C. 720=9 S. L. R. 160. In the absence of evidence of contrary intention of parties, legal representatives can require specific performance of the contract. 49 Bom. 862=91 I. C. 360=A. I. R. 1926 Bom. 97.

Sec. 38.—Applies to an offer which has been accepted as well as to an offer which has been refused. 73 I. C. 682. As to obligation of the other party after breach of contract, see 3 Mys. L. J. 197. Seller must give buyer opportunity to examine goods. A.I.R. 1927 Mad. 62. S. 38 only requires a reasonable opportunity to be given to the buyer to examine the goods sold. 42 I. C. 382; 97 I. C. 866 (Mad.) A valid tender improperly refused stops further interest. 12 I. C. 502=34 Mad. 320. Person pleading tender must always be ready and willing to pay the amount. Plea of tender before suit must be followed by payment into Court after suit. 16 Bom. 141. See also 39 Mad. 959. A tender to be valid must be a tender of the whole amount due and not of a

part only and there is nothing to prevent this general law as to tenders applying to payments decreed in respect of a mortgage. 26 O. C. 59=1923 Oudh 241. Tender with condition is not valid. 27 C. W. N. 299=21 A. L. J. 201=44 M. L. J. 728=69 I. C. 273=1922 P. C. 347; 41 Cal. 493=40 I. A. 223=26 M. L. J. 25=18 C. W. N. 66=16 Bom. I. R. 42 (P.C.) Tender of a portion of the debt conditions attached to tender vitiates tender. 25 Bom. L. R. 830=1924 Bom. 264. A conditional tender of rent demanding a receipt that the tenant paying the rent was a *khatmi* raiyat is not a good tender. 51 I. C. 793. Where a bond recited that if three instalments fall in arrears the whole principal becomes payable, a tender by the debtor of principal only without interest on over due instalments when the latter is stipulated expressly in the bond, is not a proper tender and interest on overdue instalments is recoverable. 31 I. C. 304. A tender is not valid *pro tanto* if a larger sum is in fact due and if the tender is accompanied by a demand for cancellation and delivery of the mortgage deed. 20 I. C. 184=16 M. L. T. 365. A mere offer by postal letter is not a legal tender. 26 I. C. 121=27 M. L. J. 482. The mere expression by a registered posted letter of a willingness to execute a release deed without having a document ready to be delivered is not valid tender. 38 Mad. 959=26 M. L. J. 331=23 I. C. 581. Tender of money locked up in a box or of goods enclosed in a case, which the other party is not allowed to open is not sufficient tender, and the tender as a plea in an action is incomplete unless accompanied by a tender in Court. *Ibid.* Contract of sale with condition of re-purchase—Actual production of cash only is strict compliance, but conduct of vendee may dispense with strict compliance. 2 O. W. N. 386=89 I. C. 484=1925 Oudh 533. On this

Every such offer must fulfil the following conditions :—

(1) it must be unconditional ;

(2) It must be made at a proper time and place, and under such circumstances that the person to whom it is made may have a reasonable opportunity of ascertaining that the person by whom it is made is able and willing there and then to do the whole of what he is bound by his promise to do ;

(3) if the offer is an offer to deliver anything to the promisee, the promisee must have a reasonable opportunity of seeing that the thing offered is the thing which the promisor is bound by his promise to deliver.

An offer to one of several joint promisees has the same legal consequences as an offer to all of them.

Illustration.

A contracts to deliver to B at his warehouse, on the 1st March, 1873, 100 bales of cotton of a particular quality. In order to make an offer of a performance with the effect stated in this section, A must bring the cotton to B's warehouse, on the appointed day, under such circumstances that B may have a reasonable opportunity of satisfying himself that the thing offered is cotton of the quality contracted for, and that there are 100 bales.

39. When a party to a contract has refused to perform, or disabled himself from

performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.

Effect of refusal of party to perform promise wholly.

Sec. *see also* 48 M. L. J. 522 = 90 I. C. 206 = 1925 Mad. 888. The section seems to treat each joint promisee as a partner or agent of the other joint promisee to accept tender and payment. So payment to one has the legal effect of payment to all. 36 Mad. 544 = 24 M. L. J. 333 = 19 I. C. 12. (F. B.). The section does not deal with the legal consequences of an accepted tender. *Ibid.* A valid tender must be an unconditional offer to pay a specific and ascertained sum. An offer to pay the amount found due on a settlement of accounts if the payee undertook to execute an indemnity bond, is not valid tender. 12 I. C. 502 = 34 Mad. 320 ; 35 Mad. 685 = 21 M. L. J. 508 = 10 I. C. 874. In a contract of sale physical possession of goods is unnecessary for seller to be held ready to deliver. *See* 86 I. C. 299 = 1925 Mad. 971 = 49 M. L. J. 380 ; (1925) M. W. N. 324 = 22 L. W. 265 = 90 I. C. 481 = 1925 Mad. 1168 = 49 M. L. J. 530 ; 90 I. C. 206 = 1925 Mad. 888 = 48 M. L. J. 522 ; (1925) M. W. N. 592 = 1925 Mad. 1290. In the absence of fraud or an intention to defeat the rights of other mortgagees, payment to a single mortgagee discharges the mortgagor. 73 I. C. 682 ; 44 I. C. 627 = 3 U. B. R. (1917) 42. *See also* 34 Mad. 320 ; 48 M. 693 = 47 M. L. J. 840. But *see contra* 23 I. C. 8 ; 41 I. C. 921 = 68 P. R. 1917.

Sec. 39.—English law same as Indian law, 4 Cal. 252 ; 4 O. W. N. 550 = 104 I. C. 587 = A. I. R. 1927 Oudh 265. For a review of English case-law as to repudiation of contract. *see* 7 Lah. L. J. 19 = 85 I. C. 118 = 1925 Lah. 217. Section is an enabling one. 9 M. L. T. 479 ; 29 Bom. 46 ; 10 C. W. N. 932. As to contract for performance of personal service *see* 19 Mad. 18. Performance accepted after time fixed—No right to compensation. 14 I. C. 129. *See also* 7 Lah. L. J. 19 = 1925 Lah. 217. Anticipatory breach—Facts amounting to. *See* 8 Lah. 301.

CONTRACT AND CONVEYANCE.—Distinction. 9 A. L. J. 198 = 34 All. 273. As to implied repudiation of contract, *see* (1925) M. W. N. 592 = 1925 Mad. 1290. To be relieved from future performance by the conduct of the other, the

conduct must amount to a renunciation or absolute refusal to perform the contract, such as would amount to a rescission if he had the power to rescind. 28 C. W. N. 104 = 1924 C. 427 ; 3 Mys. L. J. 197. *See also* 2 Luck. 279 = A. I. R. 1927 Oudh 12.

SALE OF IMMOVEABLE PROPERTY.—Postponement of performance—Rescission by vendor—Damages. 40 M. L. J. 13 = 61 I. C. 457 ; 23 I. C. 91 = 63 P. R. 1914 ; 29 I. C. 989 = 19 C. W. N. 933. A purchaser under a contract of sale is entitled to a good and marketable title. If the title is doubtful, *e.g.*, it requires investigation, the purchaser cannot be compelled to rescind the contract or to accept without investigation the doubtful title. 52 I. C. 971 (Mad.) (9 A. 705 P. C. Dist.). *See also* 51 Bom. 247 = 101 Ind. Cas. 229 = 29 Bom. L. R. 19 = A. I. R. 1927 Bom. 195. But if the purchaser has, by his default, in completion after he has accepted the title, given the vendor the right to rescind the contract and retain the deposit of earnest money as forfeited and such right is exercised, a subsequent discovery of any defect in the vendor's title does not confer on the purchaser the right to recover the deposit. A. I. R. 1926 Cal. 339 (2). Ss. 39 and 64 and justice, equity and good conscience require that a servant who quits his master's service in India before the expiry of the contract period, should be ordinarily paid for the full period he worked under the master deducting the damages caused by the breach. 23 M. L. J. 680 = 17 I. C. 894 = (1912) M. W. N. 1912. Under S. 39 a party to a contract can put an end to it when the other party to it fails to perform his promise in its entirety. But if he does not choose to do so the contract holds good. 10 I. C. 258 = 9 M. L. T. 479 ; 10 I. C. 18 ; 38 I. C. 877 = 2 P. L. J. 168. *See also* 22 M. L. J. 207 = 10 I. C. 320 = 10 M. L. T. 496. Where a buyer refuses to take delivery of goods when tendered them to him on the ground they were out of time he cannot afterwards justify the refusal on the ground that the goods offered were not in accordance with the contract and he is liable for dama-

Illustrations.

(a) *A*, a singer, enters into a contract with *B*, the manager of a theatre, to sing at his theatre two nights in every week during the next two months, and *A* engages to pay her 100 rupees for each night's performance. On the sixth night *A* wilfully absents herself from the theatre. *B* is at liberty to put an end to the contract.

(b) *A*, a singer, enters into a contract with *B*, the manager of a theatre, to sing at his theatre two nights in every week during the next two months, and *B* engages to pay her at the rate of 100 rupees for each night. On the sixth night *A* wilfully absents herself. With the assent of *B*, *A* sings on the seventh night. *B* has signified his acquiescence in the continuance of the contract, and cannot now put an end to it, but is entitled to compensation for the damage sustained by him through *A*'s failure to sing on the sixth night.

By whom Contracts must be performed.

40. If it appears from the nature of the case that it was the intention of the parties to any contract that any promise contained in it

Person by whom promise is to be performed.

should be performed by the promisor himself, such promise must be performed by the promisor. In other cases, the promisor or his representatives may employ a competent person to perform it.

Illustrations.

(a) *A* promises to pay *B* a sum of money. *A* may perform this promise, either by personally paying the money to *B* or by causing it to be paid to *B* by another; and, if *A* dies before the time appointed for payment, his representatives must perform the promise, or employ some proper person to do so.

(b) *A* promises to paint a picture for *B*. *A* must perform this promise personally.

Effect of accepting performance from third person.

41. When a promisee accepts performance of the promise from a third person, he cannot afterwards enforce it against the promisor.

42. When two or more persons have made a joint promise, then, unless a contrary intention appears by the contract, all such persons, during their joint lives, and after the death, of any

Devolution of joint liabilities.

of them, his representative jointly with the survivor or survivors, and after the death of the last survivor, the representatives of all jointly, must fulfil the promise.

43. When two or more persons make a joint promise, the promisee may, in the absence of express agreement to the contrary, compel

Any one of joint promisors may be compelled to perform.

any [one or more]¹ of such joint promisors to perform the whole of the promise.

ges for his justifiable refusal, because he gave a wrong reason for it. 49 Mad. 781=93 I. C. 673=1926 Mad. 778. Where agent had suffered losses on contracts made for principal, and the principal failed to indemnify the agent after demand was made, and failed to honour the hundy drawn on him and as the promise to indemnify is an implied term of the contract of agency, the default of the principal and his conduct afterwards justify a rescission of the contract of agency under S. 39. 31 I. C. 450=9 S. L. R. 77. A mortgagee although he has not paid the amount due on a prior mortgage can sue on his own mortgage in respect of amounts he has paid. 105 I. C. 12=4 O. W. N. 1011=A. I. R. 1927 Oudh 527.

RESCISSON OF CONTRACT.—Notice of insolvency—Sale of goods. 27 I. C. 102=8 S. L. R. 95. The right of rescission arises only when the other party fails to perform the contract in its entirety. 17 I. C. 37=6 S. L. R. 103; 19 I. C. 653=6 S. L. R. 187; see also 3 O. W. N. 884=2 Luck. 279=1927 Oudh 12.

Sec. 41.—S. 41 provides for the discharge of a contract by the acceptance of performance by a third party, applies only when the contract has in fact been performed. 39 All. 178

=32 M. L. J. 244=15 A. L. J. 223=1 P. L. W. 330=5 L. W. 502=25 C. L. J. 316=21 M. L. J. 292=21 C. W. N. 765=19 Bom. L. R. 444=39 I. C. 43=44 I. A. 60=(19:7) M. W. N. 290 (P.C.).

Sec. 42.—**ENGLISH LAW**, how different from Indian law, see 6 Bom. 700. Section accords with mercantile usage. 17 Bom. 1.

Sec. 43.—¹These words were substituted for the original word "one" by the Repealing and Amending Act, (XII of 1891) Sch. I.

Sec. 43. **SCOPE**—S. 43 takes away the right of a joint-debtor to be sued jointly. 27 I. C. 94=107 P. R. 1914. On this subject see also 85 I. C. 788=1925 All. 425; 89 I. C. 977; as to when payment to a joint mortgagee operates as discharge. See 48 Mad. 693=47 M. L. J. 840.

EFFECT OF SECTION is to make liability of each of the co-promisors, joint and several. 33 Mad. 317; 17 Bom. 6. Decree for whole rent can be passed against one of several tenants, 8 Pat. L. T. 201=A. I. R. 1927 Pat. 2=97 I. C. 373. But in execution of the decree, the right, title and interest of the judgment-debtors only can be sold. 5 Pat. 233=94 I. C. 28=1926 Pat. 504 Contract by one partner on behalf of the partner ship—Promisee can sue any one of the partners for performance of the whole promise.

Each of two or more joint promisors may compel every other joint promisor to contribute equally with himself to the performance of the promise, unless a contrary intention appears from the contract.

Each promisor may compel contribution.

Sharing of loss by default in contribution.

If any one of two or more joint promisors makes default in such contribution, the remaining joint promisors must bear the loss arising from such default in equal shares.

Explanation.—Nothing in this section shall prevent a surety from recovering from his principal, payments made by the surety on behalf of the principal, or entitle the principal to recover anything from the surety on account of payments made by the principal.

Illustrations.

(a) *A, B and C jointly promise to pay D 3,000 rupees. D may compel either A or B or C to pay him 3,000 rupees.*

(b) *A, B and C jointly promise to pay D the sum of 3,000 rupees. C is compelled to pay the whole. A is insolvent, but his assets are sufficient to pay one-half of his debts. C is entitled to receive 500 rupees from A's estate, and 1,250 rupees from B.*

104 I. C. 700. One of two joint promisors cannot plead the minority and the consequent immunity of the other from liability as a bar to the promisee's claim against himself. 39 Mad. 409 = 43 I. A. 99 = 31 M. L. J. 18 = 24 C. L. J. 74 = 34 I. C. 213 (P. C.). A contract of sale entered into by a major and minor vendee is a joint one and can be enforced against the major vendee. 4 Lah. 334 = 1924 Lah. 146. Where joint-debtors (who were joint tort-feasors in the suit) have under a compromise in Court contracted to pay a sum of money to the plaintiff and some of them pay the sum and sue the rest for contribution, their claim cannot be resisted on the ground that all of them were joint tort-feasors before the compromise. 38 All. 237 = 33 I. C. 165. See also 11 B. L. R. 76. The doctrine of English Law that there is no contribution between joint tort-feasors cannot safely be extended to India. 38 All. 237 = 33 I. C. 165. See also 7 Cal. 702; 25 Mad. 599. A suit against the firm in the firm's name bars a separate suit against the representatives of a deceased partner. 42 I. C. 815 = 19 Bom. L. R. 837. The effect of S. 43 is to entitle plaintiff to get a decree against any of the co-contractors though plaintiff cannot get a decree against both. 40 I. C. 194 = 19 Bom. L. R. 370. A release granted to one of several judgment-debtors without any intention to release the others will discharge the others only *pro tanto* and not in respect of the entire *mesne profits* decreed. 51 I. C. 98 = 29 C. L. J. 245. (37 Cal. 559, ref.). A release of one of two mortgagors does not release the other. 50 Cal. 18 = 74 I. C. 1021 = 1924 Cal. 209. Where one of several joint tenants is liable for the whole rent, on his death leaving several heirs, all the Co-parceners constitute in law one heir. 50 Cal. 737 = 1924 Cal. 165. A suit for cesses is maintainable against all the heirs of one of the original lessees although the heirs of the other original lessees are not properly made parties. 27 C. W. N. 521 = 1923 Cal. 615. It is no answer to a claim for rent against three tenants that if one of them becomes an insolvent, the other persons are not liable to pay the rent. 53 I. C. 973 = 30 C. L. J. 515. See also A. I. R. 1927 Pat. 2. S. 43 is not applicable to a suit for arrears of rent against one of several heirs of a deceased tenant. A landlord cannot maintain such a suit with-

out joining the other heirs. 45 I. C. 732; 27 C. W. N. 521 = 1923 Cal. 615; 36 I. C. 243. In order that one co-promisor can resist a suit on the ground that the co-promisors have not been impleaded, he must show that there was a definite contract that each promisor should not be separately liable. 105 I. C. 484. When the contract is by a single person as a tenant and he dies, the liability of his heirs is a joint liability, for co-heirs form a single person. The liability, of joint tenants for rent is a joint and several liability. 44 I. C. 80 = 22 C. W. N. 289. Suit for arrears of rent not falling due, in the life-time of the deceased tenant can be maintained against some of his heirs. The suit is not bad though all heirs are not joined. 36 I. C. 243. Where the parties are interested jointly by law in a contract by a single person, S. 43 cannot be applied. 35 I. C. 563 = 24 C. L. J. 371. Joint contract is not terminated by the death of one of the joint contractors. 16 I. C. 852 = 17 C. L. J. 201. S. 43, does not enable a person suing one or two partners, in their private capacity, and failing to establish his claim to continue the suit against them as against the firm. 31 I. C. 209 = 76 P. R. 1915; 4 Lah. 239 = 77 I. C. 338 = 1924 L. 148. Registered Pattadar with limited interest in land paying Government Revenue can recover from other persons having interest. 12 L. W. 180 = 59 I. C. 262 = (1920) M. W. N. 477. Loan by partner to the partnership—Suit for recovery of—Maintainability. 64 I. C. 183. A partner in a firm can have a dual capacity, that of creditor of the firm as well as that of partner in it. 64 I. C. 183. A suit for contribution in respect of costs is not maintainable. 33 I. C. 357 = 18 O. C. 340. A suit on a hand note executed by several persons is not bad simply because one only of the joint promisors has been sued. 76 I. C. 938 = 2 Pat. 466. Where a decree creates a joint and several liability, the judgment debtors cannot in execution claim an apportionment. If executed for the whole against any one his remedy is to sue for contribution. 2 Pat. 796 = 74 I. C. 867 = 19 L. W. 686 = 76 I. C. 905 = 1924 Mad. 279. A person in wrongful possession cannot bring a suit for contribution if payment was made in support of his own title. 15 C. W. N. 332 = 13 C. L. J. 646. (Joint promisors—Dismissal of suit against—Appeal. 34 I. C. 138.)

(c) *A, B and C* are under a joint promise to pay *D* 3,000 rupees. *C* is unable to pay anything, and *A* is compelled to pay the whole. *A* is entitled to receive 1,500 rupees from *B*.

(d) *A, B and C* are under a joint promise to pay *D* 3,000 rupees, *A and B* being only sureties for *C*. *C* fails to pay. *A and B* are compelled to pay the whole sum. They are entitled to recover it from *C*.

44. Where two or more persons have made a joint promise, a release of one of such joint promisors by the promisee does not discharge the other joint promisor or joint promisors; neither does it free the joint promisor so released from responsibility to the other joint promisor or joint promisors.¹

Effect of release of one joint promisor. unless a contrary intention appears from the contract, the right to claim performance rests, as between him and

Sec. 44.—¹ See s. 138, *infra*.

Sec. 44.—Co-heirs—Liability for rent—Claim barred against some of them—others cannot be made liable for entire rent. 48 I. C. 536. Under the Indian Law a release by the creditor of one of the mortgagors, jointly and severally liable without expressly reserving his remedies against the other mortgagors, has not the effect of releasing the others. 44 Cal 162=25 C. L. J. 24=21 C. W. N. 740. See also 4 Cal. 336; 39 Mad. 548; 6 C. L. R. 212. The English Law doctrine that the release of one of several joint debtors releases all from liability, has no application to India as evidenced by S. 44. 44 Cal. 162=25 C. L. J. 24=21 C. W. N. 740. (11 I. C. 450=14 C. L. J. 354, Ref.) The release of a joint judgment-debtor does not operate as a release of the others but they can claim the benefit of the amount actually paid by the released judgment-debtor. 39 Mad. 548=29 I. C. 393 (5 M. 37, Diss.; 33 M. 317; 37 C. 559=14 C. L. J. 354 Ref.).

Sec. 45.—For an exception to s. 45 in case of Government securities, see the Indian Securities Act (XIII of 1886), s. 5.

APPLICABILITY OF SECTION.—Section applies to all joint promisors (as) partners, co-heirs, etc. 10 Bom. 32; See also 17 Bom. 6; 17 Bom. 29; 21 Bom. 12; as also joint family members carrying on partnership business. 6 Cal. 815; 7 Bom. 217; 18 Mad. 33; 18 Cal. 86; 33 All. 382 (P. C.). It is doubtful whether S. 45 applies to a claim for possession of land. Where, however, the suit is really for specific performance of a contract, the defendant may plead, S. 45 as a bar. 57 P. R. 1911=12 I. C. 850.

EFFECT OF SECTION is to extend English law as to trading partnership to all partnership cases 9 All. 480.

SPECIAL CASES—CO-HEIRS.—One debt creates a single and indivisible liability which gives rise to one single cause of action. One of several heirs of a deceased obligee cannot sue for his share in the money due under the bond. 33 All. 327=9 I. C. 127 (7 A. 313 F.) Payment to one of the co-heirs of a promisee under a bond would not discharge the promisor from his liability. So also are payments made to a junior member of a Hindu family during the lifetime of its manager in whose favour bond was executed. 41 Mad. 637=34 M. L. J. 315=45 I. C. 419; 29 I. C. 586; see also 30 I. C. 371.

CO-MORTGAGEES.—Where property is mortgaged to two persons as tenants in common and there is no covenant to repay each separately a moiety of the amount, the right of either mort-

gagee, who desires to realize failing the consent of his co-mortgagee, is to sue making co-mortgagee a defendant. 46 I. A. 272=37 M. L. J. 483=24 C. W. N. 297 (P. C.). See also 31 C. W. N. 374. As to whether one of several joint promisees can sue for his share of the debt only see A. I. R. 1927 Mad. 84; 105 I. C. 544 (suit by one broker for his share of brokerage fees. A mortgagor who paid the whole to one of the mortgagees in disregard of a notice by the other not to pay and who is compelled to pay again, the share of the other cannot claim a refund from the mortgagee whom he has paid in full. 24 I. C. 88. One of several co-mortgagees cannot maintain a suit for sale of the entire mortgaged property to recover his share of the debt only. 24 I. C. 88 [20 I. C. 151; A. W. N. (1896) 153 Dist. A. W. N. (1892) 246 F.] So also one of the joint promisees cannot sue for his share of the debt. 51 M. L. J. 648. Co-mortgagees are presumed in equity to be tenants-in-common of the mortgage debt and their interests are severable or partible among themselves. Each of them can sue joining the unwilling co-obligors as defendants. 27 C. L. J. 453=45 I. C. 986; 46 I. A. 272=37 M. L. J. 483=24 C. W. N. 297=53 I. C. 131 (P. C.). Similarly if some of the co-mortgagees are estopped from suing, the Court can sever the debt and give decree to the others for their share. 27 C. L. J. 453=22 C. W. N. 641. A payment of the mortgage debt by the mortgagor to one of the several mortgagees is not a valid payment as against the other mortgagees, 29 I. C. 956=21 C. L. J. 570; 29 I. C. 139; 4 Lah. L. J. 23; 1922 Lah. 64; 3 Lah. L. J. 502; 63 I. C. 744. But it operates as a valid discharge of the entire mortgage if the person to whom payment is made was the manager and the agent of all the mortgagees. 105 I. C. 751. Co-mortgagees—Suit by one for his share on allegation that others had received their shares is maintainable. 25 I. C. 440=19 C. L. J. 327. Co-mortgagees—Payment to one if discharge of debt. 5 Pat. L. J. 376=56 I. C. 403; 5 Pat. L. J. 151=55 I. C. 841.

CO-PARCENER.—The manager of a joint Hindu family can enforce a contract made with the family, and the junior members are not necessary parties. 33 All. 272=38 I. A. 45=15 C. W. N. 321=21 M. L. J. 378 (P. C.); 14 I. C. 35=9 A. L. J. 410. Co-parcener—Tender to Manager of Hindu family is valid. 19 A. L. J. 852=14 A. 64.

CO-SHARER.—A co-sharer in whose sole name the title-deed stands is not entitled to object to the tenants paying to his co-sharers their shares. He is not bound by payments beyond their share

them, with them during their joint lives, and, after the death of any of them, with the representative of such deceased person jointly with the survivor or survivors, and after the death of the last survivor, with the representatives of all jointly.

Illustration.

A, in consideration of 5,000 rupees lent to him by *B* and *C*, promises *B* and *C* jointly to repay them that sum with interest on a day specified. *B* dies. The right to claim performance rests with *B*'s representative jointly with *C* during *C*'s life, and after the death of *C* with the representatives of *B* and *C* jointly.

Time and Place for Performance.

Time for performance of promise where no application is to be made and no time is specified.

46. Where, by the contract, a promisor is to perform his promise without application by the promisee, and no time for performance is specified, the engagement must be performed within a reasonable time.

Explanation.—The question "what is a reasonable time" is, in each particular case, a question of fact.

Time and place for performance of promise where time is specified and no application to be made.

47. When a promise is to be performed on a certain day, and the promisor has undertaken to perform it without application by the promisee, the promisor may perform it at any time during the usual hours of business on such day and at the place at which the promise ought

to be performed.

Illustration.

A promises to deliver goods at *B*'s warehouse on the first January. On that day *A* brings the goods to *B*'s warehouse but after the usual hour for closing it, and they are not received. *A* has not performed his promise.

Application for performance on a certain day to be at proper time and place.

48. When a promise is to be performed on a certain day, and the promisor has not undertaken to perform it without application by the promisee, it is the duty of the promisee to apply for performance at a proper place and within the usual hours of business.

unless they were made *bona fide* in which case he is entitled to maintain a suit for his own share of the rent without making his co-sharers parties 28 I. C. 141 = 28 M. L. J. 197.

FIRM.—O. 30, R. 4, C. P. C., contains a modification of S. 45 of the Contract Act and a suit by firm could continue without the legal representative of a deceased partner being brought on record as co-plaintiff. 21 I. C. 509 = 17 C. L. J. 648 (9 C. L. J. 331 Rel. on). The rule of Law is firmly established that debt due to trading partnerships stand on a different footing from debts due under ordinary contracts and that when one of the partners in a firm dies the surviving partners can sue for the recovery of the debts due to the firm without making the legal representatives of the deceased partner parties to the suit. 4 Lah. 122 = 71 I. C. 951 = 1923 Lah. 197 (9 A. 486; 17 C. L. J. 648; 20 A. 365; 32 A. 638 referred to; 18 C. 86 dissented). 7 Bur. L. T. 261 = 24 I. C. 268. All partners living at the time of the institution of the suit must join as co-plaintiffs. 91 I. C. 573 = 1926 Sind 81. A payment to one of two partners constituting a firm operates as discharge of liability. 54 I. C. 273 = 210 P. W. R. 1920. Sec. 45 does not prohibit the action where a partner of a dissolved firm collects his share of debt impleading the other partners as defendants. It is open to the latter to sue again for their share of the debt. 53 I. C. 416 = 128 P. R. 1919. See also 90 I. C. 111. One partner cannot sue alone to recover a partnership debt. He can, however, use the name of the firm and names of his co-partners so as to enable him to

sue. 40 I. C. 108 = 1917 Pat. 239 [(1908) 2 K.B. 579, foll.] One of several promisees in a contract for specific performance cannot claim specific performance. 13 I. C. 315 = (1912) M. W. N. 415. A payment to one of several joint promisees does not operate as a complete discharge of the debt. 40 I. C. 405. See also 2 Pat. L. J. 520 = 42 I. C. 408 = 1917 Pat. 258; 29 Bom. L. R. 147 = 100 I. C. 993 = A. I. R. 1927 Bom. 125. 13 I. C. 315 = (1912) M. W. N. 415; 36 Mad. 544 = 24 M. L. J. 333 (F. B.); 19 I. C. 865 = 17 C. L. J. 372; 49 I. C. 63 = 22 C. W. N. 1021. (36 M. 544 and 20 M. 461 diss. 20 M. L. J. 709 and 38 C. 342 foll.)

Sec. 46.—In a contract where the dates of delivery in instalments are not indicated, the instalments must be deemed to have been distributed rateably over the period appointed for delivery of the whole quantity of goods. 43 Cal. 305 = 20 C. W. N. 240. Agreement by puisne mortgagee to pay off prior encumbrances—Default—Damages recoverable by mortgagor. 48 I. C. 550; 5 O. L. J. 670; 1925 Oudh 132.

Sec. 47.—Sale—Vendor's duty to tender goods at the time specified—Delivery of Railway receipt not sufficient. 40 Bom. 517; 32 I. C. 948.

EXPLANATION.—To determine what is reasonable time, usage of the business is also to be considered. 24 Bom. 97; 23 Mad. 441. Where the day for performance is fixed, the promisor would have to perform it at any time during the usual business hours on the day and place fixed, even if it be a Sunday. 15 Bom. 399.

Sec. 48.—See 40 Bom. 517 under S. 47.

Explanation.—The question “what is a proper time and place” is, in each particular case, a question of fact.

Place for performance of promise where no application to be made and no place fixed for performance.

49. When a promise is to be performed without application by the promisee, and no place is fixed for the performance of it, it is the duty of the promisor to apply to the promisee to appoint a reasonable place for the performance of the promise and to perform it at such place.

Illustration.

A undertakes to deliver a thousand maunds of jute to B on a fixed day. A must apply to B to appoint a reasonable place for the purpose of receiving it, and must deliver it to him at such place.

Performance in manner or at time prescribed or sanctioned by promisee.

50. The performance of any promise may be made in any manner, or at any time which the promisee prescribes or sanctions.

Illustrations.

(a) B owes A 2,000 rupees. A desires B to pay the amount to A's account with C, a banker, B, who also banks with C, orders the amount to be transferred from his account to A's credit, and this is done by C. Afterwards, and before A knows of the transfer, C fails. There has been a good payment by B.

(b) A and B are mutually indebted. A and B settle an account by setting off one item against another, and B pays A the balance found to be due from him upon such settlement. This amounts to a payment by A and B, respectively, of the sums which they owed to each other.

(c) A owes B 2,000 rupees. B accepts some of A's goods in reduction of the debt. The delivery of the goods operates as a part payment.

(d) A desires B, who owes him Rs. 100, to send him a note for Rs. 100 by post. The debt is discharged as soon as B puts into the post a letter containing the note duly addressed to A.

Performance of Reciprocal Promises.

Promisor not bound to perform, unless reciprocal promisee ready and willing to perform.

51. When a contract consists of reciprocal promises to be simultaneously performed, no promisor need perform his promise unless the promisee is ready and willing to perform his reciprocal promise.

Sec. 49.—Section does not apply where the money is payable on demand and not without application by the promisee. 15 I. C. 885=16 C. L. J. 279 (31 M. 223 (228), Foll.). S. 49 has no application to a case where, by manifest implication or necessary import, a place is fixed by the contract for the performance of the obligation. The rule in S. 49 accordingly does not apply where there is an obligation to pay the creditor, and an inference can legitimately be drawn, either from the terms of the contract itself or from the necessities of the case, that there is a further obligation on the debtor of finding the creditor so as to pay him. *Quære*:—Whether the English Common Law rule that, if no place is named, it is the duty of the debtor to make the payment where the creditor is, has been superseded by S. 49. (7 Bom. L. R. 993, Dist.; 53 I. A. 58; 49 M. L. J. 806 (P. C.) and 30 Bom. 167, Ref.); 54 I. A. 265=29 Bom. L. R. 1027=45 C. L. J. 633=4 O. W. N. 676=25 A. L. J. 690=31 C. W. N. 998=39 M. L. T. 72=5 Rang. 451=(1927) M. W. N. 520=102 I. C. 610=26 L. W. 720=A. I. R. 1927 P. C. 156=53 M. L. J. 25 (P. C.). The question as to what is reasonable time, is a question of fact in each case. 22 M. L. J. 207=10 I. C. 320. Choice of reasonable place lies with the buyer. 24 Cal. 8. Ordinarily the debtor is to see the creditor to ascertain the amount of the debt and pay it. 31 I. C. 880=11 N. L. R. 189. Sec. 49 is in accordance with the rule of English Law, that in the absence of any specification of the place of payment, the debtor must seek out the creditor. The section

leaves it to the creditor to appoint a reasonable place of payment. 20 I. C. 683=6 Bur. L. T. 143. *Quære*.—Whether it is good law in face of. 51 I. A. 265=53 M. L. J. 25 (P. C.). See also 30 Bom. 167; 31 Mad. 223. In case *Pakki Adat* agency payment of money must be made where the constituent resides. 33 Bom. 364.

Sec. 50.—Payment to unauthorized agent is not payment to principal. 12 Beng. L. R. 360. Payment not by cash but by transfer of figures in account is valid. 1925 Sind 144=20 S. L. R. 335.

Sec. 51.—Repudiation, what is—Sufficiently definite statement as to. 43 Cal. 305=20 C. W. N. 240. On this section, see also 49 M. L. J. 300=1925 Mad. 971; 88 I. C. 569=1925 Sind 220. Where the consideration for a contract consists of a promise, the party who is bound to do the act promised, fully performs his part of the contract if he is ready to do the act when required. 20 I. C. 47 (1)=20 C. L. J. 424. As to what constitutes readiness and willingness, see 9 C. 791; 2 Bom. H. C. R. 246; 2 Bom. H. C. R. 258; 8 Lah. 198=28 Punj. L. R. 351=99 I. C. 812=A. I. R. 1927 Lah. 176; 7 Lah. 318=94 I. C. 304=1926 Lah. 318; A. I. R. 1928 Lah. 20 (2). Vendor is not bound to tender the purchase price unless the purchaser is ready and willing to perform his part of the promise. 16 S. L. R. 278=1923 Sind 50. In a suit for specific performance the strict law as to tender is not applicable. 16 S. L. R. 278=1923 Sind 50. In the case of reciprocal agreements one of them cannot be enforced

Illustrations.

(a) *A* and *B* contract that *A* shall deliver goods to *B* to be paid for by *B* on delivery. *A* need not deliver the goods, unless *B* is ready and willing to pay for the goods on delivery. *B* need not pay for the goods, unless *A* is ready and willing to deliver them on payment.

(b) *A* and *B* contract that *A* shall deliver goods to *B* at a price to be paid by instalment, the first instalment to be paid on delivery.

A need not deliver unless *B* is ready and willing to pay the first instalment on delivery.

B need not pay the first instalment, unless *A* is ready and willing to deliver the goods on payment of the first instalment.

52. Where the order in which reciprocal promises are to be performed is expressly fixed by the contract, they shall be performed in that

Order of performance of reciprocal promises. order ; and, where the order is not expressly fixed by the contract, they shall be performed in that order which the nature of the transaction requires.

Illustrations.

(a) *A* and *B* contract that *A* shall build a house for *B* at a fixed price. *A*'s promise to build the house must be performed before *B*'s promise to pay for it.

(b) *A* and *B* contract that *A* shall make over his stock in-trade to *B* at a fixed price, and *B* promises to give security for the payment of the money. *A*'s promise need not be performed until the security is given, for the nature of the transaction requires that *A* should have security before he delivers up his stock.

53. When a contract contains reciprocal promises, and one party to the contract prevents the other from performing his promise, the contract becomes voidable at the option of the party so

Liability of party preventing event on which contract is to take effect.

prevented ; and he is entitled to compensation¹ from the other party for any loss which he may sustain in

consequence of the non-performance of contract.

Illustration.

A and *B* contract that *B* shall execute certain work for *A* for a thousand rupees. *B* is ready and willing to execute the work accordingly, but *A* prevents him from doing so. The contract is voidable at the option of *B*; and, if he elects to rescind it, he is entitled to recover from *A* compensation for any loss which he has incurred by its non-performance.

54. When a contract consists of reciprocal promises, such that one of them cannot be performed, or that its performance cannot be

Effect of default as to that promise which should be first performed, in contract consisting of reciprocal promises.

claimed till the other has been performed, and the promisor of the promise last mentioned fails to perform it, such promisor cannot claim the performance of the reciprocal promise, and must make compensation to the other party

to the contract for any loss which such other party may sustain by the non-performance of the contract.

of the other is void and unenforceable. 106 I.C. 823 (1).

Sec. 52.—If delay in the payment of the purchase money is due to the vendor's own default in showing a good title, he will not be entitled to take advantage of his own fault and claim interest. 42 I.C. 509=6 L.W. 233. See also 26 A.L.J. 492.

Sec. 53.—¹ See also S. 73, *infra*. The creation of a monopoly in favour of a person to sell vegetables in a village is not opposed to public policy. 100 I.C. 859.

Sec. 54.—A party cancelling a contract without any justification is precluded from making any defence which would have been open to him in an action for damages by the other party. 59 I.C. 515=22 Bom. L.R. 1165; 49 I.C. 811=(1918) M.W.N. 772. See also 88 I.C. 697=6 Pat. L.T. 830=1925 Pat. 496. Failure of promisor to perform his part of the promise—Promisee, if can rescind whole contract. See 23 A.L.J. 806=30 C.W.N. 145 (P.C.); 2 Luck. 279=3 O.W.N. 884=1927 Oudh 12. Where a contract consisted of twelve parts, non-performance of one does not necessarily indicate an intention to put

an end to the contract. 24 I.C. 758=16 Bom L.R. 178. As soon as the contract for the sale of goods within a specified date is broken, the obligation of the purchaser to accept delivery of the goods vanishes; he is not bound to take the goods when delivered later. 20 C.L.J. 133=27 I.C. 7=20 C.W.N. 159. Engagement to ship goods and to keep space for goods shipper must be ready with cargo before he can enforce the obligation and the ship-owner to call at the port of shipment and take action against him in damages for its breach. 34 I.C. 843. Reciprocal promises—Breach by act of both parties—Suit for specific performance, whether lies—Compensation—Claim for. 38 Mad. 959=26 M.L.J. 331. See also 86 I.C. 436=1925 Mad. 1029. In case of a contract of loan for a consolidated sum of money to be paid from time to time if the lender refuses to lend a small portion remaining due to the borrower, it has the effect of the lender putting an end to the contract and he is not entitled to claim interest at the contract rates. 1 I.W. 136=22 I.C. 627; on this section, see also 37 Cal. 334; 4 Cal. 237; 15 Bom. 389.

Illustrations.

(a) *A* hires *B*'s ship to take in and convey, from Calcutta to the Mauritius, a cargo to be provided by *A*, *B* receiving a certain freight for its conveyance. *A* does not provide any cargo for ship. *A* cannot claim the performance of *B*'s promise, and must make compensation to *B* for the loss which *B* sustains by the non-performance of the contract.

(b) *A* contracts with *B* to execute certain builder's work for a fixed price, *B* supplying the scaffolding and timber necessary for the work. *B* refuses to furnish any scaffolding or timber, and the work cannot be executed. *A* need not execute the work, and *B* is bound to make compensation to *A* for any loss caused to him by the non-performance of the contract.

(c) *A* contracts with *B* to deliver to him, at a specified price, certain merchandise on board a ship which cannot arrive for a month, and *B* engages to pay for the merchandise within a week from the date of the contract. *B* does not pay within the week. *A*'s promise to deliver need not be performed, and *B* must make compensation.

(d) *A* promises *B* to sell him one hundred bales of merchandise, to be delivered next day, and *B* promises *A* to pay for them within a month. *A* does not deliver according to his promise. *B*'s promise to pay need not be performed, and *A* must make compensation.

55. When a party to a contract promises to do a certain thing at or before a

specified time, or certain things at or before specified times, and fails to do any such thing at or before specified time, the contract, or so much of it as has not been per-

Sec. 55.—Compare Ss. 62 and 63, *infra*.

PRINCIPLE OF SECTION.—See A. I. R. 1927 Sind 40. As to when time is essence of contract, see 88 I. C. 890 (English and Indian Law discussed).

CONTRACT TO SELL.—Even where time is not of the essence of contract, the purchaser must show his readiness and willingness to perform his part of the contract within a reasonable time after the agreed date. 37 I. C. 776; 69 I. C. 41=(1922) M. W. N. 47. See also 2 I. C. 460 (P. C.). Effect of failure—Contract—Construction—Sale of goods—Delivery to be taken within a specified period—Default—Delivery of part of goods after expiry of time fixed—Refusal to take delivery of the rest—Damages. 65 I. C. 9=24 Bom. L. R. 142. Effect of failure—Time for performance—A holiday—Custom as to right to perform on day following to be strictly proved. 58 I. C. 396=32 C. L. J. 140. In a contract by which an agent agreed to procure his principal a loan within a certain time and time was definitely known to be of the essence of the contract, the agent will not, where the loan is not secured within the stipulated time, be entitled to any commission. 15 C. L. J. 40=16 C. W. N. 753; 30 C. L. J. 224=24 C. W. N. 330. The rule in Kuri transactions being that the amount which is payable to the bidder is to be paid to him only on his furnishing security for future instalments, time is of the very essence of the contract and unless the security is furnished within the prescribed period the bidder loses his right to the amount payable to him. 52 I. C. 938; (1919) M. W. N. 805. Where time is the essence of the contract, claim for *quantum meruit* is unsustainable when work is delayed. 19 I. C. 48=6 Bur. L. T. 53; 69 I. C. 894=1923 Nag. 140. Where time is of the essence of the contract, failure to comply by specified time entitles promisee to immediately rescind. Where time is not of the essence of the contract, he has a right to damages only. But whether time is of the essence of a contract or not, in any case a contract must be performed within a reasonable time. 33 I. C. 668=9 S. L. R. 137; 50 I. C. 41=12 S. L. R. 144; 19 I. C. 48=6 Bur. L. T. 53.

MERCANTILE CONTRACTS.—In spite of

S. 55, in England as well as in India time is of the essence of the contract in mercantile contracts. 36 I. C. 96=10 S. L. R. 4 (2 A. C. 455 at 463, Ref.). See also 4 I. C. 945; 144 P. L. R. 1913=111 P. W. R. 1913=19 I. C. 93=80 P. R. 1913; 48 Mad. 538; 87 I. C. 681=1925 Mad. 626=48 M. L. J. 374; 83 I. C. 260=1924 Cal. 427; 1925 Mad. 1232=49 M. L. J. 200.

"MONTH" in Indian contracts means lunar month not calendar month. 36 Cal. 576.

SALE.—Consideration to be paid by the vendee to a creditor of the vendor—Vendee's default—Vendor entitled to recover by suit. 36 Mad. 348=12 I. C. 353=21 M. L. J. 983.

SALE OF LAND.—S. 55 does not lay down any principle which differs from the law of England as to contracts for sale of land. In such cases, equity looks at the substance and not at the letter of the agreement in order to ascertain whether the properties notwithstanding that they named a specific time within which the sale was to be completed, really and in substance intended more than that it should take place within a reasonable time. *Prima facie* equity treats the importance of such time-limits as being subordinate to the main purpose of the parties. 40 Bom. 289=43 I. A. 26=30 M. L. J. 186=20 C. W. N. 744 (P. C.) (38 Bom. 77, Reversed); 69 I. C. 13=1922 Bom. 14; 38 I. C. 123; 97 I. C. 269=19 S. L. R. 41. Specific performance of a contract to sell land will be granted, although there has been a failure to keep the dates assigned to it, if justice can be done between the parties and if nothing in the express stipulations of the parties; the nature of the property or the surrounding circumstances, make it inequitable to grant relief. 40 Bom. 289. An intention to make time of the essence of the contract must be expressed in unmistakable language; it may be inferred from what passed between the parties before but not after the contract is made. (*Ibid.*) 40 M. L. J. 13=61 I. C. 457; 30 I. C. 365=42 Mad. 802=34 M. L. J. 109; 52 I. C. 590=10 L. W. 376; 70 I. C. 126=1 Bur. L. J. 167=1923 Rang. 42; 33 I. C. 668=9 S. L. R. 137. The presumption that time is not of the essence of a contract to sell land, is rebuttable when the sale is arranged to meet the expenses of a marriage taking place on a certain date. 26 I. C. 121=27 M. L. J. 482.

formed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.

If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time ; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure.

If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of such acceptance, he gives notice to the promisor of his intention to do so.

Agreement to do impossible act.

56. An agreement to do an act impossible in itself is void.

TEST OF TIME BEING ESSENCE OF CONTRACT.—The question whether time is of the essence of the contract depends on the intention of the parties. 47 B. 607=25 Bom. L.R. 328 ; 38 Bom. 77=15 B. L. R. 405 ; 28 C. W. N. 104=1924 Cal. 427 ; 33 I. C. 347=22 C. L. J. 566.

WAIVER.—Consent decree.—Time not always essence of contract.—Waiver may be inferred from conduct. 36 I. C. 598=18 Bom. L.R. 803 ; 2 Pat. L. J. 520=42 I. C. 408. Acceptance of payment after the expiry of the time fixed open rates as a waiver of the limitation as to time in the contract. 2 Pat. L. J. 520=42 I. C. 408.

Sec. 58. SCOPE OF SECTION.—See 105 I. C. 319. The question whether compensation is payable or not depends not merely on (i) whether it can, in an abstract manner, be said that the act agreed to be done is impossible in itself or unlawful, but upon (ii) the knowledge as to the act being impossible or unlawful, as well as the promisor using reasonable diligence in obtaining that knowledge ; but this knowledge, or absence of diligence must be coupled with ; (iii) the want of knowledge on the part of the promisee, and finally it depends also upon (iv) whether the promisor could have prevented that event which renders the act unlawful. 105 I. C. 319.

"BECOMES IMPOSSIBLE."—Whether absolute impossibility is meant, as applied to a contract for supply of coal, see L.R. 50 I.A. 142=27 C.W. N. 974=47 B. 563=A.I.R. 1923 P.C. 105=45 M. L.J. 630 (P. C.). As to what amounts to impossibility of performance see 86 I.C. 362=1925 Mad. 907 ; 48 Mad. 533=48 M. L. J. 374. Becomes impossible—Contract of service—Wrongful dismissal—Broker employing underbroker—Termination of broker's appointment—Dependent contract. 47 Cal. 290=46 I. A. 314=24 C. W. N. 577 (P.C.). Where in a contract to lease lands, the performance becomes impossible by acquisition of land by Government the promisee is entitled to compensation for loss. 44 A. 229=20 A. L. J. 41=65 I. C. 253. Mere difficulty or the need to pay exorbitant prices is not such physical impossibility as is contemplated under S. 56. 40 Bom. 301=33 I. C. 205 ; 47 Bom. 563=25 Bom. L. R. 854=27 C. W. N. 974=45 M. L. J. 630 (P. C.). "Becomes impossible" by a rule of the Government—Effect. 36 Bom. 139=12 I.C. 693 ; see also 58 I. C. 761=24 C. W. N. 703. (As)

waggon restrictions by Government. See 99 I.C. 459=A. I. R. 1927 Mad. 89=51 M. L. J. 663. Government requisitioning all steamers available for carriage of goods. See 105 I. C. 319. Strike among local workmen as defence. See 30 Bom. L. R. 49. S. 56 is applicable only to the physical impossibility and therefore does not cover every case of frustration. 70 I. C. 379=26 C. W. N. 573 ; 36 Bom. 139=12 I. C. 693. See also 47 Bom. 563 (P. C.). Impossibility as an excuse for non performance of a contract must be a physical or legal impossibility. A rise in freights may be equivalent to such a scarcity of ships as to amount to physical impossibility. 63 I. C. 267=33 C. L. J. 151. See also 47 Bom. 563 (P. C.). "Becomes impossible"—Owing to war—Effect. 45 Cal. 28=21 C. W. N. 670 ; 58 I. C. 761=24 C. W. N. 703 ; 33 I. C. 540. "Becomes impossible" owing to exorbitant rise in price. 62 I. C. 815. Where the contract does not expressly or by necessary implication fix any time for the performance the law implies that it shall be performed within a reasonable time. 53 I. C. 125=26 M. L. T. 24. If the delay in transit is attributable to causes beyond the control of the defendant, he has acted neither negligently nor unreasonably. (*Ibid.*) As to what is reasonable time. (*Ibid.*) Where a sub-lease is entered into in the belief that the original contract will be subsisting during the period during which the sub-contract is to be worked, the cancellation of the contract terminates the sub-contract as well. 29 I. C. 151=2 L. W. 411 ; 37 I. C. 761. A contract is not rendered impossible of performance merely on account of a difficulty in performing it or a need to pay high prices. 57 I. C. 636=17 N. L. R. 1. Where a person stands surety to produce a person on a certain day in court but by that time the person had been convicted and lodged in jail, the promise becomes impossible to perform. The agreement is not one falling under the second part of S. 35. 1 Bur. L. J. 236=70 I. C. 870=1923 Rang. 26.

TEST OF IMPOSSIBILITY.—Test of impossibility is whether it was practically impossible for the defendant to get the quality contracted for within the specified time. 35 I. C. 625=(1916) 2 M. W. N. 131. If after a contract is entered into, it becomes illegal owing to declaration of war, etc., it cannot be enforced. 33 I. C. 96=9

Contract to do act afterwards becoming impossible or unlawful.

Compensation for loss through non-performance of act known to be impossible or unlawful.

A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.¹

Where one person has promised to do something which he knew, or with reasonable diligence, might have known, and which the promisee did not know to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise.

Illustrations.

(a) *A* agrees with *B* to discover treasure by magic. The agreement is void

(b) *A* and *B* contract to marry each other. Before the time fixed for the marriage, *A* goes mad. The contract becomes void.

(c) *A* contracts to marry *B*, being already married to *C*, and being forbidden by the law to which he is subject to practice polygamy. *A* must make compensation to *B* for the loss caused to her by the non-performance of his promise.

(d) *A* contracts to take in cargo for *B* at a foreign port. *A*'s Government afterwards declares war against the country in which the port is situated. The contract becomes void when war is declared.

(e) *A* contracts to act at a theatre for six months in consideration of a sum paid in advance by *B*. On several occasions *A* is too ill to act. The contract to act on those occasions become void.

Reciprocal promise to do things legal, and also other things illegal.

57. Where persons reciprocally promise, firstly, to do certain things which are legal, and, secondly, under specified circumstances, to do certain other things which are illegal, the first set of promises is a contract, but the second is a void agreement.

Illustration.

A and *B* agree that *A* shall sell *B* a house for 10,000 rupees, but that, if *B* uses it as a gambling house, he shall pay *A* 50,000 rupees for it.

The first set of reciprocal promises, namely, to sell the house and to pay 10,000 rupees for it, is a contract.

The second set is for an unlawful object, namely, that *B* may use the house as a gambling house, and is a void agreement.

Alternative promise, one branch being illegal.

58. In the case of an alternative promise, one branch of which is legal and the other illegal, the legal branch alone can be enforced.

Illustration.

A and *B* agree that *A* shall pay *B* 1,000 rupees for which *B* shall afterwards deliver to *A* either rice or smuggled opium.

This is a valid contract to deliver rice, and a void agreement as to the opium.

Appropriation of payments.

59. Where a debtor, owing several distinct debts to one person, makes a payment to him, either with express intimation, or under circumstances implying that the payment is to be applied to the discharge of some particular debt, the payment, if accepted, must be applied accordingly.

Application of payment where debt to be discharged is indicated.

Bur. L. T. 99 ; 48 I. C. 310 = 11 Bur. L. T. 84 ; 40 I. C. 526 = 32 M. L. J. 146 ; 40 I. C. 851 = 41 Mad. 225. See also 40 Bom. 570 = 33 I. C. 353 ; 42 Bom. 473 = 37 I. C. 644 ; 33 I. C. 540 ; 43 I. C. 673 = 33 M. L. J. 410.

NON-LIABILITY FOR ACCIDENT.—Clause in the contract—The accident caused by the promisor's own negligence. See 25 I. C. 924 = 7 L. B. R. 105.

CONTRACT TO THE CONTRARY.—Section applies only when there is no contract to the contrary between the parties. Section must be read as an implied term in contracts. 105 I. C. 319.

¹ See S. 65, *infra*. And see the Specific Relief Act (I of 1877), S. 13, *infra*.

Sec. 57.—If the parties have treated the legal and illegal parts of a contract as inseparable and as an integral whole, the entire contract is void. 9 Bom. 176.

Sec. 58.—S. 58 does not apply where there is no alternative promise separable from the illegal portion of the agreement. A covenant for indemnity for failure to do an illegal act is unenforceable 18 I. C. 9. Where a contract is only partly unenforceable, the whole contract goes unless it is severable. 30 M. L. J. 62 = 32 I. C. 486 (F. B.).

Secs. 59 and 60.—Appropriation—Principles of. 26 C. W. N. 153 = 63 I. C. 904 (P. C.). See also 37 All. 469 ; 38 Cal. 537 (P. C.) ; 35 Cal. 636

Illustrations.

(a) *A* owes *B*, among other debts, 1,000 rupees upon a promissory note which falls due on the first June. He owes *B* no other debt of that amount. On the first June *A* pays to *B* 1,000 rupees. The payment is to be applied to the discharge of the promissory note.

(b) *A* owes to *B*, among other debts, the sum of 567 rupees. *B* writes to *A* and demands payment of this sum. *A* sends to *B* 567 rupees. This payment is to be applied to the discharge of the debt of which *B* had demanded the payment.

60. Where the debtor has omitted to intimate and there are no other circumstances indicating to which debt the payment is to be

Application of payment where debt to be discharged is not indicated

applied, the creditor may apply it at his discretion to any lawful debt actually due and payable to him from the debtor, whether its recovery is or is not barred by the law

in force for the time being as to the limitation of suits.

61. Where neither party makes any appropriation the payment shall be applied in discharge of the debts in order of time, whether they

Application of payment where neither party appropriates.

are or are not barred by the law in force for the time being as to the limitation of suits. If the debts are of equal standing, the payment shall be applied in discharge of

each proportionably.

2 Bom. L. R. 706 ; 26 Cal. 39 ; 19 C. W. N. 237 ; 29 C. W. N. 496 = 1925 Cal. 937 ; 84 I. C. 672 = 1924 Sind 137 ; 29 Bom. L. R. 950 = 104 I. C. 673 = A. I. R. 1927 Bom. 479. Decree debt, payable by instalments—Section 59 not applicable. 29 Bom. L. R. 950. As to appropriation in case of payment by joint-debtor, *see* 1925 Rang. 4 ; 95 I. C. 175 = 1926 Oudh 514. Where money is paid to satisfy the kist and received and acknowledged on that account it is not in the power of one of the parties to the transaction to vary the effect of the transaction by altering the appropriation in which both originally concurred. 38 Cal. 537 = 38 I. A. 80 = 15 C. W. N. 443 = 21 M. L. J. 1148 = 10 I. C. 272 (P.C.). A surety has no right to control the appropriation by customer or banker of moneys paid in by the principal debtor in the absence of special agreement. 23 C. L. J. 256 = 20 C. W. N. 562. When the debtor has failed to intimate to the creditor as regards appropriation, the creditor can appropriate a payment to any lawful debt due. 7 Lah. 17 = 92 I. C. 947 = A. I. R. 1926 Lah. 183 ; 82 P. R. 1914 = 25 I. C. 560 ; 24 P. R. 1915 = 29 I. C. 346 ; 9 I. W. 198 = 49 I. C. 273. The debtor's intimation must synchronise with the payment but the creditor is entitled to make the appropriation at all times up to the time of the trial. 7 Lah. 17 = 92 I. C. 947 = A. I. R. 1926 Lah. 183 ; but *see contra* 94 I. C. 384 = A. I. R. 1926 Mad. 792 = 50 M. L. J. 242 in which it is held that priority of communication of appropriation must be looked to and in which the case-law on the subject is fully discussed. As to how long the creditor's right of appropriation continues, *see* 5 Pat. 326 = 94 I. C. 273 = 1926 Pat. 330. In the absence of any agreement to the contrary, payments made by a judgment-debtor have first to be appropriated towards the interest. 67 I. C. 606 = (1922) Pat. 66 = 55 M. L. J. 612. In the absence of any appropriation either by debtor or by creditor, the payment must be applied to the earliest debt. 37 All. 649 = 30 I. C. 92. Where payments are made in liquidation of a debt and the amount due on account of interest largely exceeds the amount paid, the creditor may properly appropriate such payments towards interest. 23 C. W. N. 534 = 51 I. C. 88.

APPROPRIATION TO INTEREST, ETC.—Applicability of section to decree debts. 41 I. C. 348 = 21 C. W. N. 1055. *See also* 29 Bom. L. R. 950 = 104 I. C. 673 = A. I. R. 1927 Bom. 479. A creditor is entitled to appropriate payments made by his debtor to the discharge of prior dues then outstanding and not barred by limitation. 19 I. C. 6 ; 58 I. C. 797 = 36 M. L. J. 296. creditor may appropriate payments towards interest. 50 Mad. 614 = 25 L. W. 699 = 38 M. L. T. (H. C.) 323 = A. I. R. 1927 Mad. 620 = 103 I. C. 394 = 52 M. L. J. 612. A creditor's right of appropriation is preserved to him until the moment of his filing the plaint in Court. He should not be deprived of this right so long as it was not inequitable to do so. 37 M. L. J. 367 = 52 I. C. 950.

APPROPRIATION OF REVENUES.—Payment of revenue with direction to collector to appropriate for one kist if can be taken for another. *See* 53 Cal. 886 = 30 C. W. N. 618 = 95 I. C. 353 = 1926 Cal. 866.

Sec. 60.—The appropriation by the plaintiff towards the simple money decree and not to the mortgage debt was right and could not be questioned. 37 M. L. J. 367 = 52 I. C. 950. Where a deposit of money is made by a debtor with a creditor for a special purpose, the former cannot subsequently claim to have appropriated the same to any other debt due by him. 59 I. C. 121.

LAWFUL DEBT.—As to what would be lawful debt, *see* 104 I. C. 799 = A. I. R. 1927 Cal. 906. The debts to which sums are applied must be proved to have lawfully existed. A. I. R. 1928 Cal. 229 (37 M. L. J. 397, Foll.). Floating account contemplating a maximum which has been reached—Effect of subsequent payments. A. I. R. 1928 Mad. 556.

Sec. 61.—Where moneys are received by the creditor without any definite appropriation on either side, the money so received must first be applied in payment of interest and then in payment of the capital. 44 Mad. 570 = 48 I. A. 150 = 40 M. L. J. 549 (P. C.) ; *see also* 29 I. C. 718 ; 35 I. C. 375 = 1 Pat. L. J. 474 ; 40 I. C. 809 = 1 Pat. L. W. 777. *See also* 6 M. H. C. 32. Where the creditor has not appropriated in taking

Contracts which need not be performed.

Effect of novation, rescission and alteration of contract.

62. If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed.

accounts, a debt which did not carry interest should rank last. 18 I. C. 535 = 17 C. W. N. 25 (P. C.). The application of S. 61 is always subject to the condition that the parties had indicated no intention inconsistent with its application. 38 Bom. 255 = 21 I. C. 343. Payments by some of the debtors who were jointly and severally liable for the debt could be appropriated in order of time towards barred items even though all debtors did not concur in making payments. 41 I. C. 421. If a creditor has credited certain payments towards arrears of rents it is for him to show that arrears were due and what they amounted to, and in the absence of evidence on these points it must be held that he was not entitled to do so. 1922 P. 446.

Sec. 62. ESSENTIALS OF NOVATION AND EFFECT.—Parties to a contract, may stipulate that one or both of them shall have the power to rescind the contract on the happening of some specified contingency. Such a stipulation is to be construed according to its natural meaning, subject to the principle of law that a party shall not take advantage of his own wrong. 24 Bom. L. R. 877 = 75 I. C. 233 (1919 A. C. 1, Ref.). See also 5 Bom. L. R. 617; 41 Cal. 137; 1925 Mad. 919; 1925 Nag. 66; 1925 Nag. 26; 1925 Patna 228. A contract need not be rescinded by an express agreement. If the parties make a new and independent agreement concerning the same matter, the latter may be said to discharge the former especially when the latter is very inconsistent with the former. 38 I. C. 278 = 20 C. W. N. 708; 46 Cal. 534 = 23 C. W. N. 704; 43 Cal. 790 = 20 C. W. N. 370; 41 Cal. 35 = 21 I. C. 217; 17 I. C. 227 = 16 C. L. J. 271. A party who relies on a new contract in substitution for the old must prove that it was supported by consideration. 19 I. C. 981 = 4 P. R. 1914. Creditor taking renewed bill for old debt does not necessarily wipe off the old debt. See 31 C. W. N. 703 = 102 I. C. 871 = A. I. R. 1927 Cal. 538. An agreement to give time for the payment of money due under a pro-note is operative in India; this principle is recognised in Art. 73, Lim. Act. 39 Mad. 129 = 30 M. L. J. 51 (F.B.). See also 49 All. 599 = 101 I. C. 643 = 25 A. L. J. 385 = A. I. R. 1927 All. 451. This is a departure from the English law. (*Ibid.*) In the case of mere contracts, a repudiation by one party assented by the other might put an end to the contract. But this principle is not applicable to rights of property. 20 I. C. 908 = (1914) M. W. N. 144. Where the contract subsisted and had failed the cause of action would be the failure of the contract. The settlement that a certain amount of money was payable for the failure is not a new contract. 75 I. C. 440 = 1923 Nag. 332. Essentials of novation—Mortgage—Sale with a view to discharge mortgage—Nature of the transaction. 72 I. C. 422 = 1923 Nag. 213. In case of cross contracts, the second contract does not operate to extinguish the first contract completely, nor is it effective as a novation. 1925 Sind 144 = 20 S. L. R. 335. See also 22 L. W. 193

= 1925 Mad. 1260.

EFFECT OF NOVATION.—Where for a note from a firm, another was accepted from surviving partners, the estate of the deceased partner is free from liability under the principle of S. 62. 42 I. C. 815 = 19 Bom. L. R. 837. See also 9 Bom. L. R. 364; 15 Cal. 309. A contract by the purchaser of a property to pay the whole or part of the consideration retained by him for payment to the vendor's creditors can be enforced by the latter, though they were not parties to the contract. 22 C. W. N. 279 = 36 I. C. 792. The basis of the purchaser's liability is not novation or a substituted contract, but because of the fact that the purchaser is a trustee of the vendor's creditors for the money in his hands to be used for their benefit. (*Ibid.*) Sometimes an agreement may be enforced by a stranger to the contract, that is, in cases of trust, quasi contracts or near relationship. (*Ibid.*) (4 I. C. 137; *Gregory v. Williams*, (1817) 3 Mer. 582 = *Tweedle v. Atkinson*, (1861) 1 B. and S. 393, Ref.) See also notes under S. 37, *supra*. Where a debtor has disabled himself from performing his promise under a later contract which had been intended to be a substitute for an earlier one it is open to the creditor to enforce the earlier contract rescinding the later and S. 62 is no bar. 66 I. C. 47 = 2 Lah. 323 (66 P. R. 1888, Foll.; 15 P. W. R. 1918; 63 P. R. 1917; 53 P. R. 1916; 41 Cal. 137, Dist.). When the terms of a mortgage by conditional sale are altered by mutual consent, there is novation of contract and the original sale clause cannot be enforced. 24 I. C. 684 = 189 P. L. R. 1914; 29 M. L. J. 125 = (1915) M. W. N. 408. Under S. 62 there can be an agreement to cancel or vary the old contract or substitute a new contract, even after the breach of the original contract. 45 Mad. 180 = 42 M. L. J. 236 = 67 I. C. 905. A new contract changing the place of performance falls under S. 62 and no fresh consideration is necessary. (1917) M. W. N. 779 = 45 I. C. 401. A negotiable instrument given in discharge of a debt does not extinguish the debt, but only suspends payment. The creditor can fall back on the original contract if, for any reason, the new contract fails. 14 I. C. 399 = 8 N. L. R. 7 (26 M. 111, 5 C. 215 and 11 A. 13, relied upon; 4 A. 330, Dist.). Effect of novation—Mortgage—Agreement for substitute fresh deed—Not fulfilled—Effect of—Estoppel. 30 I. C. 323 = 2 O. L. J. 402. A person not a party to a novation is not discharged from his liability under the original contract. 6 Bur. L. T. 171 = 21 I. C. 222.

INVALID NOVATION.—Invalid novation—Mortgage deed executed in consideration of previous bonds—Non-registration—Effect of—Remedy of promisee. 13 I. C. 858 = 14 Bom. L. R. 26. To effect a novation pursuant to an agreement to accept a new contract, the contract which was substituted must be one capable of enforcement in law. (*Ibid.*) 16 I. C. 246 = 16 C. L. J. 264. Where an insufficiently stamped hundi was given in renewal of a prior hundi, the plaintiff could fall back on the prior hundi. 67 I. C. 856 =

Illustrations.

(a) *A* owes money to *B* under a contract. It is agreed between *A*, *B* and *C* that *B* shall thenceforth accept *C* as his debtor, instead of *A*. The old debt of *A* to *B* is at an end, and a new debt from *C* to *B* has been contracted.

(b) *A* owes *B* 10,000 rupees. *A* enters into an arrangement with *B*, and gives *B* a mortgage of his (*A*'s) estate for 5,000 rupees in place of the debt of 10,000 rupees. This is a new contract and extinguishes the old.

(c) *A* owes *B* 1,000 rupees under a contract. *B* owes *C* 1,000 rupees. *B* orders *A* to credit *C* with 1,000 rupees in his books, but *C* does not assent to the arrangement. *B* still owes *C* 1,000 rupees, and no new contract has been entered to.

Promisee may dispense with or remit performance of promise.

63. Every promisee may dispense with or remit, wholly or in part, the performance of the promise made to him, or may extend the time for such performance,¹ or may accept instead of it any satisfaction which he thinks fit.

Illustrations.

(a) *A* promises to paint a picture for *B*. *B* afterwards forbids him to do so. *A* is no longer bound to perform the promise.

(b) *A* owes *B* 5,000 rupees. *A* pays to *B*, and *B* accepts, in satisfaction of the whole debt, 2,000 rupees paid at the time and place at which the 5,000 rupees were payable. The whole debt is discharged.

(c) *A* owes *B* 5,000 rupees. *C* pays to *B* 1,000 rupees, and *B* accepts them in satisfaction of his claim on *A*. This payment is a discharge of the whole claim.²

(d) *A* owes *B*, under a contract, a sum of money, the amount of which has not been ascertained. *A* without ascertaining the amount gives to *B*, and *B*, in satisfaction thereof, accepts, the sum of 2,000 rupees. This is a discharge of the whole debt, whatever may be its amount.

(e) *A* owes *B* 2,000 rupees, and is also indebted to other creditors. *A* makes an arrangement with his creditors including *B*, to pay them a [composition]³ of eight annas in the rupee upon their respective demands. Payment to *B* of 1,000 rupees is a discharge of *B*'s demand.

64. When a person at whose option a contract is voidable rescinds it, the other party thereto need not perform any promise therein contained in which he is promisor. The party rescinding a voidable contract shall, if he have received any benefit

Consequences of rescission of voidable contract.

1922 Lah. 56. Where the contemplated substituted security itself fails the parties could not be taken to have intended that the liability under the original contract would also cease. 10 L. W. 466 = 54 I. C. 318 ; 13 I. C. 858 = 14 Bom. L. R. 26 ; 26 I. C. 393 = 16 M. L. T. 489. A renewal of a debt does not *ipso facto* extinguish the security which a person has unless such renewal is accompanied by a fresh contract giving fresh security. 26 I. C. 393 = 16 M. L. T. 489. A pronote accepted in full satisfaction of a claim debars the plaintiff from bringing a suit on the original claim. 9 I. C. 896.

Sec. 63.—¹But see S. 135, *infra*.

Acceptance of performance—Cheque for smaller amount accepted and cashed—Effect of. 20 A. L. J. 717 = 44 A. 718. S. 63 not applicable where parties stand in the position of decree-holder and judgment-debtor and not in that of promisor and promisee. 24 I. C. 391. No consideration is needed for relinquishment of debt but free assent must be established. If the debt is enforceable, it can also be released under S. 63. It is doubtful, however, whether a dower debt could be discharged by verbal relinquishment. 47 Cal. 537 = 24 C. W. N. 335. English law requires consideration to support a release or relinquishment of debt. See 19 Mad. 398 ; 20 Bom. 636 ; 15 Cal. 319 ; 9 M. L. T. 270. See also 34 Mad. 156. S. 63 does not entitle a promisee for his own purposes and without the consent of the promisor to extend time to his own advantage. There must be an agreement or mutual understanding to waive. 68 I. C. 912 = 1923 L. 117. A promisee is not bound to accept part performance of a contract. 59 I. C. 971 = 3

Lah. L. J. 141. A promise to remit rent coupled with conditions is not an absolute promise of remission and the landlord is not estopped from enforcing his rights in full. 26 I. C. 958. This section would include what would be a conditional release in English law. 34 Mad. 156. Under S. 63 no consideration is necessary to forego a portion of the rent payable. 25 I. C. 741 = 16 M. L. T. 184. A suit cannot be brought for the recovery of the amount remitted when a remission had been made and communicated by the creditor to the debtor. 9 I. C. 763 = 9 M. L. T. 270 (19 M. 391, Foll.). There is nothing in law to prevent a discharge by acceptance of something in lieu of the performance of the contract. 64 I. C. 461. An agreement to discharge a previous debt in consideration of the prompt receipt of a shorter sum is a valid agreement. 20 I. C. 544. Where a party to contract of marriage having accepted cash and jewels repudiates the marriage, he is bound to return what he has taken. 65 I. C. 812 (15 C. 319, Ref.). Creditor extending time for payment, though not supported by consideration, is valid and binding. English law may be different on this subject. 49 All. 599 = 25 A. L. J. 385 = A. I. R. 1927 All. 451 (19 Mad. 398 ; 45 Mad. 180, Ref.) See also 39 M. 129 = 30 M. L. J. 51 (F. B.).

Sec. 63, ill. (c).—²See S. 41 *supra*.

Sec. 63, ill. (e).—³"Composition" was substituted for "compensation" by Act XII of 1891, S. 2.

Sec. 64.—SCOPE OF SECTION.—See 11 Bom. L. R. 693. Section does not apply to contracts originally known to be void or illegal. 9 Bom. 358 ; 15 C. W. N. 408. See also 49 Bom. 576 = 88 I. C.

thereunder from another party to such contract, restore such benefit, so far as may be, to the person from whom it was received.¹

65. When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

Obligation of person who has received advantage under void agreement or contract that becomes void.

void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

643. When a sale of minor's property by his *de facto* guardian is set aside, the minor must return to the vendee the amount of benefit received by him thereunder. 10 Lah. L. J. 183 = A. I. R. 1928 Lah. 250 (A. I. R. 1925 Bom. 9; 52 P. R. 1904 Ref.). A party guilty of a breach of contract cannot claim damages arising out of his own default. Nor can he claim a refund of earnest money advanced as a guarantee for the fulfilment of the contract. 41 All. 324 = 50 I. C. 948. (38 M. 801; 33 A. 166; 19 A. 489 rel.). See also 23 Bom. 56; 24 L. W. 386 = 99 I. C. 687 = A. I. R. 1927 Mad. 204 = 52 M. L. J. 33 (case-law reviewed). 100 I. C. 860 = A. I. R. 1927 Nag. 168. Suit for compensation recoverable under S. 64, is barred if brought after ten years. 19 I. C. 624. Alienation by minor—Alienation set aside—Minor's liability to restore benefit received. 60 I. C. 519. See also 29 I. C. 972; 30 Cal. 539, 32 All. 25. Where a sale by a guardian on behalf of a minor is held to be void *ab initio*, the vendee cannot claim for the improvement effected by him, on the property. Ss. 64 and 65 do not apply to this case. 98 P. L. R. 1913 = 18 I. C. 485. If a guardian sells his ward's property for purposes not binding and the price is utilized for the purchase of other lands for the ward not contemplated at the time of the sale, the lands so purchased do not constitute the benefit within S. 64 and need not be conveyed to the vendee from the guardian when the ward avoids the sale by the guardian. 42 Mad. 36 = 35 M. L. J. 652. As to borrowing by the Karnavan of a Malabar tawad in excess of his powers, for the purposes of the *tavazhi*, see 23 L. W. 186 = 93 I. C. 20 = 1926 Mad. 398. Financing of litigation—Money advanced in part—repudiation—Right to recover. 47 I. C. 563. Under S. 64 a person who puts an end to a contract under S. 39 is the party rescinding a voidable contract. 38 I. C. 915 = 12 N. L. R. 177. Mistake—Restoration of benefit. 66 I. C. 461 = 1922 Oudh 152. In the case of a breach of a revocable contract or trust the choice of the remedy lies with the party whose rights are infringed, and not with the promisor or trustee. 20 I. C. 783.

¹See S. 75, *infra*.

Sec. 65. SCOPE OF SECTION.—The agreement to sell the right of reversioner is manifestly void from its inception, because its subject-matter is incapable of being bound by sale. The vendee in this case was given the purchase money and interest at 6 per cent. from the date of suit. 44 M. L. J. 489 = 45 A. 179 = 50 I. A. 69 (P. C.) S. 65 is not applicable when the object of the agreement was illegal to the knowledge of both parties. 8 I. C. 161 = 15 C. W. N. 408; 41 I. C. 877 = 13 N. L. R. 114. See also 89 I. C. 684 = 1926 Lah. 159; 26 A. L. J. 492; 89 I. C. 143; 1925 Oudh 212; 1925 Oudh 737; 49 Bom. 576; 48 M. L. J. 598; 48 M. L. J. 413. Right of

subscriber in chit transaction, to get back the amount subscribed and paid to the stake-holder. See 49 M. L. J. 791 = 92 I. C. 968 = 1926 Mad. 168.

VOIDABLE CONTRACT.—A mortgagor who sues for the cancellation of a mortgage must refund to the mortgagee the amount paid by the mortgagee under the contract of mortgage. 27 I. C. 130. A rescinded contract becomes a void contract and the person who has received any advantage under it is bound to restore it to the other party. 27 I. C. 130.

"BECOMES VOID"—S. 65 does not apply where it cannot be said that the agreement was discovered to be void or became void after it had been entered into. 18 I. C. 9; 44 A. 229 = 20 A. L. J. 41; 41 Bom. 546 = 40 I. C. 1002; 42 Bom. 499 = 38 I. C. 771; 40 Bom. 529 = 33 I. C. 578; See also 89 I. C. 684; A. I. R. 1927 Oudh 177. S. 65 applies even though the contract was not void *ab initio* but becomes void subsequently and a suit to recover money paid under such a contract is maintainable. 67 I. C. 367 = 56 P. L. R. 1922; 42 Cal. 286 = 21 C. L. J. 642. S. 65 does not apply to contracts known to be void *ab initio* by reason of the illegality of the consideration. 27 P. L. R. 1915 = 27 I. C. 1008; 51 I. C. 412 = 42 P. R. 1919; 21 I. C. 517; 37 I. C. 285. A person exchanging a house worth more than 100 rupees by an unregistered deed, can recover possession of the same but must refund the consideration he received in exchange. 203 P. L. R. 1913 = 19 I. C. 236. expression 'becoming void' in the section pre-supposes enforceability and that which is not enforceable cannot become void. 57 I. C. 650; 9 I. C. 743; 38 M. L. J. 256 = 55 I. C. 697 = 43 Mad. 703. S. 65 does not apply to a mortgage, which becomes unenforceable for want of legal necessity and benefit to the family 5 Pat. L. J. 622 = 58 I. C. 303; 77 I. C. 378. Impossibility by—Action of executive—Effect of. 51 I. C. 412 = 42 P. R. 1919. On this section see also 1 Luck. 144.

DISCOVERED TO BE VOID.—"Discovered to be void"—Meaning cf. 44 Bom. 631 = 58 I. C. 465 = 44 M. L. J. 489 = 50 I. A. 69 = 1922 P. C. 403 (P. C.), 34 M. L. J. 561 = 44 I. C. 319; 41 Mad. 197 = 34 M. L. J. 282 = 41 I. C. 783; 26 I. C. 489 = (1915) M. W. N. 8; 4 O. W. N. 256 = 101 I. C. 265 = A. I. R. 1927 Oudh 177. But under the general law a plaintiff whose hands have not been tainted with corruption and who has not been a party to a fraud, is entitled to get back the money which he left with another. *Ibid* Where a mortgage is found to be void and unenforceable for want of proper attestation the mortgagee is entitled to a money-decree for the amount advanced by him. 43 I. C. 266 = 20 O. C. 306.

ILLEGAL CONTRACT.—The obligation to do justice rests upon all persons natural and artificial and where a corporation receives money or pro-

Illustrations.

(a) *A* pays *B* 1,000 rupees in consideration of *B's* promising to marry *C*, *A's* daughter. *C* is dead at the time of the promise. The agreement is void, but *B* must repay *A* the 1,000 rupees.

(b) *A* contracts with *B* to deliver to him 250 maunds of rice before the first of May. *A* delivers 130 maunds only before that day, and none after. *B* retains the 130 maunds after the first of May. He is bound to pay *A* for them.

(c) *A*, singer, contracts with *B*, the manager of a theatre, to sing at his theatre for two nights in every week during the next two months, and *B* engages to pay her a hundred rupees for each night's performance. On the sixth night, *A* willfully absents herself from the theatre, and *B*, in consequence, rescinds the contract. *B* must pay *A* for the five nights on which she had sung.

(d) *A* contracts to sing for *B* at a concert for 1,000 rupees, which are paid in advance. *A* is too ill to sing. *A* is not bound to make compensation to *B* for the loss of the profits which *B* would have made if *A* had been able to sing, but must refund to *B* the 1,000 rupees paid in advance.

Mode of communicating or revoking rescission of voidable contract.

Effect of neglect of promisee to afford promisor reasonable facilities for performance.

66. The rescission of a voidable contract may be communicated or revoked in the same manner, and subject to the same rules, as apply to the communication or revocation of a proposal.¹

67. If any promisee neglects or refuses to afford the promisor reasonable facilities for the performance of his promise, the promisor is excused by such neglect or refusal as to any non-performance caused thereby.

Illustration.

A contracts with *B* to repair *B's* house.

B neglects or refuses to point out to *A* the places in which his house requires repair.

A is excused for the non-performance of the contract if it is caused by such neglect or refusal.

CHAPTER V.

OF CERTAIN RELATIONS RESEMBLING THOSE CREATED BY CONTRACT.

Claim for necessities supplied to person incapable of contracting, or on his account.

68. If a person, incapable of entering into a contract, or any one whom he is legally bound to support, is supplied by another person with necessities suited to his condition in life, the person who has furnished such supplies is entitled to be reimbursed from the property of such incapable person.

party under an agreement which turns out to be *ultra vires* or illegal, it cannot retain it but must either return it or make compensation for it. 43 C. 790 = 35 I. C. 305 = 20 C. W. N. 370 ; 43 Cal. 115 ; 19 C. W. N. 919 ; 38 Bom. 249 = 23 I. C. 602 ; 42 All. 7 = 52 I. C. 331. S. 65 has no application where the contract embodies a purpose known to be illegal to which both sides are parties. 54 I. C. 794 ; 14 M. L. T. 489 = 21 I. C. 879 ; 46 I. C. 326.

MINOR'S CONTRACT.—Vendee, who was minor at the date of purchase, can recover consideration money, if he is subsequently dispossessed of the property purchased. 35 All. 370 = 19 I. C. 610. [30 C. 539 (P. C.) ; 39 C. 232 (P. C.) dist.] S. 65 has no application to a case where there never was or could have been any contract between competent parties as for instance where one of the parties to a contract is a minor. 45 Bom. 225 = 59 I. C. 245 ; 35 All. 370 = 19 I. C. 610 ; 40 All. 558 = 48 I. C. 478 ; 10 L. W. 225 = 53 I. C. 14 ; 23 N. L. R. 8 = 98 I. C. 650 = A. I. R. 1927 Nag. 116 ; 100 I. C. 860 = A. I. R. 1927 Nag. 168 ; 103 I. C. 209 = A. I. R. 1927 Nag. 290. *But see* next case. A minor who seeks to recover the property sold by him after cancellation of the sale, must restore the benefit he had received. 24 O. C. 348 = 64 I. C. 771 ; 53 I. C. 65 = 15 N. L. R. 149 (11 O. C. 1 foll.) ; 40 All. 558 ; 8 O. L. J. 287 ref.) *See also* 4 Bur. L. J. 597 = A. I. R. 1026 Rang. 7 ; 18 All. 373 ; 44 Bom. 175 ; 45 Bom. 225.

CONTRACT WITH LUNATIC.—S. 65 cannot

bind a party for a contract with a person of unsound mind. Such contract being void, no refund of money paid to unsound person can be claimed. 41 P. R. 1912 = 15 I. C. 404 ; 32 I. C. 804.

Sec. 66.—¹*See* Ss. 3 and 5. *supra*. Where one party shows by acts and conduct amounting to a clear renunciation or absolute refusal to perform the contract, the other party will be justified in regarding himself as discharged from all continued liability under the contract. 43 Cal. 790 = 20 C. W. N. 370. *See also* notes under Ss. 3 and 5 *supra*.

Sec. 67.—Where the defts. had practically repudiated the terms of the contract, it is not necessary that any actual tender of money should have been made to them and it is sufficient for the plaintiffs to show their readiness to pay the money. 1923 Lah. 56.

"BREACH OF CONTRACT."—What amounts to. 10 I. C. 105 = 9 M. L. T. 454.

Sec. 68.—Supply of excessively costly articles, though of real use, and objects of mere luxury are not necessities. 36 Cal. 768. As to proof of necessities, *see* 101 I. C. 702 = A. I. R. 1927 Lah. 414. During the life time of his father, money borrowed by a person incapable of entering into a contract, to pay for the *Sradh* of his mother, is not a necessity. 32 I. C. 937. Discharge of decree-debt by stranger as owner of property of the deceased, while deceased's minor sons were living would not avail the stranger. 1925 All. 213. A money-lender,

Illustrations.

(a) *A* supplies *B*, a lunatic, with necessaries suitable to his condition in life. *A* is entitled to be reimbursed from *B*'s property.

(b) *A* supplies the wife and children of *B*, a lunatic, with necessaries suitable to their condition in life. *A* is entitled to be reimbursed from *B*'s property.

Reimbursement of Person paying money due by another in payment of which he is interested.

69. A person who is interested in the payment of money which another is bound by law to pay, and who therefore pays it, is entitled to be reimbursed by the other.

advancing money to a minor alleging that it was for necessities must draw the bond so as to bind the minor's estate. 37 Mad. 38=21 M.L.J. 1077. Litigation expenses—Payment of father's debts, if necessary. 18 N. L. R. 119=64 I. C. 851=1922 Nag. 247. Costs of defending minor in Civil and Criminal cases are necessities. 21 Cal. 872; 7 Cal. 140; 17 Mad. 257. Neither the property nor the person of a ward under Court of Wards is liable for necessities. 61 I. C. 563=17 N. L. R. 20. When a guardian borrows money for the necessities of a minor in such circumstances as to give him a right to be reimbursed from the latter's estate, his creditor may be subrogated to the guardian's rights. 56 I. C. 740. Under Hindu Law a minor is under an obligation to provide for the marriage expenses of his sister and such a provision is a necessary within the meaning of S. 68, but the money cannot be recovered unless the money is spent and constitutes a 'debt'. 61 I. C. 278=8 O. L. J. 94. Liability of minor for sums borrowed by mother for procuring necessities for minor. 101 I. C. 255=A.I.R. 1927 Nag. 196; See also 7 Pat. L. T. 32=1926 Pat. 399. See also 32 All. 325. Minor is liable for the money borrowed by him for his marriage expenses. 42 I. C. 963=2 Pat. L. J. 627. A sale by the administrator of the estate of the deceased of property of his minor heirs is void and cannot be supported under S. 68, nor can the sale be ratified by minor subsequently. 9 L.B.R. 186=50 I. C. 324=12 Bur. L. T. 27.

Sec. 69. SCOPE OF SECTION.—Contribution means payment by each of the parties interested, of his share in any common liability. 24 I. C. 259=18 C.W.N. 1308. "Interested" does not mean only persons with real interest. 1925 Patna 201; 1925 Patna 737=1925 P.H.C.C. 236; 26 A.L.J. 435. See also A.I.R. 1927 Mad. 1060. A person asserting claim may pay to avert sale in execution and may get reimbursed by the true owner though he could not make good his claim. 29 C.W.N. 1052=43 C.L.J. 83=1925 Cal. 1097. As to right of *benamidar* setting aside Court sale in assertion of adverse title—See 21 L.W. 336=85 I. C. 855=1925 Mad. 95=47 M.L.J. 622. A suit for contribution is a suit brought by one of several co-sharers who has discharged the liability, to compel others to make good their shares. Mutuality is the test of contribution. 24 I. C. 259=18 C.W.N. 1308. (17 I. C. 45; 13 I. C. 144, rel.) S. 69 only applies to cases in which the person who makes the payment of money is himself not liable to pay. 17 I. C. 45=16 C.L.J. 148; 9 I. C. 489=15 C.W.N. 404; 15 C.W.N. 332=9 I. C. 219; 31 C. W. N. 630=103 I. C. 120=A. I. R. 1927 Cal. 518. (Firm paying super-tax invalidly assessed on a member cannot recover it from him. Principle of the section laid down. 29 C.W.N. 1052=1925 Cal. 1097. Vendee aware of defect in title

—Discharge of incumbrance—Right to amounts paid when title fails—Relief—Principles laid down fully. 74 I. C. 416=1923 Mad. 392. See also 41 C.L.J. 571=52 Cal. 914 (Payment by receiver). Vendee discharging debts of true owner out of sale consideration—Sale void—Subrogation. 37 M. L. J. 113=51 I. C. 57. Ss. 69 and 70 of the Contract Act do not apply to claims for contribution under S. 82 of the T. P. Act. 32 M.L.J. 347=39 I.C. 405. Where crops on a portion of the land in the possession of a tenant are attached by Government for rent due by him for another plot and both the plots are in one patta, the tenant is entitled to pay off the dues and claim to be reimbursed from the landlord notwithstanding the illegality of the attachment. 33 I. C. 234=(1915) M. W. N. 643; 39 Mad. 965=30 M. L. J. 369. A person who owns one of two lands on both of which the Government revenue was jointly assessed and pays the whole revenue is entitled to claim contribution for the proportionate sum due from the other land. Neither S. 69 nor S. 70 is applicable. 28 I. C. 456; 33 I. C. 234=(1915) M.W.N. 643. The section contemplates only a personal liability and does not refer to any lien or charge on any property. 26 M. L. J. 74=22 I. C. 253; 18 I. C. 247=25 M. L. J. 312. A Hindu reversioner who pays off a mortgage decree against the estate in the hands of a widow is entitled under S. 60 to be reimbursed by the widow in respect of the money which the latter was bound by law to pay. 35 Mad. 426=22 M.L.J. 364. See also (1928) M.W. N. 398. Where trustee of a temple borrowed money for the temple, he must be indemnified from the trust estate. 12 I. C. 335. S. 69 contemplates cases where one person is bound to pay money to a third person and another person is interested in such payment; it has no application where the person is bound to pay directly to the person who has incurred the expenses. The interest referred to in S. 69 is a pecuniary one. 35 Mad. 728=21 M.L.J. 600. (25 M. 548 Ref.) See also 1923 Nag. 53. The doctrine of contribution applies only when the position under a joint contract by two or more persons remains unaltered. 22 I. C. 263=16 O.C. 285. Payment by a person without title and without possession but expecting to get title in a pending litigation does not entitle him to take advantage of Ss. 69 and 70. 2 Pat. L. J. 676=42 I. C. 839. A volunteer who pays off a previous attaching creditor of the person liable to pay, does not stand in the shoes of the debtor but has only a cause of action against him personally. 35 I. C. 448=10 Bur. L. T. 67.

"BOUND BY LAW TO PAY".—Meaning of "bound by law to pay". See 49 M.L.J. 88=1925 Mad. 1041; 43 I. C. 482=42 Bom. 93; 25 A.L.J. 791=103 I. C. 289=A.I.R. 1927 All. 713. The expression 'bound by law to pay' means a

Illustration.

B holds land in Bengal, on a lease granted by *A*, the zemindar. The revenue payable by *A* to the Government being in arrear, his land is advertised for sale by the Government. Under the revenue law, the consequence of such sale will be the annulment of *B*'s lease. *B*, To prevent the sale and the consequent annulment of his own lease, pays to the Government the sum due from *A*. *A* is bound to make good to *B* the amount so paid,

legal liability and not a contractual liability. 39 I.C. 405=32 M.L.J. 347; 53 I.C. 796=(1916) M.W.N. 878. Purchaser of the right of one of the co-sharers is bound in law to pay the amount of the decree for arrears of rent for the period prior to his sale, against the co-sharers, although he was not a party to the decree, 30 C.W.N. 366=94 I.C. 159=A.I.R. 1926 Cal. 657; claim for sums spent by Hindu widow in possession against reversioner. See (1928) M.W.N. 398. A landlord cannot under S. 69 or 70 recover from his tenant the cost of sweepers and *bhishtis* employed under an order of the Municipal Board to keep the premises clean. 26 I.C. 77=12 A.L.J. 931; 10 I.C. 458=8 A.L.J. 622; 45 Bom. 638=60 I.C. 892; 41 I.C. 242=21 C.W.N. 628. Where one of the judgment-debtors satisfies the decree by payment under compulsion of legal process, he is entitled under Ss. 69, 70 to call upon the other judgment-debtors for contribution. 20 C.L.J. 200=19 C.W.N. 458; 32 I.C. 200=23 C.L.J. 125. A party liable to be affected by a sale under a rent decree obtained by a co-sharer landlord can satisfy the decree and sue for reimbursement. 24 I.C. 259=18 C.W.N. 130; 22 I.C. 720. (21 I.C. 207 rel.) One of several judgment-debtors, who purchases the decree cannot execute it against the other judgment-debtors, but can sue them for contribution under S. 69. 20 I.C. 569=18 C.W.N. 113. A co-sharer who pays the full decretal amount due to the landlord on account of a decree obtained against all the co-sharers is entitled to contribution from the other co-sharers. 13 I.C. 457; 16 C.W.N. 975=17 C.L.J. 179; 30 C.W.N. 366=94 I.C. 159=1926 Cal. 657; 95 I.C. 545=A.I.R. 1926 Cal. 1031. A man can recover the money paid to avoid attachment of his property in execution of a decree against another, from the judgment-debtor. 9 I.C. 966. The section applies to the case of a surety who pays a decree debt, which other persons besides the judgment-debtor for whom he stood surety, where bound by law to pay. 40 M.L.J. 529=62 I.C. 706. If a purchaser of the equity of redemption pays off at the time of redemption the amount of a bond not charged on the property, he cannot recover it from the mortgagor under S. 69, 28 I.C. 697. But where a mortgagee with possession failed to pay the Government revenue and the mortgagor paid the same, he can recover it with interest. 24 L.W. 607=51 M.L.J. 633. A co-sharer who is not bound by law to pay a rent-decree in favour of the superior landlord is not also liable to contribution where the decree is paid off by the other co-sharer. 56 I.C. 949. See also 64 I.C. 918=20 A.L.J. 42.

INTERESTED IN PAYMENT.—Interested in payment—Puisne mortgagee paying prior mortgage—Right to reimbursement, 63 I.C. 604=19 A.L.J. 840; 54 Cal. 424=45 C.L.J. 191=101 I.C. 130=A.I.R. 1927 Cal. 393. Attaching creditor interested in paying money to release property from another attachment. 97 I.C. 319=A.I.R. 1926 All. 745. The words 'interested

in payment' do not exclude a person who is interested as well as bound by law to pay. The words 'bound by law to pay' include persons legally bound to pay whether under contract or otherwise. 62 I.C. 881=4 N.L.J. 76; 22 I.C. 9=26 M.L.J. 66; 48 I.C. 69=34 I.C. 367. See also 19 A.L.J. 73=61 I.C. 892. But see 39 Mad. 795=29 M.L.J. 639. Pre-emptor paying off mortgage when vendee had undertaken with vendor to pay—if can recover from vendee. 46 I.C. 83=16 A.L.J. 531; 19 A.L.J. 16=43 All. 268. Where a person redeemed a mortgage under the *bona fide* belief that he was entitled to the property under mortgage; he will be allowed a refund of his redemption money in a suit for possession by the legal owner. 18 I.C. 811=11 A.L.J. 179. Mortgagee paying rent decree amount to set aside rent sale can recover from the purchaser from the mortgagor under a private sale. 43 C.L.J. 142=94 I.C. 811=1926 Cal. 765. Payment of consolidated rate by owner of premises—Occupier—Contribution. 44 I.C. 669 Contribution in case of joint decree debt paid by one. 22 C.W.N. 347=45 Cal. 691. One of several judgment-debtors paying off decree. 49 I.C. 627; 3 P.L.T. 122=64 I.C. 226. 'Interested'—Interest must be lawful. 34 I.C. 341=21 C.W.N. 394; 22 C.W.N. 347=45 Cal. 691. Reversioner interested in payment of revenue by the widow. 19 M.L.J. 331. Decree for rent against Hindu Widow—Deposit by Reversioner—Sale cancelled—Reversioner whether entitled to re-imbursement. 19 C.L.J. 72=18 C.W.N. 778. Decree for rent against co-sharer—Satisfied by one alone—Suit for contribution. 15 I.C. 55=18 C.W.N. 327; 21 I.C. 102=19 C.L.J. 525; 11 I.C. 155; 9 I.C. 615. The person interested in the payment of money under S. 69 must be a person not compellable to pay the whole or any portion of it. 39 Mad. 795=29 M.L.J. 639. See also A.I.R. 1927 Mad. 1060 (Vendor of property paying charges on land between the date of vendee entering into possession and execution of sale deed at a later date can recover the money so paid). See also on this point A.I.R. 1927 Mad. 59; 25 A.L.J. 791=A.I.R. 1927 All. 713; 104 I.C. 358=1 Luck. C. 275 (Lessor failing to pay land revenue—Lessee paying the same to avoid forfeiture is entitled to be indemnified.) When a person *bona fide*, believing himself to have a claim to a property, pays off the charges on the property, he is entitled to recover the amount, 78 I.C. 177=1923 Nag. 301 (7 C. 573; 26 C. 826 foll). Person obtaining probate and paying off claim against deceased—Probate revoked—Suit to recover amount paid. 59 I.C. 128. The interest of the person lending the money under this section must be one as would be recognised by law. 61 I.C. 278=8 O.L.J. 94; 55 I.C. 60. An interest resting merely on grounds of sentiment or on moral or on social obligations is not 'an interest' which would give in law a right to repayment. 61 I.C. 278=8 O.L.J. 94.

70. Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered¹.

Obligation of person enjoying benefit of non-gratuitous act.

Sec. 70.—¹ As to suits by minors under S. 70 in Presidency Small Cause Courts, see the Presidency Small Cause Courts Act (XV of 1882), S. 32.

SCOPE OF SECTION.—This section goes beyond the corresponding English Law, 33 Cal. 377. The section though wide, will enable the Court to do substantial justice. 42 Bom. 556 = 19 Bom. L.R. 650. (38 C. 1 Rel. on). See also 1925 Pat. 201; 90 I. C. 337 = 1925 Mad. 571; 1925 Nag. 19; 21 L.W. 336 = 47 M.L.J. 622. Person paying money due to some property from sale, believing the property to be his can recover the same from the rightful owner. 99 I. C. 845 = A.I.R. 1927 Mad. 459. See also 29 C.W.N. 1052 = 43 C.L.J. 83 = 1925 Cal. 1097. Payment of land revenue is a necessity and can be recovered. 84 I. C. 580 = 1925 Nag. 33. Compensation for use and occupation which is described sometimes as fair rent or occupation rent which in English Law is looked upon as based on implied contract cannot be so viewed in India inasmuch as the Contract Act does not speak of it in Ch. V. 30 M.L.J. 492 = 34 I. C. 6. It is not necessary under the section that the defendant must have an option before the benefit is conferred of accepting or declining it. 38 Mad. 235 = 25 M.L.J. 433. (33 M. 15 diss. 16 C.L.J. 156 app.) But see 28 I. C. 697; 25 I. C. 783 = 16 M.L.T. 375. S. 70 applies to all cases of benefit *bona fide* conferred by one person upon another and which benefit is enjoyed by the other person. 38 M. 235 = 25 M.L.J. 433. In construing the section, Courts in India should be guided more by justice, equity and good conscience than by English precedents. Even though plaintiff might have an interest in paying the money, yet it might none the less be for defendant. (*Ibid.*) S. 70 applies only in the absence of express contracts. 32 I. C. 511. On this sec. see also 1927 M. W. N. 872.

ENJOYING BENEFIT.—Plaintiff is not entitled to compensation under S. 70 where payment was not made by him for defendant's benefit or with his knowledge or consent. 40 Bom. 646 = 35 I. C. 794; 75 I. C. 624 = 1923 A. 404 (2); 62 I. C. 615 = 25 C. W. N. 813; 53 I. C. 90 = 30 C. L. J. 34. Purchaser of the share of one co-sharer is a person benefited by payment of the amount of the decree for arrears of rent the obtained against all the co-sharers, though the rent sued for relate to a period prior to the purchase. 30 C. W. N. 366 = 94 I. C. 159 = A. I. R. 1926 Cal. 657. The liabilities of joint tenants for rent is joint and several under S. 43 and if one of them pays the whole rent, he can sue the others for contribution. 27 I. C. 334 = 20 C. L. J. 492; 21 C. W. N. 394 = 34 I. C. 341; 61 P. R. 1914 = 25 I. C. 542. Where a person is bound to do an act, or would do an act, whether another consents to it, or not, the former cannot claim contribution even though the latter derives benefit in consequence of the act. 43 M. L. J. 271 = 1923 Mad. 64. (45 I. C. 786; 21 Cal. 496; 33 Mad. 15; 16 M. L. T. 375 foll.) Under S. 70 it is sufficient if the payment

is lawful and not intended to be gratuitous, i.e., it should be a *bona fide* payment. It is not necessary that the payer should be interested in paying the money as in S. 69. 51 I. C. 857 = 9 J. W. 435. The authorities do not sanction recovery under S. 70 when the person primarily liable has no knowledge actual or imputed that expenditure is or probably may be necessary on his behalf. 39 Mad. 965 = 30 M. L. J. 369.

CO-OWNERS.—Irrigation—Contribution. English and Indian Law. 28 M. L. J. 384 = 28 I. C. 309. Suit for contribution for repairing irrigation channel belonging to plaintiff and defendant by plaintiff alone. See A. I. R. 1927 Mad. 122 = 92 I. C. 838. Such suit is not maintainable if repair is done by plaintiff without defendants' consent and under his conclusive supervision and to his substantial benefits. 27 L.W. 406 = A. I. R. 1928 Mad. 320. S. 69 does not authorize a person who made a payment to protect his own interest from recovering from the person on whose behalf he ostensibly paid it, unless the latter was bound in law to pay the money. 3 Pat. L. T. 122 = 64 I. C. 226; 59 I. C. 172 = 17 N. L. R. 8. Where several persons join together in instituting a suit to secure a common benefit, and one of them bears the expenses of the litigation, he is entitled to be reimbursed by his co-plaintiff under S. 70, in the absence of an express agreement between them settling the proportions which each had to bear. 34 I. C. 54 = 2 Pat. L. W. 437.

EXTENT OF BENEFIT.—In order to take advantage of S. 70 the plaintiffs must prove the extent of benefit derived by the other party. 30 I. C. 178 = 29 M. L. J. 597; 60 I. C. 414. Where the contract is to do work for a lump sum nothing could be recovered as *quantum meruit* for part only of work done. 19 I. C. 48 = 6 Bur. L. T. 53; 16 I. C. 692 = (1912) M. W. N. 956.

GRATUITOUS PAYMENT FOR SERVICE.—Where a pleader works for a client without any contract as to remuneration he will be entitled to a reasonable payment for his services. 20 I. C. 47 (1) = 20 C. L. J. 424. Hindu joint family—Execution of decree against individual member—Payment by him—Suit for refund. 54 I. C. 807 = 11 L. W. 115. S. 70 is not applicable to a case where a person does some act for his own benefit unavoidably. 45 I. C. 786; 54 I. C. 807 = 11 L. W. 115. When it is proved that the plaintiff has really done some work under a contract, which he alleged but failed to prove the alleged contract, reasonable compensation should be given to the plaintiff for the work done. 30 I. C. 223 = 2 O. L. J. 332. Where there has been no express agreement about the fees to be paid to a medical man he is entitled to a reasonable amount to be fixed by the Court. 25 I. C. 777.

"LAWFULLY".—Lawfully—Money left with vendees for payment to mortgagees—Property mortgaged different from property sold—Vendees not entitled to recover amount paid in excess of that directed to be paid by the vendors. 40 All. 555 = 47 I. C. 903. See also 14 C. W. N. 699; 18

Illustrations.

(a) *A*, a tradesman, leaves goods at *B*'s house by mistake. *B* treats the goods as his own. He is bound to pay *A* for them.

(b) *A* saves *B*'s property from fire. *A* is not entitled to compensation from *B*, if the circumstances show that he intended to act gratuitously.

Responsibility of finder of goods.

Liability of person to whom money is paid; or thing delivered by mistake or under coercion.

71. A person who finds goods belonging to another and takes them into his custody, is subject to the same responsibility as a bailee.¹

72. A person to whom money has been, paid, or anything delivered, by mistake or under coercion,² must repay or return it.

Illustrations.

(a) *A* and *B* jointly owe 100 rupees to *C*. *A* alone pays the amount to *C*, and *B*, not knowing this fact, pays 100 rupees over again to *C*. *C* is bound to repay the amount to *B*.

Bom. L. R. 700. Hindu reversioner paying money to prevent sale for road cess.—Right to recover from widow or life estate holder. 25 C. W. N. 1029=49 Cal. 470=1922 Cal. 353. See also 86 I. C. 737=1925 Mad. 1175. A payment under O. 21, R. 89, C. P. C. is a valid payment for the purposes of S. 70. 13 I. C. 144=16 C. L. J. 156. A person paying rent in order to create title must be deemed to be making it voluntarily and not lawfully and so S. 70 would not apply. 15 C. W. N. 332=9 I. C. 219=13 C. L. J. 646; 9 I. C. 615. (21 C. 142, foll.). A person who pays assessments honestly and under the belief that he has title to the land could not recover them from the defendant, if it is clear that the defendant and not he is the real owner. 12 M. L. T. 261=17 I. C. 253. Co-sharer making improvements—Right to recover, 10 I. C. 694=7 N. L. R. 11.

LANDLORD AND TENANT.—Unauthorised use of water. 22 I. C. 31=(1914) M. W. N. 66.

LEGAL PRACTITIONER.—Suit for fees on the basis of agreement barred by S. 28, Leg. Prac. Act—Claim for reasonable compensation not sustainable. 8 Pat. L. T. 175. *Quantum meruit*—Claim for remuneration for services rendered—See 54 Cal. 189.

Sec 71.—¹ See Ss. 151 and 152 *infra*. As to definition of "bailee," see S. 148, *infra*.

² Sec. 72.—For definition of "coercion," see S. 15, *supra*.

COERCION.—In this section is used in its general sense. 5, R. 653.

MISTAKE.—As the section lays down that a person to whom money is paid by mistake or coercion must repay or return it, it implies that the money was not really due to the person to whom it was paid. 43 All. 272=60 I. C. 881; 45 M. L. J. 497=4 Lah. 284=50 I. A. 162=1923 P. C. 114 (P. C.); 42 B. 161=42 I. C. 869. Money paid under a mistake of fact on the part of both the parties is recoverable. 1922 Cal. 1 (2)=16 I. C. 131=16 C. L. J. 437; 90 I. C. 906=1925 Mad. 762 (Power of Court to take notice of facts arising subsequent to suit.) The doctrine of equitable restitution has no application where the defendant labouring under the same mistake as the plaintiff has *bona fide* parted with the goods to others. 43 M. L. J. 142=70 I. C. 751=1923 M. 17; 15 I. C. 361=5 Bur. L. T. 75. Where the plaintiffs through negligence wrongly accepted the position of drawees of a hundi, presented by a bank, held there was gross carelessness on

their part in not detecting the mistake immediately and also in not intimating the bank of it within a reasonable time after they discovered the mistake and they were not entitled to recover the money from the defendant bank. 50 Bom. 49=91 I. C. 342=27 Bom. L. R. 1229=A. I. R. 1926 Bom. 66. Money paid to wrong person by plaintiff's broker contrary to plaintiff's instructions can be recovered under S. 72. 18 S. L. R. 65=1925 Sind 93. Money paid under a decree which is afterwards found not to be due cannot be recovered as money had and received, in a fresh suit, unless the decree is set aside or superseded by some ulterior proceeding. 46 I. C. 562. Insolvency.—Money paid in excess under mistake of fact by officer of Court—Claim for refund by other creditors—Maintainability. See 29 Bom. L. R. 1167. On this sec. see also A. I. R. 1928 Lah. 316.

COERCION.—Where property of one person is wrongfully attached in execution of a decree against another and the real owner pays off the decree amount under protest the owner is entitled to demand repayment from the decree-holder. This is the law both in England and in India. 40 Cal. 598=40 I. A. 56=25 M. L. J. 104=18 I. C. 949 (P. C.) (8 I. A. 93 rel.). The word 'Coercion' in S. 72 is used in its general and ordinary sense in which it is defined in S. 15. *Ibid.* See also 5 R. 653. The word 'Coercion' referred to in S. 72 is used in its general and ordinary sense, its meaning not being controlled by the definition of "Coercion" in S. 15. 65 I. C. 517; 17 I. C. 205=14 Bom. L. R. 854. (40 C. 598 P. C. rel.). Money paid under legal process—Recoverability—43 Cal. 269=20 C. W. N. 188; 53 I. C. 553. Money paid by a person under arrest in a non-compoundable case with a view to stifle a prosecution amounts to payment under coercion. 40 Mad. 285=31 M. L. J. 264. A landlord collected water-cess from plaintiffs at a penal rate and paid it to the Government. He is not liable to be sued by the plaintiffs for the recovery of the water cess so paid by them. 29 M. L. J. 597=30 I. C. 178. A payment of water cess made under fear of coercive process is not a voluntary payment. 37 Mad. 322=24 M. L. J. 365. Money paid under compulsion of a legal process cannot be recovered as money had and received unless it was realized by fraud or some unconscionable dealing or by a grave mistake which a Court of equity will relieve against. 46 I. C. 534=3 P. L. J. 465.

(d) A railway company refuses to deliver up certain goods to the consignee, except upon the payment of an illegal charge for carriage. The consignee pays the sum charged in order to obtain the goods. He is entitled to recover so much of the charge as was illegally excessive.

CHAPTER VI.

OF THE CONSEQUENCES OF BREACH OF CONTRACT.

73. When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the

Compensation for loss or damage caused by breach of contract.

contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

Sec. 73. SCOPE.—Section merely prescribes method of assessing damages. It does not take away right of seller to sue for price when property in the goods has passed to buyer. 34 Bom. 192; 36 Cal. 736. The buyer has no right without the consent of the seller to extend the time and claim damages at the rate prevailing on the deferred date. 97 I. C. 269=19 S. L. R. 41. Section applies only when contract has been broken. *see* 4 Bom. L. R. 874. No difference between moveable and immoveable property. 1927 Sind 49. Law does not regard collateral and consequential damages arising from delay in payment of money. *See* 35 Cal. 683. So, also, loss of profits on breach of contract, is not to be considered in measuring damages. *See* 21 Mad. 172. As to delivery by instalments. 21 M.L.J. 182. *See also* 30 Cal. 477; 1 Cal. 264. Plaintiff can claim damages as on the date when the defendant failed to take delivery of goods. 54 Cal. 97=99 I.C. 244=44 C. L. J. 364-1927 Cal. 291. Measure of damages where no time is fixed for delivery. *See* 14 All. L. J. 597. As to damages in case of breach of promise of marriage. *See* 42 Bom. 499. Manager of a joint Hindu family personally liable in damages for failure to perform a contract for sale of immoveable property when the sale is not binding on the minor coparceners. 28 Punj. L. R. 620=100 I. C. 422=9 Lah. L. J. 199=1927 Lah. 252. As to the duty of plaintiff suing for damages to take all reasonable steps to mitigate the loss consequent upon breach of contract. *See* 43 Cal. 493=43 Ind. App. 6 (P.C.). In a suit for damages for breach of contract the duty on the part of the plaintiff to minimise damages arises only after breach has occurred. 83 I.C. 260=A. I. R. 1924 Cal. 427. *See also* 49 B. 25=86 I. C. 521.

INTEREST ACT.—There is no conflict of any kind between the single section of Interest Act and this section—21 N.L.R. 16=1925 Nag. 451. *See also* 8 Lah. 310=100 I. C. 846=28 Punj. L. R. 161=1927 Lah. 333. Interest Act permits the Court to allow interest in certain circumstances but does not limit its doing so only to those circumstances. *Ibid.* Even though there is no agreement to pay interest, court can award damages for wrongful detention of money. 93 I. C. 647=A. I. R. 1926 Cal. 755; 95 I. C. 175=1926 Oudh 514. Interest cannot be awarded as damages when there has been no demand. 101 I. C. 57=1927 All. 444.

RIGHT TO DAMAGES.—Right to sue for damages not transferable. 25 A. L. J. 811=102 I. C. 766=1927 All. 621. Party rendering per-

formance impossible cannot get damages. 1925 Nag. 119 (2). Damages in usual way must be awarded to purchaser, if vendor fails to make good title to property sold by him. 85 I. C. 421=1925 Lah. 262. *See also* 19 S. L. R. 337=101 I. C. 704=1927 Sind 120.

MEASURE OF DAMAGES—DIFFERENCE OF PRICE.—Measure of damages to which a promisee is entitled in a case of a breach of contract is the difference between the contract rate and the market rate on the date of breach of contract. 43 Cal. 493=43 I. A. 6; 36 Cal. 617; 41 Mad. 409; 22 M. L. J. 413. *See also* 38 Cal. 458. *See also* 5 Bur. L. J. 198; 102 I. C. 628; 97 I. C. 871; 1926 Mad. 1021=57 M.L.J. 243. Regarding measure of damages in cases of resale. (1927) N. W.N. 549. *See also* 28 Punj. L.R. 620=100 I.C. 422=9 Lah. L.J. 199=1927 Lah. 252. Time spent in survey of the goods does not postpone date of breach. 45 Bom. 129. Value created for special purpose is irrelevant. 26 Bom. 235 (239). Due date is date when goods ought to be delivered according to contract. 7 Lah. L.J. 360=1925 Lah. 513. In a contract which fixes the date for performance the due date is as a rule ascertainable. *Ibid.* Damages, measure of—Time, if essence of contract—*See* 49 B. 1=1924 Bom. 473. Lease of rice mill—Failure to give possession—Measure of damages—Applicable to cases of contract affecting immoveable property—*See* 4 Bur. L. J. 93=1925 Rang 261. In cases of loss arising from dispossession. *See* 1927 Nag. 75.

EARNEST MONEY, FORFEITURE OF.—In the absence of stipulation vendor must prove special damage when claiming forfeiture of earnest money when contract is broken by vendee. 1925 Nag. 109. Breach of contract—Amount not deposited as earnest money and not appropriated by payee to loss due to breach—Amount is not liable to forfeiture on breach—*See* 90 I. C. 573=1925 S. 254. *See also* 103 I. C. 158=1927 Nag. 281; 100 I. C. 860=1927 Bom. 195. When the breach is not by vendee he can claim back his earnest money. 51 Bom. 247=101 I. C. 229=29 Bom. L. R. 19=1927 Bom. 195.

MISCELLANEOUS.—Clause empowering vendor on vendee's default to pay on due date to resell at anytime and on such terms and conditions as vendor might decide is valid, provided vendor acts within its limits. 49 B. 25=86 I. C. 521. Relief against penalty can be granted even in compromise decrees. 1925 Mad. 264 (1). Right of buyer to extend time without consent of seller and claiming damages, *see* 1927 Sind 49.

When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it and had broken his contract.

Compensation for failure to discharge obligation resembling those created by contract.

Explanation.—In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account.

Illustrations.

(a) *A* contracts to sell and deliver 50 maunds of saltpetre to *B*, at a certain price to be paid on delivery. *A* breaks his promise. *B* is entitled to receive from *A*, by way of compensation, the sum, if any, by which the contract price falls short of the price for which *B* might have obtained 50 maunds of saltpetre of like quality at the time when the saltpetre ought to have been delivered.

(b) *A* hires *B*'s ship to go to Bombay, and there take on board, on the first of January, a cargo which *A* is to provide and to bring it to Calcutta, the freight to be paid when earned. *B*'s ship does not go to Bombay, but *A* has opportunities of procuring suitable conveyance for the cargo upon terms as advantageous as those on which he had chartered the ship. *A* avails himself of those opportunities, but is put to trouble and expense in doing so. *A* is entitled to receive compensation from *B* in respect of such trouble and expense.

(c) *A* contracts to buy of *B*, at a stated price 50 maunds of rice, no time being fixed for delivery. *A* afterwards informs *B* that he will not accept the rice if tendered to him. *B* is entitled to receive from *A*, by way of compensation, the amount, if any, by which the contract price exceeds that which *B* can obtain for the rice at the time when *A* informs *B* that he will not accept it.

(d) *A* contracts to buy *B*'s ship for 60,000 rupees, but breaks his promise. *A* must pay to *B*, by way of compensation, the excess, if any, of the contract price over the price which *B* can obtain for the ship at the time of the breach of promise.

(e) *A*, the owner of a boat contracts with *B* to take a cargo of jute to Mirzapur, for sale at that place, starting on a specified day. The boat, owing to some avoidable cause, does not start at the time appointed, whereby the arrival of the cargo at Mirzapur is delayed beyond the time when it would have arrived if the boat had sailed according to the contract. After that date, and before the arrival of the cargo, the price of jute falls. The measure of the compensation payable to by *A* is the difference between the price which *B* could have obtained for the cargo at Mirzapur at the time when it would have arrived if forwarded in due course, and its market price at the time when it actually arrived.

(f) *A* contracts to repair *B*'s house in a certain manner, and receives payment in advance. *A* repairs the house, but not according to contract. *B* is entitled to recover from *A* the cost of making the repairs conform to the contract.

(g) *A* contracts to let his ship to *B* for a year, from the first of January, for a certain price. Freight rises, and, on the first of January, the hire obtainable for the ship is higher than the contract price. *A* breaks his promise. He must pay to *B*, by way of compensation, a sum equal to the difference between the contract price and the price for which *B* could hire a similar ship for a year on and from the first of January.

(h) *A* contracts to supply *B* with a certain quantity of iron at a fixed price, being a higher price than that for which *A* could procure and deliver the iron. *B* wrongfully refuses to receive the iron. *B* must pay to *A*, by way of compensation, the difference between the contract price of the iron and the sum for which *A* could have obtained and delivered it.

(i) *A* delivers to *B*, a common carrier, a machine to be conveyed, without delay, to *A*'s mill informing *B* that his mill is stopped for want of the machine. *B* unreasonably delays the delivery of the machine, and *A*, in consequence, loses a profitable contract with the Government. *A* is entitled to receive from *B*, by way of compensation, the average amount of profit which would have been made by the working of the mill during the time that delivery of it was delayed, but not the loss sustained through the loss of the Government contract.

(j) *A*, having contracted with *B* to supply *B* with 1,000 tons of iron at 100 rupees a ton, to be delivered at a stated time, contracts with *C* for the purchase of 1,000 tons of iron at 80 rupees a ton, telling *C* that he does so for the purpose of performing his contract with *B*. *C* fails to perform his contract with *A*, who cannot procure other iron, and *B*, in consequence, rescinds the contract. *C* must pay to *A* 20,000 rupees, being the profit which *A* would have made by the performance of his contract with *B*.

(k) *A* contracts with *B* to make and deliver to *B*, by a fixed day, for a specified price, a certain piece of machinery. *A* does not deliver the piece of machinery at the time specified, and, in consequence of this, *B* is obliged to procure another at a higher price than that which he was to have paid to *A*, and is prevented from performing a contract which *B* had made with a third person at the time of his contract with *A* (but which had not been then communicated to *A*), and is compelled to make compensation for breach of that contract. *A* must pay to *B*, by way of compensation, the difference between the contract price of the piece of machinery and the sum paid by *B* for another, but not the sum paid by *B* to the third person by way of compensation.

(l) *A*, a builder, contracts to erect and finish a house by the first of January, in order that *B* may give possession of it at that time to *C*, to whom *B* has contracted to let it. *A* is informed of the contract between *B* and *C*. *A* builds the house so badly that, before the first of January, it falls

down and has to be re-built by B, who, in consequence, loses the rent which he was to have received from C, and is obliged to make compensation to C for the breach of his contract. A must make compensation to B for the cost of rebuilding the house, for the rent lost, and for the compensation made to C.

(m) A sells certain merchandise to B, warranting it to be of a particular quality, and B, in reliance upon this warranty, sells it to C with a similar warranty. The goods prove to be not according to the warranty, and B becomes liable to pay C a sum of money by way of compensation. B is entitled to be reimbursed this sum by A.

(n) A contracts to pay a sum of money to B on a day specified. A does not pay the money on that day. B in consequence of not receiving the money on that day is unable to pay his debts, and is totally ruined. A is not liable to make good to B anything except the principal sum he contracted to pay, together with interest up to the day of payment.

(o) A contracts to deliver 50 maunds of saltpetre to B on the first of January, at a certain price. B afterwards, before the first of January, contracts to sell the saltpetre to C at a price higher than the market price of the first of January. A breaks his promise. In estimating the compensation payable by A to B, the market price of the first of January, and not the profit which would have arisen to B from the sale to C, is to be taken into account.

(p) A contracts to sell and deliver 500 bales of cotton to B on a fixed day. A knows nothing of B's mode of conducting his business. A breaks his promise, and B, having no cotton, is obliged to close his mill. A is not responsible to B for the loss caused to B by the closing of the mill.

(q) A contracts to sell and deliver to B, on the first of January, certain cloth which B intends to manufacture into caps of a particular kind for which there is no demand, except at that season. The cloth is not delivered till after the appointed time, and too late to be used that year in making caps. B is entitled to receive from A, by way of compensation, the difference between the contract price of the cloth and its market price at the time of delivery, but not the profits which he expected to obtain by making caps, nor the expenses which he has been put to in making preparation for the manufacture.

(r) A, a ship-owner, contracts with B to convey him from Calcutta to Sydney in A's ship, sailing on the first of January, and B pays to A, by way of deposit, one-half of his passage-money. The ship does not sail on the first of January, and B after being, in consequence, detained in Calcutta for some time, and thereby put to some expense, proceeds to Sydney in another vessel, and, in consequence, arriving too late in Sydney, loses a sum of money. A is liable to repay to B his deposit, with interest, and the expense to which he is put by his detention in Calcutta and the excess, if any of the passage-money paid for the second ship over that agreed upon for the first, but not the sum of money which B lost by arriving in Sydney too late.

74. 1 [When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused

Compensation for breach of contract where penalty stipulated for.

18ec. 74.—This paragraph and the Explanation were substituted for the first para. of S. 74, by the Indian Contract Act Amendment Act (VI of 1890), S. 4.

SCOPE.—The section as it originally stood was intended to do away with the distinction between penalty and liquidated damages. 9 Cal. 689 (692); 3 Mad. 224; 11 Cal. 545; 5 All. 238; 27 Cal. 421; 3 C. W. N. 43 (45); 17 Bom. 106 (111). Section does not apply to covenants in a lease of which the breach involves forfeiture. 42 Mad. 654. As to the commencement of the operation of the amended section. See 25 Mad. 343; 26 Mad. 445; 25 All. 169. (Conflict of rulings). The doctrine of penalties is not applicable to stipulations contained in a decree. (1925) P.H.C.C. 353. Payment of larger amount in default of conditions provided in a compromise decree depends on determination of the question whether the larger amount was actually due or whether an amount not actually due was sought to be recovered. 103 I.C. 805 = A.I.R. 1927 Lah. 659. See also (1927) M. W. N. 587 = 26 L. W. 453 = 105 I. C. 789 = A. I. R. 1927 Mad. 965 = 53 M. L. J. 562.

PENALTY.—A penalty under the section will only follow a breach of a contract or an obligation. Where there is no obligation at all there is no question of penalty. 1925 P.H. 4 C.C. 353. It

cannot be said that the terms of a Chit fund Contract cannot be penal. 102 I.C. 14. See also (1927) M. W. N. 527. Penalty—Liquidated damages—Difficulty of ascertaining amount of damages—See 6 Lah. L. J. 554 = 84 I. C. 865 = 1925 Lah. 284. Regarding return of earnest money in case of breach see 101 I.C. 841 (2) = A.I.R. 1927 Sind 205; 100 I. C. 860 = A. I. R. 1927 Nag. 168; 101 I. C. 686; 102 I. C. 766. It is forfeited when the transaction falls through by reason of the fault of the vendee. 24 A.L.J. 248 = 94 I.C. 782 = 1926 P.C. 1 = 50 M. L. J. 629 (P.C.) Regarding recovery of entire amount due under instalment bond in cases of failure to pay instalments. See (1927) M.W. N. 527; 103 I. C. 148 = A. I. R. 1927 Nag. 284; 26 L. W. 351 = 104 I. C. 827 = 39 M. L. T. 287. Rules of a benefit fund providing for loans at a low rate of interest to share-holders.—The whole loan becoming repayable at an enhanced rate of interest on the death of a share-holder and the failure of his legal representative to apply to continue as shareholder.—The provision does not amount to a penalty. 95 I. C. 610 = 1926 Mad. 785 = 50 M. L. J. 595. Under a compromise decree plaintiff agreed to accept a smaller sum than what he claimed and it was to be paid in 2 instalments on dates fixed. If default were made in payment on the due date, the full provision claimed by the plaintiff

thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

Explanation.—A stipulation for increased interest from the date of default may be a stipulation by way of penalty.]

Exception.—When any person enters into any bail-bond, recognizance or other instrument of the same nature, or, under the provisions of any law, or under the orders of the Government of India or of any Local Government, gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned therein.

Explanation.—A person who enters into a contract with Government does not necessarily thereby undertake any public duty, or promise to do an act in which the public are interested.

Illustrations.

(a) A contracts with B to pay B Rs. 1,000, if he fails to pay B Rs. 500 on a given day. A fails to pay B Rs. 500 on that day. B is entitled to recover from A such compensation, not exceeding Rs. 1,000 as the Court considers reasonable.

(b) A contracts with B that, if A practises as a surgeon within Calcutta, he will pay B Rs. 5,000. A practises as a surgeon in Calcutta. B is entitled to such compensation, not exceeding Rs. 5,000 as the Court considers reasonable.

(c) A gives a recognizance binding him in a penalty of Rs. 500 to appear in Court on a certain day. He forfeits his recognizance. He is liable to pay the whole penalty.

was payable. *Held* the provision was not penal. 91 I.C. 790 (2) = 24 A.L.J. 210 = A.I.R. 1926 All. 278. The undertaking by a mortgagor to pay a larger sum than the principal at the time of redemption is enforceable. 3 O.W.N. 610 = 96 I.C. 538 = A.I.R. 1926 Oudh 502.

INTEREST AMOUNTING TO PENALTY :—Question as to stipulation being by way of penalty is to be decided from circumstances of each case. (1925) Mad. 84 = 47 M.L.J. 605. *See also* 105 I.C. 477. Agreement for hire—Payment of amount stipulated for non-return of hired animal whether amounts to penalty. 46 C. L. J. 362. As to when stipulations for interest are penal, *see* Author's Law of Interest Chap. on Penalty (Case-law collected and discussed fully therein). Where reasonable compensation for breach is provided there is no penalty, but where it is in *terrorem* it is a penalty. 47 M. L. J. 833 = 1925 Mad. 177. A stipulation charging enhanced interest from the date of the bond on failure of payment on the fixed date is penal and cannot be enforced. 89 I.C. 896—*See also* 89 I.C. 119 ; 83 I.C. 773 = 1923 Lah. 452 ; 106 I.C. 38. Stipulation to pay compound interest on default is not penal. 47 M.L.J. 910 = 85 I.C. 391. *See also* 103 I.C. 496 ; 101 I.C. 759 = 1927 All. 538 (1). Where compound interest at 25 p.c. is claimed a court of equity is justified in cutting it down to 6 p.c. simple interest. 86 I.C. 176 = 1925 Lah. 450. Rate of Re. 1—8—3 per cent. per mensem compound interest was held as not penal. 7 Lah. L. J. 417 = 1925 Lah. 580. (101 P.R. 1918 and 124 P.R. 1918, R.) *See also* 1925 Sind 164 ; 21 L.W. 54 = 85 I.C. 261 ; 87 I.C. 129 = 1924 Bom. 264. *See also* 100 I.C. 269 = 27 Punj. L. R. 807 = A. I. R. 1927 Lah. 113 ; 92 I.C. 593 (1) = A. I. R. 1926 Cal. 690. Provision in the mortgage document for compound interest at a higher rate on default—Whether penal. *See* 85 I.C. 392 = 1925 Mad. 302. Compound interest is said to be penal only

when the rate increases in default. 100 I.C. 679 = 1927 All. 315 ; 104 I.C. 191 = A.I.R. 1927 Nag. 338 ; 104 I.C. 817 = 26 L. W. 351 = 39 M. L. T. 287 ; 50 Mad. 614 = 25 L. W. 699 = 38 M. L. T. (H.C.) 323 = A.I.R. 1927 Mad. 620 = 103 I.C. 394 = 52 M. L. J. 612. Stipulation to pay compound interest at 1½ per cent. per mensem on default to pay simple interest at 2 per cent. per mensem was held a penalty and rate was reduced to 1 per cent. compound interest. 1925 All. 78. Stipulation to pay interest from the date of bond on failure to repay a loan by a certain date is penal. 1925 Oudh 72. Stipulation to pay enhanced interest, when penal. 84 I. C. 677 = 1925 Pat. 64 ; 9 Lah. L. J. 301. Stipulation to take no interest up to a certain date, 1 per cent. afterwards is penal. 28 O. C. 51 = 12 O. L. J. 70 = 83 I. C. 92 = 1925 Oudh. 231. It is not right to hold that in every case where there is a stipulation for payment of interest on non-payment of rent within a certain date it must be taken to be penal. 41 C.L.J. 453 = 1925 Cal. 722. Where there is no undue influence or unconscionable bargain high rate of interest is not penal. 30 C. W. N. 83 = 1925 Cal. 1193. When interest in a pronote was fixed at 12 per cent but a less rate was provided in case of monthly payment, the higher rate is no penalty. 105 I. C. 592 = 5 R. 573. 21 per cent. rate on mortgage security held not excessive. 55 I. A. 107 = A. I. R. 1928 P. C. 80 = 50 M.L.J. 32 (P.C.).

CONTRACT WITH GOVERNMENT—Forest contract—Breach—Rescissions—Penalty—Damages, Right to—Forest Act, S. 84—Effect of. *See* 49 B. 194 = 27 Bom. L. R. 66.

EXCEPTION.—Court not bound to exact the whole amount. 95 I.C. 614 = A.I.R. 1926 Nag. 435.

HINDU LAW—PARTITION—Annuity granted to one of the members in lieu of share—Provision for resumption of share in default of payment of annuity—Penalty, relief against. 1925 Mad. 84.

¹(d) A gives B a bond for the repayment of Rs. 1,000 with interest at 12 per cent. at the end of six months, with a stipulation that in case of default, interest shall be payable at the rate of 75 per cent. from the date of default. This is a stipulation by way of penalty, and B is only entitled to recover from A such compensation as the Court considers reasonable.

¹(e) A, who owes money to B, a money-lender, undertakes to repay him by delivering to him 10 maunds of grain on a certain date, and stipulates that, in the event of his not delivering the stipulated amount by the stipulated date, he shall be liable to deliver 20 maunds. This is a stipulation by way of penalty, and B is only entitled to reasonable compensation in case of breach.

¹(f) A undertakes to repay B a loan of Rs. 1,000 by five equal monthly instalments with a stipulation that, in default of payment of any instalment, the whole shall become due. This stipulation is not by way of penalty, and the contract may be enforced according to its terms.

¹(g) A borrows Rs. 100 from B and gives him a bond for Rs. 200 payable by five yearly instalments of Rs. 40 with a stipulation that, in default of payment of any instalment, the whole shall become due. This is a stipulation by way of penalty.

Party rightfully rescinding contract entitled to compensation.

75. A person who rightly rescinds a contract is entitled to compensation for any damage which he has sustained through the non-fulfilment of the contract.

Illustration.

A, a singer, contracts with B, the manager of a theatre, to sing at his theatre for two nights in every week during the next two months, and B engages to pay her 100 rupees for each night's performance. On the sixth night, A wilfully absents herself from the theatre, and B in consequence rescinds the contract. B is entitled to claim compensation for the damage which he has sustained through the non-fulfilment of the contract.

CHAPTER VII.

SALE OF GOODS.

When Property in Goods sold passes.

"Goods" defined.

76. In this chapter, the word "goods" means and includes every kind of moveable property.

"Sale" defined.

77. "Sale" is the exchange of property for a price. It involves the transfer of the ownership of the thing sold from the seller to the buyer.

Sale how effected.

78. Sale is effected by offer and acceptance of ascertained goods for a price,

¹S. 74, Ills. (d), (e), (f) and (g) were inserted by the Indian Contract Act (Amendment Act,) (VI of 1899), S. 4 (2).

Sec. 76.—UNCONSCIONABLE BARGAIN.—Share certificates are moveable property within the meaning of S. 76 and are therefore 'goods'. 46 Bom. 489=23 Bom. L. R. 1144; 25 Bom. L. R. 414=1923 Bom. 372; 50 B. 360=53 L. A. 92=A. I. R. 1926 P. C. 38=51 M. L. J. 1 (P.C.) The term 'goods' in S. 178 of the Act is not governed by the definition thereof in S. 76. 37 I. C. 707=24 C. L. J. 335. Where ascertained goods are sold and despatched to the buyer, but the buyer refuses to take delivery, the seller can sue him for their price. 59 I. C. 877=3 Lah. L. J. 239. House without site is not moveable property. 8 M.H.C.R. 100.

Sec. 77.—Price must be in terms of money. 11 Mad. 459; 30 Cal. 921. Currency note is money. 3 Cal. 379; 33 Mad. 196. Currency notes are not "goods". 33 Mad. 196. Hire purchase agreement is not one for sale. 6 Bom. L. R. 871.

Sec. 78.—On a sale of ascertained goods the property in the goods passes to the purchaser as soon as the contract of sale is made, even though the delivery of the goods is postponed at his request and to suit his own convenience. 20 A. L. J. 579=68 I. C. 239. See also 27 Mad. 548; 32 Cal. 816. Postponement of payment of price, when to be inferred. See 29 Bom. L. R. 1036. When goods are sent by Railway the railway

receipt being addressed to the consignor to be delivered to the purchaser only on receipt of the price for the goods, the property in the goods does not pass to the purchaser till the price is paid 100 I. C. 795=A.I.R. 1927 Lah. 1036. But where the defendant received part payment of the price and handed over to the buyer the railway receipt duly endorsed, the property in the goods passed to the buyer as soon as the contract is made and the money paid. 7 Lah. 406=97 I. C. 765 (2)=A.I.R. 1926 Lah. 606. Unless there is a clear intention expressed in the contract between the parties that property should not pass to the vendee until the payment of the full purchase money, property will pass to the vendee on delivery. 95 I. C. 867=7 Pat. L. J. 801=A.I.R. 1926 Pat. 353. Stipulation as to payment of price by instalments — Property passes as per intention of parties. 25 Bom. L. R. 778=77 I. C. 150. S. 78 is not to be construed as laying down an inflexible rule as to the passing of property. *Ibid.* It is curious that S. 78 should not be expressed as subject to a contrary intention, but the Act is a notoriously badly drafted Act and it does not purport to be exhaustive. *Ibid.* In a C.I.F. contract the property in the goods passes as soon as the goods are shipped, but when the first buyer sells to another party the property in the goods does not pass until the bills of lading are endorsed to the purchaser. 59 I. C. 515=22 Bom. L. R. 1165. An exercise of the power of sale by the donee of that power in

or of a price for ascertained goods, together with payment of the price or delivery of the goods; or with tender, part-payment, earnest or part-delivery; or with an agreement, express or implied, that the payment or delivery or both, shall be postponed.

Where there is a contract for the sale of ascertained goods, the property in the goods sold passes to the buyer when the whole or part of the price or when the earnest is paid or when the whole or part of the goods is delivered.

If the parties agree, expressly or by implication, that the payment or delivery, or both, shall be postponed, the property passes as soon as the proposal for sale is accepted.

Illustrations.

(a) B offers to buy A's horse for 500 rupees. A accepts B's offer, and delivers the horse to B. The horse becomes B's property on delivery.

(b) A sends goods to B, with the request that he will buy them at a stated price if he approves of them or return them if he does not approve of them. B retains the goods and informs A that he approves of them. The goods become B's when B retains them.

(c) B offers A for his horse 1,000 rupees, the horse to be delivered to B on a stated day, and the price to be paid on another stated day. A accepts the offer. The horse becomes B's as soon as the proposal is accepted.

(d) B offers A for his horse 1,000 rupees on a month's credit. A accepts the offer. The horse becomes B's as soon as the offer is accepted.

(e) B on the first January, offers to A for a quantity of rice 2,000 rupees, to be paid on the first March following, the rice not to be taken away till paid for. A accepts the offer. The rice becomes B's as soon as the offer is accepted.

Transfer of ownership of thing sold, which has yet to be ascertained, made or finished.

79. Where there is a contract for the sale of a thing which has yet to be ascertained, made or finished, the ownership of the thing is not transferred to the buyer, until it is ascertained, made or finished.

Illustration.

B orders A, a barge-builder, to make him a barge. The price is not made payable by instalments. While the barge is building, B pays to A money from time to time on account of the price. The ownership of the barge does not pass to B until it is finished.

Completion of sale of goods which the seller is to put into state in which buyer is to take them.

80. Where, by a contract for the sale of goods, the seller is to do anything to them for the purpose of putting them into a state in which the buyer is to take them, the sale is not complete until such thing has been done.

Illustration.

A, a ship-builder, contracts to sell to B, for a stated price, a vessel which is lying in A's yard; the vessel to be rigged and fitted for a voyage, and the price to be paid on delivery. Under the contract, the property in the vessel does not pass to B until the vessel has been rigged, fitted up and delivered.

his own favour, does not affect the substance of the transaction. 24 I. C. 758=16 Bom. L.R. 178. The fact that the performance of a contract falls on a holiday does not alter the rights of parties by suspending their private business. 58 I. C. 396=32 C. L.J. 140. To claim the benefit of performance of contract on the next day following a holiday, the party must not only prove the existence of a trade usage but also that when read with a written contract it would not be meaningless or inconsistent. 58 I. C. 396=32 C.L.J. 140. A vendor having no lien on the property sold on credit when the possession is delivered to the purchaser cannot proceed directly against a third person dispossessing the purchaser of the property in question. 17 I.C. 963=16 C. L. J. 575. See also 13 I. C. 469=(1912) M. W. N. 72. Where specific goods are sold and agreed to be delivered wholesale to a certain person at a certain rate, it is for the buyer to get goods weighed and delivered

to him. 26 O. C. 39=68 I. C. 969. The weight is only for the consideration of the buyer. *Ibid.* The goods cannot be said to be ascertained until they are inspected and approved. 79 I. C. 183=5 Pat. L. T. 558. A delivery order in respect of goods sold to a certain person or bearer, is a document of title to the goods and passes from hand to hand in the trade and represents the goods. 36 I. C. 593=10 Bur. L. T. 248. In the rice trade the delivery of a milling notice is equivalent to the delivery of the actual rice. 24 I.C. 441=7 Bur. L. T. 54. In a hire-purchase agreement, the hirer has an option to return the article hired or to become its owner on full payment. It is not a sale, the hirer being merely a bailee. 15 Cr. L. J. 425=7 Bur. L. T. 222=24 I. C. 161.

Sec. 79.—See 7 Lah. L. J. 512=88 I. C. 230=1925 Lah. 581.

Sec. 80.—**SALE OF RICE**—Cost of gunny bag—Liability for. 50 I. C. 549=11 Bur. L. T. 214

Completion of sale of goods when seller has to do anything thereto in order to ascertain price.

81. Where anything remains to be done to the goods by the seller for the purpose of ascertaining the amount of the price, the sale is not complete until this has been done.

Illustrations.

(a) *A*, the owner of a stack of bark, contracts to sell it to *B* weigh and deliver it, at 100 rupees per ton. *B* agrees to take and pay for it on a certain day. Part is weighed and delivered to *B*; the ownership of the residue is not transferred to *B* until it has been weighed pursuant to the contract.

(b) *A* contracts to sell a heap of clay to *B* at a certain price per ton. *B* is, by the contract, to load the clay in his own carts and to weigh each load at a certain weighing machine, which his carts must pass on their way from *A*'s ground to *B*'s place of deposit. Here nothing more remains to be done by the seller; the sale is complete, and the ownership of the heap of clay is transferred at once.

Completion of sale when goods are unascertained at date of contract.

82. Where the goods are not ascertained at the time of making the contract of sale, it is necessary, to the completion of the sale that the goods shall be ascertained¹.

Illustration.

A agrees to sell to *B* 20 tons of oil in *A*'s cisterns. *A*'s cisterns contain more than 20 tons of oil. No portion of the oil has become the property of *B*.

83. Where the goods are not ascertained at the time of making the agreement for sale but goods answering the description in the agreement are subsequently appropriated by one party for the purpose of the agreement, and that appropriation is assented to by the other, the goods have been ascertained, and the sale is complete.

Illustration.

A having a quantity of sugar in bulk, more than sufficient to fill 20 hogsheads, contracts to sell *B* 20 hogsheads of it. After the contract, *A* fills 20 hogsheads with the sugar, and gives notice to *B* that the hogsheads are ready, and requires him to take them away. *B* says he will take them as soon as he can. By this appropriation by *A*, and assent by *B*, the sugar becomes the property of *B*.

84. Where the goods are not ascertained at the time of making the contract of sale, and by the terms of the contract the seller is to do an act with reference to the goods which cannot be done until they are appropriated to the buyer, the seller has a right to select any goods answering to the contract, and by his doing so the goods are ascertained.

Illustration

B agrees with *A* to purchase of him, at a stated price to be paid on a fixed day, 50 maunds of rice, out of a larger quantity in *A*'s granary. It is agreed that *B* shall send sacks for the rice, and

Sec. 81.—Under a contract of sale, property in goods does not pass to the purchaser until it is ascertained, as by weightment by the vendor, unless there are other terms of the agreement or some particular local or trade usage to the contrary. 35 I. C. 449=10 S. L. R. 14; But see also 68 I. C. 969=1923 Oudh 15. (24 I. C. 383 Ref. to and 32 I. C. 720, Diss. from.) The fact that the goods are to be remeasured by buyers by itself would not be sufficient to prevent the property in the goods passing to the buyers. 95 I. C. 453=A. I. R. 1926 Sind. 246. On this Sec. see also 4 Cal. 801; 20 C. W. N. 1224=44 Cal. 98. Contract to sell ascertained goods in lieu of debt—Buyer to count and stack the same—Property passes at once. 103 I. C. 222.

¹ **Sec. 82.**—See S. 79, *supra*.

Sec. 83.—SALE OF GOODS.—'Ready goods' meaning of. 57 I. C. 140=47 Cal. 458. In cases of share contracts, sale is complete as soon as the seller hands over the certificates and the buyer accepts them. 50 Bom. 360=53 I. A. 92=51 M. L. J. 1=A. I. R. 1926 P. C. 38.

Where the defendant instructed plaintiff to send him rice on board a ship and defendant sent it without any further conditions the property in the rice passes to purchaser where the rice is shipped. 31 I. C. 334=18 M. L. T. 457.

APPROPRIATION.—The question whether there has been appropriation of goods is one of fact. Any particular mode of appropriation is not required by the law. 9 I. C. 255=21 M. L. J. 413. The commonest form of appropriating goods to a contractor for the sale of unascertained goods is by delivering them to a carrier. 24 Bom. L. R. 1140=70 I. C. 138 (leading case on the subject). As to rules which determine what constitutes appropriation, see *Ibid.* See also 48 All. 622; 95 I. C. 130=A. I. R. 1926 All. 679. A suit for the recovery of price of goods sold does not lie unless the property in the goods has passed to the purchaser. 2 P. L. W. 123=42 I. C. 582; on this section see also 88 I. C. 230=1925 Lah. 581; 88 I. C. 910=29 C. W. N. 808; 86 I. C. 794=1925 Lah. 586; A. I. R. 1926 Cal. 218.

that *A* shall put the rice into them. *B* does so, and *A* puts 50 maunds of rice into the sacks. The goods have been ascertained.

Transfer of ownership of moveable property, when sold together with immoveable.

85. Where an agreement is made for the sale of immoveable and moveable property combined, the ownership of the moveable property does not pass before the transfer of the immoveable property.

Illustration.

A agrees with *B* for the sale of a house and furniture. The ownership of the furniture does not pass to *B* until the house is conveyed to *B*.

Buyer to bear loss after goods have become his property.

86. When goods have become property of the buyer, he must bear any loss arising from their destruction or injury.

Illustrations.

(a) *B* offers, and *A* accepts, 100 rupees for a stack of firewood standing on *A*'s premises, the firewood to be allowed to remain on *A*'s premises till a certain day, and not to be taken away till paid for. Before payment, and while the firewood is on *A*'s premises, it is accidentally destroyed by fire. *B* must bear the loss.

(b) *A* bids 1,000 rupees for a picture at a sale by auction. After the bid, it is injured by an accident. If the accident happens before the hammer falls, the loss falls on the seller; if afterwards, on *A*.

Transfer of ownership of goods agreed to be sold while non-existent.

87. When there is a contract for the sale of goods not yet in existence, the ownership of the goods may be transferred by acts done, after the goods are produced in pursuance of the contract, by the seller, or by the buyer

with the seller's assent.

Illustrations.

(a) *A* contracts to sell to *B*, for a stated price, all the indigo which shall be produced at *A*'s factory during the ensuing year. *A*, when the indigo has been manufactured, gives *B* an acknowledgment that he holds the indigo at his disposal. The ownership of the indigo vests in *B* from the date of the acknowledgment.

(b) *A*, for a stated price, contracts that *B* may take and sell any crops that shall be grown on *A*'s land in succession to the crops then standing. Under this contract *B* with the assent of *A*, takes possession of some crops grown in succession to the crops standing at the time of the contract. The ownership of the crops, when taken possession of, vests in *B*.

(c) *A*, for a stated price, contracts that *B* may take and sell any crops that shall be grown on his land in succession to the crop then standing. Under this contract *B* applies to *A* for possession of some crops grown in succession to the crops which were standing at the time of the contract. *A* refuses to give possession. The ownership of the crops has not passed to *B*, though *A* may commit a breach of contract in refusing to give possession.

Contract to sell and deliver, at a future day goods not in seller's possession at date of contract.

88. A contract for the sale of goods to be delivered at a future day is binding, though the goods are not in the possession of the seller at the time of making the contract, and though at that time he has no reasonable expectation of acquiring them otherwise than by purchase.

Illustration.

A contracts, on the first January, to sell *B* 50 shares in the East Indian Railway Company, to be delivered and paid for on the first March of the same year. *A*, at the time of making the contract, is not in possession of any shares. The contract is valid.

Determination of price not fixed by contract.

89. Where the price of goods sold is not fixed by the contract of sale, the buyer is bound to pay the seller such a price as the Court considers reasonable.

Sec. 85.—All agreements for the sale of property partly moveable and partly immoveable fall under S. 85. 12 I. C. 805 = 4 Bur. L. T. 127. See also 5 Bom. 554.

Sec. 86.—S. 86 does not preclude a buyer from agreeing to take over risk of loss or damage before the property in the goods passes to him. 56 I. C. 978. On this section see also 4 Cal. 801. In a C. I. F. contract on tender of the effective shipping documents the property in the goods

passes to the buyer, but in spite of it a contract implying that the goods are at the buyer's risk from the time of the shipment is not invalid. 56 I. C. 978.

Sec. 87.—In the case of goods not in existence at the time of contract the ownership passes as soon as they actually come into existence. 9 I. C. 255 = 21 M. L. J. 413 (16 Mad. 429; 31 Cal. 667 Foll.). As to equitable assignments by way of security. See 21 Bom. 287.

Illustration.

B, living at Patna, orders of *A*, a coach builder at Calcutta, a carriage of a particular description. Nothing is said by either as to the price. The order having been executed, and the price being in dispute between the buyer and the seller, the Court must decide what price it considers reasonable.

Delivery.

90. Delivery of goods sold may be made by doing anything which has the effect of putting them in the possession of the buyer, or of any person authorized to hold them on his behalf.

Delivery how made.

Illustrations.

(a) *A* sells to *B* a horse, and causes or permits it to be removed from *A*'s stables to *B*'s. The removal to *B*'s stable is a delivery.

(b) *B*, in England, orders 100 bales of cotton from *A*, a merchant of Bombay, and sends his own ship to Bombay for the cotton. The putting the cotton on board the ship is a delivery to *B*.

(c) *A* sells to *B* certain specific goods which are locked up in a godown. *A* gives *B* the key of the godown, in order that he may get the goods. This is a delivery.

(d) *A* sells to *B* five specific casks of oil. The oil is in the warehouse of *A*. *B* sells the five casks to *C*. *A* receives warehouse rent for them from *C*. This amounts to a delivery of the oil to *C*, as it shows an assent on the part of *A* to hold the goods as warehouseman of *C*.

(e) *A* sells to *B* 50 maunds of rice in the possession of *C*, a warehouseman. *A* gives *B* an order to *C* to transfer the *C* rice to *B*, and assents to such order, and transfers the rice in his books to *B*. This is a delivery.

(f) *A* agrees to sell *B* five tons of oil at 1,000 rupees per ton to be paid for at the time of delivery. *A* gives to *C*, a wharfinger, at whose wharf he had twenty tons of the oil, an order to transfer five of them into the name of *B*. *C* makes the transfer in his books, and gives *A*'s clerk a notice of the transfer for *B*. *A*'s clerk takes the transfer notice to *B*, and offers to give it him on payment of the price of the oil. *B* refuses to pay. There has been no delivery to *B*, as *B* never assented to make *C* his agent to hold for him the five tons selected by *A*.

91. A delivery to a wharfinger or carrier of the goods sold has the same effect as a delivery to the buyer, but does not render the buyer liable for the price of goods which do not reach him, unless the delivery is so made as to enable him to hold the wharfinger or carrier responsible for the safe custody or delivery of the goods.

Effect of delivery to wharfinger or carrier.

Illustration.

B, at Agia, orders of *A*, who lives at Calcutta, three casks of oil to be sent to him by railway. *A* takes three casks of oil directed to *B* to the railway station and leaves them there without conforming to the rules which must be complied with in order to render the Railway Company responsible for their safety. The goods do not reach *B*. There has not been a sufficient delivery to charge *B* in a suit for the price.

92. A delivery of part of goods, in progress of the delivery of the whole, has the same effect, for the purpose of passing the property in such goods, as a delivery of the whole; but a delivery of part of the goods, with an intention of severing it from the whole, does not operate as a delivery of the remainder.

Effect of part delivery.

Illustrations.

(a) A ship arrives in a harbour laden with a cargo consigned to *A*, the buyer of the cargo. The captain begins to discharge it, and delivers over part of the goods to *A* in progress of the delivery of the whole. This is a delivery of the cargo to *A* for the purpose of passing the property in the cargo.

(b) *A* sells to *B* a stack of firewood to be paid for by *B* on delivery. After the sale, *B* applies for and obtains from *A* leave to take away some of the firewood. This has not the legal effect of delivery of the whole.

Sec. 90.—The handing of a delivery order is not sufficient to give possession; a constructive delivery must have the clear effect of putting the goods in the possession of the person entitled. 22 I. C. 952 = 7 Bur. L. T. 93. On this section see also 38 Cal. 127; 8 Bom. 501.

Sec. 91.—As to scope of section and corresponding English law. See 24 Bom. L.R. 1140 = 70 I.C. 138 = 1923 Bom. 125. Where goods are consigned to a Railway company property passes to the consignee under S. 91 and he alone can thereafter sue the Railway Company for loss arising out of the contract of freight. 73 I.C. 537 = 1924 M. 517. Delivery to the Railway Company has the same

effect as delivery to the buyer and passes title. 24 I. C. 423 = (1914) M. W. N. 803. (1 M. H. C. R. 200 Dist.). If the purchaser does not receive the goods sold to him he can claim only interest on the purchase money by way of damages. 38 I. C. 404 = 3 O. L. J. 737. On this section, see also 88 I. C. 910 = 29 C. W. N. 808; 90 I. C. 381; 1925 Mad. 46 = 47 M. L. J. 312; 7 Lah. L. J. 395 = 89 I. C. 751 = 1925 Lah. 555.

Sec. 92.—See 15 Cal. 1. Sec. does not apply to money or currency notes as they are not "goods". 33 Mad. 196. In case of mutual contract, whether the Sec. applies, and whether there is need for demand for delivery of goods, see 8 Lah. 501.

(c) *A* sells 50 maunds of rice to *B*. The rice remains in *A*'s warehouse. After the sale, *B* sells to *C* 10 maunds of the rice, and *A*, at *B*'s desire, sends the 10 maunds to *C*. This has not the legal effect of a delivery of the whole.

93. In the absence of any special promise, the seller of goods is not bound to deliver them until the buyer applies for delivery.

94. In the absence of any special promise as to delivery, goods sold are to be delivered at the place at which they are at the time of the sale; and goods contracted to be sold are to be delivered at the place at which they are at the time of the contract for sale, or, if not then in existence, at the place at which they are produced.

Seller's Lien.

95. Unless a contrary intention appears by the contract, a seller has a lien on sold goods as long as they remain in his possession and the price or any part of it remains unpaid.

96. Where, by the contract, the payment is to be made at a future day, but no time is fixed for the delivery of the goods, the seller has no lien, and the buyer is entitled to a present delivery of the goods without payment. But if the buyer becomes insolvent before delivery of the goods, or if the time appointed for payment arrives before the delivery of the goods, the seller may retain the goods for the price.

"Insolvency" defined.

Explanation.—A person is insolvent who has ceased to pay his debts in the usual course of business, or who is incapable of paying them.

Illustration.

A sells to *B* a quantity of sugar in *A*'s warehouse. It is agreed that three months' credit shall be given. *B* allows the sugar to remain in *A*'s warehouse. Before the expiry of the three months, *B* becomes insolvent. *A* may retain the goods for the price.

Seller's lien where payment to be made at future day, and buyer allows goods to remain in seller's possession.

97. Where, by the contract, the payment is to be made at a future day, and the buyer allows the goods to remain in the possession of the seller until that day and does not then pay for them, the seller may retain the goods for the price.

Illustration.

A sells to *B* a quantity of sugar in *A*'s warehouse. It is agreed that three months' credit shall be given. *B* allows the sugar to remain in *A*'s warehouse till the expiry of the three months, and then does not pay for them. *A* may retain the goods for the price.

Seller's lien against subsequent buyer.

98. A seller in possession of goods sold may retain them for the price against any subsequent buyer, unless the seller has recognized the title of the subsequent buyer.

Stoppage in Transit.

99. A seller who has parted with the possession of the goods, and has not received the whole price, may, if the buyer becomes insolvent, stop the goods while they are in transit to the buyer.

Sec. 93.—See 15 Bom. 1; 7 Lah. 442=94 I. C. 304=A. I. R. 1926 Lah. 318; A. I. R. 1928 Lah. 20 (2).

Sec. 94.—Sec. applies only where contract is silent as to place of delivery. 24 Cal. 8 (P. C.)

Sec. 95.—Unless there is possession there is no lien. 50 B. 360=94 I. C. 824=A. I. R. 1926 P. C. 38=53 I. A. 92=51 M. L. J. 1 (P. C.) Retention of seller's lien does not necessarily imply unconditional appropriation. 86 I. C. 794=1925 Lah. 586.

Sec. 96.—As to effect of insolvency of buyer. See 34 Cal. 289; 5 Bom. L. R. 373. Section not

confined to cases of specific ascertained goods. 27 L. W. 23=54 M. L. J. 116.

Secs. 96 and 97.—See 84 I. C. 912=1925 Mad. 292.

Sec. 98.—Lien is not affected by limitation. Right continues though remedy is barred. 22 Cal. 21. On this Section see also 38 Cal. 127.

Sec. 99.—COMMISSION AGENT buying goods for another can stop goods in transit if the purchaser does not pay for them. He need not prove purchaser's insolvency but only he should show that he was unable to pay or refused to pay. 16

100. Goods are to be deemed in transit while they are in the possession of the

When goods are to be deemed in transit.

carrier, or lodged at any place in the course of transmission to the buyer, and are not yet come into the possession of the buyer or any person on his behalf, otherwise than as being in possession of the carrier, or as being so lodged.

Illustrations.

(a) *B*, living at Madras, orders goods of *A*, at Patna, and directs that they shall be sent to Madras. The goods are sent to Calcutta, and there delivered to *C* a wharfinger, to be forwarded to Madras. The goods, while they are in the possession of *C*, are in transit.

(b) *B*, at Delhi, orders goods of *A*, at Calcutta. *A* consigns and forwards the goods to *B* at Delhi. On arrival there, they are taken to the warehouse of *B*, and left there. *B* refuses to receive them, and immediately afterwards stops payment. The goods are in transit.

(c) *B*, who lives at Poona, orders goods of *A*, at Bombay. *A* sends them to Poona by *C*, a carrier appointed by *B*. The goods arrive at Poona and are placed by *C*, at *B*'s request, in *C*'s warehouse for *B*. The goods are no longer in transit.

(d) *B* a merchant of London, orders 100 bales of cotton of *A*, a merchant at Bombay. *B* sends his own ship to Bombay for the cotton. The transit is at an end when the cotton is delivered on board the ship.

(e) *B*, a merchant of London, orders 100 bales of cotton of *A*, a merchant at Bombay. *B* sends his own ship to Bombay for the cotton. *A* delivers the cotton on board the ship, and takes bills of lading from the master, making the cotton deliverable to *A*'s order or assigns. The cotton arrives at London, but, before coming into *B*'s possession, *B* becomes insolvent. The cotton has not been paid for. *A* may stop the cotton.

101. The sellers' right of stoppage, does not, except in the cases hereinafter

Continuance of right of stoppage.

mentioned, cease on the buyer's reselling the goods while in transit, and receiving the price, but continues until the goods have been delivered to the second buyer, or to some

person on his behalf.

102. The right of stoppage ceases if the buyer, having obtained a bill of lading

Cessation of right on assignment by buyer of bill of lading.

or other document showing title to the goods,¹ assigns it, while the goods are in transit, to a second buyer, who is acting in good faith, and who gives valuable consideration for them.

Illustrations.

(a) *A* sells and consigns certain goods to *B*, and sends him the bill of lading. *A* being still unpaid, *B* becomes insolvent, and, while the goods are in transit, assigns the bill of lading for cash to *C*, who is not aware of his insolvency. *A* cannot stop the goods in transit.

(b) *A* sells and consigns certain goods to *B*. *A* being still unpaid *B* becomes insolvent, and, while the goods are still in transit, assigns the bill of lading for cash to *C*, who knows that *B* is insolvent. The assignment not being in good faith, *A* may still stop the goods in transit.

I. C. 61 = 14 Bom. L. R. 532; see also 45 Cal. 111; 46 Cal. 831. Whether the rights of a seller of goods to stop the goods in transit is a mere equitable right, see 50 Cal. 399 = 27 C.W. N. 231. Origin and nature of the vendor's right of stoppage considered. (*Ibid.*) The term 'Vendor' in S. 102 is to be given a liberal meaning as including a person standing in the position of a vendor. 53 I.C. 986 = 46 Cal. 831; On App. from. 41 I.C. 944 = 45 Cal. 111. See also 34 Bom. 640; 18 Cal. 573 (P. C.); 17 Bom. 92. A broker who contracts as principal with a buyer of goods has a right to enforce the contract and is entitled to sue in respect thereof. 46 C. 831 = 53 I. C. 986. A commission agent buying on his own credit for another is a quasi vendor and has the right of stoppage in transit. 24 I. C. 798 = 7 S. L. R. 163; (1802) 3 East. 93; 16 I. C. 61 (Rel.). The right of stoppage also exists against a sub-buyer. (*Ibid.*) As to accepting bill of exchange for

price, see 3 M. I. A. 422 (P. C.).

Sec. 100.—See 14 Bom. 57; 17 Bom. 62; 14 Bom. L. R. 532. Railway receipt is document of title. 40 Bom. 630 (P. C.) = 31 M. L. J. 541. See also 7 S. L. R. 163; 10 Bur. L. T. 92. Railway receipts are not negotiable by law and are not rendered negotiable by S. 137 of the T. P. Act. Nor was there anything to show that such receipts were negotiable by the mercantile custom of Rangoon. 1 Bur. L. J. 90 = 63 I. C. 694. But see 40 Bom. 630 (P. C.).

Sec. 102.—¹ See S. 108, exception 1, *infra*.

The exceptions mentioned in S. 102 are exhaustive. 24 I. C. 798 = 7 S. L. R. 163. But see also 40 Bom. 630 (P. C.), and the cases cited under S. 103. If railway receipt is not a document of title as bill of lading, see 24 I. C. 798 = 7 S. L. R. 163. But see also 40 Bom. 630 (P. C.), and the cases cited under S. 103. (38 Bom. 255, Dist.; 14 Bom. 57, Foll.)

- 103.** Where a bill of lading or other instrument of title to any goods is assigned by the buyer of such goods by way of pledge, to secure an advance made specifically upon it, in good faith, the seller cannot, except on payment or tender to the pledgee of the advance so made, stop the goods in transit.

Stoppage where bill of lading is pledged to secure specific advance.

Illustrations.

(a) *A* sells and consigns goods to *B* of the value of 12,000 rupees. *B* assigns the bill of lading for these goods to *C*, to secure a specific advance of 5,000 rupees made to him upon the bill of lading by *C*. *B* becomes insolvent, being indebted to *C* to the amount of 9,000 rupees. *A* is not entitled to stop the goods except on payment or tender to *C* of 5,000 rupees.

(b) *A* sells and consigns goods to *B* of the value of 12,000 rupees. *B* assigns the bill of lading for these goods to *C*, to secure the sum of 5,000 rupees due from him to *C*, upon a general balance of account. *B* becomes insolvent. *A* is entitled to stop the goods in transit without payment or tender to *C* of the 5,000 rupees.

- 104.** The seller may effect stoppage in transit either by taking actual possession of the goods, or by giving notice of his claim to the carrier or other depository in whose possession they are.

Stoppage how effected.

- 105.** Such notice may be given, either to the person who has the immediate possession of the goods, or to the principal whose servant has possession. In the latter case, the notice must be given at such a time, and under such circumstances, that the principal, by the exercise of reasonable diligence, may communicate it to his servant in time to prevent a delivery to the buyer.

Notice of seller's claim.

- 106.** Stoppage in transit entitles the seller to hold the goods stopped until the price of the whole of the goods sold is paid.

Right of seller on stoppage.

Illustration.

A sells to *B* 100 bales of cotton; 60 bales having come into *B*'s possession, and 40 being still in transit, *B* becomes insolvent, and *A*, being still unpaid, stops the 40 bales in transit. *A* is entitled to hold the 40 bales until the price of the 100 bales is paid.

Re-sale.

- 107.** Where the buyer of goods fails to perform his part of the contract, either by not taking the goods sold to him, or by not paying for them, the seller, having a lien on the goods, or having stopped them in transit, may, after giving notice to the

Re-sale on buyer's failure to perform.

Sec. 103.—Railway receipts were treated in the Bombay cotton market as proof of the possession and control of the goods therein referred to or as authorizing the holder to receive or transfer the goods. 40 Bom. 630 = 20 C. W. N. 1182 = 31 M. L. J. 541 = 43 I. A. 164 (P. C.). But see 24 I. C. 798 = 7 S. L. R. 163. Where a Railway receipt was assigned by way of pledge to secure an advance made specifically upon it in good faith for the consignee, the seller is not entitled to stop the goods in transit except on payment or tender to the pledgees of the advances made by them. (*Ibid.*) The expression 'instruments of title' means same thing as 'documents showing title' in Ss. 102 and 108 and 'documents of title' in S. 103 the variety of expression being due to inartistic drafting. (*Ibid.*) A Railway receipt being assignable, by endorsement is an instrument of title to the goods under S. 103. (*Ibid.*) Railway receipt providing for delivery of goods only to the consignee or his endorsee is not an instrument of title. 16 I. C. 61 = 14 Bom. L. R. 532.

Sec. 104.—A telegram sent by an unpaid vendor of goods on his becoming insolvent to a Railway Company not to deliver the goods is sufficient notice to effect a stoppage in transit under S. 104 as no particular form of notice is

required. 26 I. C. 424 = 8 S. L. R. 65. See also 17 Bom. 62.

Sec. 107. CONDITIONS OF RE-SALE.—If there is no complete sale, S. 107 does not apply. 56 I. C. 647 = 23 O. C. 67; 1923 Bom. 125; 70 I. C. 843; 66 I. C. 510; 8 Lah. 514. Re-sale can be held only if property in the goods pass to the purchaser. 1925 Lah. 70; 27 Bom. L. R. 1168 = 1925 Bom. 547; 5 Bur. L. J. 198 = 100 I. C. 307 = A. I. R. 1927 Rang. 81; 100 I. C. 795 = A. I. R. 1927 Lah. 209. Re-sale must be within reasonable time. 27 Bom. L. R. 1168 = 1925 Bom. 547; and only after notice to vendee. 84 I. C. 472 = 1925 Oudh 310. The measure of damages for breach of a contract to sell, is the difference between the contract rate and the rate at the date of breach. The buyer who has defaulted is not entitled to the benefit of the subsequent rise in prices in assessment of damages. 43 Cal. 493 = 43 I. A. 6 = 20 C. W. N. 105 = 30 M. L. J. 73 (P. C.); 10 I. C. 895; 65 I. C. 263; 27 I. C. 373. See also 8 Lah. 514; 100 I. C. 795 = A. I. R. 1927 Lah. 269. This section applies only where notice has been given by the seller to the buyer of his intention to re-sell after the lapse of a reasonable time. 65 I. C. 263. In notice of re-sale exact date of re-sale need not be mentioned. (1927) M. W. N. 549 =

buyer of his intention to do so, re-sell them, after the lapse of a reasonable time, and the buyer must bear any loss, but is not entitled to any profit which may occur on such re-sale.

Title.

108. No seller can give to the buyer of goods a better title to those goods than he has himself, except in the following cases :—

Title conveyed by seller of goods to buyer.

105 I. C. 613 = A. I. R. 1927 Mad. 880. In mercantile contracts time is essence of contract. 1923 Lah. 138. There can be no right of re-sale if the property in the goods has not passed to the buyer. 24 Cal. 124; 25 Cal. 504; 24 Cal. 177; 23 Mad. 18; 39 Cal. 569; 1924 Lah. 319; 8 Lah. 514. Where a right of re-sale is given by the contract between the parties, it is not necessary that the property in the goods should pass to the purchaser to enable the seller to re-sell the goods and claim the difference. 72 I. C. 772 = 1924 Lah. 319. See also A. I. R. 1927 Rang. 81.

REASONABLE TIME.—The right of re-sale can be exercised only after the lapse of a reasonable time and it cannot be exercised before the last date up to which delivery would have been taken by the buyer. 95 I. C. 188 = A. I. R. 1926 Nag. 410. If the goods have been re-sold by the vendor within a reasonable time after the breach of contract by the purchaser, the measure of the damages will be the difference between price agreed to be given and the price realized on the re-sale, with the costs and expenses of the re-sale. 72 I. C. 772 = 1924 Lah. 319. Not only is vendor bound to wait for a reasonable time after giving notice of re-sale, but he is also bound to exercise his right of re-sale within a reasonable time after the date of the breach. 100 I. C. 795 = A. I. R. 1927 Lah. 269. Plea of delay in re-sale, not taken in pleadings whether can be raised in appeal. See 8 Lah. 501. Rights of unpaid seller to re-sell goods at purchaser's risk—Rescission of contract—English and Indian Law. 3 Lah. 296 = 67 I. C. 228. In a suit for damages for breach of contract to buy goods, the plaintiff can only recover the difference between the contract price and the market price at the date of the breach. 56 I. C. 647 = 23 O. C. 67. If the seller exercises his right of re-sale he rescinds the contract sale, the property revests in himself and he sells it as owner. A seller of goods who gives notice of re-sale and makes an invalid re-sale can recover damages for breach of contract from the defaulting buyer. The measure of damages in such a case is the market value on the date of the breach *minus* the value obtained on re-sale. 9 Bur. L. T. 209 = 36 I. C. 252. The seller can revoke his notice of re-sale. (*Ibid.*) If the buyer pays the contract price and re-sale expense before re-sale is effected, or within a reasonable time after revocation of the notice the seller must deliver the goods to the buyer. (*Ibid.*) After the re-sale the defaulting purchaser has no right, under the original contract, and he cannot claim the goods upon payment of the contract price. (*Ibid.*) (15 B. L. R. 26; 24 Cal. 124; 24 Cal. 172 = 39 Cal. 568, Foll.) The re-sale must be fairly conducted, otherwise the purchaser can recover damages as would put him in the same position as if the re-sale had been properly held and proper price obtained. (*Ibid.*) Where a seller putting up the property for

sale does not advertise such sale in the locality and the price is inadequate in consequence the buyer is not responsible for the difference between the contract price and the inadequate price realised at such sale. 35 I. C. 373 = 10 Bur. L. T. 35. The words of S. 107 are permissive and not compulsory. An unpaid vendor who gives notice of his intention to pursue the course set out in S. 107 is not bound to carry out such intention and can change his mind if he likes. 25 I. C. 799 = 7 L. B. R. 252. In a C. I. F. contract, it is essential for the plaintiff to prove that he has performed his part by delivery or tender of the documents. 100 I. C. 567 = A. I. R. 1927 Lah. 223. The original vendee in such cases is entitled to the benefit of higher prices realized by the vendor in mitigation of the sum payable by him as damages. (*Ibid.*) Re-selling brokerage and commission for goods not actually re-sold cannot be allowed as they are unreasonable and not justified by S. 74, being imaginary and fictitious. 29 I. C. 933 = 9 S. L. R. 20.

See 108.—Document of title to goods includes Railway receipt. 40 Bom. 630 = 20 C. W. N. 1182 = 31 M. L. J. 541 = 43 I. A. 164 (P. C.). See also under S. 102. Mate's receipt is not to be regarded to be a negotiable security nor a bill of lading nor a document of title, and no practice of general application among merchants existed by which such a receipt was regarded as negotiable in the ordinary course of business. 41 Cal. 670 = 18 C. W. N. 457 = 22 I. C. 311 (P. C.). Share certificate allowed to be with broker—Transfer by latter—Estoppel of owner. 23 Bom. L. R. 1144 = 46 Bom. 489. See also 46 Cal. 342 = 22 C. W. N. 1042 (Transfer by pledge); 50 Bom. 229 = 96 I. C. 30 = A. I. R. 1926 Bom. 338. A Railway receipt is a mercantile document of title and an endorsee thereof can maintain a suit for the loss of the goods covered by it. 25 I. C. 380 = 38 Bom. 659. "Possession" in Excep. 1 to S. 108 does not apply to qualified possession such as that of hire of goods or where the possession is different from mere possession for specific purpose. A pledgee's possession is not such as would entitle him to deal with the goods in fraud of the rights of the owner. 46 Cal. 342 = 22 C. W. N. 1042. Share certificates, if "goods" and transferable by negotiation. See 48 I. C. 966 = 46 Cal. 331; the expression "goods" in S. 108 of the Contract Act includes all moveable property. (*Ibid.*) See also 10 I. C. 359 = 38 Cal. 127 (Delivery order). Where a gratuitous bailment of jewels for a specific purpose is made and the pledgee sells them to a *bona fide* purchaser for value without notice, the latter does not acquire a good title to the jewels as against the real owner. 42 M. L. J. 32 = 45 M. 173. The word "possession" in S. 178 is used in the same sense as in S. 108 and neither of the sections applies where the possession is qualified or for a specific purpose. (*Ibid.*) A *bona fide* purchaser of hypothecated goods from

Exception 1.—When any person is, by the consent of the owner, in possession of any goods, or of any bill of lading, dock-warrant, warehouse-keeper's certificate, wharfinger's certificate or warrant or order for delivery, or other document showing title to goods, he may transfer the ownership of the goods of which he is so in possession, or to which such documents relate, to any other person, and give such person a good title thereto, notwithstanding any instructions of the owner to the contrary : Provided that the buyer acts in good faith, and under circumstances which are not such as to raise a reasonable presumption that the person in possession of the goods or documents has no right to sell the goods.

Exception 2.—If one of several joint-owners of goods has the sole possession of them by the permission of the co-owners, the ownership of the goods is transferred to any person who buys them of such joint-owner in good faith, and under circumstances which are not such as to raise a reasonable presumption that the person in possession of the goods has no right to sell them.

Exception 3.—When a person has obtained possession of goods under a contract voidable at the option of the other party thereto, the ownership of the goods is transferred to a third person who, before the contract is rescinded, buys them in good faith of the person in possession ; unless the circumstances which render the contract voidable amounted to an offence committed by the person in possession or those whom he represents.

In the case the original seller is entitled to compensation from the original purchaser for any loss which the seller may have sustained by being prevented from rescinding the contract.

Illustrations.

(a) *A* buys from *B*, in good faith, a cow which *B* had stolen from *C*. The property in the cow is not transferred to *A*.

(b) *A*, a merchant, entrusts *B*, his agent, with a bill of lading relating to certain goods, and instructs *B* not to sell the goods for less than a certain price, and not to give credit to *D*. *B* sells the goods to *D* for less than that price, and gives *D* three months' credit. The property in the goods passes to *D*.

(c) *A* sells to *B* goods of which he has the bill of lading, but the bill of lading is made out for delivery of the goods to *C*, and it has not been endorsed by *C*. The property is not transferred to *B*.

(d) *A*, *B* and *C* are joint Hindu brothers, who own certain cattle in common. *A* is left by *B* and *C* in possession of a cow, which he sells to *D*. *D* purchases *bona fide*. The property in the cow is transferred to *D*.

(e) *A*, by a misrepresentation not amounting to cheating, induces *B* to sell and deliver to him a horse. *A* sells the horse to *C* before *B* has rescinded the contract. The property in the horse is

the hypothecator without notice of the incumbrance, takes the goods free of it. 42 Mad. 59 = 35 M. L. J. 450. Ss. 108 and 178 apply only where the intermediate possessor is entitled to a legal dominion over the property and not where he has mere custody thereof. 38 Mad. 783 = 23 I. C. 174 (12 B. L. R. 42 ; 24 Bom. 458 = 27 Mad. 424, foll.). Mere *bona fides* of the purchaser or pledgee is not enough ; he will have to prove that by some act or omission the true owner has forfeited his right to recover back his possession. (*Ibid.*) 1 Bur. L. J. 164 = 1923 Rang. 98 (1) A document showing title to goods represents the goods to which it relates and the law governing its transferability is the same as that for the goods themselves as contained in Ss. 101 and 178. 40 I. C. 86 = 10 Bur. L. T. 92. See also 42 I. C. 829 = 11 S. L. R. 56. The test whether document is a 'Document of title' or a 'document showing title' is whether the document is used in the ordinary course of business as proof of possession or control of the goods or as authorizing by endorsement or delivery the possessor of the document to transfer or receive the goods. 40 I. C. 86 = 10 Bur. L. T. 92. See also 42 I. C. 829 = 11 S. L. R. 56. Endorser of delivery order gives an implied

warranty of title. (*Ibid.*) Exception to the section does not apply to cases of qualified possession, e.g., an owner under a hire purchaser agreement. 40 I. C. 888 = 54 P. R. 1919 ; 67 I. C. 638 = 3 Lah. L. J. 249 ; 53 I. C. 50. But see 59 I. C. 965. Where paddy is entrusted to a miller for milling, his possession being a qualified one is not protected by the Excep. (1). 55 I. C. 239 = 12 Bur. L. T. 184.

Sec. 108, Excep. (1).—A mate's receipt is not a document showing title to goods within Excep. (1). 55 I. C. 239 = 12 Bur. L. T. 184 (44 Cal. 670 = 40 Bom. 630, Ref.). An honest purchase made carelessly without making proper enquiries is not made in good faith and does not convey any title. 12 I. C. 809 = 4 Bur. L. T. 128. See also 86 I. C. 908 = 1924 Rang. 379.

MORTGAGE OF STOCK-IN-TRADE.—Mortgagor in possession transferring it to *bona fide* purchaser without notice of mortgage—Mortgagee cannot have any lien over the goods on the principle of this section. 6 Bur. L. J. 238 = 5 R. 633 (42 Mad. 59, Rel. on).

Excep. (2).—As to application of excep. (2) to Hindu joint family, see 11 B. L. R. 198.

transferred to *C*; and *B* is entitled to compensation from *A* for any loss which *B* has sustained by being prevented from rescinding the contract.

(*f*) *A* compels by a wrongful intimidation, or induces him by cheating or forgery, to sell him a horse, and before *B* rescinds the contract, sells the horse to *C*. The property is not transferred to *C*.

Warranty.

109. If the buyer, or any person claiming under him, is, by reason of the invalidity of the seller's title, deprived of the thing sold, the seller is responsible to the buyer, or the person claiming under him, for loss caused thereby, unless a contrary intention appears by the contract.

Seller's responsibility for badness of title.

Establishment of implied warranty of goodness or quality.

Warranty of soundness implied on sale of provisions.

Warranty of bulk implied on sale of goods by sample.

110. An implied warranty of goodness or quality may be established by the custom of any particular trade.

111. On the sale of provisions, there is an implied warranty that they are sound.

112. On the sale of goods by sample, there is an implied warranty that the bulk is equal in quality to the sample.

113. Where goods are sold as being of a certain denomination, there is an implied warranty that they are such goods as are commercially known by that denomination, although the buyer may have bought them by sample, or after inspection of the bulk.

Warranty implied where goods are sold as being of a certain denomination.

Explanation.—But if the contract specifically states that the goods, though sold as of a certain denomination, are not warranted to be of that denomination, there is no implied warranty.

Illustrations.

(*a*) *A*, at Calcutta, sells to *B* twelve bags of "waste silk," then on its way from Murshedabad to Calcutta. There is an implied warranty by *A* that the silk shall be such as is known in the market under the denomination of "waste silk."

(*b*) *A* buys, by sample and after having inspected the bulk, 100 bales of "Fair Bengal" cotton. The cotton proves not to be such as is known in the market as "Fair" Bengal: there is a breach of warranty.

114. Where goods have been ordered for a specified purpose, for which goods of the denomination mentioned in the order are usually sold, there is an implied warranty by the seller that the goods supplied are fit for that purpose.

Warranty where goods ordered for a specified purpose.

Sec. 109.—A warranty by the seller that the horse sold is sound is not waived by the purchaser obtaining a veterinary doctor's certificate as to the soundness of the horse. 14 I. C. 135=9 A. L. J. 285. As to warranty on execution sales, see 3 Cal. 806. As to implied warranty of title, see also 29 C. W. N. 537=1924 P. C. 143; 86 I. C. 1020=1925 Lah. 366.

Secs. 112 and 113.—To recover special damages for a breach of warranty in a re-sale the buyer should not have been negligent in failing to detect the inferiority of the goods before he re-sells or deals with them. 59 I. C. 424=16 P. W. R. 1921. On this section, see also 12 Bom. 50; 6 C. W. N. 495.

Sec. 113.—Sale of goods—Implied warranty of fitness—Railway sleepers—Goods to be passed by vendor's agent—Damages—Right of buyer. 34 Mad. 453=38 I. A. 169=15 C. W. N. 981=21 M. L. J. 1110 (P. C.). A buyer can refuse to take delivery of goods when they do not correspond to the description in the contract and is not liable for damages to the vendor arising from the breach. 55 I. C. 209. The effect of S. 113 is that when there is no express warranty in the sale of goods, there is an implied warranty of

merchantability. The question whether goods are "merchantable" in law is a question of mixed fact and law. 43 M. L. J. 208=16 L. W. 145=69 I. C. 396. Where goods are sold by description there is an implied warranty that the goods shall be of merchantable quality. 35 M. L. J. 180=47 I. C. 555. This is so even when the purchase is after inspection but if the buyer has examined the goods there is no implied warranty as to defects which such examination would have revealed. (*Ibid.*) See also 54 I. C. 315. This section does not apply to a sale of specific goods which were before the parties at the time of the negotiation. 57 I. C. 481=7 O. L. J. 312. A commission agent, buying goods differs from the ordinary seller in that instead of getting a profit on the price he gets a payment by way of commission. In other respects he is on the same footing as regards the buyer. This section applies and there is an implied warranty that the goods supplied are of a certain denomination. 25 I. C. 927=7 L. B. R. 110.

Sec. 114.—Implied contract as to warranty—*Caveat emptor*—English and Indian Law. 25 Bom. L. R. 778=77 I. C. 150.

Illustration.

B orders of *A*, a copper manufacturer, copper for sheathing a vessel. *A*, on this order, supplies copper. There is an implied warranty that the copper is fit for sheathing a vessel.

Warranty on sale of articles of well-known ascertained kind.

115. Upon the sale of an article of a well-known ascertained kind, there is no implied warranty of its fitness for any particular purpose.

Illustration.

B writes to *A*, the owner of a patent invention for cleaning cotton—"Send me your patent cotton-cleaning machine to clean the cotton at my factory." *A* sends the machine according to order. There is an implied warranty by *A* that it is the article known as *A's* patent cotton-cleaning machine, but none that it is fit for the particular purpose of cleaning the cotton at *B's* factory.

116. In the absence of fraud and of any express warranty of quality, the seller of an article which answers the description under which it was sold is not responsible for a latent defect in it.

Seller when not responsible for latent defect.

Illustration.

A sells to *B* a horse. It turns out that the horse had, at the time of the sale, a defect of which *A* was unaware. *A* is not responsible for this.

117. Where a specific article sold with a warranty has been delivered and accepted, and the warranty is broken, the sale is not thereby rendered voidable, but the buyer is entitled to compensation from the seller for loss caused by the breach of warranty.

Buyer's right on breach of warranty.

Illustration.

A sells and delivers to *B* a horse warranted sound. The horse proves to have been unsound at the time of sale. The sale is not thereby rendered voidable, but *B* is entitled to compensation from *A* for loss caused by the unsoundness.

118. Where there has been a contract, with a warranty, for the sale of goods which, at the time of the contract, were not ascertained or not in existence, and the warranty is broken, the buyer may—

Right of buyer on breach of warranty in respect of goods not ascertained.

accept the goods or refuse to accept the goods when tendered, or keep the goods for a time reasonably sufficient for examining and trying them, and then refuse to accept them; provided that during such time he exercises no other act of ownership over them than is necessary for the purpose of examination and trial.

Sec. 116.—The words 'latent defects' mean a defect which is not obvious to the eye and is not apparently noticeable. Section applies to a case of sale by sample. 43 C. L. J. 126=94 I. C. 873=A.I.R. 1926 Cal. 749.

Sec. 118.—It is not the duty of the purchaser who refuses to take delivery to return the goods to the seller from the place of delivery at his cost. 35 All. 325=19 I.C. 254. See also 1925 Mad. 221. The question of acceptance does not arise when the property in the goods has passed to the buyer. 70 I. C. 877=24 Bom. L. R. 991=1923 Bom. 92. The liability of the seller ceases with the transmission of the delivery order, on receipt of which the buyer should, under the terms of the contract for sale, clear the goods, and from that date the seller can claim interest and godown rent. The seller's holding of the goods for the buyer is as effective as physical delivery to the buyer. 41 Bom. 518=37 I. C. 271. Exchange—Time as of the essence of contract—Consent decree. 36 I. C. 598=18 Bom. L. R. 803. When the goods are delivered to the vendees the onus is upon them to prove that they had in fact rejected them as of inferior quality within a reasonable time. 34 I.C.

290=23 C.L.J. 415. Where the goods are sold and delivered to a buyer the buyer can have the goods in his custody for a reasonable time to examine them and see whether they comply with the warranty. At the same time, the buyer loses his right to reject the goods by any act amounting to acceptance. Mere receipt of goods is no acceptance. 65 I. C. 464=1922 Lah. 127 (23 C. L. J. 415). See also 35 All. 370. What is reasonable time is purely a question of fact and has to be decided on the circumstances of each case. A period of 18 days was held not to be a reasonable time in the case of cotton goods. 65 I. C. 464=1922 Lah. 127. Where the purchasers complain that all purchases are not of the stipulated quality, they have no right to ask for sample before taking delivery but they should take delivery and then make their claim. 21 I. C. 573=(1913) M.W.N. 895. Taking delivery of goods for sale to avoid further loss does not affect the question of acceptance. 14 I. C. 248. Sale of goods—Breach of warranty—Surveyor's report—Binding on seller—Trade usage. 49 I. C. 49=12 S.L.R. 78.

In any case the buyer is entitled to compensation from the seller for any loss caused by the breach of warranty ; but, if he accepts the goods and intends to claim compensation, he must give notice of his intention to do so within a reasonable time after discovering the breach of the warranty.

Illustrations.

(a) *A* agrees to sell and, without application on *B*'s part, deliver to *B* 200 bales of unascertained cotton by sample. Cotton not in accordance with sample is delivered to *B*. *B* may return it if he has not kept it longer than a reasonable time for the purpose of examination.

(b) *B* agrees to buy of *A* twenty-five sacks of flour by sample. The flour is delivered to *B*, who pays the price. *B*, upon examination, finds it not equal to sample ; *B* afterwards uses two sacks, and sells one. He cannot now rescind the contract and recover the price, but he is entitled to compensation from *A* for any loss caused by the breach of warranty.

(c) *B* makes two pairs of shoes for *A* by *A*'s order. When the shoes are delivered they do not fit *A*. *A* keeps both pairs for a day. He wears one pair for a short time in the house, and takes a long walk out of doors in the other pair. He may refuse to accept the first pair, but not the second. But he may recover compensation for any loss sustained by the defect of the second pair.

Miscellaneous.

119. When the seller sends to the buyer goods not ordered with goods ordered, the buyer may refuse to accept any of the goods so sent, if there is risk or trouble in separating the goods ordered from the goods not ordered.

When buyer may refuse to accept, if goods not ordered are sent with goods ordered.

Illustration.

A orders of *B* specific articles of China. *B* sends these articles to *A* in a hamper, with other articles of China which had not been ordered. *A* may refuse to accept any of the goods sent.

Effect of wrongful refusal to accept.

120. If a buyer wrongfully refuses to accept the goods sold to him, this amounts to a breach of the contract of sale.

Right of seller as to rescission on failure of buyer to pay price at time fixed.

121. When goods sold have been delivered to the buyer, the seller is not entitled to rescind the contract on the buyer's failing to pay the price at the time fixed unless it was stipulated by the contract that he should be so entitled.

Sale and transfer of lots sold by auction.

122. Where goods are sold by auction, there is a distinct and separate sale of the goods in each lot, by which the ownership thereof is transferred as each lot is knocked down.

Effect of use by seller of pretended biddings to raise price.

123. If, at a sale by auction, the seller makes use of pretended biddings to raise the price, the sale is voidable at the option of the buyer.

CHAPTER VIII.

OF INDEMNITY AND GUARANTEE.

124. A contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person, is called a "contract of indemnity."

"Contract of indemnity" defined.

Sec. 119.—When a larger supply than was actually ordered is consigned, the person who has ordered the goods cannot refuse the consignment *in toto* when the goods actually ordered is severable from the rest without risk or trouble. 5 L. W. 149 = 37 I.C. 792. A consignee has got the right to reject the goods when more than what was ordered is sent. That the consignor's agent subsequently offered to reduce the consignment cannot affect the legal position of parties. 74 I. C. 923 = 1924 A. 53. See also (1927) M.W.N. 549. Vendor sending more goods than contracted for—Acceptance by purchaser—Breach of contract—Measure of damages. See (1927) M.W.N. 549 = 105 I.C. 613 = A.I.R. 1927 Mad. 880.

Sec. 120.—Wrongful refusal by the purchaser

to accept the goods sold to him amounts to a breach of contract. 19 I. C. 93 = 80 P. R. 1913. See 34 Bom. 92 ; 36 Cal. 736.

Sec. 121.—The stipulation referred to must be an express stipulation and Rule (c) of the Bombay Stock Exchange cannot be read as such. 50 Bom. 360 = 53 I. A. 92 = 51 M. L. J. 1 = A. I. R. 1926 P. C. 38 (P. C.).

Sec. 122.—See 16 Cal. 702 ; 14 Mad. 225.

Sec. 123.—A sale is voidable at the instance of the buyer under S. 123 by reason of puffers being employed to raise the price by fictitious bids. 3 P.W. R. 1916 = 31 I.C. 689.

Sec. 124.—Distinction between contract of indemnity and guarantee—Unlike the case of a contract of guarantee, there is no direct right of

Illustration.

A contracts to indemnify B against the consequences of any proceedings which C may take against B in respect of a certain sum of 200 rupees. This is a contract of indemnity.

125. The promisee in a contract of indemnity, acting within the scope of his authority, is entitled to recover from the promisor—

(1) all damages which he may be compelled to pay in any suit in respect of any matter to which the promise to indemnify applies ;

(2) all costs which he may be compelled to pay in any such suit if, in bringing or defending it, he did not contravene the orders of the promisor, and acted as it would have been prudent for him to act in the absence of any contract of indemnity, or if the promisor authorized him to bring or defend the suit ;

(3) all sums which he may have paid under the terms of any compromise of any such suit, if the compromise was not contrary to the orders of the promisor, and was one which it would have been prudent for the promisee to make in the absence of any contract of indemnity, or if the promisor authorized him to compromise the suit.

126. A "contract of guarantee" is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the "surety" ; the person in respect of whose default the guarantee is given is called the "principal debtor", and the

"Contract of guarantee,"
"surety," "principal debtor,"
and "creditor."

action on the original contract to the person who indemnifies, against the person whose conduct has caused loss—He can sue only in the name of the promisee. 49 Mad. 156=95 I. C. 154=A. I. R. 1926 Mad. 544. Covenant against loss—Breach—Suit for damages when person indemnified had not paid money. 41 All. 395=51 I. C. 158. Contract of indemnity—Decree against defendant—Third party notice—Claim should be confined only to amount decreed. 59 I. C. 16. As to indemnifying surety, *see also* 63 I. C. 108. It is not necessary that actual damage should be caused before the party affected can sue on it. '92 I. C. 715=A. I. R. 1926 Mad. 597. Where the vendor contracts to indemnify the vendee against the costs of litigation, the vendee can claim pleader's fees unless they are unreasonable. 43 Mad. 898=39 M. L. J. 316. When an assignee of a debt whom the assignor had agreed to indemnify against loss sues on the debt and his suit is dismissed after a fair trial, he is entitled to be indemnified. (1917) M. W. N. 868. A stipulation in a contract of sale to discharge an existing encumbrance on the property sold, is in the nature of an indemnity. 38 I. C. 188=5 L. W. 228. Forbearance to sue principal at the surety's request is sufficient consideration for promise by a surety to pay the amount himself. 12 I. C. 126=(1911) 2 M. W. N. 145. Suretyship and indemnity—Distinction. 3 Pat. L. J. 396=46 I. C. 27.

Sec. 125.—Suit for damages lies for breach of contract of indemnity for loss of possession when the title is impaired and not necessarily when possession is actually lost. 31 M. L. J. 556=35 I. C. 789. Suit by surety on a contract of indemnity before he has paid the money is premature. 50 I. C. 611=15 N. L. R. 78. "Payment" means payment in money or its equivalent and not by the execution of a fresh bond. (*Ibid.*) Where on a sale of land a portion of the purchase-money is left with the vendee to pay certain debts of the vendor and the vendee also agreed to compensate the vendor in case of his default in paying the

amounts, the vendor can sue the vendee on a breach of the covenant without proof of actual loss sustained by him (vendor) by such breach. 35 M. L. J. 692=49 I. C. 313. The amount recoverable is the amount which has been paid whether under a consented decree or under *bona fide* compromise. 50 I. C. 611=15 N. L. R. 78. Decree against promisee—If can be impeached by promisor—Recovery of costs. 22 N. L. R. 49=A. I. R. 1926 Nag. 109. As to liability of surety, *see also* 7 B. 76 ; 6 B. H. C. R. 241, 30 Mad. 235, 88 I. C. 699 ; non-liability for time-barred debt. 19 Bom. 697. Limitation against surety. *See* 44 Cal. 978. *See also* 34 All. 429=14 I. C. 245.

Sec. 126.—S. 126 makes no difference between an oral and written guarantee, the former being as equally binding as the latter. 42 All. 70=52 I. C. 684. Where a surety has paid off the whole debt, he is entitled to stand in the place of the creditor who has been so paid off and is entitled to the benefit of every security which the creditor had against the debtor at the time when the suretyship contract was entered into. (*Ibid.*) Mere recommendation does not constitute guarantee. A. I. R. 1927 Mad. 620.

Secs. 126 and 128.—"Liability" under Ss. 126 and 128 means a liability enforceable at law and if such liability does not exist there cannot be a contract of guarantee. 42 Bom. 444=46 I. C. 122. A payment by principal is not binding on the surety. 44 Cal. 978=21 C. W. N. 482. S. 128 is directed to defining the liability of a surety upon the terms of guarantee, not intended to affect the statute of limitation. 44 Cal. 978, *supra*. Applicability of section to surety under S. 145, Cr. P. C. 29 I. C. 149=19 C. W. N. 961. There need not be privity between a principal debtor and a surety. All debtors whose debt the surety promises to pay are his principal debtors though they are not the objects of his benevolent intention. 40 M. L. J. 529=62 I. C. 706=(1921) M. W. N. 334.

person to whom the guarantee is given is called the "creditor." A guarantee may be either oral or written.

127. Anything done, or any promise made, for the benefit of the principal debtor may be a sufficient consideration to the surety for giving the guarantee.

Consideration for guarantee.

Illustrations.

(a) *B* requests *A* to sell and deliver to him goods on credit. *A* agrees to do so, provided *C* will guarantee the payment of the price of the goods. *C* promises to guarantee the payment in consideration of *A*'s promise to deliver the goods. This is a sufficient consideration for *C*'s promise.

(b) *A* sells and delivers goods to *B*. *C* afterwards requests *A* to forbear to sue *B* for the debt for a year, and promises that if he does so, *C* will pay for them in default of payment by *B*. *A* agrees to forbear as requested. This is a sufficient consideration for *C*'s promise.

(c) *A* sells and delivers goods to *B*. *C* afterwards, without consideration, agrees to pay for them in default of *B*. The agreement is void.

Surety's liability.

128. The liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract.

Illustration.

A guarantees to *B* the payment of a bill of exchange by *C*, the acceptor. The bill is dishonoured by *C*. *A* is liable not only for the amount of the bill but also for any interest and charges which may have become due on it.

"Continuing guarantee."

129. A guarantee which extends to a series of transactions is called a "continuing guarantee."

Illustrations.

(a) *A* in consideration that *B* will employ *C* in collecting the rent of *B*'s zamindari, promises *B* to be responsible, to the amount of 5,000 rupees, for the due collection and payment by *C* of those rents. This is a continuing guarantee.

Sec. 127.—A mere recommendation by one person to another to lend money to a third person does not render the first person, a surety or liable for the loan, if given. 24 M. L. J. 249 = 25 I. C. 726 (20 Bom. 755, foll.; 24 W.R. 445 Dist.). See also 97 I.C. 866. As to what is good consideration for surety for giving guarantee, and as how surety is discharged, see 23 C.W.N. 545 = 50 I.C. 651 (P.C.). A contract of guarantee cannot be enforced unless there was some consideration for the guarantee. 33 I. C. 723. On this section, see also 31 Cal. 242; 1 All. 487.

Sec. 128.—Principal and surety—Liability of—Limitation for suit against surety—Starting point. 53 I. C. 999. Surety must pay interest until satisfaction. 9 S.L.R. 237 = 1925 Sind 164. This section does not refer to the nature of the principal's obligation but only to the extent of the surety's liability. 2 Lah. 204 = 22 Cr. L. J. 662 = 63 I.C. 454 = 3 U.P.L.R. (L.) 77. Surety's liability can be limited by special contract or made contingent upon some event other than the principal debtor. 95 I. C. 707 (2) = A.I.R. 1926 Nag. 449. A creditor may sue the surety though he does not sue the insolvent principal debtor. In a suit by the creditor against the surety, principal debtor need not be a party. 50 I. C. 312. A suit may be maintained against the surety though the principal has not been sued. 48 I. C. 424 = 91 P. R. 1918. When, on appeal by the principal debtor only, against, a decree both against him and surety, the decree is reversed the surety is not thereby discharged from his liability. 14 P. W. R. 1911 = 9 I. C. 742. (5 Bom. 547 and 12 Cal. 330, foll.) The liability of a surety is co-extensive with that of the principal debtor and the liability ceases when the principal's debt has been extinguished by the merger of the estate of the creditor and the debtor. 44 M. L. J. 171 = 72 I.C. 194 = 1923 M. 340. Where the cause of action is separate, the liability of the surety is

also separate with respect to each of the promissory notes, although he became surety for the consolidated amount. 40 I. C. 347 = 5 L.W. 721. A creditor can proceed against the surety and compel him to pay, before exhausting his remedies against the principal debtor. 37 I.C. 401 = 5 L.W. 161. (19 Bom. 578, dist.). Where a surety promised to make good any discrepancies of the principal debtor in his dealings with *A* to the extent of Rs. 1,000 and wrote a letter subsequently to entrust the principal debtor with further business referring to the guarantee already given his liability does not thereby become unlimited. 21 I. C. 322 = 14 M.L.T. 249. A surety becomes liable only on the contract of suretyship and not by the mere fact of the loan. He is liable for each loan as soon as it is made. 9 I.C. 204 = 21 M.L.J. 457. Where the contract is invalid for want of registration but only the equities arising in favour of the parties out of the subsequent acts of the parties can be enforced under the doctrine of part performance, the liability of the surety under the contract cannot be enforced. 95 I.C. 824 = A.I.R. 1926 Nag. 466. Under this section the death of the principal debtor does not discharge the surety from his obligation. 69 I. C. 557 = 1923 Lah. 145. Surety—Rights and liabilities of. See 27 I. C. 309 = 8 S. L. R. 112.

Sec. 129.—Continuing guarantee must refer to a series of transactions some of which were unknown at the time. 1925 Nag. 7 = 22 N. L. R. 158. License to sell liquor for 3 years granted on the faith of the guarantee—It was not a continuing guarantee. 96 I. C. 248 = 28 Bom. L. R. 662 = A. I. R. 1926 Bom. 465. A security contained the following clause "our heirs and legal representatives shall be bound by the terms of this surety bond in the same way in which we are bound by them". Held, that it amounted to a continuing guarantee. 53 Cal. 154.

(b) *A* guarantees payment to *B*, a tea-dealer to the amount of £100, for any tea he may from time to time supply to *C*. *B* supplies *C*, with tea to above the value of £100, and *C* pays *B* for it. Afterwards *B* supplies *C* with tea to the value of £200. *C* fails to pay. The guarantee given by *A* was a continuing guarantee, and he is accordingly liable to *B* to the extent of £100.

(c) *A* guarantees payment to *B* of the price of five sacks of flour to be delivered by *B* to *C* and to be paid for in a month. *B* delivers five sacks to *C*. *C* pays for them. Afterwards *B* delivers four sacks to *C*, which *C* does not pay for. The guarantee given by *A* was not a continuing guarantee, and accordingly he is not liable for the price of the four sacks.

130. A continuing guarantee may at any time be revoked by the surety, as to future transactions, by notice to the creditor.

Illustrations.

(a) *A*, in consideration of *B*'s discounting, at *A*'s request, bills of exchange for *C*, guarantees to *B*, for twelve months, the due payment of all such bills to the extent of 5,000 rupees. *B* discounts bills for *C* to the extent of 2,000 rupees. Afterwards, at the end of three months, *A* revokes the guarantee. This revocation discharges *A* from all liability to *B* for any subsequent discount. But *A* is liable to *B* for the 2,000 rupees, on default of *C*.

(b) *A* guarantees to *B*, to the extent of 10,000 rupees, that *C* shall pay all the bills that *B* shall draw upon him. *B* draws upon *C*. *C* accepts the bill. *A* gives notice of revocation. *C* dishonours the bill at maturity. *A* is liable upon his guarantee.

Revocation of continuing guarantee by surety's death.

131. The death of the surety operates, in the absence of any contract to the contrary, as a revocation of a continuing guarantee, so far as regards future transactions.

132. Where two persons contract with a third person to undertake a certain liability, and also contract with each other that one of them shall be liable only on the default of the other, the third person not being a party to such contract, the liability of each of such two persons to the third person under the first contract is not affected by the existence of the second contract, although such third person may have been aware of its existence.

Illustration.

A and *B* make a joint and several promissory note to *C*. *A* makes it, in fact, as surety for *B*, and *C* knows this at the time when the note is made. The fact that *A*, to the knowledge of *C*, made the note as surety for *B*, is no answer to a suit by *C* against *A* upon the note.

133. Any variance, made without the surety's consent, in the terms of the contract between the principal [debtor]¹ and the creditors, discharges the surety as to transactions subsequent to the variance.

Discharge of surety by variance in terms of contract.

Sec. 130.—A continuing guarantee enables surety to withdraw as to future transactions but a guarantee covering definite case does not enable a surety to nullify the security by withdrawal by means of a mere notice to creditor. 37 I.C. 919. It is not competent to the surety for a receiver appointed by Court, to discharge himself merely by notice to the decree-holder or other person at whose instance or for whose benefit the receiver was appointed. 30 C. W. N. 266=(1026) M.W.N. 493=A. I. R. 1926 P.C. 32 (P.C.). Creditor is not bound to exhaust his remedies against the principal debtor before proceeding against the surety. See 59 I.C. 312. A surety under O. 41, R. 6, C.P.C., is not a continuing guarantee within S. 130. 32 I. C. 807. Where the surety deposited certain securities as security for faithful discharge of duty by his son, his death does not determine the guarantee. 42 I.C. 900. This section does not apply to special contract of suretyship by surety to administration bond, irrespective of the grant of Letters of Administration. 36 I. C. 100=10 Bur. L. T. 237. Surety to administration bind discharge of. See 5 Mys. L. J. 105.

Sec. 131.—(Continuing guarantee—Does not terminate on death of guarantor. 43 All. 132-61 I.C. 138; 47 I. A. 164 (P.C.); 55 Cal. 154.

Sec. 132.—See 3 Cal. 184 (Liability of acceptor and drawer of bill of exchange).

Sec. 133.—¹ The word "debtor" was inserted by Act XXIV of 1917.

Secs. 133 and 135.—Discharge of surety—Revocation of contract. 58 I. C. 272=22 Bom. L. R. 711. See also 7 Lah. L. J. 343=1925 Lah. 552. Principal and surety—Variation in contract with principal effect of. 45 Bom. 157=58 I. C. 184; 73 I. C. 353=1924 Lah. 211; 71 I. C. 783 (2). So long as an account with the Bank is unbroken a surety should not, without his consent express or implied, be prejudiced by any departure from the rule of appropriation of items in order of date. 33 I. C. 34=20 C. W. N. 562. A surety cannot escape liability on the ground that the circumstances were such that the principal debtor was entitled to avoid the contract when in fact the contract was not avoided. 29 I. C. 712. A slight alteration in the course of business does not amount to an alteration in the main contract such as would affect the liability of the surety

Illustrations.

(a) *A* becomes surety to *C* for *B*'s conduct as a manager in *C*'s bank. Afterwards, *B* and *C* contract, without *A*'s consent, that *B*'s salary shall be raised, and that he shall become liable for one-fourth of the losses on overdrafts. *B* allows a customer to overdraw, and the bank loses a sum of money. *A* is discharged from his suretyship by the variance made without his consent, and is not liable to make good this loss.

(b) *A* guarantees *C* against the misconduct of *B* in an office to which *B* is appointed by *C*, and of which the duties are defined by an Act of the Legislature. By a subsequent Act, the nature of the office is materially altered. Afterwards, *B* misconducts himself. *A* is discharged by the change from future liability under his guarantee, though the misconduct of *B* is in respect of a duty not affected by the later Act.

(c) *C* agrees to appoint *B* as his clerk to sell goods at a yearly salary, upon *A*'s becoming surety to *C* for *B*'s duly accounting for moneys received by him as such clerk. Afterwards, without *A*'s knowledge or consent, *C* and *B* agree that *B* should be paid by a commission on the goods sold by him and not by a fixed salary. *A* is not liable for subsequent misconduct of *B*.

(d) *A* gives to *C* a continuing guarantee to the extent of 3,000 rupees for any oil supplied by *C* to *B* on credit. Afterwards *B* becomes embarrassed, and, without the knowledge of *A*, *B* and *C* contract that *C* shall continue to supply *B* with oil for ready money, and that the payments shall be applied to the then existing debts between *B* and *C*. *A* is not liable on his guarantee for any goods supplied after this new arrangement.

(e) *C* contracts to lend *B* 5,000 rupees on the 1st March. *A* guarantees repayment. *C* pays the 5,000 rupees to *B* on the 1st January. *A* is discharged from his liability, as the contract has been varied inasmuch as *C* might sue *B* for the money before the 1st of March.

134. The surety is discharged by any contract between the creditor and the

Discharge of surety by re-
lease or discharge of principal
debtor.

principal debtor, by which the principal debtor is released,
or by any act or omission of the creditor, the legal con-
sequence of which is the discharge of the principal debtor.

21 I. C. 322 = 14 M. L. T. 249. A surety giving security under O. 38, R. 5, C. P.C., for the value of property sought to be attached before judgment continues to be liable though the suit is decreed not by the court but by an award of arbitrators. Reference to arbitration is an ordinary incident of the suit. 45 I. C. 429 = 11 S. L. R. 122. Stay of execution—Surety not discharged by agreement between judgment-debtor and decree-holder increasing rate of interest and extending time for payment. 91 I. C. 772 = A. I. R. 1925 Lah. 552.

Sec. 134.—If creditor allows his remedy against the principal debtor to become time barred, the surety is deemed to have been discharged. See 25 A.L.J. 937. But see 100 I.C. 922 = A.I.R. 1927 Lah. 396. So also where the creditor allows his suit against the principal debtor to abate, on account of his omission to bring the legal representative on record, the surety is discharged. 106 I.C. 481 (2) = 29 Punj. L.R. 68. Omission to proceed against principal in time owing to difficulty in service—Striking off his name—Rights of surety. If surety is discharged, see 39 Bom. 52 = 27 I.C. 165. See also 5 Bom. 647; 13 Cal. 330; 33 Mad. 308; 14 Bom. 267; 7 Bom. 146. Principal and surety—Decree against surety—Appeal—Cross-appeal by creditor—Principal not made party—Appeal. 16 I. C. 387 (2). A surety is discharged if a consent decree is passed without his knowledge and consent. 30 C.W.N. 540 = 95 I.C. 409 = A.I.R. 1926 Cal. 818. Change in relationship between debtor and creditor—Discharge of surety. 71 I.C. 783 (2) = 1924 Lah. 194. Plaintiff withdrawing his suit against principal debtor—Suit against the surety must also be dismissed. 40 I.C. 400. See also 1925 Sind 164. The surety of an agreement originally void is not discharged if the creditor withdraws his claim against the principal or his legal representatives and he impliedly assents to it. 54 P.R. 1916 = 35 I.C. 537. Where one of

two co-sureties discharges the principal debt without the knowledge of the other by the execution of a fresh promissory note to the original creditor's transferee he is not entitled by contribution as against the co-surety on his discharging the latter note. 15 L.W. 143 = 70 I.C. 355.

Secs. 134 and 139. PROMISSORY NOTE.—Suit against maker and sureties—Withdrawal of claim against maker—Right against sureties. 38 M. L. J. 131 = 11 L. W. 248 = 54 I. C. 758 = (1920) M. W. N. 178. If the remedy of the creditor against the principal debtor is allowed to become barred by time, the surety is deemed to have been discharged. 25 A.L.J. 937. But see also 100 I. C. 922 = A. I. R. 1927 Lah. 396 (which lays down that creditor's omission to sue principal within the limitation period is no discharge of surety). The creditor telling the principal debtor that he would not be called upon to pay and that the amount would be recovered from the surety, who may sue him if he likes. The creditor has not done or omitted to do any act, the legal consequence of which would be to discharge the principal debtor. 96 I.C. 248 = 28 Bom. L.R. 662 = A.I.R. 1926 Bom. 465. The principle of the English law that discharge of principal debtor will not affect right of suit against sureties where there is a reservation to proceed against them is applicable in India. 38 M.L.J. 131 = 54 I.C. 758. That the creditor cannot proceed with his suit against principal debtor owing to disappearance of the latter, and demands relief against surety only, does not amount to discharge of the surety. 17 I.C. 893 = 8 N.L.R. 188.

Secs. 134 and 137.—If the contract entered into by the principal debtor is void or voidable the creditor can fall back on the contract of indemnity and enforce the liability of the surety. 22 O.C. 109 = 52 I.C. 88. Suit dismissed as against principal—Surety if discharged. 44 I. C. 693. Surety, discharge of—Waiver of claim

Illustrations.

(a) *A* gives a guarantee to *C* for goods to be supplied by *C* to *B*. *C* supplies goods to *B*, and afterwards *B* becomes embarrassed and contracts with his creditors (including *C*) to assign to them his property in consideration of their releasing him from their demands. Here *B* is released from his debt by the contract with *C*, and *A* is discharged from his suretyship.

(b) *A* contracts with *B* to grow a crop of indigo on *A*'s land and to deliver it to *B* at a fixed rate, and *C* guarantees *A*'s performance of this contract. *B* diverts a stream of water which is necessary for irrigation of *A*'s land and thereby prevents him from raising the indigo. *C* is no longer liable on his guarantee.

(c) *A* contracts with *B* for a fixed price to build a house for *B* within a stipulated time, *B* supplying the necessary timber. *C* guarantees *A*'s performance of the contract. *B* omits to supply the timber. *C* is discharged from his suretyship.

Discharge of surety when creditor compounds with, gives time to, or agrees not to sue, principal debtor.

Surety not discharged when agreement made with third person to give time to principal debtor

135. A contract between the creditor and the principal debtor, by which the creditor makes a composition with, or promises to give time to, or not to sue, the principal debtor, discharges the surety, unless the surety assents to such contract.

136. Where a contract to give time to the principal debtor is made by the creditor with a third person, and not with the principal debtor, the surety is not discharged.

Illustration.

C, the holder of an overdue bill of exchange drawn by *A* as surety for *B*, and accepted by *B*, contracts with *M* to give time to *B*. *A* is not discharged.

137. Mere forbearance on the part of the creditor to sue the principal debtor or to enforce any other remedy against him does not, in the absence of any provision in the guarantee to the contrary, discharge the surety.

Illustration.

B owes to *C* a debt guaranteed by *A*. The debt becomes payable. *C* does not sue *B* for a year after the debt has become payable. *A* is not discharged from his suretyship.

138. Where there are co-sureties, a release by the creditor of one of them does not discharge the others; neither does it free the surety so released from his responsibility to the other sureties.

Release of one co-surety does not discharge others.

139. If the creditor does any act which is inconsistent with the rights of the surety, or omits to do any act which his duty to the surety requires him to do, and the eventual remedy of the surety himself against the principal debtor is thereby impaired, the surety is discharged.

Discharge of surety by creditor's act or omission impairing surety's eventual remedy.

against principal debtor—Waiver and forbearance—Distinction—*Locus Penitentiae*. 20 I.C. 189=6 Bur. L. T. 62. A suit is maintainable against the surety although no suit is filed against the principal debtor. 52 I. C. 870=13 S.L.R. 92 (7 Bom. 146, foll.).

Sec. 135.—[See also notes under S. 133.] As to the principle of this section, see 4 Cal. 132; 14 M.L.T. 249. A mere forbearance or delay in suing the principal or pressing him for payment does not discharge the surety. 55 I.C. 610=1 Lah. 262. "Forbearance," meaning of. See 11 All. 310; 24 All. 504; 22 All. 351; 12 Cal. 330; 8 All. 259. S. 135 has no application to the case of a surety under O. 38, R. 3, C.P.C. 37 M.L.J. 435=53 I.C. 367. A surety's liability does not come to an end if the creditor gives time to the principal debtor in consideration of part payment of the debt by the latter. 24 I.C. 864. (22 All. 351, dist.) Where a creditor extends time for the payment of debt, without surety's consent the surety is discharged. 30 I.C. 637=8 Bur. L.T. 114. But a surety executing a bond under S. 55 (4), C.P.C., being in favour of the

Court, although the ultimate beneficiary may be the decree-holder. In such a case surety is not discharged by decree-holder granting time to judgment-debtor. 100 I. C. 762=A. I. R. 1927 Lah. 336.

Secs. 137 and 139.—The abatement of an appeal as against the principal debtor does not necessarily imply that the debt payable by him is extinguished or discharged. The liability of the surety continues in spite of the abatement. 54 I.C. 105. Where, on an embezzlement, the creditor sued only the principal debtor in the first instance, he could bring a second suit against the surety. The cause of action against the principal debtor and surety are different. 21 I. C. 437=11 A. L. J. 689. The opening of a second account in favour of the principal debtor does not discharge the guarantee. 23 C.L.J. 256=20 C.W.N. 562. See also 3 Cal. 177.

Sec. 138.—See S. 44 *supra*.

Sec. 139.—Bank deposits—Security for—Liquidation—Creditors applying for dividends is not inconsistent with rights of surety. 4 Lah. L.J. 183=1922 Lah. 89. Surety was discharged from

Illustrations.

(a) *B* contracts to build a ship for *C* for a given sum, to be paid by instalments as the work reaches certain stages. *A* becomes surety to *C* for *B*'s due performance of the contract. *C*, without the knowledge of *A*, prepays to *B* the last two instalments. *A* is discharged by this prepayment.

(b) *C* lends money to *B* on the security of a joint and several promissory note made in *C*'s favour by *B*, and by *A* as surety for *B*. together with a bill of sale of *B*'s furniture, which gives power to *C* to sell the furniture, and apply the proceeds in discharge of the note. Subsequently, *C* sells the furniture, but, owing to his misconduct and wilful negligence, only a small price is realised. *A* is discharged from liability on the note.

(c) *A* puts *M* as apprentice to *B*, and gives a guarantee to *B* for *M*'s fidelity. *B* promises on his part that he will, at least once a month, see *M* make up the cash. *B* omits to see this done as promised, and *M* embezzles. *A* is not liable to *B* on his guarantee.

140. Where a guaranteed debt has become due, or default of the principal debtor to perform a guaranteed duty has taken place, the

Rights of surety on payment or performance.

surety, upon payment or performance of all that he is liable for, is invested with all the rights which the creditor

had against the principal debtor.

141. A surety is entitled to the benefit of every security which the creditor has

Surety's rights to benefit of creditor's securities.

against the principal debtor at the time when the contract of suretyship is entered into, whether the surety knows of the existence of such security or not; and, if the credi-

tor loses or, without the consent of the surety, parts with such security, the surety is discharged to the extent of the value of the security.

Illustrations.

(a) *C* advances to *B*, his tenant, 2,000 rupees on the guarantee of *A*. *C* has also a further security for the 2,000 rupees by a mortgage of *B*'s furniture. *C* cancels the mortgage. *B* becomes insolvent, and *C* sues *A* on his guarantee. *A* is discharged from liability to the amount of the value of the furniture.

(b) *C* a creditor, whose advance to *B* is secured by a decree, receives also a guarantee for that advance from *A*. *C* afterwards takes *B*'s goods in execution under the decree, and then, without the knowledge of *A*, withdraws the execution. *A* is discharged.

(c) *A*, as surety for *B*, makes a bond jointly with *B* to *C*, to secure a loan from *C* to *B*. Afterwards, *C* obtains from *B* a further security for the same debt. Subsequently, *C* gives up the further security. *A* is not discharged.

142. Any guarantee which has been obtained by means of misrepresentation made by the creditor, or with his knowledge

Guarantee obtained by misrepresentation invalid.

and assent, concerning a material part of the transaction, is invalid.

143. Any guarantee which the creditor has obtained

Guarantee obtained by concealment invalid.

by means of keeping silence as to material circumstances is invalid.

Illustrations.

(a) *A* engages *B* as clerk to collect money for him, *B* fails to account for some of his receipts and *A* in consequence calls upon him to furnish security for his duly accounting. *C* gives his guarantee for *B*'s duly accounting. *A* does not acquaint *C* with *B*'s previous conduct. *B* afterwards makes default. The guarantee is invalid.

(b) *A* guarantees to *C* payment for iron to be supplied by him to *B* to the amount of 2,000 tons. *B* and *C* have privately agreed that *B* should pay five rupees per ton beyond the market price,

liability to the extent that he was deprived from recovering from the principal debtor the amount claimed by the creditor. 58 P.L.R. 1912=15 I.C. 469. Where a person stands surety for several defendants but the plaintiff proceeds against one defendant only, the exoneration of the remaining defendants discharges the surety. 60 I.C. 114. Discharge of surety—Conduct of creditor—Negligence. 38 M.L.J. 402=58 I.C. 648.

Sec. 140. "INVESTED"—Meaning of. 27 Bom. L. R. 1168=1925 Bom. 547. A surety upon payment of the debt to the creditor becomes clothed with all rights of the creditor against the principal debtor as persons claiming under the principal debtor. 38 M. L. T. (H. C.)

124=99 I. C. 676=25 I. W. 190=A. I. R. 1917 Mad. 421. The word 'invested' dispenses with necessity of assignment. 27 Bom. L. R. 1168=94 I. C. 575=A. I. R. 1925 Bom. 547. As to what rights one acquired by a surety who pays party only of the debt due, see 49 All. 640=101 I. C. 513=25 A. L. J. 497=A. I. R. 1927 All. 538. A surety's right stands on a higher footing than a right for contribution, he is bound to discharge the liability of the person for whom he stands surety but he is not liable jointly and severally to pay the decree debt along with all the judgment-debtors. 40 M. L. J. 529=62 I. C. 706.

Sec. 141.—See 7 B. H. C. 118.

Sec. 143.—See 15 Bom. 585=33 Cal. 713; 6 Mad. 466.

such excess to be applied in liquidation of an old debt. This agreement is concealed from *A*. *A* is not liable as a surety.

Guarantee on contract that creditor shall not act on it until co-surety joins.

144. Where a person gives a guarantee upon a contract that the creditor shall not act upon it until another person has joined in it as co-surety, the guarantee is not valid if that other person does not join.

145. In every contract of guarantee there is an implied promise by the principal debtor to indemnify the surety ; and the surety is entitled to recover from the principal debtor whatever sum he has rightfully paid under the guarantee, but no sums which he has paid wrongfully.

Implied promise to indemnify surety.

Illustrations.

(a) *B* is indebted to *C* and *A* is surety for the debt. *C* demands payment from *A* and on his refusal sues him for the amount. *A* defends the suit, having reasonable grounds for doing so, but is compelled to pay the amount of the debt with costs. He can recover from *B* the amount paid by him for costs as well as the principal debt.

(b) *C* lends *B* a sum of money, and *A*, at the request of *B*, accepts a bill of exchange drawn by *B* upon *A* to secure the amount. *C*, the holder of the bill, demands payment of it from *A*, and, on *A*'s refusal to pay, sues him upon the bill. *A*, not having reasonable grounds for so doing, defends the suit, and has to pay the amount of the bill and costs. He can recover from *B* the amount of the bill, but not the sum paid for costs, as there was no real ground for defending the action.

(c) *A* guarantees to *C*, to the extent of 2,000 rupees, payment for rice to be supplied by *C* to *B*. *C* supplies to *B* rice to a less amount than 2,000 rupees, but obtains from *A* payment of the sum of 2,000 rupees in respect of the rice supplied. *A* cannot recover from *B* more than the price of the rice actually supplied.

146. Where two or more persons are co-sureties for the same debt or duty, either jointly or severally, and whether under the same or different contracts, and whether with or without the knowledge of each other, the co-sureties, in the absence of any contract to the contrary, are liable, as between themselves, to pay each an equal share of the whole debt, or of that part of it which remains unpaid by the principal debtor.

Co-sureties liable to contribute equally.

Illustrations.

(a) *A*, *B* and *C* are sureties to *D* for the sum of 3,000 rupees lent to *E*. *E* makes default in payment. *A*, *B* and *C* are liable, as between themselves, to pay 1,000 rupees each.

(b) *A*, *B* and *C* are sureties to *D* for the sum of 1,000 rupees lent to *E*, and there is a contract between *A*, *B* and *C* that *A* is to be responsible to the extent of one-quarter, *B* to the extent of one-quarter, and *C* to the extent of one-half. *E* makes default in payment. As between the sureties, *A* is liable to pay 250 rupees, *B* 250 rupees, and *C* 500 rupees.

Liability of co-sureties bound in different sums.

147. Co-sureties who are bound in different sums are liable to pay equally as far as the limits of their respective obligations permit.

Illustrations.

(a) *A*, *B* and *C* as sureties for *D*, enter into three several bonds, each in a different penalty, namely, *A* in the penalty of 10,000 rupees, *B* in that of 20,000 rupees, *C* in that of 40,000 rupees, conditioned for *D*'s duly accounting to *E*. *D* makes default to the extent of 30,000 rupees. *A*, *B* and *C* are each liable to pay 10,000 rupees.

(b) *A*, *B* and *C*, as sureties for *D*, enter into three several bonds, each in a different penalty, namely, *A* in the penalty of 10,000 rupees, *B* in that of 20,000 rupees, *C* in that of 40,000 rupees, conditioned for *D*'s duly accounting to *E*. *D* makes default to the extent of 40,000 rupees. *A* is liable to pay 10,000 rupees, and *B* and *C* 15,000 rupees each.

(c) *A*, *B* and *C*, as sureties for *D*, enter into three several bonds, each in a different penalty, namely, *A* in the penalty of 10,000 rupees, *B* in that of 20,000 rupees, *C* in that of 40,000 rupees,

Sec. 145.—"Rightfully paid," meaning of. See 26 Mad. 332 ; 49 Bom. 202 = 27 Bom. L. R. 178 = 86 I. C. 883 = 1925 Bom. 244. The liability of the principal debtor to pay the surety cannot arise from a mere implied promise to indemnify contained in S. 145 but must be the result of a contract between the surety and the creditor to which the debtor is a party. The implied rights possessed by a surety are available when the suretyship has been undertaken at the request, actual or constructive of the principal debtor but

not otherwise. 39 Mad. 965 = 30 M. L. J. 369. Execution of mortgage by a surety is payment and suit would lie to recover it from the debtor. 58 I. C. 123. "Payment" means payment in money or property as money equivalent and not merely in the shape of a bond or a pro-note or acknowledgment of liability. 50 I. C. 611 = 15 N. L. R. 78. See also 89 I. C. 65 = 1925 Nag. 392.

Sec. 146.—See S. 43 *supra*. See 26 All. 407 ; 4 Bom. 321.

conditioned for *D*'s duty accounting to *E*. *D* makes default to the extent of 70,000 rupees. *A*, *B* and *C* have to pay each the full penalty of his bond.

CHAPTER IX. OF BAILMENT.

148. A "bailment" is the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. The person delivering the goods is called the "bailor." The person to whom they are delivered is called the "bailee."

Explanation.—If a person already in possession of the goods of another contracts to hold them as a bailee, he thereby becomes the bailee, and the owner becomes the bailor, of such goods although they may not have been delivered by way of bailment.

149. The delivery to the bailee may be made by doing anything which has the effect of putting the goods in the possession of the intended bailee or of any person authorized to hold them on his behalf.

150. The bailor is bound to disclose to the bailee faults in the goods bailed, of which the bailor is aware, and which materially interfere with the use of them, or expose the bailee to extraordinary risks; and, if he does not make such disclosure, he is responsible for damage arising to the bailee directly from such faults.

If the goods are bailed for hire, the bailor is responsible for such damage, whether he was or was not aware of the existence of such faults in the goods bailed.

Illustrations.

(a) *A* lends a horse, which he knows to be vicious, to *B*. He does not disclose the fact that the horse is vicious. The horse runs away. *B* is thrown and injured. *A* is responsible to *B* for damage sustained.

(b) *A* hires a carriage of *B*. The carriage is unsafe, though *B* is not aware of it, and *A* is injured. *B* is responsible to *A* for the injury.

151. In all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed.²

Sec. 148.—It is the pawnor and not an assignee from him that can give directions to the pawnee as regards the delivery or disposal of the pledged property. The directions must be definite and reasonable in order to be binding on the pledgee. 65 I. C. 65=1922 Nag. 127. Liability of goldsmith. 15 I. C. 431=5 Burr. L. T. 106. In case of deposit of money there is no bailment. 13 Bom. 338; 32 Mad. 68. The relationship is that of borrower and lender. (*Ibid.*)

BAILMENT distinguished from sale or exchange. See 2 All. 756.

Sec. 149.—By law the duty of a Railway company is that of a common carrier and the Railway Company cannot refuse carriage of goods. Liability of railway is that of bailee. Rules restricting liability imposed by Railway Act are invalid. 20 A.L.J. 31=44 A. 218. The mere fact that the loading clerk of a railway filled up what is called the serial number in the forwarding note without doing anything further would not amount to the delivery of goods to the railway by the consignor. 45 A. 235=21 A.L.J. 474.

Secs. 151 and 152.—¹ The responsibility of the Trustees of the Port of Madras constituted

under Mad. Act II of 1905, in regard to animals or goods has been declared to be that of a bailee, under these sections, without the qualifying words "in the absence of any special contract" in S. 152. See S. 41 (1) of the Madras Port Trust Act (Mad. Act II of 1905).

Sec. 151.—² As to railway contracts, see the Indian Railways Act (IX of 1890) S. 72. General Acts, Vol. IV. As to the liability of common carriers, see S. 8 of the Carriers Act (III of 1865).

Sec. 151.—The liability of a hotel-keeper to his guests is governed by S. 151 and his liability is that of a bailee. 20 A. L. J. 728=44 A. 735. The English Common Law does not regulate the liability of hotel keepers in this country (*Ibid.*) Pressure of work or unavoidable accident cannot help to avoid liability. 85 I. C. 786=1925 Cal. 737. Whether it can be inferred from the facts found that ordinary prudence has been exercised, is a question of law and justifies an interference in second appeal. 25 I. C. 939. The position of a Railway Company is that of a bailee and is governed by S. 151. 38 I. C. 143. Where four hens put in a crate were consigned to a Railway Company and were put in a closed van by the

152. The bailee, in the absence of any special contract, is not responsible for the loss, destruction or deterioration of the thing bailed, if he has taken the amount of care of it described in section 151.

Bailee when not liable for loss, etc., of thing bailed.

Termination of bailment by bailee's act inconsistent with conditions.

153. A contract of bailment is voidable at the option of the bailor, if the bailee does any act with regard to the goods bailed, inconsistent with the conditions of the bailment.

Illustration.

A lets to *B*, for hire, a horse for his own riding. *B* drives the horse in his carriage. This is, at the option of *A*, a termination of the bailment.

154. If the bailee makes any use of the goods bailed, which is not according to the conditions of the bailment, he is liable to make compensation to the bailor for any damage arising to the goods from or during such use of them.

Liability of bailee making unauthorized use of goods bailed.

Illustrations.

(a) *A* lends a horse to *B* for his own riding only. *B* allows *C*, a member of his family, to ride the horse. *C* rides with care, but the horse accidentally falls and is injured. *B* is liable to make compensation to *A* for the injury done to the horse.

(b) *A* hires a horse in Calcutta from *B* expressly to march to Benares. *A* rides with due care, but marches to Cuttack instead. The horse accidentally falls and is injured. *A* is liable to make compensation to *B* for the injury to the horse.

Railway Company on account of which they died. *Held*, Railway Company was liable. (*Ibid.*) As to liability of common carriers, *see also* 34 All. 656; 18 Cal. 620; 38 Cal. 28; 28 Mad. 700; 6 Cal. 227. As to liability of Railway company, *see also* 37 Bom. 1; 17 Bom. 417; 30 Cal. 252; 39 Bom. 191; 39 All. 418; 23 O. C. 96=56 I. C. 714. Burden of proving that loss or destruction of goods entrusted to a Railway Company is not due to the negligence of the Railway Company lies on the Company. 91 I. C. 963=A. I. R. 1926 Lah 217. Common carrier—Liability for goods for carriage—Demurrage charges—When leviable. 41 I. C. 387=22 C. W. N. 310. A consignee is liable for demurrage charges and has no right to the price of the goods if he unjustifiably refuses to take delivery of goods. But demurrage cannot be charged for the period subsequent to a notice to the consignee that the goods will be sold away at auction in case he fails to remove them. 41 I. C. 387=22 C. W. N. 310. A carrier by sea cannot contract out of liability for the negligence of himself or of his servants. The English Common Law is applicable: the law as it stood before the Carriers Act, 1830, must be applied. 52 I. C. 296=12 Bur. L. T. 173. Bill of lading—Liability for loss of goods contracted out—Legality. *See* 29 Bom. L. R. 1551. Licensee of a ferry is a common carrier. The responsibility of a common carrier is not within the Contract Act but regulated by the Carriers Act and the English Law. 50 I. C. 562. The liability of a Railway Company for loss of goods consigned for carriage is governed by the test laid in the sections. The Railway Company is not in the position of insurers as common carriers. 38 I. C. 702=25 C. L. J. 77. *See also* 39 Cal. 311; 16 C. W. N. 329=12 I. C. 596=14 C. L. J. 472 (Damage to goods). Railway Company—Goods destroyed by fire—Liability. 39 Bom. 191=25 I. C. 241. Mere happening of accident is not proof of negligence. 3 All. 398.

Railway—Liability of as carrier—Exemption—Risk-note Form B. 2 Pat. 442=72 I. C. 440. The onus is upon the bailee to show that he is exonerated from liability for loss by means of a special risk-note relieving him from such liability. (*Ibid.*) A bailee is responsible for proper care of goods entrusted to him. The burden of proof lies on him to show that such care as a man of ordinary prudence would have exercised, was duly exercised by him. 1 Bur. L. J. 132=74 I. C. 18=1923 R. 74 (2). Money deposited for safe custody in Bank—Failure of Bank—Liability of deposit—Amount of care. 36 I. C. 31. Bailment—Suit against bailee for damages—Negligence, proof of—Onus on plaintiff—Duty of defendant. 20 Bom. L. R. 735=27 C. L. J. 615 (P. C.). The obligation of a bailee includes not only the duty of taking all reasonable precautions to obviate these risks but also the duty of taking all proper measures for the protection of the goods when such risks had already occurred. 14 Bom. L. R. 165=14 I. C. 793 (2)=37 B. 1. Degree of care varies with the quality of goods. 27 C. W. N. 1017=80 I. C. 279=1924 Cal. 92. In a case of highly perishable articles he should take special precautions. 9 I. C. 470=4 Bur. L. T. 26.

Sec. 152.—A bailee for hire is bound to return the article hired at the end of the period for which it is hired. But there is an implied warranty that the thing is fit for the purpose for which it is hired and if there is a breach of this warranty, the bailee is not bound to pay the hire and return the article but can give notice of the same to the bailor. 45 Bom. 1017=61 I. C. 570. The owner of a lighter carrying goods are liable for the loss of and damage to goods as bailees under S. 152 as in using the lighter they did not take the amount of care described in S. 151. 42 I. C. 636 on this section, *see also* 29 Bom. L. R. 1551.

Sec. 153.—*See* 19 Cal. 332.

Effect of mixture, with bailor's consent, of his goods with bailee's.

155. If the bailee, with the consent of the bailor, mixes the goods of the bailor with his own goods, the bailor and the bailee shall have an interest, in proportion to their respective shares, in the mixture thus produced.

156. If the bailee, without the consent of the bailor, mixes the goods of the bailor with his own goods, and the goods can be separated or divided, the property in the goods remains in the parties respectively; but the bailee is bound to bear the expense of separation or division, and any damage arising from the mixture.

Illustration.

A bails 100 bales of cotton marked with a particular mark to B. B, without A's consent, mixes the 100 bales with other bales of his own, bearing a different mark: A is entitled to have his 100 bales returned, and B is bound to bear all the expense incurred in the separation of the bales, and any other incidental damage.

157. If the bailee, without the consent of the bailor, mixes the goods of the bailor with his own goods, in such a manner that it is impossible to separate the goods bailed from the other goods and deliver them back, the bailor is entitled to be compensated by the bailee for the loss of the goods.

Illustration.

A bails a barrel of Cape flour worth Rs. 45 to B. B, without A's consent, mixes the flour with country flour of his own worth only Rs. 25 a barrel. B must compensate A for the loss of his flour.

158. Where, by the conditions of the bailment, the goods are to be kept or to be carried, or to have work done upon them by the bailee for the bailor, and the bailee is to receive no remuneration, the bailor shall repay to the bailee the necessary expenses incurred by him for the purpose of the bailment.

159. The lender of a thing for use may at any time require its return, if the loan was gratuitous, even though he lent it for a specified time or purpose. But, if, on the faith of such loan made for a specified time or purpose, the borrower has acted in such a manner that the return of the thing lent before the time agreed upon would cause him loss exceeding the benefit actually derived by him from the loan, the lender must, if he compels the return, indemnify the borrower for the amount in which the loss so occasioned exceeds the benefit so derived.

160. It is the duty of the bailee, to return, or deliver according to the bailor's directions, the goods bailed, without demand, as soon as the time for which they were bailed has expired, or the purpose for which they were bailed has been accomplished.

161. If, by the default of the bailee, the goods are not returned, delivered or tendered at the proper time, he is responsible to the bailor for any loss, destruction or deterioration of the goods from that time².

Bailee's responsibility when goods are not duly returned.

Sec. 160.—A bailee who has given up possession of goods bailed with the consent of the bailor cannot thereafter maintain a suit for recovery of the goods bailed. 19 Cr. L. J. 220=43 I. C. 796=4 Pat. L. W. 62. Receipt from consignee of goods is good evidence of complete delivery. 39 Cal. 311. Bailment—conversion of goods—Measure of damages. 34 I.C. 297; 9 Bur. L.T. 224. See also 83 I. C. 151=1924 Cal. 1056.

Sec. 161.—S. 161 has been declared to apply to the responsibility of the Trustees of the Port of Madras as to animals and goods in their possession. See Madras Port Trust Act (Mad.

Act II of 1905).

²As to railway contracts. See the Indian Railways Act (IX of 1890) S. 72.

[See also under S. 160.] In the absence of evidence as to the execution of risk note Form A, the railway is liable for delay in delivery. 65 I. C. 771=20 A. L. J. 114. Contract Act is not a complete Code with reference to the law of bailments. Bailments are of two kinds, voluntary and involuntary. Where depository dies and the subject of the deposit passes into the hands of his heir the latter becomes an involuntary bailee. A depository is a bailee within Chapter IX of

Termination of gratuitous bailment by death.

162. A gratuitous bailment is terminated by the death either of the bailor or of the bailee.

163. In the absence of any contract to the contrary, the bailee is bound to deliver to the bailor, or according to his directions, any increase or profit which may have accrued from the goods bailed.

Bailor entitled to increase or profit from goods bailed.

Illustration.

A leaves a cow in the custody of *B* to be taken care of. The cow has a calf. *B* is bound to deliver the calf as well as the cow to *A*.

164. The bailor is responsible to the bailee for any loss which the bailee may sustain by reason that the bailor was not entitled to make the bailment, or to receive back the goods or to give directions, respecting them.

Bailor's responsibility to bailee.

165. If several joint owners of goods bail them, the bailee may deliver them back to, or according to the directions of, one joint owner without the consent of all, in the absence of any agreement to the contrary.

Bailment by several joint owners.

166. If the bailor has no title to the goods, and the bailee, in good faith, delivers them back to, or according to the directions of, the bailor, the bailee is not responsible to the owner in respect of such delivery.

Bailee not responsible on re-delivery to bailor without title.

Right of third person claiming goods bailed.

167. If a person, other than the bailor, claims goods bailed, he may apply to the court to stop the delivery of the goods to the bailor, and to decide the title to the goods.

168. The finder of goods has no right to sue the owner for compensation for trouble and expense voluntarily incurred by him to preserve the goods and to find out the owner; but he may retain the goods against the owner until he receives such compensation; and, where the owner has offered a specific reward for the return of goods lost, the finder may sue for such reward, and may retain the goods until he receives it.

Right of finder of goods; may sue for specific reward offered.

169. When a thing which is commonly the subject of sale is lost, if the owner cannot with reasonable diligence be found, or if he refuses, upon demand, to pay the lawful charges of the finder, the finder may sell it—

When finder of thing commonly on sale may sell it.

(1) when the thing is in danger of perishing or of losing the greater part of its value, or,

(2) when the lawful charges of the finder, in respect of the thing found, amount to two-thirds of its value.

170. Where the bailee has, in accordance with the purpose of the bailment, rendered any service involving the exercise of labour or skill in respect of the goods bailed, he has, in the absence of a contract to the contrary, a right to retain such goods until he receives due remuneration for the services he has rendered in respect of them.

Bailee's particular lien.

Illustrations.

(a) *A* delivers a rough diamond to *B*, a jeweller, to be cut and polished, which is accordingly done. *B* is entitled to retain the stone till he is paid for the services he has rendered.

the Act. 69 I. C. 900=26 C. W. N. 772. (33 M. 56 Ref.). Contract between Railway Company and owner of goods containing conditions as to the route to be adopted for transit—Breach of conditions—Liability of Railway Company as bailee. See 8 P. L. T. 651.

Sec. 163.—See 49 Bom. 233=27 Bom. L. R. 455=48 M. L. J. 648 (P. C.).

Sec. 165.—See 20 M. L. J. 709.

Sec. 166.—See S. 177 of the Indian Evidence

Act, 1872 (I of 1872).

To a suit by the real owner of goods for their delivery, the fact that the pledgee (defendant) has parted with the goods pledged to or to the order of the person by whom they were deposited without notice of any claim by any other person is a complete defence. 37 Bom. 122=40 I. A. 1=24 M. L. J. 176=17 C. W. N. 358. (P. C.).

Sec. 170.—See 6 All. 139; 8 Cal. 312; 13 Bom. 314.

(b) *A* gives cloth to *B*, a tailor, to make into a coat. *B* promises *A* to deliver the coat as soon as it is finished, and to give a three months' credit for the price. *B* is not entitled to retain the coat until he is paid.

171. Bankers, factors, wharfingers, attorneys of a High Court and policy-brokers may, in the absence of a contract to the contrary, retain, as a security for a general balance of account, any goods bailed to them; but no other persons have a right to retain, as a security for such balance, goods bailed to them, unless there is an express contract to that effect.

Bailments of Pledges.

172. The bailment of goods as security for payment of a debt or performance of a promise is called "pledge." The bailor is in this case called the "pawnor." The bailee is called the pawnee defined.

173. The pawnee may retain the goods pledged, not only for payment of the debt or the performance of the promise, but for the interest of the debt, and all necessary expenses incurred by him in respect of the possession or for the preservation of the goods pledged.

174. The pawnee shall not, in the absence of a contract to that effect, retain the goods pledged for any debt or promise other than the debt or promise for which they are pledged, but such contract, in the absence of anything to the contrary, shall be presumed in regard to subsequent advances made by the pawnee.

Sec. 171—As to lien of an agent. *See* S. 221. *infra* As to lien of Railway Administration, *see* the Indian Railways Act, (IX of 1890), S. 55.

DISTINCTION BETWEEN THE GENERAL LIEN OF A BAILEE (BANKER etc.) AND THE RIGHTS OF A CREDITOR, who advances money to accommodate his customers to buy goods and deposit them with him on what is called the godown system is that the one is a mere right of retention and in the other the special property in the chattel is created. 8 Lah. 373 = 101 I. C. 725 = A. I. R. 1927 Lah. 408.

A Nattukkottas Chetty is a 'banker' within S. 171 and is therefore entitled to banker's lien on goods bailed to him. 43 Mad. 747 = 39 M. L. J. 135.

LIEN OF BANKERS.—*See* 33 Mad. 53; 19 Mad. 234. Money can be the subject of a banker's lien but not the money held by the bank under a special contract. 95 I. C. 358 = A. I. R. 1926 Sind. 225 = 21 S. L. R. 385. *Factor*, who is—*See* 1 Luck. 133 = 3 O. W. N. 160 = 92 I. C. 744 = A. I. R. 1926 Oudh 202.

LIEN OF WHARFINGERS.—*See* 8 Cal. 312. Equitable lien of barrister and attorney on money paid into Court. 29 I. C. 870 = 8 L. B. R. 70. *See also* 4 Bom. 353; 6 Cal. 7. A factor is an agent entrusted with the possession of goods for sale. 29 I. C. 462 = (1915) M. W. N. 519. *Factor*—Agent for sale of goods making advances against goods—Agreement to recoupe advances from sale proceeds—Suit by agent for refund of advances before actual sale. 55 I. C. 671 = 11 L. W. 1.

Sec. 172.—The method provided by S. 172 of the Contract Act for the hypothecation of chattels is not the only method for creating security thereon. They may be hypothecated without transferring their possession. In such cases the only question that arises is whether

there was an intention to create a security and if there was intention to create security, equity gives effect to it. 44 I. C. 211 = 22 C. W. N. 758. In a pledge the property should be actually or constructively delivered to the pawnee. Title deeds of property are not goods that may be pledged within the meaning of S. 172. 33 L. C. 891 = 22 C. W. N. 297. As to pledge of shares or negotiable securities, *see* 12 Bom. L. R. 870. As to pledge of goods retained in the godowns of the pledgor who agreed not to remove them or encumber them without the consent of the pledge, *see* 50 Bom. 547 = 96 I. C. 417 = 28 Bom. L. R. 689 = A. I. R. 1926 Bom. 427. A pledge or pawn according to S. 172 lies mid-way between a loan and a mortgage which wholly passes the property in the thing conveyed. 33 I. C. 891 = 22 C. W. N. 297. Hypothecation of animals—Enforceability against third parties—Offspring of animals—Accession. 10 P. R. 1915 = 28 I. C. 230. Neither the T. P. Act nor the Contract Act recognizes the non-possessory hypothecation of moveables. And the rights and remedies of the parties must be regulated by the Courts according to general law of contract. 10 I. C. 869 = 7 N. L. R. 72. A *bona fide* incumbrancer without notice in possession of moveable property will be preferred to the prior incumbrancer. A person alleging notice must prove it. 28 I. C. 462 = 7 L. B. R. 336.

Sec. 174.—Pledge—Unlawful withholding of goods—Refusal to deliver—Action. 41 All. 643 = 55 I. C. 45. When there was a mortgage of certain shop goods then lying on the premises and the mortgagor undertook to keep on the premises stock to the extent of the debt replacing sold goods by new goods, it is not a mere license but an equitable mortgage of the substituted goods and there is complete assignment of after-acquired property. It is not necessary

Pawnee's right as to extraordinary expenses incurred.

175. The pawnee is entitled to receive from the pawnor extraordinary expenses incurred by him for the preservation of the goods pledged.

176. If the pawnor makes default in payment of the debt, or performance, at the stipulated time of the promise, in respect of which the goods were pledged, the pawnee may bring a suit against the pawnor upon the debt or promise, and retain the goods pledged as a collateral security; or he may sell the thing pledged, on giving the pawnor reasonable notice of the sale.

If the proceeds of such sale are less than the amount due in respect of the debt or promise, the pawnor is still liable to pay the balance. If the proceeds of the sale are greater than the amount so due, the pawnee shall pay over the surplus to the pawnor.

177. If a time is stipulated for the payment of the debt, or performance of the promise, for which the pledge is made, and the pawnor makes default in payment of the debt or performance of the promise at the stipulated time, he may redeem the goods pledged at any subsequent time before the actual sale of them¹; but he must, in that case, pay, in addition, any expenses which have arisen from his default.

178. A person who is in possession of any goods, or of any bill of lading, dock-warrant, warehouse-keeper's certificate, wharfinger's certificate, or warrant or order for delivery, or any other document of title to goods, may make a valid pledge of such goods or documents: Provided that the pawnee acts in good faith, and under circumstances which are not such as to raise a reasonable presumption that the pawnor is acting improperly:

that an equitable assignment should be enforced by a suit for specific performance. 17 I. C. 31 = 6 S. L. R. 97. The only condition is that the goods on coming into existence should be capable of identification as to things assigned. (*Ibid.*)

Sec. 176.—Conditions necessary for exercise of pawnee's right of sale. *See* 8 Lah. 373 = 101 I. C. 725 = A. I. R. 1927 Lah. 408. As to rights of pawnee *see* 104 I. C. 641. Notice of sale—Reasonableness of. 40 All. 522 = 45 I. C. 462 = 16 A. L. J. 390. The rights of a pledgee under this section either to sue on the debt or sell the property pledged are concurrent rights. 33 I. C. 891 = 22 C. W. N. 297. *See also* 32 Cal. 27; 27 Mad. 528; 22 Cal. 21. A pledgee is not entitled to sell the goods before the amount of the loan becomes due and before effecting a sale he must give reasonable notice to the pledgor. 2 P. W. R. 1917 = 39 I. C. 169 = 14 P. L. R. 1917. (6 W. R. 81. Ref.) If pledgee sells through Court, he can purchase at Court sale. 19 Cal. 322. This section requires a notice only when the pawnee wishes to exercise his opinion of selling the pledged goods. If he chooses to bring a suit upon the debt no notice is apparently required by that section. 48 I. C. 970.

Sec. 177.—For limitation, *see* the Indian Limitation Act (IX of 1908), Sch. I, No. 145.

Sec. 178.—Scope and application of section. *See* 40 Mad. 678 = 19 M. L. T. 368 = 34 I. C. 751 = 30 M. L. J. 587; 30 Bom. L. R. 470 = A. I. R. 1928 Bom. 225. A Railway receipt for goods consigned is a document of title to goods. 40 Bom. 630 = 20 C. W. N. 1182 = 31 M. L. J. 541 = 43 I. A. 164 (P. C.). *See also* 30 I. C. 950 = 38 Mad. 664. "Goods" include shares in joint stock companies. 8 I. C. 183 = 12 Bom. L. R. 870. *See also* 30 All. 165. *But see* 37 I.

C. 707; 24 C. L. J. 835. As to pledge of share certificates obtained by misrepresentation, *see* 92 I. C. 9 = A. I. R. 1925 Bom. 314. A pledgee of goods who without notice of the title of the real owner delivers goods to or to the order of depositor is not guilty of a conversion. 37 Bom. 122 = 40 I. A. 1 = 24 M. L. J. 176 = 17 C. W. N. 358 (P. C.). S. 179 does not limit the scope of S. 178 but saves a pledgee at least to the extent of the pledgor's own interest notwithstanding the presence of invalidating conditions falling under one of the provisions to S. 178. 42 Bom. 205 = 40 I. C. 148. A party is bound by pledge of his goods by another who is in possession of them, where he not only approves the other's conduct but urges the other to pledge them. (*Ibid.*) Consignment of goods—Pledging receipt—Pledgee, if he acquires title—Fraud. 54 I. C. 224 = 23 C. W. N. 907. Fraud, meaning of. *See* 27 Bom. L. R. 514 = 1925 Bom. 314. "Possession" means judicial possession. 1 Rang. 199 = 2 Bur. L. J. 241; 1923 Sind 54; 50 I. C. 476 = 23 C. W. N. 352. The word 'possession' as used in this section does not include the possession by a gratuitous bailee and so a pledge by him of the thing is invalid. The pledgee must return the thing so pledged, to the original depositor. 61 I. C. 305; 14 S. L. R. 175. A pledgee from a hire purchaser acquires no good title to the goods pledged. 50 I. C. 476 = 23 C. W. N. 352 (12 B. L. R. 42, Foll., 34 P. R. 1902, Dist). Government securities cannot be pledged except by endorsement by the owner. 33 I. C. 891 = 22 C. W. N. 297. Agent disposing of sewing machine—Assistance of Criminal Court not to be given. 1 Bur. L. J. 45 = 1923 R. 68 (1). Requirements of the section—Judicial possession—Pledgee in possession—Suit by rightful owner—Limitation. 40 Mad. 678 = 30 M. L. J. 587.

Provided also that such goods or documents have not been obtained from their lawful owner, or from any person in lawful custody of them, by means of an offence or fraud.

Pledge where pawnor has only a limited interest. **179.** Where a person pledges goods in which he has only a limited interest, the pledge is valid to the extent of that interest.

Suits by Bailees or Bailors against Wrong-doers.

180. If a third person wrongfully deprives the bailee of the use or possession of the goods bailed, or does them any injury, the bailee is entitled to use such remedies as the owner might have used in the like case if no bailment had been made; and either the bailor or the bailee may bring a suit against a third person for such deprivation or injury.

Apportionment of relief or compensation obtained by such suits. **181.** Whatever is obtained by way of relief or compensation in any such suit shall, as between the bailor and the bailee, be dealt with according to their respective interests.

CHAPTER X.

AGENCY.

Appointment and Authority of Agents.

182. An "agent" is a person employed to do any act for another or to represent another in dealings with third persons: The person for whom such act is done, or who is so represented, is called the "principal".

Sec. 179.—*See* 42 Bom. 205.

Sec. 180.—Under S. 180 either a bailor or bailee of a chattel may maintain an action in respect of it against a wrong-doer, the latter by virtue of possession, the former by virtue of his property. 43 Cal. 733 = 21 C. W. N. 632.

Sec. 182.—Principal and agent—Relationship of. 63 I. C. 521 = 13 L. W. 537 (P. C.).

TESTS OF AGENCY.—*See* 12 C. W. N. 28. No consideration is required to support agency. 3 Cal. 300, Benamidar is not agent. 5 B. L. R. 237; nor committee of lunatic. 20 Bom. 61; nor guardian of minor (*Ibid.*); nor manager of joint Hindu family. 22 All. 307; 26 Mad. 544. Minor may be agent. 3 Bom. L. R. 627. Every act of an agent in the course of his employment on behalf of his principal and within the apparent scope of his authority, binds the principal unless the agent in fact is unauthorized to do that act and the person dealing with him has notice of the same. 24 I. C. 209. *See also* 43 Cal. 833 = 34 I. C. 807. The use of the word 'agent' in a general way, loosely without specifying the purpose of the agency does not help to determine whether a person is an agent. 21 I. C. 322 = 14 M. L. T. 249. Unless authority to act is conferred and accepted, mere settlement of the terms of remuneration does not constitute a contract of agency. A commission agent is not in law, the agent of all persons and firms, whose business he occasionally transacts. 50 I. C. 146; 12 S. L. R. 93. The agency is only with reference to specific sales or purchases made under the directions of the principal. (*Ibid.*) In order to entitle a broker to his commission, he must prove either that the transaction has been completed or that, if it is not the non-completion was due to default on the part of the principal. *See* 24

Bom. L. R. 847 = 1922 B. 433, and cases referred to therein. A broker is the agent of the person for whom he acts. Unlike the factor he is not entrusted with the custody and the apparent ownership of the goods, but he is merely to effect business on commission on the sale resulting from his efforts. Where the contract is not in writing, terms are to be inferred from conduct of the parties. 39 All. 81 = 36 I. C. 371. *Per* Woodroffe, J.—A broker is the agent of both parties and his contract is one of employment only so long as he adheres strictly to his position as a broker by confining himself to the business of negotiation. 42 Cal. 1050 = 19 C. W. N. 623. Broker—Liability of, in principal's contracts—Calcutta jute market—Custom of. 50 Cal. 12 = 1923 Cal. 419. Sub-broker receiving money from constituents and misappropriating—Payment to broker for other transactions—Suit for money. 25 Bom. L. R. 1014 = 48 Bom. 20. An Honorary Treasurer of a Subscription Committee is not its agent and not liable therefore for gross negligence in not cashing a cheque passed by a donor. 36 All. 268 = 23 I. C. 600. *Del credere* agents—Certified brokers of the Bombay Native Stock and Share Brokers' Association are such 23 Bom. L. R. 1144 = 46 Bom. 489. *Pakka adatia*—Position of. 52 I. C. 519 = 21 Bom. L. R. 783; 19 I. C. 29; 15 Bom. L. R. 85. A *pakka adatia* is a speculative transaction and not a wager. The rights and liabilities of *Pakka adatia* are well settled and he has a right to be indemnified by the seller. 42 Bom. 373 = 34 M. L. J. 305 = 22 C. W. N. 625 = 45 I. A. 29 = 44 I. C. 284 (P. C.) Agency *Pakka adatia*—Relation with constituents. 37 Bom. 347 = 17 I. C. 152. According to the ordinary practice in Bombay the *Pakka adatias* would be entitled to call for margin if the rise or fall in the market

183. Any person who is of the age of majority according to the law to which he is subject, and who is of sound mind, may employ an agent.

Who may employ agent.

184. As between the principal and third persons any person may become an agent, but no person who is not of the age of majority and of sound mind can become an agent, so as to be responsible to his principal according to the provisions in that behalf herein contained.

Who may be an agent.

185. No consideration is necessary to create an agency.

Consideration not necessary.

Agent's authority may be expressed or implied.

186. The authority of an agent may be expressed or implied.

187. An authority is said to be express when it is given by words spoken or written. An authority is said to be implied when it is to be inferred from the circumstances of the case; and things spoken or written, or the ordinary course of dealing, may be accounted circumstances of the case.

Definitions of express and implied authority.

Illustration.

A owns a shop in Serampur, living himself in Calcutta, and visiting the shop occasionally. The shop is managed by *B*, and he is in the habit of ordering goods from *C* in the name of *A* for the purpose of the shop, and of paying for them out of *A*'s funds with *A*'s knowledge. *B* has an implied authority from *A* to order goods from *C* in the name of *A* for the purposes of the shop.

188. An agent having an authority to do an act has authority to do every lawful thing which is necessary in order to do such act.

Extent of agent's authority.

justified such a demand. But the *onus* lies on the *pakka adatti* to establish the circumstances which justify the exercise of such powers. 29 Bom. L. R. 147=100 I. C. 993=A. I. R. 1927 Bom. 125 [28 Bom. L. R. 1488 (P. C.) Rel. on.] A broker can claim commission if he brings about a sale, but he can also claim it if he brings about the transaction to the stage of an agreement to sell and then the transaction fails because the purchaser draws back, 60 I. C. 727. Broker—Contract falling through owing to default of principal—Right to brokerage. 12 Bur. L. T. 68=51 I. C. 582. Broker—Commission—Right to—Completion of transaction—Failure of one of the parties to complete the contract—Effect of. 24 Bom. L. R. 847=1922 B. 433. A partner who does an act for the firm is an agent for the firm, but he is not an agent for the partners. 10 I. C. 250=153 P. L. R. 1911. A person contracting to purchase property and promising damages on default is not an agent of the promisee. 50 I. C. 69=9 L. W. 312. Commission, Suit for—Limitation. 39 All. 81=36 I. C. 371; 73 I. C. 143=1923 Lah. 473.

Sec. 188—*Cf.* S. 11, *supra*.

See 29 C. W. N. 422=86 I. C. 571=1925 Cal. 609.

Sec. 184.—Under S. 184 a minor can act as an agent of a firm and any contracts entered into by such a minor as an agent are binding on the firm. And they are equally binding on the minor if he did not give notice of the repudiation within a reasonable time after attaining majority. 45 I. C. 17=17 P. L. R. 1918. *See also* 3 Bom. L. R. 627. A minor agent is not responsible for loss arising from the negligence of his guardian. An infant cannot be made liable for a tort arising out of contract where the contract is not binding upon him. 43 I. C. 923.

Sec. 186.—*See* however, S. 33 of the Indian

Registration Act, 1908. *See also* Code of Civil Procedure, (Act V of 1908), Sch. I, Order III, rule 4. If an agent endowed with very wide powers and authorized to buy and sell property, to deal with Government and to pay revenue, contracts a loan on behalf of his principal, which the latter did not repudiate when it came to his knowledge, the principal is bound by the debt and must pay it. 39 I. C. 225=1 Pat. L. W. 346. If a married couple live together and the husband acts alone in dealing with joint property, he acts as the wife's agent in respect of her interest as well as his own, but the presumption is rebuttable. 10 I. C. 919=4 Bur. L. T. 115 (3 L. B. R. 66 Rel.) What constitutes agency. *See* 1925 Cal. 541.

Sec. 187.—Where an act purporting to be done under a power of attorney is challenged as being in excess of the authority conferred by the power, it must be shown on a fair construction of the whole instrument, that the authority in question is to be found within the four corners of the instrument, either in express terms or by necessary implication. 43 Cal. 527=32 I. C. 419=43 I. A. 48=30 M. L. J. 232 (P. C.) [(1893) A. C. 170, Foll.] *See also* 24 Bom. 360; 21 Mad. 274. The mere fact that the principal did not receive the benefit of the transaction does not rid him of liability. In the case of a Nattukottai Chetti money lending business, an agent who has authority to borrow and to lend to others, has an implied authority to pledge the credit of the firm for the purpose of obtaining or securing advances from others to the customers of the firm. 43 Cal. 527 (P. C.) *supra*. Husband when liable for wife's debts. 9 All. 147.

Sec. 188.—AUTHORITY OF AGENT.—Authority of Agent—Construction of. 39 Cal. 568=13 I. C. 705=16 C. W. N. 593 (On appeal from 10 I. C. 895.) Authority of agent in money lend-

An agent having an authority to carry on a business has authority to do every lawful thing necessary for the purpose, or usually done in the course of conducting such business.

Illustrations.

(a) *A* is employed by *B*, residing in London, to recover at Bombay a debt due to *B*. *A* may adopt any legal process necessary for the purposes of recovering the debt, and may give a valid discharge for the same.

(b) *A* constitutes *B* his agent to carry on his business of a ship-builder. *B* may purchase timber and other materials, and hire workmen, for the purposes of carrying on the business.

189. An agent has authority, in an emergency, to do all such acts for the purpose of protecting his principal from loss as would be done by a person of ordinary prudence, in his own case, under similar circumstances.

Agent's authority in an emergency

Illustrations.

(a) An agent for sale may have goods repaired if it be necessary.

(b) *A* consigns provisions to *B* at Calcutta, with directions to send them immediately to *C* at Cuttack. *B* may sell the provisions at Calcutta, if they will not bear the journey to Cuttack without spoiling.

Sub-Agents.

190. An agent cannot lawfully employ another to perform acts which he has expressly or impliedly undertaken to perform personally, unless by the ordinary custom of trade a sub-agent may, or, from the nature of the agency, a sub-agent must, be employed.

When agent cannot delegate.

ing business to purchase shares. (1927) M.W.N. 118; to raise loans for purposes of principal's business, 2 Luck 253 = A. I. R. 1927 Oudh 44; to sue on behalf of undisclosed principal, 24 L. W. 826 = 99 I. C. 687 = 52 M. L. J. 33 = A. I. R. 1927 Mad. 204. Authority of Agent—Power of attorney—Construction of—Limitation of authority. 2 P.L.J. 600 = 41 I. C. 175 = 1917 Pat. 273. See also 7 Bur. L. T. 126 = 23 I. C. 516. Authority of Agent—Principal and agent—Acts of agent beyond scope—When principal liable—Third parties. 36 I. C. 968 = 10 S.L. R. 72. An agent not authorized to compromise cannot bind his principal by any compromise effected by him. 96 P. R. 1914 = 24 I. C. 630. An agent authorized by a power of attorney only to collect debts has no authority to realize their value, or any part of it by selling them. 35 M. L. J. 581 = 48 I. C. 756 = 41 Mad. 923. If the power of attorney does not authorize the agent to carry on a business except with limitations, any act done by him in excess of such power will not bind the principal. 41 I. C. 224 = 6 L. W. 417. The plaintiff from whom money was borrowed by the defendant's agent without authority, is entitled to receive his amount to the extent of the benefit received by the principal. 32 I. C. 763 = (1915) M.W.N. 761. An agreement by an agent to pay reasonable interest for goods purchased on credit is binding on principal, 26 I. C. 365. (1 C.L.J. 199, Foll.) An agent who has power to sign his name does not necessarily mean that he has full powers necessary for a disposition of property. 10 M. L. T. 304 = 12 I. C. 393.

POWER OF ATTORNEY.—A power of attorney given to an agent to collect outstandings includes also a power to collect debts due under decrees, even if they were obtained before the date of the power. 15 M. L. T. 337 = 23 I. C. 99. Power of attorney should be construed strictly. 23 M. L. J. 595 = 12 M. L. T. 528 = 17 I. C. 139. A power enabling an agent to carry on the business of a

firm does not entitle him to sue for dissolution of the firm. A suit so instituted should not be dismissed but should be allowed to be amended by requiring the principal himself to sign the plaint. 25 I. C. 140 = 7 Bur. L. T. 202.

CONNECTED ACTS.—An agent authorized to receive money for the principal may be presumed to be also authorized to do every lawful and necessary thing connected with it. 37 I. C. 442 = 3 O. L. J. 623. [43 Cal. 527 (P. C.) Ref. to].

INSURANCE.—A commission agent purchasing goods insuring them under instructions from the merchant, has an insurable interest in the goods and can recover the money under the policy in case of loss. 36 Bom. 484 = 12 I. C. 897.

LANDLORD AND AGENT.—Where the agent of a landlord has no authority to create pecuniary liability on his behalf, no personal decree could be passed against the landlord. 16 I. C. 990. The question of the authority of an agent to bind his landlord has to be decided on the facts of each case. 35 I. C. 81.

POST OFFICE.—Where the person entitled to payment, requests the payment by means of a money order, the Post Office is the agent of that person and not of the sender. (Cf.) Postal rules which allow the sender of a money order or other article to recall it before actual delivery. 33 I. C. 723 = 14 A. L. J. 236.

ILLEGAL OR VOID CONTRACT.—Agent receiving money on principal's behalf under illegal or void contract is liable to account to the principal; also an agent making a profit without making full disclosure to his principal is liable to account to him for the same. 19 I. C. 161 = 15 C. W. N. 408.

Sec. 189.—Power to enter into forward contracts. See 10 I. C. 895 (On appeal 13 I. C. 705 = 39 Cal. 568).

Sec. 190.—As to appointment of sub-agent. See 1 Bur. L. J. 219 = 1923 R. 84.

"Sub-agent" defined.

Representation of principal by sub-agent properly appointed.

Agent's responsibility for sub-agent.

Sub-agent's responsibility.

191. A "sub-agent" is a person employed by, and acting under the control of, the original agent in the business of the agency.

192. Where a sub-agent is properly appointed, the principal is, so far as regards third persons, represented by the sub-agent, and is bound by and responsible for his acts, as if he were an agent originally appointed by the principal.

The agent is responsible to the principal for the acts of the sub-agent.

The sub-agent is responsible for his acts to the agent, but not to the principal, except in case of fraud or wilful wrong.

193. Where an agent, without having authority to do so, has appointed a person to act as a sub-agent, the agent stands towards such person in the relation of a principal to an agent, and is responsible for his acts both to the principal and to third persons; the principal is not represented by or responsible for the acts of the person so employed, nor is that person responsible to the principal.

Agent's responsibility for sub-agent appointed without authority.

194. Where an agent, holding an express or implied authority to name another person to act for the principal in the business of the agency, has named another person accordingly, such person is not a sub-agent, but an agent of the principal for such part of the business of the agency as is entrusted to him.

Relation between principal and person duly appointed by agent to act in business of agency.

Illustrations.

(a) *A* directs *B*, his solicitor, to sell his estate by auction, and to employ an auctioneer for the purpose. *B* names *C*, an auctioneer, to conduct the sale. *C* is not a sub-agent, but is *A*'s agent for the conduct of the sale.

(b) *A* authorizes *B*, a merchant in Calcutta, to recover moneys due to *A* from *C & Co.* *B* instructs *D*, a solicitor, to take legal proceedings against *C & Co.* for the recovery of the money. *D* is not a sub-agent, but is solicitor for *A*.

195. In selecting such agent for his principal, an agent is bound to exercise the same amount of discretion as a man of ordinary prudence would exercise in his own case; and if he does this he is not responsible to the principal for the acts or negligence of the agent so selected.

Agent's duty on naming such person

Illustrations.

(a) *A* instructs *B*, a merchant, to buy a ship for him. *B* employs a ship surveyor of good reputation to choose a ship for *A*. The surveyor makes the choice negligently and the ship turns out to be unseaworthy and is lost. *B* is not, but the surveyor, is responsible to *A*.

(b) *A* consigns goods to *B*, a merchant, for sale. *B*, in due course, employs an auctioneer in good credit to sell the goods of *A*, and allows the auctioneer to receive the proceeds of the sale. The auctioneer afterwards becomes insolvent without having accounted for the proceeds. *B* is not responsible to *A* for the proceeds.

Sec. 192.—Agent liable to the principal for the sub-agent's fraud. 43 I. C. 699 = 19 Bom. L. R. 948. There is no privity of contract between the principal and the sub-agent under S. 192. 26 I. C. 822; 27 M. L. J. 501.

Sec. 193.—See 19 Bom. L. R. 948; 17 Bom. 307.

Sec. 194. In spite of the existence of S. 194 of the Contract Act branch banks do not recognise nor carry out instructions given by clients of other branches unless they have been definitely instruct-

ed to do so; as an act of courtesy, one branch may try to oblige the client of another branch by making enquiries, etc. For practical purposes and so far as their obligations are concerned the branches do not recognise any liability whatsoever to carry out instructions from the clients of other branches unless these be properly conveyed through the branch bank with which the client deals. This is a universal practice and the court should take cognisance of it. 102 I. C. 788 = A. I. R. 1927 Lah. 562 (2).

Ratification.

Right of person as to acts done for him without his authority. Effect of ratification.

196. Where acts are done by one person on behalf of another, but without his knowledge or authority, he may elect to ratify or disown such acts. If he ratify them, the same effects will follow as if they had been performed by his authority.

Ratification may be expressed or implied.

197. Ratification may be expressed or may be implied in the conduct of the person on whose behalf the acts are done.

Illustrations.

(a) *A*, without authority, buys goods for *B*. Afterwards *B* sells them to *C* on his own account; *B*'s conduct implies a ratification of the purchase made for him by *A*.

(b) *A*, without *B*'s authority, lends *B*'s money to *C*. Afterwards *B* accepts interest on the money from *C*. *B*'s conduct implies a ratification of the loan.

Knowledge requisite for valid ratification.

198. No valid ratification can be made by a person whose knowledge of the facts of the case is materially defective.

Effect of ratifying unauthorized act forming part of a transaction.

199. A person ratifying any unauthorized act done on his behalf ratifies the whole of the transaction of which such act formed a part.

Sec. 196.—The right of a principal to ratify an unauthorized act of his agent under S. 196 is confined to cases where the agent purports to act on the principal's behalf and not where the agent acts on his own behalf without authority, or contrary to principal's directions and on behalf of the principal. 30 M. L. J. 497 = 34 T. C. 760. See also 68 I. C. 787 = 1923 Lah. 100; 33 P. R. 1913 = 11 P. L. R. 1913 = 16 I. C. 950; 28 I. C. 135 = 28 M. L. J. 199; [35 Mad. 177; (1910) A. C. 240, foll. See also 6 Bom. 463; 35 I. A. 48; 3 All. 832]; 7 M. I. A. 476; 48 I. C. 959. Guardian's lease—Ratification. receipt of rent whether amounts to—See 46 C. I. J. 441 = 103 I. C. 522 = A. I. R. 1927 Cal. 796. There can be no ratification of a void transaction. 9 M. L. J. 104 = 100 I. C. 839 = A. I. R. 1927 Nag. 214. A mortgage executed by a general agent holding a power of attorney, which did not authorize him to execute mortgages is operative if acted upon, and ratified by the principal and cannot be treated as being void *ab initio*. 19 A. L. J. 827 = 44 A. 77. Contracts made by agents of corporations how far binding—Doctrine of part-performance when applies, 23 C. L. J. 26 = 20 C. W. N. 370 = 43 Cal. 790. A principal cannot ratify a transaction in part and repudiate it in part. Before a principal is bound by ratification it must be proved he had knowledge of all essential facts of the transaction. 25 I. C. 274 = 19 C. W. N. 56. The question of the gumstah's power to bind his landlord is one which must be decided on the particular facts of each case. 10 I. C. 456 = 15 C. W. N. 953.

Sec. 197.—Ratification implies an intention to ratify on the part of the principal; and any act of his can be relied upon as amounting to ratification, only if done after he had full knowledge of the material facts ratified. Thus what the principal says under a mistaken impression cannot amount to ratification. (1927) M. W. N. 118 = 102 I. C. 561 = A. I. R. 1927 Mad. 478. Ratification cannot be inferred from a mere omission to

repudiate in terms an unauthorized transaction. 52 I. C. 414 = 10 L. W. 33. See also 24 Cal. 469. As to where principal's ratification may be presumed where the agent exceeds his authority and embarks on unauthorized transactions. See 9 L. W. 251 = 49 I. C. 758. Where an agent contrary to instructions makes advances against security the principal may realize the security and hold the agent liable for the balance and such intermeddling does not amount to ratification. (*Ibid.*) The application of the principles governing the relationship of English agents to their principals should not be extended to Chetty's agents in India whose position approximates to that of a trustee. 49 I. C. 758 = 25 M. L. T. 286 = (1919) M. W. N. 72. Ratification of an act in excess of authority on the agent's part by principal may be inferred from his mere silence or acquiescence. 31 I. C. 216 = 29 M. L. J. 551. (28 M. L. J. 199 foll.) Act of Nattukottai Chetti agent in excess of his authority. Acts of the principal to mitigate the loss—Effect of section. (1927) M. W. N. 118 = 102 I. C. 561 = 38 M. L. T. (H. C.) 56 = A. I. R. 1927 Mad. 478. Ratification of an unauthorized act of an agent is complete only when the fact is communicated to the other party to the contract. Till then the principal has an option to withdraw. 38 Mad. 997 = 14 M. L. T. 454. Acts relied on inconsistent with denial of liability may give rise to inference of ratification. 48 I. C. 959. A mere *ex post facto* submission to what has taken place, is no ratification of it. 7 O. L. J. 429 = 58 I. C. 165.

Sec. 198.—Mortgage of movables—Object of the sections and the effect of parole mortgage. 37 I. C. 231 = 18 Bom. L. R. 587.

Sec. 199.—In spite of an agent's liability to render all the accounts of all his transactions to the principal, the principal cannot sue him on one of his several transactions without adjusting all the rights and liabilities of the parties in others. 40 Cal. 335 = 17 C. W. N. 67.

200. An act done by one person on behalf of another, without such other person's authority, which, if done with authority, would have the effect of subjecting a third person to damages, or of terminating any right or interest of a third person, cannot, by ratification, be made to have such effect.

Ratification of unauthorized act cannot injure third person.

Illustrations.

(a) *A*, not being authorized thereto by *B*, demands, on behalf of *B*, the delivery of a chattel, the property of *B*, from *C*, who is in possession of it. This demand cannot be ratified by *B*, so as to make *C* liable for damages for his refusal to deliver.

(b) *A* holds a lease from *B*, terminable on three months' notice. *C*, an unauthorized person gives notice of termination to *A*. The notice cannot be ratified by *B*, so as to be binding on *A*.

Revocation of Authority.

201. An agency is terminated by the principal revoking his authority; or by the agent renouncing the business of the agency; or by the business of the agency being completed; or by either the

principal or agent dying or becoming of unsound mind; or by the principal being adjudicated an insolvent under the provisions of any Act for the time being in force for the relief of insolvent debtors.

Termination of agency.

202. Where the agent has himself an interest in the

property which forms the subject-matter of the agency, the agency cannot, in the absence of an express contract, be terminated to the prejudice of such interest.

Termination of agency where agent has an interest in subject-matter.

Illustrations.

(a) *A* gives authority to *B* to sell *A*'s land, and to pay himself, out of the proceeds, the debts due to him from *A*. *A* cannot revoke this authority, nor can it be terminated by his insanity or death.

(b) *A* consigns 1,000 bales of cotton to *B*, who has made advances to him on such cotton, and desires *B* to sell the cotton, and to repay himself, out of the price, the amount of his own advances, *A* cannot revoke this authority, nor is it terminated by his insanity or death.

Sec. 200.—A notice to quit given by one of two joint Receivers on behalf of both without the authority of the other is not valid and cannot be rendered so by subsequent ratification by the other Receiver. 34 I. C. 221=23 C. L. J. 453. Where the only objection to the grant of a melcharth is that it was granted without proper authority it can be subsequently, ratified by the person who has power to grant it. 73 I. C. 376=1924 Mad. 245. See also 27 Bom. 515.

Sec. 201.—In the case of an employment of an under-broker by broker for a fixed term, if the services of broker are dispensed with in the interval, the dependent contract of under-brokerage is also dissolved and the under-broker is not entitled to sue the broker for damages for wrongful dismissal unless the broker had brought about the termination of the head agency purposely. 47 Cal. 290=46 I. A. 314=24 C. W. N. 577 (P. C.). There is termination of agency after the death of the principal and a suit against agent for accounts must be brought within 3 years under art. 89, Lim. Act. 26 C. W. N. 320=65 I. C. 219=1922 C. 53. Principal and Agent—Agent of joint co-parceners—Effect of death of one. 41 I. C. 288=21 C. W. N. 620; See also 38 I. C. 278=20 C. W. N. 708; 16 I. C. 852=17 C. L. J. 201. Where one of two joint agents dies, upon his death, the agency terminates, only so far as he is concerned but continues as regards the surviving Agent. 38 I. C. 278=20

C. W. N. 708; see also 41 I. C. 288=21 C. W. N. 620; 16 I. C. 852=17 C. L. J. 201. Agency terminated by fulfilment of instructions. 70 P. R. 1915=31 I. C. 215. As to what constitutes completion of business, see also 12 All. 541; 26 Cal. 715; 7 Bom. 518 (business of pleader.) Question of termination of agency is one of fact. The usage among money-lending Nattukkottai Chetties and the terms of the contract between the parties can be admitted to decide the question. 31 M. L. J. 687=36 I. C. 812. An agency will not terminate on the expiry of the period contracted for between the principal and agent, if the agent is allowed to continue as agent. No fresh agency is created but the old agency is continued. 31 M. L. J. 685=56 I. C. 804. An agency terminates when the agent hands over charge to another in obedience to a telegram from his principal revoking his authority but his liability in respect of acts done as agent continues. Case-law discussed. 39 Mad. 376=28 M. L. J. 140. On this point see also 39 Mad. 693=3 L. W. 13=31 I. C. 583=29 M. L. J. 788.—Imperfect partition of village—Lambardar's powers whether affected. 19 I. C. 549=9 N. L. R. 46. Mortgagees put into possession so as to appropriate profits towards interest—Power to resume possession. 12 Bur. L. T. 46=47 I. C. 133=9 L. B. R. 172. On this section see also 20 Mad. 97; 5 Bom. 253.

203. The principal may, save as is otherwise provided by the last preceding section, revoke the authority given to his agent at any time before the authority has been exercised so as to bind the principal.

When principal may revoke agent's authority.

204. The principal cannot revoke the authority given to his agent after the authority has been partly exercised so far as regards such acts and obligations as arise from acts already done in the agency.

Revocation where authority has been partly exercised.

Illustrations.

(a) *A* authorizes *B* to buy 1,000 bales of cotton on account of *A*, and to pay for it out of *A*'s money remaining in *B*'s hands. *B* buys 1,000 bales of cotton in his own name, so as to make himself personally liable for the price. *A* cannot revoke *B*'s authority so far as regards payments for the cotton.

(b) *A* authorizes *B* to buy 1,000 bales of cotton on account of *A*, and to pay for it out of *A*'s money remaining in *B*'s hands. *B* buys 1,000 bales of cotton in *A*'s name and so as not to render himself personally liable for the price. *A* can revoke *B*'s authority to pay for the cotton.

205. Where there is an express or implied contract that the agency should be continued for any period of time, the principal must make compensation¹ to the agent, or the agent to the principal, as the case may be, for any previous revocation or renunciation of the agency without sufficient cause.

Compensation for revocation by principal or renunciation by agent.

Notice of revocation or renunciation.

Revocation and renunciation may be expressed or implied

206. Reasonable notice must be given of such revocation or renunciation; otherwise the damage thereby resulting to the principal or the agent, as the case may be, must be made good to the one by the other.

207. Revocation and renunciation may be expressed or may be implied in the conduct of the principal or agent respectively.

Illustration.

A empowers *B* to let *A*'s house. Afterwards *A* lets it himself. This is an implied revocation of *B*'s authority.

When termination of agent's authority takes effect as to agent, and as to third persons.

208. The termination of the authority of an agent does not, so far as regards the agent, take effect before it becomes known to him, or, so far as regards third persons, before it becomes known to them.

Illustrations.

(a) *A* directs *B* to sell goods for him, and agrees to give *B* five per cent. commission on the price fetched by the goods. *A* afterwards, by letter, revokes *B*'s authority. *B*, after the letter is sent, but before he receives it, sells the goods for 100 rupees. The sale is binding on *A*, and *B* is entitled to five rupees as his commission.

(b) *A*, at Madras, by letter directs *B* to sell for him some cotton lying in a warehouse in Bombay, and afterwards, by letter, revokes his authority to sell and directs *B* to send the cotton to Madras. *B* after receiving the second letter, enters into a contract with *C*, who knows of the first letter, but not of the second, for the sale to him of the cotton. *C* pays *B* the money, with which *B* absconds. *C*'s payment is good as against *A*.

(c) *A* directs *B*, his agent, to pay certain money to *C*. *A* dies, and *D* takes o't probate t his will. *B*, after *A*'s death, but before hearing of it pays the money to *C*. The payment is good as against *D*, the executor.

Sec. 203.—Principal and agent—Authority conferred by two or more persons jointly—Revocation by one—Legality. 22 I. C. 90=18 C. L. J. 621. On this section see also 24 Bom. 403; 17 Bom. 542.

Sec. 205.—¹ See s. 73, *supra*.

Suit for damages for revocation of agency by principal—Damage, 15 S.L.R. 140=1922 Sind 25. See also 5 Bom. 253. An agreement to serve as an agent may be rescinded like any other

agreement and an agent is liable for compensation if he renounces the agency without sufficient cause, within the specified period when the agency is to last for any particular period. 31 I. C. 450=9 S. L. R. 77.

Sec. 206.—Renunciation of agency occurs, when agent abandons his employment or sets up adverse title. 30 Cal. 609. See also 15 Cal. 692.

Sec. 208.—See 35 Bom. 302.

209. When an agency is terminated by the principal dying or becoming of unsound mind, the agent is bound to take, on behalf of the representatives of his late principal, all reasonable steps for the protection and preservation of the interests entrusted to him.

Agent's duty on termination of agency by principal's death or insanity.

210. The termination of the authority of an agent causes the termination (subject to the rules herein contained regarding termination of an agent's authority) of the authority of all sub-agents appointed by him.

Termination of sub-agent's authority.

Agent's Duty to Principal.

211. An agent is bound to conduct the business of his principal according to the directions given by the principal, or, in the absence of any such directions according to the custom which prevails in doing business of the same kind at the place where the agent conducts such business. When the agent acts otherwise, if any loss be sustained, he must make it good to his principal, and, if any profit accrues, he must account for it.

Agent's duty in conducting principal's business.

Illustrations.

(a) *A*, an agent engaged in carrying on for *B* a business, in which it is the custom to invest from time to time, at interest, the moneys which may be in hand, omits to make such investment. *A* must make good to *B* the interest usually obtained by such investments.

(b) *B*, a broker, in whose business it is not the custom to sell on credit, sells goods of *A* on credit to *C*, whose credit at the time was very high. *C*, before payment, becomes insolvent. *A* must make good the loss to *A*.

212. An agent is bound to conduct the business of the agency with as much skill as is generally possessed by persons engaged in similar business, unless the principal has notice of his want of skill. The agent is always bound to act with reasonable diligence, and to use such skill as he possesses; and to make compensation to his principal in respect of the direct consequences or his own neglect, want of skill or misconduct, but not in respect of loss or damage which are indirectly or remotely caused by such neglect, want of skill or misconduct.

Skill and diligence required from agent.

Illustrations.

(a) *A*, a merchant in Calcutta, has an agent, *B*, in London to whom a sum of money is paid on *A*'s account, with orders to remit. *B* retains the money for a considerable time. *A*, in consequence of not receiving the money becomes insolvent. *B* is liable for the money and interest from the day on which it ought to have been paid, according to the usual rate, and for any further direct loss—as *e. g.*, by variation of rate of exchange—but not further.

(b) *A*, an agent for the sale of goods, having authority to sell on credit sells to *B* on credit, without making the proper and usual enquiries as to the solvency of *B*. *B*, at the time of such sale, is insolvent. *A* must make compensation to his principal in respect of any loss thereby sustained.

Sec. 209.—Even after the death of the principal, the agent can enter into transactions necessary to protect the interest of the heirs of the deceased and such authority continues till it is revoked by the heirs. 60 I. C. 739; 3 Lah. L. J. 265. As to survivorship of agency see 30 Cal. 265; 17 C. L. J. 201.

Sec. 211.—Principal and Agent—Negligence—Claim of principal barred by limitation—Liability of agent. 52 I. C. 71. In the absence of custom of trade or express or implied authority of the principal payment to a broker is no payment to the principal. 40 I. C. 799. Principal and Agent—Joint property of brothers—Some managing property—Relationship—Duty of manager. 29 I. C. 905. Where an agent has caused loss to the principal by not carrying out his directions, and by supplying goods contrary to his directions, the agent or his legal representatives are liable for the value of the goods so supplied. 66 I. C. 446. As to when nominal damages are awarded 20 Bom. 633. Commission Agent transacting with

himself under fictitious name—English and Indian law compared. 37 I. C. 241=10 S. L. R. 86. When a commission agent's transaction with himself involves no opposition between his own interests and his duty to principal, the transaction becomes binding on the principal, though the agent cannot claim commission in such a case. (*Ibid.*) Even under the Indian Law the usage to be binding requires specific pleading and strict proof of its existence. (*Ibid.*) As to effect of Agent's infringement of principal's instructions, see 26 Punj. L. R. 108=86 I. C. 567=7 Lah. L. J. 84=1924 Lah. 332. Commission agent authorised to sell goods at a particular place has no discretion to take the goods to another place for sale. (1927) M. W. N. 578. Right of principal over secret profit made by agent—Doctrine of tracing. (1927) M. W. N. 118.

Sec. 212.—See 18 Cal. 574; 13 C. W. N. 59; 1925 Mad. 46=47 M. L. J. 312; 43 C. L. J. 479 97 I. C. 205=A. I. R. 1926 Cal. 983.

(c) *A*, an insurance-broker employed by *B* to effect an insurance on a ship, omits to see that the usual clauses are inserted in the policy. The ship is afterwards lost. In consequence of the omission of the clauses nothing can be recovered from the underwriters. *A* is bound to make good the loss to *B*.

(d) *A*, a merchant in England, directs *B*, his agent at Bombay, who accepts the agency, to send him 100 bales of cotton by a certain ship. *B*, having it in his power to send the cotton, omits to do so. The ship arrives safely in England. Soon after her arrival the price of cotton rises. *B* is bound to make good to *A* the profit which he might have made by the 100 bales of cotton at the time the ship arrived, but not any profit he might have made by the subsequent rise.

Agent's accounts.

213. An agent is bound to render proper accounts to his principal on demand.

Agent's duty to communicate with principal.

214. It is the duty of an agent, in cases of difficulty, to use all reasonable diligence in communicating with his principal, and in seeking to obtain his instructions.

215. If an agent deals on his own account in the business of the agency, without first obtaining the consent of his principal and acquainting him with all material circumstances which have come to his own knowledge on the subject, the principal may repudiate the transaction, if the case shows either that any material fact has been dishonestly

Right of principal when agent deals, on his own account, in business of agency without principal's consent.

Sec. 213.—A principal is entitled to a final account between himself and the agent on the termination of the agency and the agent can rely upon casual accounts settled between themselves as being *prima facie* correct. 13 I.C. 612, 1925 Lah. 100. Agent must support his accounts by proper vouchers. 6 Cal. 754; 43 Cal. 248; 52 Cal. 766=90 I. C. 944. Agents' duty is analogous to that of trustee. 7 Cal. 627. There is no corresponding obligation to account on the part of the principal. 7 Cal. 654; 1925 Lah. 100. Accounts, suit for—Legal representative of agent—Liability to account—Onus. 47 I. C. 371=28 C.L.J. 492. The death of an agent during the pendency of a suit against him for accounts does not exonerate his legal representatives from all liability to the principal. (*Ibid.*) Rendering an account of his agency and account for money received by him, is not confined merely by rendering of accounts of what has been done with the money, but includes also the payment of any balance which might be found due upon taking accounts. 21 C. W. N. 591=40 I. C. 359=25 C. L. J. 335. The obligation of an agent towards his principal does not terminate merely in submission of account papers. 43 Cal. 248=19 C. W. N. 1070. He is bound to explain those papers and if on accounts taken it is found that he has in his hands money which belongs to his principal, he is bound to pay that sum (*Ibid.*) The liability to render an account cannot be enforced against the legal representatives of an agent. The liability is personal, and the legal representatives need not render accounts in the same sense in which the agent himself might have been called upon to do. 17 C. W. N. 5=16 I. C. 742=16 C. L. J. 282. See also 47 I. C. 371=28 C. L. J. 492. The remedy of the principal after the death of his agent is to sue the representatives for any loss he may have suffered by the negligence, misconduct, misfeasance or malfeasance of his agent. 17 C. W. N. 5=16 I. C. 742. Agent's heirs—Liability to account. 16 C. W. N. 1042=16 I. C. 414=16 C. L. J. 288. In a suit for accounts against the agent, the mere production by the agent of his accounts would not amount to proof of same. 11 I. C. 161=15 C.

W. N. 930. The audit of a company's accounts does not preclude it from calling upon the agents for rendition, though it closes the accounts between the shareholders and the directorate in the absence of fraud or mistake in connection with the audit. 42 I. C. 375=86 P. L. R. 1917. Where money is advanced to an agent for work to be done on the understanding that a bill is to be sent subsequently the agent must account for the money. 62 I. C. 503=13 L. W. 366. Suit by principal against agent for moneys unaccounted for is maintainable. 44 Mad. 214=39 M. L. J. 586. An agent is bound to pay interest on the sum of money retained by him and due to the principal from the date of demand therefor by the principal. 33 M. L. J. 468=6 L. W. 520=42 I. C. 219. An agent by retaining money due to the principal cannot be held to have committed a fraud. (*Ibid.*) A secretary of a Fund is only an agent and not a trustee though he is himself a director and recovers. (*Ibid.*)

Sec. 214.—See S. 189 *supra*. Principle of section. 105 I. C. 836=4 O.W. N. 1061.

An agent authorized to buy and sell at the best rates cannot defer carrying out the order, till communicating the rate of the day to the principal. 50 I. C. 146=12 S. L. R. 93. Commission agent authorized to sell goods at a particular place has no discretion to take them to another place for sale. (1927) M. W. N. 578.

Sec. 215.—Section is only an enabling one. See 34 Bom. 292; 15 Mad. 889; 43 M. L. J. 444. Section based on principle that no one can have an interest against his duty. 7 B. H. C. 90; 29 Bom. 730. A. I. R. 1927 Sind 195. An agent stands in a fiduciary relation towards his principal. He cannot enter into any transaction in which his personal interest conflicts with his due towards his principal. He cannot make any secret profit for himself while selling his principal's property or making settlement for damages on behalf of his principal. 9 Lah. 7. When an agent uses his debt due to his principal to obtain property for himself, he realizes that debt on the principal's behalf and is liable to account for the same. 25 I. C. 88=12 A. L. J. 463. Dealing by agent in the business of the agency without the

concealed from him by the agent, or that the dealings of the agent have been disadvantageous to him.

Illustrations.

(a) *A* directs *B* to sell *A*'s estate. *B* buys the estate for himself in the name of *C*. *A*, on discovering that *B* has bought the estate for himself, may repudiate the sale, if he can show that *B* has dishonestly concealed any material fact, or that the sale has been disadvantageous to him.

(b) *A* directs *B* to sell *A*'s estate. *B*, on looking over the estate before selling it, finds a mine on the estate which is unknown to *A*. *B* informs *A* that he wishes to buy the estate for himself, but conceals the discovery of the mine. *A* allows *B* to buy, in ignorance of the existence of the mine. *A* on discovering that *B* knew of the mine at the time he bought the estate, may either repudiate or adopt the sale at his option.

216. If an agent, without the knowledge of his principal, deals in the business of the agency on his own account instead of on account of his principal, the principal is entitled to claim from the agent any benefit which may have resulted to him from the transaction.

Principal's right to benefit gained by agent dealing on his own account in business of agency.

Illustration.

A directs *B*, his agent, to buy a certain house for him. *B* tells *A* it cannot be bought, and buys the house for himself. *A* may, on discovering that *B* has bought the house, compel him to sell it to *A* at the price he gave for it.

217. An agent may retain,¹ out of any sums received on account of the principal in the business of the agency, all moneys due to himself in respect of advances made or expenses properly incurred by him in conducting such business, and also such remuneration as may be payable to him for acting as agent.

Agent's right of retainer out of sums received on principal's account.

Agent's duty to pay sums received for principal.

218. Subject to such deductions, the agent is bound to pay to his principal all sums received on his account.

219. In the absence of any special contract, payment for the performance of any act is not due to the agent until the completion of such act; but an agent may detain moneys received by him on account of goods sold, although the whole of the goods

When agent's remuneration becomes due.

knowledge of the principal—Contract is voidable at the option of principal—English and Indian law. 43 M. L. J. 444; 45 M. 1005=1922 Mad. 497. See also 42 I. C. 357 (Mad.); 102 I. C. 366=A. I. R. 1927 Sind 195. Even apart from S. 215 the dishonest concealment by the plaintiff of the identity of the contracting party constitutes fraud and entitles the defendants to avoid the contract. 43 M.L.J. 444=45 M. 1005. Where the plaintiff company were managing agents of the defendant's company to which the former supplied goods, the plaintiff company was held not entitled to make any profit on the goods supplied to their principal, the defendant's company. 26 I. C. 478=8 L. B. R. 102. Breach of duty by agent would entail loss of his remuneration. 26 Bom. 689. As to liability of executor, see 22 Cal. 14.

Sec. 216.—It is the duty of an agent not merely to do nothing to injure the interests of his principal, but to do all in his power to further them. He should not place himself in a position in which his interests might be adverse to that of the principal. 41 A. 635=52 I. C. 373. Secret profits made by agent, right of principal over—Doctrine of tracing—See (1927) M.W.N. 118. A principal can have a decree for an account of profits of property outside British India purchased by an agent in execution of a mortgage decree passed in favour of the principal; but a principal is not entitled to a mandatory injunction directing the agent to execute a re-conveyance to the principal. 31 I. C. 216=29 M. L. J. 581. Agent's duty to

carry out a sale for a particular sum—Acceptance by agent of secret commission from vendor—Failure to communicate with principal. 22 I. C. 597=1 L. W. 181. See also 19 M. L. T. 381=30 M. L. J. 497. Suit for accounts and suit for damages—difference between. 38 M. L. T. 256 (H. C.).

Sec. 217.—¹ See s. 221, *infra*.

Agency for sale of sugar—Agent depositing moneys with principal—Insolvency of principal—Right of agent to set off. 15 L. W. 201. (P. C.). Claims and cross-claims—Business of principal—Company transferred to another company—Business conducted as before—Set off. 24 C. W. N. 1004 (P. C.). Agent is entitled to a lien or retainer upon monies of his principal which are in his hands, for all expenses properly incurred. In cases of exercise of lien or retainer no question of time limit arises at all. 1 Bur. L. J. 219=1923 R. 84. (39 Mad. 365, foll.) Pleadings lien—Entrustment of shares for sale in private capacity—Appropriation for fees. 5 S.L.R. 222=15 I. C. 785=13 Cr.L.J. 513. He stands in fiduciary relation to his client and it is for him to show that the client consented to the appropriation without undue influence on his part. 5 S. L. R. 222=15 I. C. 785=13 Cr. L. J. 513. (32 Bom. 37 at 44, 45 ref.).

Sec. 218.—See 30 Cal. 1011; 25 All. 639; 19 M. L. J. 759; 19 M. L. T. 381=30 M. L. J. 497; 30 Bom. L. R. 486.

Sec. 219.—When an agent is employed for commission to sell certain property at a certain

consigned to him for sale may not have been sold, or although the sale may not be actually complete.

Agent not entitled to remuneration for business misconducted.

220. An agent who is guilty of misconduct in the business of the agency¹ is not entitled to any remuneration in respect of that part of the business which he has misconducted.

Illustrations.

(a) *A* employs *B* to recover 1,00,000 rupees from *C*, and to lay it out on good security. *B* recovers the 1,00,000 rupees and lays out 90,000 rupees on good security, but lays out 10,000 rupees on security which he ought to have known to be bad, whereby *A* loses, 2,000 rupees. *B* is entitled to remuneration for recovering the 1,00,000 rupees and for investing the 90,000 rupees. He is not entitled to any remuneration for investing the 10,000 rupees, and he must make good the 2,000 rupees to *B*.

(b) *A* employs *B* to recover 1,000 rupees from *C*. Through *B*'s misconduct the money is not recovered. *B* is entitled to no remuneration for his services, and must make good the loss.

221. In the absence of any contract to the contrary, an agent is entitled to retain goods, papers and other property, whether moveable or immovable, of the principal received by him, until the amount due to himself for commission, disbursements and services in respect of the same has been paid or accounted for to him.

Agent's lien on principal's property.

Principal's duty to Agent.

Agent to be indemnified against consequences of lawful acts.

222. The employer of an agent is bound to indemnify him against the consequences of all lawful acts done by such agent in exercise of the authority conferred upon him.

Illustrations.

(a) *B*, at Singapur, under instructions from *A* of Calcutta, contracts with *C* to deliver certain goods to him. *A* does not send the goods to *B*, and *C* sues *B* for breach of contract. *B* informs *A* of the suit, and *A* authorizes him to defend the suit. *B* defends the suit, and is compelled to pay damages and costs, and incurs expenses. *A* is liable to *B* for such damages, costs and expenses.

(b) *B*, a broker at Calcutta, by the orders of *A*, a merchant there, contracts with *C* for the purchase of 10 casks of oil for *A*. Afterwards *A* refuses to receive the oil, and *C* sues *B*. *B* informs *A*, who repudiates the contract altogether. *B* defends, but unsuccessfully, and has to pay damages and costs and incurs expenses. *A* is liable to *B* for such damages, cost and expenses.

223. Where one person employs another to do an act, and the agent does the act in good faith, the employer is liable to indemnify the agent against the consequences of that act, though it cause an injury to the rights of third persons.

Agent to be indemnified against consequences of acts done in good faith.

price and the agent succeeds in finding a purchaser at that price but the principal declines to sell, the agent is entitled to reasonable remuneration for his work and labour. 14 I. C. 981=15 C. L. J. 312. So also where sale goes off owing to caprice or default of vendor. 8 M. L. T. 40. See also 20 Bom. 124. Broker—Contract to procure loan—Loan procured but on conditions—Agent, if entitled to commission. 11 I. C. 820=15 C. L. J. 40=16 C. W. N. 753. When the contract provides for the agent's commission on payment for the goods by the purchasers, the agent is not entitled to remuneration on cancelled contracts, and the doctrine of *quantum meruit* cannot be invoked. 29 Bom. L. R. 375=102 I. C. 225=A. L. R. 1927 Bom. 225 (1923—1 K. B. 110 foll.)

Sec. 220.—¹See e.g., ss. 195, 211, 212, 213, 214 and 218, *supra*.

A conveyance purporting to have been executed by two persons as agents of a woman whose name nowhere appears in the document and where the agents themselves have not signed it as such, is not one which would bind the woman. 12 I. C. 206=4 Bur. L. T. 255.

Sec. 221.—As to the general lien of the agent who is a banker factor, attorney or policy-broker see s. 171, *supra*.

See 31 Mad. 123; 89 I. C. 409.

Sec. 222.—In the absence of a stipulation, money spent by a commission agent during a business trip on boarding and lodging cannot be considered to be incidental to carrying on the business of the principal who is not bound to pay the bill. 19 I. C. 248=206 P. L. R. 1912. Contract C. I. F.—Contract to ship goods on account and risk of buyer—Outbreak of war—Right of Commission Agent. 49 I. C. 196=8 L. W. 565=35 M. L. J. 184=41 Mad. 1060. Agreement to pay single sum for remuneration—Remuneration, if can be split up. 22 I. C. 597=1 L. W. 181.

Sec. 223.—The liability of a principal and agent is not joint but alternative. A person dealing with a principal through his agent may sue either or he may sue both of them alternatively, but he cannot obtain judgment against both jointly. 49 M. 900=97 I. C. 475=A. I. R. 1926 Mad. 1213=51 M. L. J. 311. As to decree to be passed in a suit against both agent and principal,

Illustrations.

(a) *A*, a decree holder and entitled to execution of *B*'s goods, requires the officer of the Court to seize certain goods, representing them to the goods of *B*. The officer seizes the goods, and is sued by *C*, the true owner of the goods. *A* is liable to indemnify the officer for the sum which he is compelled to pay to *C*, in consequence of obeying *A*'s directions.

(b) *B* at the request of *A*, sells goods in the possession of *A*, but which *A* had no right to dispose of. *B* does not know this, and hands over the proceeds of the sale to *A*. Afterwards *C*, the true owner of the goods, sues *B* and recovers the value of the goods and costs. *A* is liable to indemnify *B* for what he has been compelled to pay to *C* and for *B*'s own expenses.

224. Where one person employs another to do an act which is criminal, the employer is not liable to the agent, either upon an express or an implied promise, to indemnify him against the consequences of that act.

Non-liability of employer of agent to do a criminal act.

Illustrations.

(a) *A* employs *B* to *C*, and agrees to indemnify him against all consequences of the act, *B* thereupon beats *C*, and has to pay damages to *C* for so doing. *A* is not liable to indemnify *B* for those damages.

(b) *B*, the proprietor of a newspaper, publishes, at *A*'s request, a libel upon *C* in the paper, and *A* agrees to indemnify *B* against the consequences of the publication, and all costs and damages of any action in respect thereof. *B* is sued by *C* and has to pay damages, and also incurs expenses. *A* is not liable to *B* upon the indemnity.

Compensation to agent for injury caused by principal's neglect.

225. The principal must make compensation to his agent in respect of injury caused to such agent by the principal's neglect or want of skill.

Illustration.

A employs *B* as a bricklayer in building a house, and puts up the scaffolding himself. The scaffolding is unskilfully put up, and *B* is in consequence hurt. *A* must make compensation to *B*.

Effect of agency on contract with third persons.

226. Contracts entered into through an agent, and obligations arising from acts done by an agent, may be enforced in the same manner, and will have the same legal consequences, as if the contracts had been entered into and the acts done by the

Enforcement and consequences of agent's contracts.

principal in person.

see A. I. R. 1926 Oudh 41. An agent, on general grounds is entitled to reimbursement and indemnity by his principal but only on the condition that he has acted within the scope of his directions, 59 I. C. 971=3 Lah. L. J. 141; 23 I. R. 1915 *infra*. Suit to enforce that right is governed by Art. 83 of the Limitation Act. 100 P. L. R. 1915=26 I. C. 145=35 P. W. R. 1915=23 P. R. 1915. If an agent exercises reasonable skill and diligence, he is not responsible to the principal for an error of judgment which causes loss to the principal. 31 I. C. 450=9 S. L. R. 77.

Secs. 223 and 224.—Money sent by agent for unlawful purposes on authority of principal—Right to recover. See 88 I. C. 980; A. I. R. 1926 Sind 40=20 S. L. R. 100. Act, though unlawful, not criminal, effect of. See 20 S. L. R. 100=A. I. R. 1926 Sind 40.

Sec. 224.—See S. 24, *supra*.

Sec. 225.—*Cf.* The Indian Fatal Accidents Act (XIII of 1855).

Sec. 226.—Agent acting beyond scope of authority—Principal's liability. 35 I. C. 208=14 A. L. J. 601. As a general rule, the agent has no authority to borrow money on account of his principal so as to render the latter liable to the lender unless the principal has given express authority or previous sanction or has subsequently adopted and ratified the loan. 36 I. C. 968=10 S. L. R. 72. If an agent is acting in collusion with a third

party without the principal's consent and the act is detrimental to the interest of the principal, the latter is not bound. 56 I. C. 631=2 Lah. L. J. 516. Payment to an agent is payment to the principal. 13 I. C. 955=36 P. L. R. 1912. An agent cannot sue or be sued in respect of a sale to him on behalf of the principal. 20 I. C. 844=25 M. L. L. 32. Where an agent signs a promissory note for a business belonging to a minor, the holder must be fixed with notice of the contents of the power of attorney under which the agent acts and of the extent of his authority and of the fact that the business belonged to a minor. 21 M. L. J. 620=35 Mad. 692=14 I. C. 389. Agent—Power to sell property—Recital of authority unnecessary. 23 O. C. 353=59 I. C. 596. One of several joint debtors cannot be an agent of their creditor so far as joint-debtors are concerned and a payment to that debtor is not a payment to the creditor. 11 I. C. 864=4 Bur. L. T. 197. Where an agent fraudulently, in furtherance of his own interests, and contrary to instruction enters into a contract the principal will be bound only if third persons dealing with the agent have acted in good faith. 36 I. C. 968=10 S. L. R. 72; 45 I. C. 856. The onus of proving good faith lies on such third persons claiming against the principal. 36 I. C. 968=10 S. L. R. 72. (9 Bom. L. R. 388 ref.).

Illustrations.

(a) *A* buys goods from *B*, knowing that he is an agent for their sale, but not knowing who is the principal. *B*'s principal is the person entitled to claim from *A* the price of the goods, and *A* cannot in a suit by the principal set off against that claim a debt due to himself from *B*.

(b) *A*, being *B*'s agent with authority to receive money on his behalf, receives from *C* a sum of money due to *B*. *C* is discharged of his obligation to pay the sum in question to *B*.

227. When an agent does more than he is authorized to do, and when the part of what he does which is within his authority, can be separated from the part which is beyond his authority, so much only of what he does as is within his authority is binding as between him and his principal.

Principal how far bound when agent exceeds authority.

Illustration.

I, being owner of a ship and cargo, authorizes *B* to procure an insurance for 4,000 rupees on the ship. *B* procures a policy for 4,000 rupees on the ship, and another for the like sum on the cargo. *A* is bound to pay the premium for the policy on the ship, but not the premium for the policy on the cargo.

Principal not bound when excess of agent's authority is not separable.

228. Where an agent does more than he is authorized to do, and what he does beyond the scope of his authority cannot be separated from what is within it, the principal is not bound to recognize the transaction.

Illustration.

A authorizes *B* to buy 500 sheep for him. *B* buys 500 sheep and 200 lambs for one sum of 6,000 rupees. *A* may repudiate the whole transaction.

229 Any notice given to or information obtained by the agent, provided it be given or obtained in the course of the business transacted by him for the principal, shall, as between the principal and third parties, have the same legal consequence as if it had been given to or obtained by the principal.

Consequences of notice given to agent.

Illustrations.

(a) *A* is employed by *B* to buy from *C* certain goods, of which *C* is the apparent owner, and buys them accordingly. In the course of the treaty for the sale, *A* learns that the goods really belonged to *D*, but *B* is ignorant of that fact. *B* is not entitled to set off a debt owing to him from *C* against the price of the goods.

(b) *A* is employed by *B* to buy from *C* goods of which *C* is the apparent owner. *A* was before, he was so employed, a servant of *C*, and then learnt that the goods really belonged to *D*, but *B* is ignorant of that fact. In spite of the knowledge of his agent, *B* may set-off against the price of the goods a debt owing to him from *C*.

Agent cannot personally enforce, nor be bound by, contracts on behalf of principal.

230. In the absence of any contract to that effect, an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them.

Sec. 227—Agent acting in the course of the business—Principal liable to third parties suffering damage. 43 All. 623=19 A. L.J. 654.

Sec. 228.—See 10 B. H. C. 319; 8 B. H. C. 10.

Sec. 229.—Principle of section. 25 All. 1; 28 I. C. 488=59 P. L. R. 1915. Constructive notice of a fact which the agent knows cannot be imputed to the principal when it was not to the interest of the agent to disclose the fact to the principal and which the agent did not in fact disclose. See 46 I. A. 250=44 B. 139=24 C. W. N. 469=54 I. C. 121 (P. C.). See also 12 B. H. C. 262. Knowledge of agent prior to agency would not bind the principal. 89 I. C. 625=1925 Nag. 398. If the agent, acting on his principal's behalf in some transaction in which his knowledge would otherwise be imputed to his principal, takes part in any fraud or misfeasance against the principal, the principal is not bound by the agent's knowledge. 36 Bom. 564=14 I. C. 353.

Sec. 230.—Where the defendant as manager of the Banaili Raj got some work done by the plain-

tiff and the name of the Raja was not disclosed there is no personal liability against the defendant for the work done by him for the Raj. 24 I. C. 415. See also 89 I. C. 380=1925 Oudh 641. Evidence of custom or usage incidental to contract. 35 I. C. 3=20 C. W. N. 365. A broker who gives to the buyer a note in the form "bought by your order and for your account from our principals" is not more than intermediary, and was not an agent of the undisclosed principal for sale, to make him liable under the section. 19 C. W. N. 623=42 Cal. 1050. Auctioneer is different from an ordinary agent, and can sue in his name for price of goods sold at auction. 20 S. L. R. 287=92 I. C. 394=A. I. R. 1926 Sind 6. An agent is not personally bound by a contract entered into by him on behalf of his principal in the absence of any contract to that effect. 73 I. C. 885=1923 Lah. 296. The presumption in S. 230 (1) is rebuttable. 67 I. C. 157. The mere fact that the principal is abroad does not absolve the personal liability of the agent if the other contracting

Presumption of contract to contrary.

Such a contract shall be presumed to exist in the following cases:—

(1) Where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad :

(2) Where the agent does not disclose the name of his principal :

(3) Where the principal, though disclosed, cannot be sued.

231. If an agent makes a contract with a person who neither knows, nor has reason to suspect, that he is an agent, his principal may require the performance of the contract ; but the other contracting party has, as against the principal, the same rights as he would have had as against the agent if the

Rights of parties to a contract made by agent on disclosed.

agent had been principal.

If the principal discloses himself before the contract is completed, the other contracting party may refuse to fulfil the contract, if he can show that, if he had known who was the principal in the contract, or if he had known that the agent was not a principal, he would not have entered into the contract.

232. Where one man makes a contract with another, neither knowing nor having reasonable ground to suspect that the other is an agent, the principal, if he requires the performance of the contract, can only obtain such performance subject to the rights and obligations subsisting between the agent and the other party to the contract.

Performance of contract with agent supposed to be principal.

Illustration.

A, who owes 500 rupees to *B*, sells 1,000 rupees worth of rice to *B*. *A* is acting as agent for *C* in the transaction, but *B* has no knowledge nor reasonable ground of suspicion that such is the case. *C* cannot compel *B* to take the rice without allowing him to set-off *A*'s debt.

233. In cases where the agent is personally liable, a person dealing with him may hold either him or his principal, or both of them, liable.

Right of person dealing with agent personally liable.

Illustration.

A enters into a contract with *B* to sell him 100 bales of cotton, and afterwards discovers that *B* was acting as agent for *C*. *A* may sue either *B* or *C*, or both, for the price of the cotton.

party looked to him alone for performance. 67 I. C. 157. See also 65 I. C. 473. To make an agent personally liable under a contract it must be clearly established that the agent had not disclosed the name of his principal. 65 I. C. 473. An agent who describes himself as such, may still be contracting in his personal capacity but failure to specify his capacity, as an agent in signing a contract does not raise any such presumption when the terms of the contract itself are clearly to the contrary. 65 I. C. 468 = 2 Lah. L. J. 374. When an agent enters into a contract he may sue thereon in his own name, if he has an interest in the contract. 55 I. C. 992. (24 Mad. 130 foll.) 27 Bom. L. R. 1168 = 1925 Bom. 547. Agent receiving goods on behalf of principal—Agent's liability for price. 39 I. C. 793 = 143 P. L. R. 1917. See also 24 I. C. 1007 ; 27 Mad. 315. An agent is not entitled to personally enforce a contract entered into by him on behalf of his principal, nor is he personally bound by such contract. 52 I. C. 179. A person contracting with an agent for an undisclosed principal can sue either the agent or the principal or both. 59 I. C. 965 ; 2 I. L. J. 374 = 65 I. C. 468 ; 39 Cal. 802 = 18 C. W. N. 263.

against the agent claim the full benefit of the contract entered by the agent in his own name and as against the party contracting with the agent, the principal is bound by the equities arising between the agent and the contracting party. 26 I. C. 822 = 27 M. L. J. 501. (3 I. C. 801 ref. to.) see also 40 Cal. 335 ; 10 Bom. L. R. 306. (Partners). Where a railway receipt for goods consigned for transit as in the name of an agent, the real owner is entitled to sue for their value, if the goods are lost. 92 I. C. 1007. An agent contracting in his own name without mentioning the agency can sue and be sued upon the contract. 26 I. C. 822 = 27 M. L. J. 501. See also 35 Mad. 692 = 21 M. L. J. 620 ; 1925 Cal. 29 ; 46 C. L. J. 362.

Sec. 232.—See 4 Bom. 447.

Sec. 233.—Section gives the party who is dealing with an agent who is personally liable a double form of election. He can sue both the principal and agent jointly or sue one of them. If he sues one, a suit against the other will be barred. 40 I. C. 194 = 19 Bom. L. R. 370. S. 233 enacts substantive law and not adjective law defining procedure by which the liability may be enforced. 40 I. C. 194 = 19 Bom. L. R. 370. See also 31 Mad. 45 ; 18 Cal. 31 ; 90 I. C. 487.

Sec. 231.—Under S. 231 a principal can, as

234. When a person who has made a contract with an agent induces the agent

Consequence of inducing agent or principal to act on belief that principal or agent will be held exclusively liable.

to act upon the belief that the principal only will be held liable, or induces the principal to act upon the belief that the agent only will be held liable, he cannot afterwards hold liable the agent or principal respectively.

235. A person untruly¹ representing himself to be the authorized agent of another, and thereby inducing a third person to deal with

Liability of pretended agent.

him as such agent, is liable, if his alleged employer does not ratify his acts, to make compensation to the other in respect of any loss or damage which he has incurred by so dealing.

Person falsely contracting as agent not entitled to performance.

236. A person with whom a contract has been entered into in the character of agent is not entitled to require the performance of it if he was in reality acting, not as agent, but on his own account.

237. When an agent has, without authority, done acts or incurred obligation to

Liability of principal inducing belief that agent's unauthorised acts were authorized.

third persons on behalf of his principal, the principal is bound by such acts or obligations if he has by his words or conduct induced such third persons to believe that such acts and obligations were within the scope of the agent's authority.

Illustrations.

(a) *A* consigns goods to *B* for sale, and gives him instructions not to sell under a fixed price. *C*, being ignorant of *B*'s instructions, enters into a contract with *B* to buy the goods at a price lower than the reserved price. *A* is bound by the contract.

(b) *A* entrusts *B* with negotiable instruments endorsed in blank. *B* sells them to *C* in violation of private orders from *A*. The sale is good.

238. Misrepresentations made, or frauds committed, by agents acting in the

Effect, on agreement, of misrepresentation or fraud by agent.

course of their business for their principals, have the same effect on agreements made by such agents as if such misrepresentations or frauds had been made or committed by the principals²; but misrepresentations made, or

frauds committed, by agents, in matters, which do not fall within their authority, do not affect their principals.

Illustrations.

(a) *A* being *B*'s agent for the sale of goods, induces *C* to buy them by a misrepresentation, which he was not authorised by *B* to make. The contract is voidable, as between *B* and *C*, at the option of *C*.

(b) *A*, the captain of *B*'s ship, signs bills of lading without having received on board the goods mentioned therein. The bills of lading are void as between *B* and the pretended consignee.

CHAPTER XI.

OF PARTNERSHIP.

239. "Partnership" is the relation which subsists between persons who have agreed to combine their property, labour or skill in some business, and to share the profits thereof between them.

"Partnership" defined.

Sec. 234.—*See* 4 Bom. 477; 6 Bom. 326; 9 All. 681; 7 Mad. 392; 2 All. 307.

Sec. 235.—¹ *See* 208 *supra*.

Agent untruly representing his authority—Acting beyond his scope—Liability of. 13 I. C. 94 = 34 All. 168. *See also* 8 M. L. T. 353. Liability of agent when principal repudiates. 1924 Oudh 184 = 72 I. C. 1011.

Sec. 236.—A person with whom a contract is made as an agent when he is not so, cannot sue under S. 236. 39 Cal. 802 = 18 C. W. N. 263. *See also* 34 Cal. 625.

Sec. 237.—*See* 18 Bom. L. R. 317; 6 C. W. N. 29.

Sec. 238.—² *See* S. 250 *infra*.

It is enough if the fraud is committed by the agent in the course of his business for his principal, *i.e.*, in matters falling within the scope of his authority. 50 Cal. 258 = 27 C. W. N. 18; 36 All. 416 = 24 I. C. 20. Principal and Agent—Criminal liability. 42 Cal. 1094 = 33 I. C. 289 = 19 C. W. N. 1239. Forgery and fraud by agent—Principal not bound. 15 S. L. R. 93.

Sec. 239.—Partnership is a relationship between persons recognized by law. The law does not recognize partnership as being an entity at all. It is a mere guise or cloak or name by which the individual persons, joint owners are

"Firm" defined.

Persons who have entered into partnership with one another are called collectively a "firm".

Illustrations.

(a) *A* and *B* buy 100 bales of cotton, which they agree to sell for their joint account; *A* and *B* are partners in respect of such cotton.

(b) *A* and *B* buy 100 bales of cotton, agreeing to share it between them. *A* and *B* are not partners.

(c) *A* agrees with *B*, a goldsmith, to buy and furnish gold to *B*, to be worked up by him and sold, and that they shall share in the resulting profit or loss. *A* and *B* are partners.

(d) *A* and *B* agree to work together as carpenters, but that *A* shall receive all profits and shall pay wages to *B*. *A* and *B* are not partners.

(e) *A* and *B* are joint owners of a ship. This circumstance does not make them partners.

240. A loan to a person engaged or about to engage in any trade or undertaking, upon a contract with such person that the lender shall receive interest at a rate varying with the profits or that he shall receive a share of the profits, does not, of itself, constitute the lender a partner, or render him responsible

Lender not a partner by advancing money for share of profits.

as such.

Property left in business by retiring partner, or deceased partner's representative.

241. In the absence of any contract to the contrary, property left by a retiring partner, or the representative of a deceased partner, to be used in the business is to be considered a loan within the meaning of the last preceding section.

concealed or pointed out. 56 I. C. 325=47 Cal. 29. An agreement to contribute money towards an undertaking and to share the profits and losses therefrom is a partnership. 46 I. C. 342=3 U. B. R. (1918) 62. Agreement to share profits is an essential element in partnership. 8 Lah. 310=100 I. C. 846=A. I. R. 1927 Lah. 333. It is not essential to constitute a partnership that the partners should agree to share the losses. 51 Bom. 342=20 Bom. L. R. 207=100 I. C. 1025=A. I. R. 1927 Bom. 185. Partners may also agree to share the profits on any way they like. They may after to share them equally or that one is to receive a fixed monthly or annual sum in lieu of profits (*Ibid.*). Person signing plaint, etc., in firm's name is not necessarily a partner. A. I. R. 1927 Sind 247. Partnership is determined by intention of parties—Commission and not profits. 28 C. W. N. 34=1924 C. 424; 51 Bom. 342=29 Bom. L. R. 207=100 I. C. 102; A. I. R. 1927 Bom. 187. A partnership is established when the parties agree to carry on a business or to share the profits in the same way in common. A partner is entitled to purchase partnership property provided he makes a fair and full disclosure of the nature of the transaction to the other partners. 43 Cal. 733=22 C. L. J. 339=31 I. C. 430=21 C. W. N. 632. Contract Act does not deal with sub-partnership but the provisions of S. 31 of the English Partnership Act may be adopted in India. As to rights of assignee of a share in a partnership. See 4 L. W. 10=34 I. C. 543=(1916) 2 M. W. N. 18. One firm cannot be partner in another. 50 Cal. 549=1924 Cal. 74. A gumasta sharing in the profits as well as in the losses in a business is a partner. 3 P. W. R. 1918=44 I. C. 283=155 P. L. R. 1917. A servant whose remuneration varies with the profits may be partner in popular sense, but is not legally so. 69 I. C. 781=1922 Nag. 96. See also 51 Bom. 342. One partner having option to send another or take fresh partners—Nature of relation is that of partnership. 25 Bom. L. R. 1225=1924 Bom.

182. Partner is agent of firm and not of other partners—Partnership suit—Right of defendant to get what is due to him. 163 P. L. R. 1911=10 I. C. 250. Co-owners of a ship are not, as such partners but only tenants-in-common. But if they employ their ship in earning freight or otherwise as money-making machine, they become partners and their earnings or subject to the ordinary law of partnership. 51 Mad. 939=35 M. L. J. 87. Where the divided members of a Hindu family run a business, they are partners within S. 239 and where one member puts an end to such partnership S. 253 (b) will apply. 63 I. C. 548=19 A. L. J. 525. Hindu joint family—Manager—Partnership with stranger—Position of Members. 34 M. L. J. 271=41 Mad. 454=43 I. C. 9. All co-parceners of joint Hindu family partners in a firm in which one of them is a co-parcener. A. I. R. 1927 Sind 247. (27 Bom. 157; 2 S. L. R. 13, A. I. R. 1925 Sind 159 rel. on.) use of the term "partnership" in document, effect of. 8 Lah. 310. Creditors jointly advancing money to another do not necessarily become partners in a firm even though they possess a right to a share of the profits. There is no relation of partnership *inter se* between such creditors, and as such there is no partnership. 65 I. C. 368=1922 Nag. 67. Partnership—Agreement defining rights of parties—Dissolution. 35 I. C. 652=10 S. L. R. 58.

Sec. 240.—Evidence of partnership, see also 22 I. C. 14. See also 4 All. 74; 21 Bom. L. R. 190.

Sec. 241.—The continuance of the surviving partners of a firm to carry on the business in the old firm name does not by itself render the effects of a deceased partner liable for any partnership debts contracted after his death. 103 I. C. 172=A. I. R. 1927 Sind 218. The assets of the deceased partner are a loan to the firm if they are retained in the business after his death, and the arrangement he makes at the time of death binds his estate. 37 Bom. 158=19 I. C. 406.

242. No contract for the remuneration of a servant or agent of any person, engaged in any trade or undertaking, by a share of the profits of such trade or undertaking shall, of itself, render such servant or agent responsible as a partner therein, nor give him the rights of a partner.

Servant or agent remunerated by share of profits not a partner.

243. No person, being a widow or child of a deceased partner of a trader and receiving, by way of annuity, a proportion of the profits made by such trader in his business, shall, by reason only of such receipt, be deemed to be a partner of such trader, or be subject to any liabilities incurred by him.

Widow or child of deceased partner receiving annuity out of profits not a partner.

244. No person receiving, by way of annuity or otherwise, a portion of the profits of any business, in consideration of the sale by him of the good-will of such business, shall, by reason only of such receipt, be deemed to be a partner of the person carrying on such business, or be subject to his liabilities.¹

Person receiving portion of profits for sale of good-will not a partner.

Responsibility of person leading another to believe him a partner.

Liability of person permitting himself to be represented as a partner.

245. A person who has, by words spoken or written or by his conduct, led another to believe that he is a partner in a particular firm, is responsible to him as partner in such firm.

246. Any one consenting to allow himself to be represented as a partner is liable, as such, to third persons who, on the faith thereof, give credit to the partnership.

247. A person who is under the age of majority according to the law to which he is subject² may be admitted to the benefits of partnership, but cannot be made personally liable for any obligation of the firm; but the share of such minor in the property of the firm is liable for the obligations of the firm.

Minor partner not personally liable, but his share is.

248. A person who has been admitted to the benefits of partnership under the age of majority² becomes, on attaining that age, liable for all obligations incurred by the partnership since he was so admitted, unless he gives public notice, within a reasonable time, of his repudiation of the partnership.

Liability of minor partner on attaining majority.

Release of debts by partner—Right of other partners to question. 41 Mad. 446 = 34 M. L. J. 41. See also 15 Bom. L. R. 192. A minor who is entitled to claim the assets of his deceased father in a partnership cannot claim as of right a share in the profits of the concern. There is no fiduciary relation between the surviving partners and the legal representatives of the deceased partner. The amount due to the deceased is a loan and nothing more. There are innumerable difficulties in the way of an account being taken. Discretion must be left in the Court in such matters to act on behalf of the minor. 4 L. W. 521 = 37 I. C. 728.

Sec. 244.—¹ Cf. the Partnership Act, 1865 (28 & 20 Vict. c. 86), s. 4.

Sec. 248 does not apply to claimant partners. 100 I. C. 389 = A. I. R. 1927 Sind 155.

Secs. 247 and 248.—² See Indian Majority Act (IX of 1875), *infra*. A person under the age of majority cannot become a partner by contract. 30 C. 539. If he is admitted to the benefits of the partnership under S. 247 his right is no more than a right to particular share in the property of the firm after its obligations have been satisfied. The question whether a minor has been admitted to the benefit of a partnership is one of fact to be pleaded and proved at the trial and cannot be allowed to be raised for the first time on appeal.

49 Cal. 560 = 43 M. L. J. 41 = 26 C. W. N. 954 = 49 I. A. 108 = 1922 P. C. 237 (P. C.). See also 97 I. C. 446 = A. I. R. 1927 Sind 18 = 21 S. L. R. 280. A minor partner of a firm cannot individually be adjudged an insolvent. But an application for an adjudication may be directed against the firm and the minor's interest therein. 42 All. 515 = 18 A. L. J. 611. Debts contracted by partner for the firm—Liability of the firm—Hindu Law—Minor members' liability. 23 C. W. N. 500 = 51 I. C. 597 = 29 C. L. J. 280. An infant partner though he may be admitted to the benefit of the partnership cannot as such be adjudged an insolvent. A Hindu minor is not personally liable for debts incurred in family trade but his share therein is alone liable. 26 I. C. 836 = 42 Cal. 225. Minor—Admission to the benefits of partnership. See 67 I. C. 95 = 1922 Lah. 441. Where a father as manager of a joint Hindu family is partner in a firm, his death will not dissolve the partnership as the family continues to be a partner. The minor members are liable only to the extent of their share in the firm, for its debts. 61 P. R. 1915 = 31 I. C. 45. (3 Cal. 738 foll.) Though a minor is admitted to the benefits of a Partnership he never becomes personally liable for the partnership debts. 40 M. L. J. 153 = 62 I. C. 802. Ss. 247 and 248 do not apply to the case of minor members of a joint family

249. Every partner is liable for all debts and obligations incurred while he is a partner in the usual course of business by or on behalf of the partnership; but a person who is admitted as a partner into an existing firm does not thereby become liable to the creditors of such firm for anything done before he become a partner.

Partner's liability for debts of Partnership.

Partner's liability to third person for neglect or fraud of co-partner.

250. Every partner is liable to make compensation to third persons in respect of loss or damage arising from the neglect or fraud of any partner in the management of the business of the firm.

251. Each partner who does any act necessary for, or usually done in, carrying on the business of such a partnership as that of which he is a member binds his co-partners to the same extent as if he were their agent duly appointed for that purpose.

Partner's power to bind co-partners.

trade started by the manager of the family or descending ancestrally in the family. The interest of the minor depends on his belonging to the family and is not acquired by agreement or admission to the partnership. 41 Mad. 824=35 M. L. J. 473=49 I. C. 220. Where the manager of a joint Hindu family carries on a trade in partnership with a stranger, the minor co-partners are liable for his debts not merely to the extent of the partnership assets but to the extent of their share in the entire joint family property. 7 L. W. 218=43 I. C. 76. (6 L. W. 708; 35 Mad. 692 dist.). Ss. 247 and 248 are quite independent of the principle of Hindu Law and are applicable to all members whether Hindu or not. 20 M. L. T. 565=36 I. C. 787=(1917) M. W. N. 150. What amounts to an admission of a minor to the partnership and his liabilities discussed. *Ibid.* A minor on attaining majority cannot be adjudicated insolvent for the debts of the firm. *Ibid.* Under this section a minor cannot be declared an insolvent. If a person is wrongly adjudged an insolvent, the adjudication may be annulled under S. 42 of the Prov. Ins. Act. 58 I. C. 558. A minor may become a member of a partnership and can bind his co-partners under Ss. 184, 247 and 251 as if he were their agent by making a pro-note. 42 I. C. 98. Section 248 is directed primarily to protection of creditors of the firm. Where, however, one set of partners is indebted to another for the provision of capital, a minor liable under the deed of partnership, can repudiate his membership if he is to escape liability to the other partners. 72 I. C. 926. Death of a Mahomedan partner—Rights and liabilities of his minor children. 6 Rang. 198.

Sec. 249.—Where two persons form a partnership for the purpose of a trading adventure, and goods are purchased or moneys raised, ostensibly by an individual debtor but truly and substantially for the purpose of the joint adventure, all are liable as partners. But there is no such responsibility for goods purchased upon the credit of an individual adventurer though they are afterwards brought into stock as his contribution to the joint adventure. 39 Bom. 261=42 I. A. 48=26 I. C. 915=19 C. W. N. 337 (P. C.). When a firm ceases to exist, but some of the partners carry on the business under the same name, the retiring partners cannot be made liable for any transaction entered into after the dissolution. 68 I. C. 932=1922 Lah. 466. Person entering into a partnership agreement to a liable for antecedent debts of the firm—Right of creditor to enforce

the agreement and make him liable for such debts. 49 Mad. 930=98 I. C. 257=A. I. R. 1926 Mad. 1138=51 M. L. J. 506. The estate of the deceased partner, if liable for the debt contracted by the surviving partner to enable him to perform a contract entered into during the lifetime of the former. 42 Mad 15=35 M. L. J. 669. Except on dissolution of the partnership, no suit could be maintained by a partner or his assignee for contribution against the other partner in respect of a partnership debt. 33 M. L. J. 509=43 I. C. 217. A partner is always liable for the partnership debt unless there is a restriction expressed or implied on the liability to be incurred by one partner on a bill or promissory note which may be executed by another partner for the partnership purposes. 40 Mad. 727=31 M. L. J. 138. (17 M. L. J. 126=21 I. C. 864 dist. 26 I. C. 915 foll.). Applicability of section to Burmese married couple. 5 Rang. 206 (F. B.).

Sec. 250.—Where a partnership is rescinded on the ground of fraud, the partners at fault, cannot ask the other partners to contribute to the loss which may have resulted in the partnership. 3 Lah. L. J. 106=60 I. C. 709. On this sec. See also 28 Bom. 226.

Sec. 251.—Any partner in a trading firm has an implied authority to borrow money for the purposes of the business on the credit of the firm. 25 Bom. L. R. 1093=48 Bom. 176. This authority must depend on the nature of the business. It is presumed to exist in the case of a trading or commercial partnership. 21 S. L. R. 267=96 I. C. 927 (2)=A. I. R. 1926 Sind 201. A firm would be a trading firm if its business consists in buying and selling. 48 B. 176. As to when act of partner binds the firm. See 13 I. C. 255=5 S. L. R. 168. Powers of partners as to acknowledgment of debt. 38 I. C. 873=19 Bom. L. R. 86; 37 Mad. 146=21 I. C. 634=25 M. L. J. 501. In the absence of direct evidence that one partner has authorized another to make acknowledgment or payment saving limitation on his behalf, such authority can be inferred from other circumstances, such as the position of the other co-contractors or partners in the business. 34 M. L. J. 373=41 Mad. 427=45 I. C. 18 (F. B.). Partner, power to borrow money or mortgage firms' assets or to acknowledge debt—Acknowledgment by partner after winding up. 8 L. B. R. 363=36 I. C. 225=9 Bur. L. T. 230. Though payment to a partner of a firm debt is valid discharge of the debt, an agreement to set off a debt due to the firm against a private debt

Exception.—If it has been agreed between the partners that any restriction shall be placed upon the power of any one of them, no act done in contravention of such agreement shall bind the firm with respect to persons having notice of such agreement.

Illustrations.

(a) *A* and *B* trade in partnership, *A* residing in England, and *B* in India. *A* draws a bill of exchange in the name of the firm. *B* has no notice of the bill, nor is he at all interested in the transaction. The firm is liable on the bill, provided the holder did not know of the circumstances under which the bill was drawn.

(b) *A*, being one of a firm of solicitors and attorneys, draws a bill of exchange in the name of the firm without authority. The other partners are not liable on the bill.

(c) *A* and *B* carry on business in partnership as bankers. A sum of money is received by *A* on behalf of the firm. *A* does not inform *B* of such receipt, and afterwards *A* appropriates the money to his own use. The partnership is liable to make good the money.

(d) *A* and *B* are partners. *A*, with the intention of cheating *B*, goes to a shop and purchases articles on behalf of the firm, such as might be used in the ordinary course of the partnership business, and converts them to his own separate use, there being no collusion between him and the seller. The firm is liable for the price of the goods.

252. Where partners have by contract regulated and defined, as between themselves, their rights and obligations, such contract can be annulled or altered only by consent of all¹ of them, which consent must either be expressed, or be implied from a uniform course of dealing.

Annulment of contract defining partners' rights and obligations.

Illustration.

A, *B* and *C*, intending to enter into partnership, execute written articles of agreement, by which it is stipulated that the net profits arising from the partnership business shall be equally divided between them. Afterwards they carry on the partnership business for many years, *A* receiving one-half of the nett profits and the other half being divided equally between *B* and *C*. All parties know of and acquiesce in this arrangement. This course of dealing supersedes the provision in the articles as to the division of profits.

Rules determining partners' mutual relations, where no contract to contrary.

253. In the absence of any contract to the contrary the relations of partners to each other are determined by the following rules :—

due from one partner must be presumed to be in fraud of partnership and does not amount to a valid discharge of the debt due to the firm. 9 I. C. 116=13 C.L.J. 234; (19 M. L. J. 221 foll.). A partnership when apparently contemplated does not constitute the relationship of principal and agent between the parties if the terms of the partnership cannot be ascertained. 31 I. C. 632=185 P. W. R. 1915. Co-partners—Authority of.—Partner, if can bind firm, by submission to arbitration. 7 L. W. 114=43 I. C. 508= (1918) M. W. N. 51. No power to bind firm for submission to arbitration. 39 M. L. T. 563. Partnership—Money deposited—Receipt signed by Manager—Proprietor, liability of. 247 P. L. R. 1914=27 I. C. 252. In a partnership whose business it is to buy and deal in land, a partner can mortgage the partnership land. 10 I. C. 776=4 Bur. L. T. 71. A lease taken by two partners without the concurrence of others cannot bind the latter when such concurrence is a necessary condition of the partnership. 6 Bur. L. T. 164=21 I. C. 3=7 L. B. R. 42. Applicability of section to Burmese married couple. See 5 R. 296 (F. B.).

Sec. 253.—¹See s. 253, cl. (5), *infra*.

Sec. 253. GENERAL.—Generally one partner cannot charge his co-partners with any sums in the share of salary or commission but where a *pardanashin* lady is a partner the responsibility is thrown upon other partners. 16 C. W. N. 299=13 I. C. 23=15 C. L. J. 204. A partnership is dissolved by operation of law by the death of

one of the partners. 46 I. C. 467=118 P. W. R. 1918. On the death of a partner, the partnership is at an end and there is no obligation on his legal representatives to continue the partnership. If, however, it is continued it is a new partnership. 23 I. C. 771=7 S. L. R. 85. The illegality of the partnership is no answer to a demand against it arising out of a transaction to which it is a party if the other person was not aware of it. 43 Mad. 141=38 M. L. J. 123. If a business is carried on only by two partners and is legal only so far as one is concerned, the presumption is that he has benefited by one half of the loan and a decree should be given against that partner only for half the amount borrowed by the partnership. 43 Mad. 141=38 M. L. J. 123. Good-will—Right of every partner—Ejman—Working partner—Rights of. 43 I. C. 661=22 M. L. T. 225. A partnership at will is dissolved from the date on which one partner retires, and no notice of the retirement is necessary. 25 I. C. 22. Where a partner advances a loan he has a right to interest on the loan. Suit by the partner for recovery of the amount, can be maintained. 64 I. C. 183. Land purchased by partners in a trading concern out of partnership fund does not of necessity become partnership property. Whether they hold such land as co-owners or as partners depends upon the purpose for which it is purchased. 30 I. C. 24=9 S. L. R. 11. See also 32 I. C. 853=49 P. W. R. 1916. Therefore when land is purchased out of partnership funds and not used for its business

(1) all partners are joint owners of all property originally brought into the partnership stock, or bought with money belonging to the partnership, or acquired for purposes of the partnership business. All such property is called partnership property. The share of each partner in the partnership property is the value of his original contribution, increased or diminished by his share of profit or loss :

(2) all partners are entitled to share equally in the profits of the partnership business, and must contribute equally towards the losses sustained by the partnership:

(3) each partner has a right to take part in the management of the partnership business :

(4) each partner is bound to attend diligently to the business of the partnership, and is not entitled to any remuneration for acting in such business :

(5) when differences arise as to ordinary matters connected with the partnership business, the decision shall be according to the opinion of the majority of the partners ; but no change in the nature of the business of the partnership can be made, except with the consent of all the partners [1]:

(6) no person can introduce a new partner into a firm without the consent of all the partners :

(7) if from any cause whatsoever, any member of a partnership ceases to be so, the partnership is dissolved as between all the other members :

(8) unless the partnership has been entered into for a fixed term, any partner may retire from it at any time :

(9) where a partnership has been entered into for a fixed term, no partner can during such term, retire, except with the consent of all the partners, nor can he be expelled by his partners for any cause whatever, except by order of Court :

(10) partnerships, whether entered into for a fixed term or not, are dissolved by the death of any partner.

the question is an open one to be determined on general evidence. *Ibid.* Liability of partners for negligence. 53 I. C. 2=1919 Pat. 419 "Contract to the contrary"—need not always be express. It can also be inferred from certain acts of the parties. See 38 M. L. T. (H. C.) 214 =100 I. C. 616=A. I. R. 1927 Mad. 429=(1927) M. W. N. 874=25 L. W. 388=52 M. L. J. 318 ; 54 Cal. 687.

Sec. 253 (5).—¹See S. 252, *supra*.

Sec. 253, Cls. (7) and (10).—S. 253 (7) and (10) are subject to the qualification, *viz*, "in the absence of a contract to the contrary," which may be made expressly or by conduct. The stoppage of business or refusal to supply capital by a partner cannot be treated as a dissolution of the firm. 66 I. C. 811=25 C. W. N. 847. The question whether there has been an abandonment depends upon the facts of each case. *Ibid.* An infant inheriting his father's share in the partnership is liable for his father's personal liabilities only to the extent of the assets inherited by him. 66 I. C. 811=25 C. W. N. 847. When some of the partners sell the partnership business without the knowledge or consent of the other partners, the partnership is thereby dissolved. 27 I. C. 344=8 S. L. R. 69. Rival theories as to shares by plaintiff and defendant—Defendant's case believed and decree passed—Presumption under S. 253 if need be raised. 8 L. 241=102 I. C. 817=A. I. R. 1927 Lah. 485.

CL (9). PARTNERSHIP.—Fixed term—Dissolution before expiry of term—Rights and liabilities of partners *inter se*. 6 P. I. R. 1915=27 I. C. 650. Where a partnership came into existence for a fixed term with a clause enabling one partner to dissolve by giving six months' notice to the other, any other mode of dissolution by

agreement between the parties must be strictly proved by the party alleging the same. 50 B. 665=28 Bom. L. R. 1275=99 I. C. 495=A. I. R. 1926 Bom. 585.

PARTNERSHIP AT WILL.—Filing plaint in a suit for dissolution by one partner is enough by itself to put an end to partnership at will. 31 C. W. N. 857=(1927) M. W. N. 500=25 A. L. J. 687=A. I. R. 1927 P. C. 70=53 M. L. J. 245.

CL. 10.—Where a partnership consists of members of a joint Hindu family, it is not dissolved by the death of any of the partners as a stipulation to that effect is ordinarily to be inferred. 74 I. C. 721=1924 All. 277 ; 38 I. C. 278=28 C. W. N. 708. Joint Hindu family—Partnership with stranger. 101 P. R. 1914=27 I. C. 69. A power of Attorney executed by two members of a Hindu family is not terminated by the death of one of them when the interest of deceased members passes to the surviving member. 35 M. L. J. 294=44 I. C. 849 (21 C. W. N. 620 foll.) The section does not apply where the partners have by their conduct continued the partnership notwithstanding the death of a partner in which case a contract to the contrary may be inferred. 38 I. C. 278=20 C. W. N. 708 ; 94 I. C. 547=A. I. R. 1925 Sind 103. A partnership must be deemed to continue even after the death of one partner who is replaced by his wife. 16 C. W. N. 299=13 I. C. 23=15 C. L. J. 204. See also 68 I. C. 722=1922 Lah. 349. Cl. (10) must be read as qualified by the interlocutory words "in the absence of any contract to the contrary." 68 I. C. 722=1922 Lah. 349. A partnership is necessarily dissolved *ipso facto* on the death of one partner and until a new partnership is formed the legal representative of the deceased partner cannot be made jointly liable with the surviving partners.

When Court may dissolve partnership.

254. At the suit of a partner the Court may dissolve the partnership in the following cases :—

- (1) when a partner becomes of unsound mind :
- (2) when a partner, other than the partner suing, has been adjudicated an insolvent under any law relating to insolvent debtors :
- (3) when a partner, other than the partner suing, has done any act by which the whole interest of such partner is legally transferred to a third person :
- (4) when any partner becomes incapable of performing his part of the partnership contract :
- (5) when a partner, other than the partner suing, is guilty of gross misconduct in the affairs of the partnership or towards his partners :
- (6) when the business of the partnership can only be carried on at a loss.

Dissolution of partnership by prohibition of business.

255. A partnership is in all cases dissolved by its business being prohibited by law.

256. If a partnership entered into for a fixed term be continued after such term has expired, the rights and obligations of the partners will, in the absence of any agreement to the contrary, remain the same as they were at the expiration of the term, so far, as such rights and obligations can be applied to a partnership dissolvable at the will of any partner.

Rights and obligations of partners in partnership continued after expiry of term for which it was entered into.

257. Partners are bound to carry on the business of the partnership for the greatest common advantage, to be just and faithful to each other, and to render true accounts and full information of all things affecting the partnership to any partner or his legal representatives.

Account to firm of benefit derived from transaction affecting partnership.

258. A partner must account to the firm for any benefit derived from a transaction affecting the partnership.

11 I. C. 403=60 P. W. R. 1911. Sole partner dying—Business continued by heirs—Legal effect A. I. R. 1926 All. 161 (2). In a suit for accounts of the partnership on the death of a partner, all the representatives of the deceased partner should join. 33 I. C. 564. Business carried on after dissolution—Liability to account. See 67 I. C. 10=34 C. L. J. 405.

Sec. 254.—A partner's claim to a decree for dissolution rests in its origin, not on contract but on his inherent right to invoke the court's protection on equitable grounds, in spite of the terms in which the rights and obligations of the partners may have been regulated and defined by the partnership contract. See 42 Bom. 380=22 C. W. N. 601=35 M. L. J. 262=45 I. A. 61 (P. C.) (Principle explained.) Lunacy of a partner does not *ipso facto* dissolve partnership. Order of court is necessary. 30 C. W. N. 11=53 Cal. 214=91 I. C. 824=A. I. R. 1926 Cal. 271. Nor adjudication of a partner. 106 I. C. 154. Even when a partnership is entered into for a fixed term, a decree for dissolution may be passed before the expiry of the term. 89 I. C. 333=A. I. R. 1926 Lah. 145. If in a suit for dissolution of partnership at will, the Court fixes a date from which the partnership is to be dissolved, the dissolution commences from that date and not from the date of institution of the suit. 38 I. C. 873=19 Bom. L. R. 86. If a partner is treated in such a way by other partners as to make it impossible for the former to continue to be a member of the partnership, his remedy is under sub-S. (5) of S. 254. 64 I. C. 204. A partner guilty of misconduct cannot sue for dissolu-

tion of the partnership or for any other relief. 1 Lah. 6=19 P. L. R. 1920=57 I. C. 185. Partner who either destroys the old account books of the firm, or makes such interpolations in the account books which makes them worthless and unreliable, or falsely prepares the balance-sheet or tries to deprive his firm of a valuable asset is guilty of misconduct. (*Ibid.*) The forum for a suit for dissolution of partnership and rendition of accounts cannot be determined by the place in which capital for the partnership is subscribed. 42 P. R. 1916=33 I. C. 953.

Sec. 256.—In the absence of special circumstances to the contrary, the representatives of a deceased partner are entitled to a share in the profits made out of the business since the death of the partner and continued by the surviving partner. 33 C. L. J. 411=64 I. C. 861=48 Cal. 906.

Sec. 257.—See 28 Cal. 53 (P. C.)

Sec. 258.—A firm cannot claim commission on goods purchased on its own behalf. 36 I. C. 210. A person can recover profits or compensation from his partner who is carrying on a rival trade to the prejudice of the partnership. 19 I. C. 250=11 A. L. J. 423. All partners must be joined in a suit for contribution by one or more partners if partnership has come to an end and no adjustment has been made. 35 I. C. 910=42 P. L. R. 1917. Plaintiff in possession of accounts or property must give credit to the defendant for his profit even though the claim be barred by time. "He who seeks equity must do equity" must be acted upon. 35 I. C. 910=42 P. L. R. 1917. See also 9 Bom. L. R. 604.

Illustrations.

(a) *A, B and C* are partners in trade. *C*, without the knowledge of *A* and *B*, obtains for his own sole benefit a lease of the house in which the partnership business is carried on. *A* and *B* are entitled to participate, if they please, in the benefit of the lease.

(b) *A, B and C* carry on business together in partnership as merchants trading between Bombay and London. *D*, a merchant in London to whom they make their consignments, secretly allows *C* a share of the commission which he receives upon such consignments, in consideration of *C*'s using his influence to obtain the consignments for him. *C* is liable to account to the firm for the money so received by him.

259. If a partner, without the knowledge and consent of the other partners, carries on any business competing or interfering with that of the firm, he must account to the firm for all profits made in such business, and must make compensation to the firm for any loss occasioned thereby.

Obligations, to firm, of partner carrying on competing business.

260. A continuing guarantee, given either to a firm or to a third person, in respect of the transactions of a firm, is, in the absence of agreement to the contrary, revoked as to future transactions by any change in the constitution of the firm to which, or, in respect of the transactions of which, such guarantee was given.

Revocation of continuing guarantee by change in firm.

Non-liability of deceased partner's estate for subsequent obligations.

261. The estate of a partner who has died is not, in the absence of an express agreement, liable in respect of any obligation incurred by the firm after his death.

262. Where there are joint debts due from the partnership, and also separate debts due from any partner, the partnership property must be applied in the first instance in payment of the debts of the firm, and, if there is any surplus, then the share of each partner must be applied in payment of his separate debts or paid to him. The separate property of any partner must be applied first in the payment of his separate debts, and the surplus (if any) in the payment of the debts of the firm.

Payment of partnership debts, and of separate debts

Continuance of partners' rights and obligations after dissolution.

263. After a dissolution of partnership, the rights and obligations of the partners continue in all things necessary for winding up the business of the partnership.

264. Persons dealing with a firm will not be affected by a dissolution of which no public notice has been given, unless they themselves had notice of such dissolution.

Notice of dissolution.

Sec. 260—*Cf.* the Mercantile Law Amendment Act, 1856 (19 & 20 Vict., c. 97), s. 4.

Secs. 261 and 262.—The personal representative of a deceased partner is bound to give an account of what has been received on behalf of the partnership, but he will be only liable for the person he represents to the extent of the assets he received. 40 All. 416=45 I. C. 31. Liability of minor representative laid down (*Ibid*). Property of partnership—Right to dispose of—Rights of creditors. 54 I. C. 719=18 N. L. R. 186.

Sec. 263.—It is well settled that, in certain cases when on the dissolution of a firm one of the partners retains assets of the firm in his hands without any settlement of accounts and applies them in continuing the business for his benefit he may be ordered to account for these assets with interests thereon, even in the absence of fraud or misconduct in the nature of fraud. 42 Cal. 914=42 I. A. 91=29 M. L. J. 70=28 I. C. 710 (P. C.). Profits after dissolution of partnership is partnership property. 9 O. L. J. 599=74 I. C. 324=1923 Oudh 23. Under this section the rights and obligations of the firm continue after dissolution in all things necessary

for the purpose of winding up. Some one of the partners can sign and verify a plaint on behalf of the firm after dissolution in a suit for such purpose. 9 I. C. 450=4 Bar. L. T. 10. Partnership transactions—Reference to arbitration—Legal representatives, when bound. 18 C. W. N. 1025=27 M. L. J. 192=17 Bom. L. R. 5=24 I. C. 307 (P. C.) Accounts—Suit by one partner against other partner for damages for use and occupation of partnership property, Maintainability of. 31 I. C. 707=19 C. W. N. 1115. Suit by partner joining others as *pro forma* defendants—Maintainability, see 29 Bom. L. R. 147. A partner can give a valid discharge of a debt due to the partnership after its dissolution. 52 I. C. 456=10 L. W. 67 (36 Mad. 544=34 M. L. J. 41 foll.). See *also* 41 Mad. 446=44 I. C. 466=34 M. L. J. 41.

Sec. 264.—This section is an illustration of a particular form of estoppel by conduct. 68 I. C. 932=1922 Lah. 466. In the absence of notice express or constructive, given of a dissolution of partnership, third parties, who deal with it are entitled to assume that the partnership still continues. (1925) M. W. N. 707=92 I. C. 653=

1 265. Where a partner is entitled to claim a dissolution of partnership, or where a partnership has terminated, the Court may, in the absence of any contract to the contrary, wind up the business of the partnership, provide for the payment of its debts and distribute the surplus according to the shares

Winding-up by Court, on dissolution or after termination.

of the partners respectively.

Limited liability partnerships, incorporated partnerships and joint stock companies.

266. Extraordinary partnerships, such as partnerships with limited liability, incorporated partnerships and joint-stock companies, shall be regulated by the law for the time being in force relating thereto. ²

SCHEDULE.

ENACTMENTS REPEALED.

Statutes.

No. and year of Statute.	Title.	Extent of repeal.
Stat. 29 Car. II, cap. 3.	An Act for prevention of Frauds and Perjuries . . .	Sections 1, 2, 3, 4 and 17.
Stat. II & 12 Vict., cap. 21.	To consolidate and amend the law relating to insolvent debtors in India.	Section 42.

A. I. R. 1926 Mad. 114 = 50 M. L. J. 67. The section must not be construed as an absolute proposition of law, but must be read with S. 115 of the Evidence Act. 68 I. C. 932 = 1922 L. 466. In order that the section may apply in any particular case, the burden is on the claimant to prove that a person whom he wishes to be held liable as a partner was ostensibly a partner in the defendant firm at the date of the cause of action. 100 I. C. 389 = A. I. R. 1927 Sind 155. The expression "persons dealing with a firm" indicates only such persons who have been in the habit of dealing with the firm previously. 68 I. C. 932 = 1922 L. 466. Expressions equally applies to old and new customers. 100 I. C. 389 = A. I. R. 1927 Sind 155. "Persons dealing with a firm" means persons who have been in the habit of dealing with and who even at the time of dissolution intended to deal with a firm as if the firm remained the same. 30 I. C. 84 = 17 Bom. L. R. 762. See also 100 I. C. 389 = A. I. R. 1927 Sind 155. (1927) M. W. N. 770; 93 I. C. 448 = A. I. R. 1926 Sind 90. The persons who want to rely on the section is bound to prove (1) that they are persons dealing with the firm; (2) that no public notice of dissolution was given and (3) that they themselves had no notice. 93 I. C. 448 = A. I. R. 1926 Sind 90. The section does not contemplate such persons who deal with a firm for the first time after the retirement of some of the partners. 68 I. C. 932 = 1922 Lah. 466. Persons dealing with a firm, unless they had actual notice, are not affected by its

dissolution if a public notice is not given. 30 I. C. 864 = 17 Bom. L. R. 762. See also 1922 Lah. 466. In the case of old customers of a firm the mere publication of notice of dissolution in the public press is not sufficient to relieve a retiring partner from liability. 1 Rang. 47 = 2 Bur. L. J. 46 = 74 I. C. 16. In order to affect an old customer there must be proof of actual notice of the dissolution of the partnership. 29 Bom. L. R. 1244 = 101 I. C. 520 = A. I. R. 1927 Bom. 560.

PUBLICATION IN THE CALCUTTA EXCHANGE GAZETTE was held not sufficient notice to affect merchants in Madras who deal with the firm. 25 L. W. 765 = 104 I. C. 120 = A. I. R. 1927 Mad. 661.

Sec 265.—¹This section was substituted for the original S. 265 by the Indian Contract Act (Amendment Act) (IV of 1886), S. 1.

The intention to dissolve may be inferred in the case of partnership at will from circumstances showing that a partner has in fact abandoned his interest in the concern. 32 I. C. 853 = 49 P. W. R. 1916.

Sec. 266.—²See for instance the Indian Companies Act (VI of 1882), (now VII of 1913), and the following special Acts (not republished in any Code):—V of 1838 (Bengal Bonded Warehouse), as amended by V of 1854; V of 1857 (Oriental Gas Company), as amended by XI of 1867; the Presidency Banks Act (XI of 1876), *infra*; Madras Act VI of 1869 (Equitable Assurance Society).

Acts.

No. and year of Act	Title.	Extent of repeal.
Act XIII of 1840.	An Act for the amendment of the law regarding factors, by extending to the territories of the East India Company, in cases governed by English law, the provisions of the Statute 4 Geo. IV, Chap. 83, as altered and amended by the Statute 6 Geo. IV, Chap. 94.	The whole.
Act XIV of 1840.	An act for rendering a written memorandum necessary to the validity of certain promises and engagements, by extending to the territories of the East India Company, in cases governed by English law, the provisions of the Statute 9 Geo. IV, Chap. 14.	The whole.
Act XX of 1844.	An Act to amend the law relating to advances <i>bona fide</i> made to Agents intrusted with goods, by extending to the territories of the East India Company, in cases governed by English law, the provisions of the Statute 5 & 6 Victoria, c. 39, as altered by this Act.	The whole.
Act XXI of 1848.	An Act for avoiding Wagers.	The whole.
Act V of 1866.	An Act to provide a summary procedure on bills of exchange, and to amend in certain respects the Commercial law of British India.	Sections 9 and 10
Act XV of 1866.	An Act to amend the law of Partnership in India	The whole.
Act VIII of 1867.	An Act to amend the law relating to Horse-racing in India.	The whole.

THE CONVEYANCE OF LAND ACT (XXXI OF 1854).¹

[16th December, 1854.

Short title given, Act XIV of 1897.

Rep. in pt. Act XIV of 1870; Act XII of 1874; Act XX of 1876; (locally), Act IV of 1882

(Declared in force throughout British India, except as regards the Scheduled Districts, Act XV of 1874, S. 3.

An Act [* * * * *]² to simplify the modes of conveying land in cases to which the English Law is applicable.

WHEREAS it is expedient, in cases to which the English law applies, [* * *

Preamble. * * *]³ to simplify the modes of conveying land, and to exempt the purchasers of trust-property from the liability

to see to the application of the purchase money; It is enacted as follows:—

1. [Real actions, fines and recoveries abolished.] Rep. by the Repealing Act, 1870 (XIV of 1870).

2. Every tenant in tail or other owner of an estate of inheritance less than an

Tenant in tail may dispose of or enlarge his estate by simple deed, etc.

estate in fee-simple, either at law or in equity, in any lands or hereditaments, not being under any disability, shall have power to dispose of such lands and hereditaments against the issue in tail, and all persons whose estates are

to take effect after the determination or in defeasance of his own, or to enlarge his

¹ Short title, "The Conveyance of Land Act, 1854." See the Indian Short Titles Act (XIV of 1897). The Act has been declared to be in force in the whole of British India, except as regards the Scheduled Districts, by the Laws

Local Extent Act (XV of 1874), S. 3.

² The words "to abolish real actions and also fines and common recoveries and" were repealed by the Repealing Act (XVI of 1874).

³ Repealed by Act XVI of 1874.

said estate into an estate in fee-simple, by any deed declaring an intention so to dispose of the said lands or hereditaments, or to enlarge his estate therein ; and every tenant in tail or other owner of an estate of inheritance less than an estate in fee-simple, who shall be under the disability of coverture, shall have power to dispose of or enlarge her said estate in manner aforesaid, by any deed declaring her intention so to do, and acknowledged by her as hereinafter mentioned :

Provided that every disposition under this section shall be subject to the rights of all persons in respect of estates prior to the estate tail or other estate of inheritance which is the subject of such disposition, and the rights of all other persons, except those against whom such disposition is by this Act authorized to be made.

3. Every married woman who, either alone, or jointly with her husband is possessed of or entitled to any estate or interest in or any power to be exercised over, any lands or hereditaments, which, but for the passing of this Act, she might have disposed of or extinguished by levying a fine, or suffering a recovery, or by joining in either of such assurances, shall have power by deed, to be acknowledged by her as hereinafter mentioned, to dispose of, release, surrender or extinguish any such estate, interest or power, as fully and effectually as if she were an unmarried woman.

Married woman, with husband's concurrence, may dispose of her estate by deed acknowledged.

Secs. 2 and 3 to apply to money subject to be invested in land.

5. No deed to be executed by a married woman under the provisions hereinbefore contained shall, so far as regards the interest of such married woman, be valid or effectual unless her husband concur therein, nor unless the deed be acknowledged in manner hereinafter prescribed before a Judge of one of Her Majesty's Supreme Courts, or before a Judge or other covenanted officer of the East India Company exercising civil jurisdiction in the place wherein such deed shall be acknowledged, or before some Commissioner appointed either especially for the occasion, or appointed as a permanent Commissioner by one of Her Majesty's said Courts to take such acknowledgment.

6. If the husband of any married woman, desirous of enlarging, passing or destroying any estate, interest or power, by a deed to be acknowledged by her under this Act, shall be a lunatic, idiot or of unsound mind, whether he shall have been found such by inquisition or not, or from any other cause shall be incapable of executing a deed, or if his residence shall not be known, or if he shall be in prison, or living apart from his wife either by mutual consent or by sentence of divorce, or in consequence of his being transported beyond the seas, or from any other cause whatever, it shall be lawful for any of Her Majesty's said Courts, by an order to be made in a summary way upon the application of such married woman, and upon such evidence as to the Court shall seem meet, to dispense with the concurrence of her husband in the deed so to be acknowledged ; and any deed to be executed or acknowledged by her in pursuance of such order shall (but without prejudice to the rights of her husband as they existing, independently of this Act), be as valid and effectual as if he had concurred therein.

If husband be lunatic, etc., Court may direct acknowledgment by deed without his concurrence, saving right of the husband, etc.

7. It shall be lawful for any of Her Majesty's said Courts to appoint by its order, under the seal of the Court, to be published in the Government Gazette or otherwise as the Court shall direct, permanent commissioners, either by name or office, and to appoint from time to time, under special commis-

Supreme Courts may appoint commissioners to take such acknowledgments.

Sec. 3.—*Cf.* the Fines and Recoveries Act, 1833 (3 & 4 Will. IV. c. 74), S. 77.

Sec. 5.—*Cf.* the Fines and Recoveries Act, 1833 (3 & 4 Will. IV. c. 74), S. 79

Sec. 6.—*Cf.* the Fines and Recoveries Act, 1833 (3 & 4 Will. IV. c. 74), S. 81.

Sec. 7.—For order appointing the Sub-Judge of the Nilgiris to be a permanent Commissioner for

sions, special commissioners, any one of whom shall be authorized and empowered unless the act is directed to be done before more than one to take the acknowledgment of any deed by any married woman, who, by reason of her place of residence, or ill-health, or other sufficient cause, shall be unable to make such acknowledgment before one of the Judges or other officers described in the preceding section.

8. Every such Judge, officer or commissioner as aforesaid, before he shall receive the acknowledgment by any married woman of any deed to be acknowledged by her under this Act, shall examine her apart from her husband touching her knowledge of such deed, and shall ascertain whether she understands its object, and freely and voluntarily consents to the same, and unless she appears to understand its object, and freely and voluntarily to consent to such deed, he shall not permit her to acknowledge the same, and in such case such deed, so far as relates to the execution thereof by such married woman, shall be void.

9. Every Judge, officer or commissioner taking such acknowledgment under this Act shall, at the time of taking the same, sign a memorandum to be endorsed on or written at the foot, or in the margin of such deed, which memorandum shall be to the following effect, namely, "this deed, marked (), was this day produced before me and acknowledged by therein named to be her act and deed, previous to which acknowledgment the said was examined by me separately and apart from her husband, touching her knowledge of the contents of the said deed, and her consent thereto and appeared to understand the same and declared the same to be freely and voluntarily executed by her."

10. Every deed executed by a married woman and hereby required to be acknowledged shall, so far as regards the interest of such married woman, take effect only from the time of the acknowledgment thereof.

11. It shall not be necessary for any person producing a deed so acknowledged in any Court of Justice to prove the handwriting or authority of the Judge or other officer, or the commissioner taking such acknowledgment, but if such memorandum purports to have been in substance regularly made and signed, the deed shall be presumed to have been duly acknowledged by the party until the contrary is shown.

12. Nothing in this Act contained shall abridge, extend or affect the powers of alienation or disposition which any married women might have exercised over any property or rights, otherwise than by levying a fine or suffering a recovery, or by joining in one of such assurances before the passing of this Act.

13. In any deed or will executed after this Act comes into operation, and disposing of immoveable property situate in the territories [* * *]¹ under the Government of [*]² India, [*]² wherein contingent estates are limited without the appointment of any trustees to preserve such contingent estates the same shall be, to all intents and purposes, as effectually protected by the law as if such trustees had been duly appointed.

14. Any estate or interest in immoveable property, situate within the said territories, whether in possession, remainder or reversion, may, in addition to any other mode of conveyance or release which is now valid, be conveyed, passed or released by a simple deed, whether such deed operate under the Statute³ of Uses or not.

the purposes of taking the acknowledgment of deeds by married women resident in the Nilgiri District, *see* Mad. List of Loc. R. & O., Vol. I.

Sec. 8.—*Cf.* the Fines and Recoveries Act, 1833 (3 & 4 Will. IV c. 74), S. 80.

Sec. 9.—*Cf.* the Fines and Recoveries Act, 1833 (3 & 4 Will. IV, c. 74), S. 84.

Sec. 13.—¹The words "in the possession and" were repealed by the Repealing Act (XII of 1876).

Sec. 13.—²The words "the East" and the word "Company" were repealed by the Repealing Act (XVI of 1874).

Sec. 14.—³*See* the Real Property Act, 1845 (8 & 9 Vict., c. 106), Ss. 2 and 4, respectively.

15. No conveyance of any kind shall operate to destroy, impair or affect any estate or interest which the conveying party has no right to destroy, impair or affect or beyond the extent to which he may impair or affect the same.

No conveyance to operate tortiously.

16. It shall not be necessary in any deed relating to immoveable property situate within the said territories, to be executed after the passing of this Act, to add words of limitation to heirs, when the intention is to give the absolute interest to a person and his heirs general; but a gift, grant or other conveyance of immoveable property to, or in favour of, any person shall be taken to give him the entire and absolute interest in the nature of an estate in fee-simple, unless such construction is rendered inadmissible by the other contents of the deed; and when in any deed or will executed after the passing of this Act any property is given to a person for life or for other freehold interest, and afterwards in the same deed, or will, is limited to his heirs or heir special the estates shall not unite, but the limitation to the heirs shall be a limitation of an estate to be taken by the heirs by purchase.

Words of limitation not necessary in a deed to give estate by inheritance.

Estate limited to heirs shall not unite with prior life estate.

17. When any property is sold, the proceeds of which are subject to any trust, the *bona fide* purchaser of the property shall not in any case be bound to see to the application of the purchase money to the purposes of the trust.

Bona fide purchaser not required to see to application of trust money.

Act to apply only to cases governed by English law.

18. Nothing in this Act contained shall extend to any case to which the English law is not applicable.

19. [Interpretation-clause.] *Rep. by the Repealing Act, 1874 (XVI of 1874.*

THE CO-OPERATIVE SOCIETIES ACT (II OF 1912).

PREFATORY NOTE.—The following is the Statement of Objects and Reasons appended to the Bill:—

1. "Legislation is called for not only in order to lay down the fundamental conditions which must be observed but also with a view to giving co-operative societies a corporate existence without resort to the elaborate provisions of the Companies Act, but it is thought that legislation should be confined within the narrowest possible limits. The Bill has, therefore, been drawn so as to deal only with those points which the Government consider to be essential, and its provisions have been expressed in simple and general terms, a wide rule-making power being reserved to Local Governments, so that what is felt to be of the nature of an experiment may be tried in each province or part of a province on such lines as seem to afford most promise of success.

2. The adequacy of the existing Act was examined at a Conference of Registrars of Co-operative Credit Societies in 1909, and it was held that the Act still remained in many ways unduly restricted, and that it also required certain alterations in detail which had been suggested by experts since 1909. The Conference of Registrars drew up proposals for the amendment of the Act, and after consulting Local Government on this proposals the Government of India have prepared the Bill now published. The chief changes contemplated by the Government of India are four in number:—

(i) The Act of 1904 applies to Societies for the purpose of co-operative credit only and not to Co-operative Societies of other kinds, such as those established for production or distribution. It has in practice been found that the establishment of Credit Societies has led to the founding of other classes of Co-operative Societies also, and it is advisable that the privileges extended by the Act to Co-operative Credit Societies should be extended to those other Societies. It is proposed therefore that the Act as now revised should be made applicable to all classes of Co-operative Societies—(*Vide* clause 1 (1) and clause 4 of the Bill.)

(ii) In the Act of 1904 Societies were classified according as they were "Urban" or "Rural" and the principle was laid down that as a general rule rural societies should be with unlimited liability. This basis for distinction was adopted, mainly because it represented a classification which has already been recommended and put in force in the initiation of Co-operative Credit Societies in certain parts of India, but even at the time it was criticised as unsuitable by experts, and it has in practice been found artificial and inconvenient. The real distinction is between Societies with limited and those with unlimited liability, and it is proposed in the new Bill to maintain this distinction only while retaining the principle that agricultural Credit Societies must as a general rule be with unlimited liability. (*See* cl. 4 of the Bill.)

¹ Sec. 17.—Repealed in places to which the Transfer of Property Act (IV of 1882) extends or is extended by Act IV of 1882, S. 2.

(iii) The Act of 1904 did not contemplate that Societies with unlimited liability should distribute profits. It is still felt that such Societies do not represent the best form of Co-operation for agricultural communities, but this form of Society has, in practice, been for some time in existence in several provinces, and Societies of this character, though not of the orthodox type, are recognized to be capable of useful work. Although therefore it is not intended to give them undue encouragement, it is proposed to legalise their existence and to permit an unlimited Society, with the sanction of the Local Government, to distribute profits (*see* clause 28 of the Bill).

(iv) A cardinal principle which is observed in the organization of Co-operative Societies in Europe is the grouping of such Societies into Unions and then financing by means of Central Banks. This stage of Co-operation had not been fully realised or provided for in the Act of 1904, but such grouping of Societies has already been found feasible in most provinces, and it is now considered desirable to legalise the formation of Co-operative Credit Societies of which the members shall be other Co-operative Credit Societies. (*Vide* clauses 5 (1), 6 and 10 (3) of the Bill.)

(3) In addition to carrying out the main alterations above described the present Bill contains several other changes in detail and it has been found advisable to recast the Bill in order to improve the drafting and to incorporate the changes now contemplated. The chief alterations, other than those above referred to, are the following :—

Clause 3.—It is proposed to make provision for investing in persons, other than Registrars, the power of a Registrar.

Clause 5.—It is proposed to maintain the existing restrictions as to residence or class as obligatory before registration in the case of Credit Societies and to render the existence of ten members obligatory before registration in the case of all kinds of Co-operative Societies other than those, all the members of which are themselves registered Societies. It is proposed further to give the Registrar the power of decision as to the residence qualification and to place persons of the same occupation on the same footing as persons of the same tribe or class.

Clause 8.—The provision giving conclusive authority to the Registrar's certificate of registration is new.

Clause 14.—It is proposed by this clause to give the Registrar power to conduct an audit by deputy. The previous provision that no charge should be made for audit has been omitted.

Clause 16.—It is proposed to extend from one year to 18 months the term of lien on agricultural products and to permit a lien on articles manufactured from raw materials supplied by or with the help of a registered Society.

Clauses 22 and 23 are based on provisions in the English Industrial and Provident Societies Act. Clause 22 makes the register of members *prima facie* evidence of the date of commencement and cessation of membership and clause 23 provides for proof of entries in the books of a registered Society.

Clause 26.—This clause allows registered Societies to invest good securities, and validates investments made prior to the amendment of the law now suggested.

Clause 27.—It is now proposed to make it clear that a registered Society is not precluded from receiving deposits from non-members.

Clause 29.—The provision allowing contributions to charities is new.

Clause 30.—The existing provisions have been altered so as to allow a Registrar to conduct an enquiry by deputy.

Clause 31.—The provision allowing a creditor to require an inspection is new. It is based on a similar provision in the Companies Act.

Clause 35.—The provision allowing the Registrar to cancel registration when the number of members becomes less than ten is new.

Clause 37.—Sub-clauses 2 (*m*) and (*l*) and 3 are new. The two former allow the Local Government to prescribe returns and the procedure on liquidation, and the latter permits of the delegation of the powers of the Local Government.

Clauses 39 and 40.—The existing section 29 has been recast with a view to making clear the distinction in the power of exemption of the Local Government before and after registration.

THE CO-OPERATIVE SOCIETIES ACT (II OF 1912).

S. 50 rep. Act XVII of 1914; Am. Act XXXVIII of 1920.

Declared in force in British Baluchistan (with an addition), Reg. II of 1913, s. 3; in Arakan Hill District, Reg. I of 1916, S. 2.

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THE CO-OPERATIVE SOCIETIES ACT (II OF 1912).¹

[1st March, 1912.

An Act to amend the Law relating to Co-operative Societies.

WHEREAS it is expedient further to facilitate the formation of Co-operative Societies for the promotion of thrift and self-help among agriculturists, artisans and persons of limited means, and for that purpose to amend the law, relating to Co-operative Societies; it is hereby enacted as follows:—

Preliminary.

Short title and extent.

1. (1) This Act may be called THE CO-OPERATIVE SOCIETIES ACT, 1912; and

(2) It extends to the whole of British India.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

(a) "by-laws" means the registered by-laws for the time being in force, and includes a registered amendment of the by-laws:

(b) "committee" means the governing body of a registered society to whom the management of its affairs is entrusted:

(c) "member" includes a person joining in the application for the registration of a society and a person admitted to membership after registration in accordance with the by-laws and any rules:

(d) "officer" includes a chairman, secretary, treasurer, member of committee, or other person empowered under the rules or the by-laws to give directions in regard to the business of the society:

(e) "registered society" means a society registered or deemed to be registered under this Act:

¹ For Statement of Objects and Reasons, see Gazette of India, 1911, Pt. V, p. 95; for Report of Select Committee, see *ibid.*, 1912, Pt. V, p. 7; and for Proceedings in Council, see *ibid.*, 1911, Pt. VI, pp. 186, 679 and *ibid.*, 1912, Pt. VI, pp. 3, 31 and 256.

It has been declared in force under S. 3 of the British Baluchistan Laws Regulation (II of 1913) to British Baluchistan, see Bal. Code.

Sec. 1.—Policy of the Act, see 15 A. L. J. 653 = 42 I.C. 968 = 40 All. 89.

(f) "Registrar" means a person appointed to perform the duties of a Registrar of Co-operative Societies under this Act : and

(g) "rules" means rules made under this Act.

Registration.

3. The Local Government may appoint a person to be Registrar of Co-operative Societies for the Province or any portion of it, and may appoint persons to assist such Registrar, and may, by general or special order, confer on any such persons all or any of the powers of a Registrar under this Act.

4. Subject to the provisions hereinafter contained, a society which has as its object the promotion of the economic interests of its members in accordance with co-operative principles, or a society established with the object of facilitating the operations of such a society, may be registered under this Act with or without limited liability :

Provided that unless the Local Government by general or special order otherwise directs—

(1) the liability of a society of which a member is a registered society shall be limited :

(2) the liability of a society of which the object is the creation of funds to be lent to its members, and of which the majority of the members are agriculturists, and of which no member is a registered society shall be unlimited.

Restrictions on interest of member of society with limited liability and a share capital.

5. Where the liability of the members of a society is limited by shares, no member other than a registered society shall—

(a) hold more than such portion of the share capital of the society, subject a maximum of one-fifth, as may be prescribed by the rules ; or

(b) have or claim any interest in the shares of the society exceeding one thousand rupees.

6. (1) No society, other than a society of which a member is a registered society, shall be registered under this Act which does not consist of at least ten persons above the age of eighteen years and, where the object of the society is the creation of funds to be lent to its members, unless such persons—

(a) reside in the same town or village or in the same group of villages, or

(b) save where the Registrar otherwise directs, are members of the same tribe, class, caste or occupation.

(2) The word "limited" shall be the last word in the name of every society with limited liability registered under this Act.

7. When any question arises whether for the purposes of this Act a person is an agriculturist or a non-agriculturist, or whether any person is a resident in a town or village or group of villages, or whether two or more villages shall be considered to form a group, or whether any person belongs to any particular tribe, class, caste or occupation, the question shall be decided by the Registrar, whose decision shall be final.

8. (1) For purposes of registration an application to register shall be made to the Registrar.

(2) The application shall be signed—

(a) in the case of a society of which no member is a registered society, by at least ten persons qualified in accordance with the requirements of section 6, sub-section (1) ; and

(b) in the case of a society of which a member is a registered society, by a duly authorized person on behalf of every such registered society, and where all the

members of the society are not registered societies, by ten other members or, when there are less than ten other members, by all of them.

(3) The application shall be accompanied by a copy of the proposed by-laws of the society, and the persons by whom or on whose behalf such application is made shall furnish such information in regard to the society as the Registrar may require.

9. If the Registrar is satisfied that a society has complied with the provisions of this Act and the rules and that its proposed by-laws are not contrary to the Act or to the rules, he may, if he thinks fit, register the society and its by-laws.

10. A certificate of registration signed by the Registrar shall be conclusive evidence that the society therein mentioned is duly registered unless it is proved that the registration of the society has been cancelled.

11. (1) No amendment of the by-laws of a registered society shall be valid until the same has been registered under this Act, for which purpose a copy of the amendment shall be forwarded to the Registrar.

(2) If the Registrar is satisfied that any amendment of the by-laws is not contrary to this Act or to the rules, he may, if he thinks fit, register the amendment.

(3) When the Registrar registers an amendment of the by-laws of a registered society, he shall issue to the society a copy of the amendment certified by him, which shall be conclusive evidence that the same is duly registered.

Rights and liabilities of members.

12. No member of a registered society shall exercise the rights of a member unless or until he has made such payment to the society in respect of membership or acquired such interest in the society, as may be prescribed by the rules or by-laws.

13. (1) Where the liability of the members of a registered society is not limited by shares, each member shall, notwithstanding the amount of his interest in the capital, have one vote only as a member in the affairs of the society.

(2) Where the liability of the members of a registered society is limited by shares, each member shall have as many votes as may be prescribed by the by-laws.

(3) A registered society which has invested any part of its funds in the shares of any other registered society may appoint as its proxy, for the purpose of voting in the affairs of such other registered society, any one of its members.

14. (1) The transfer or charge of the share or interest of a member in the capital of a registered society shall be subject to such conditions as to maximum holding as may be prescribed by this Act or by the rules.

(2) In case of a society registered with unlimited liability a member shall not transfer any share held by him or his interest in the capital of the society or any part thereof unless—

(a) he has held such share or interest for not less than one year; and

(b) the transfer or charge is made to the society or to a member of the society.

Duties of registered societies.

15. Every registered society shall have an address, registered in accordance with the rules, to which all notices and communications may be sent, and shall send to the Registrar notice of every change thereof.

16. Every registered society shall keep a copy of this Act and of the rules governing such society, and of its by-laws, open to inspection free of charge at all reasonable times at the registered address of the society.

- 17.** (1) The Registrar shall audit or cause to be audited by some person authorized by him by general or special order in writing in this behalf the accounts of every registered society once at least in every year.

Audit.

(2) The audit under sub-section (1) shall include an examination of overdue debts, if any, and a valuation of the assets and liabilities of the society.

(3) The Registrar, the Collector or any person authorised by general or special order in writing in this behalf by the Registrar shall at all times have access to all the books, accounts, papers and securities of a society, and every officer of the society shall furnish such information in regard to the transactions and working of the society as the person making such inspection may require.

Privileges of registered societies.

18. The registration of a society shall render it a body corporate by the name under which it is registered, with perpetual succession and a common seal, and with power to hold property, to enter into contracts, to institute and defend suits and other legal proceedings and to do all things necessary for the purposes of its constitution.

Societies to be bodies corporate.

19. Subject to any prior claim of the Government in respect of land-revenue or any money recoverable as land revenue or of a landlord in respect of rent or any money recoverable as rent, a registered society shall be entitled in priority to other creditors to enforce any outstanding demand due to the society from a member or past member—

Prior claim of society.

(a) in respect of the supply of seed or manure or of the loan of money for the purchase of seed or manure—upon the crops or other agricultural produce of such member or person at any time within eighteen months from the date of such supply or loan ;

(b) in respect of the supply of cattle, fodder for cattle, agricultural or industrial implements or machinery, or raw materials for manufacture, or of the loan of money for the purchase of any of the foregoing things—upon any such things so supplied, or purchased in whole or in part from any such loan, or on any articles manufactured from raw materials so supplied or purchased.

20. A registered society shall have a charge upon the share or interest in the capital and on the deposits of a member or past member and upon any dividend, bonus or profits payable to a member or past member in respect of any debt due from such member or past member to the society, and may set off any sum credited or payable to a member or past member in or towards payment of any such debt.

Charge and set-off in respect of shares or interest of member.

21. Subject to the provisions of section 20, the share or interest of a member in the capital of a registered society shall not be liable to attachment or sale under any decree or order of a Court of Justice in respect of any debt or liability incurred by such member, and neither the Official Assignee under the Presidency-towns Insolvency Act, 1909, nor a Receiver under the Provincial Insolvency Act, 1907, shall be entitled to or have any claim on such share or interest.

Shares or interest not liable to attachment.

Sec. 19.—The Chairman of a Co-operative Credit Society has no right to sue a member of a society in his own name. The suit should be brought by the society itself under S. 6 (2) of the Co-operative Credit Societies Act. 10 I. C. 570.

Musical instruments are not industrial implements or machinery and do not come within any other part of the class of articles referred to in the section. See 38 I. C. 414 = (1916) 2 U. B. R. 133. See also cases referred to therein.

Secs. 19 and 20. Under S. 73 of the C.P. Code

the claim of a Co-operative Society cannot be enforced under S. 19 of the Co-operative Societies Act unless they have a decree or charge under S. 20 of the latter Act. 42 Cal. 377 = 18 C.W.N. 1140.

Sec. 19 (b).—Fat intended to be purchased and sold at a profit and not for the purpose of manufacturing some other commodity is not "raw-material" within S. 19 (b) of the Act. 3 P. W.R. 1917 = 39 I. C. 373.

22. (1) On the death of a member a registered society may transfer the share or interest of the deceased member to the person nominated in accordance with the rules made in this behalf, or, if there is no person so nominated to such person as may appear to the committee to be the heir or legal representative of the deceased member, or pay to such nominee, heir or legal representative, as the case may be, a sum representing the value of such member's share or interest, as ascertained in accordance with the rules or by-laws :

Transfer of interest on death of member.

Provided that—
(i) in the case of a society with unlimited liability, such nominee, heir or legal representative, as the case may be, may require payment by the society of the value of the share or interest of the deceased member ascertained as aforesaid ;

(ii) in the case of a society with limited liability, the society shall transfer the share or interest of the deceased member to such nominee, heir or legal representative, as the case may be, being qualified in accordance with the rules and by-laws for membership of the society or on his application within one month of the death of the deceased member to any person specified in the application who is so qualified.

(2) A registered society may pay all other moneys due to the deceased member from the society to such nominee, heir or legal representative, as the case may be.

(3) All transfers and payments made by a registered society in accordance with the provisions of this section shall be valid and effectual against any demand made upon the society by any other person.

23. The liability of a past member for the debts of a registered society as they existed at the time when he ceased to be a member shall continue for a period of two years from the date of his ceasing to be a member.

Liability of past member.

24. The estate of a deceased member shall be liable for a period of one year from the time of his decease for the debts of a registered society as they existed at the time of his decease.

Liability of the estates of deceased members.

25. Any register or list of members or shares kept by any registered society shall be *prima facie* evidence of any of the following particulars entered therein :—

Register of members.

(a) the date at which the name of any person was entered in such register or list as a member ;

(b) the date at which any such person ceased to be a member.

26. A copy of any entry in a book of a registered society regularly kept in the course of business, shall, if certified in such manner as may be prescribed by the rules, be received, in any suit or legal proceeding, as *prima facie* evidence of the existence of such entry, and shall be admitted as evidence of the matters, transactions and accounts therein recorded in every case where, and to the same extent as, the original entry itself is admissible.

Proof of entries in societies' books.

27. Nothing in section 17, sub-section (1), clauses (b) and (c), of the Indian Registration Act, 1908, shall apply to—

(1) any instrument relating to shares in a registered society, notwithstanding that the assets of such society consist in whole or in part of immoveable property ; or

(2) any debenture issued by any such society and not creating, declaring, assigning, limiting or extinguishing any right, title or interest to or in immoveable property except in so far as it entitles the holder to the security afforded by a registered instrument whereby the society has mortgaged, conveyed or otherwise transferred

the whole or part of its immoveable property or any interest therein to trustees upon trust for the benefit of the holders of such debentures ; or

(3) any endorsement upon or transfer of any debenture issued by any such society.

Power to exempt from income tax, stamp-duty and registration fees.

128. (1) The Governor-General in Council, by notification in the *Gazette of India*, may, in the case of any registered society or class of registered society, remit—

the income-tax payable in respect of the profits of the society, or of the dividends or other payments received by the members of the society on account of profits.

(2) The Local Government by notification in the local official Gazette, may, in the case of any registered society or class of registered society, remit—

(a) the stamp duty with which, under any law for the time being in force, instruments executed by or on behalf of a registered society or by an officer or member and relating to the business of such society, or any class of such instruments, are respectively chargeable ; and

(b) any fee payable under the law of registration for the time being in force.

Property and funds of registered societies.

Restrictions on loans.

29. (1) A registered society shall not make a loan to any person other than a member :

Provided that, with the general or special sanction of the Registrar, a registered society may make loans to another registered society.

(2) Save with the sanction of the Registrar, a society with unlimited liability shall not lend money on the security of moveable property.

(3) The Local Government may, by general or special order, prohibit or restrict the lending of money on mortgage of immoveable property by any registered society or class of registered societies.

30. A registered society shall receive deposits and loans from persons who are not members only to such extent and under such conditions as may be prescribed by the rules or by-laws.

Restriction on borrowing.

31. Save as provided in sections 29 and 30, the transactions of a registered society with persons other than members shall be subject to such prohibitions and restrictions, if any, as the Local Government may, by rules, prescribe.

Restrictions on other transaction with non-members.

Investment of funds.

32. (1) A registered society may invest or deposit its funds—

(a) in the Government Savings Bank, or

(b) in any of the securities specified in section 20 of the Indian Trusts Act,

1882, or

(c) in the shares or on the security of any other registered society, or

(d) with any bank or person carrying on the business of banking, approved for this purpose by the Registrar, or

(e) in any other mode permitted by the rules.

(2) Any investments or deposits made before the commencement of this Act which would have been valid if this Act had been in force are hereby ratified and confirmed.

Funds not to be divided by way of profit.

33. No part of the funds of a registered society shall be divided by way of bonus or dividend or otherwise among its members :

Provided that after at least one-fourth of the net profits in any year have been carried to a reserve fund, payments from the remainder of such profits and from any

Sec. 28.—¹ This section was renumbered as section 28 (1) and in the same section the letter and brackets "(a)" and the whole of clauses (b) and (c) were omitted and Sub-Sec. (2) was added by Act XXXVIII of 1920, Part II.

Sec. 29.—A by-law of a Co-operative Society

to the effect that the society shall not sell goods on credit to a non-member cannot have the force of law. It cannot be pleaded in defence by vendee outsider in a suit brought against him for recovery of balance standing against him. 96 I. C. 351 (2) = A. I. R. 1926 Nag. 461.

profits of past years available for distribution may be made among the members to such extent and under such conditions as may be prescribed by the rules or by-laws :

Provided also that in the case of a society with unlimited liability no distribution of profits shall be made without the general or special order of the Local Government on this behalf.

34. Any registered society may, with the sanction of the Registrar, after one-fourth of the net profits in any year has been carried to a reserve fund contribute an amount not exceeding ten per cent. of the remaining net profits, to any charitable purpose, as defined in section 2 of the Charitable Endowments Act, 1890.

Inspection of affairs.

35. (1) The Registrar may of his own motion, and shall on the request of the Collector, or on the application of a majority of the committee, or of not less than one-third of the members, hold an inquiry or direct some person authorized by him by order in writing in this behalf to hold an inquiry into the constitution, working and financial condition of a registered society.

(2) All officers and members of the society shall furnish such information in regard to the affairs of the society as the Registrar or the person authorized by the Registrar may require.

36. (1) The Registrar shall on the application of a creditor of a registered society, inspect or direct some person authorized by him by order in writing in this behalf to inspect the books of the society :

Inspection of books of indebted society.

Provided that—

(a) the applicant satisfies the Registrar that the debt is a sum then due, and that he has demanded payment thereof and has not received satisfaction within a reasonable time ; and

(b) the applicant deposits with the Registrar such sum as security for the costs of the proposed inspection as the Registrar may require.

(2) The Registrar shall communicate the results of any such inspection to the creditor.

37. Where an inquiry is held under section 35, or an inspection is made under section 36, the Registrar may apportion the costs, or such part of the costs as he may think right, between the society, the members or creditor demanding an inquiry or inspection, and the officers or former officers of the society.

38. Any sum awarded by way of costs under section 37 may be recovered, on application to a Magistrate having jurisdiction in the place where the person from whom the money is claimable actually and voluntarily resides or carries on business, by the distress and sale of any moveable property within the limits of the jurisdiction of such Magistrate belonging to such person.

Dissolution of society.

39. (1) If the Registrar, after an inquiry has been held under section 35 or after an inspection has been made under section 36 or on receipt of an application made by three-fourths of the members of a registered society, is of opinion that the society ought to be dissolved, he may cancel the registration of the society.

(2) Any member of a society may, within two months from the date of an order made under sub-section (1), appeal from such order.

(3) Where no appeal is presented within two months from the making of an order cancelling the registration of a society, the order shall take effect on the expiry of that period.

(4) Where an appeal is presented within two months, the order shall not take effect until it is confirmed by the appellate authority.

(5) The authority to which appeals under this section shall lie shall be the Local Government :

Provided that the Local Government may, by notification¹ in the local official Gazette, direct that appeals shall lie to such Revenue-authority as may be specified in the notification.

40. Where it is a condition of the registration of a society that it should consist of at least ten members, the Registrar may, by order in writing, cancel the registration of the society if at any time it is proved to his satisfaction that the number of the members has been reduced to less than ten.

Cancellation of registration of society.

Effect of cancellation of registration.

41. Where the registration of a society is cancelled, the society shall cease to exist as a corporate body—

(a) in the case of cancellation in accordance with the provisions of section 39, from the date the order of cancellation takes effect ;

(b) in the case of cancellation in accordance with the provisions of section 40, from the date of the order.

42. (1) Where the registration of a society is cancelled under section 39 or section 40, the Registrar may appoint a competent person to be liquidator of the society.

Winding up.

(2) A liquidator appointed under sub-section (1) shall have power—

(a) to institute and defend suits and other legal proceedings on behalf of the society by his name of office ;

(b) to determine the contribution to be made by the members and past members of the society respectively to the assets of the society ;

(c) to investigate all claims against the society and, subject to the provisions of this Act, to decide questions of priority arising between claimants ;

(d) to determine by what persons and in what proportions the costs of the liquidation are to be borne ; and

(e) to give such directions in regard to the collection and distribution of the assets of the society, as may appear to him to be necessary for winding up the affairs of the society.

(3) Subject to any rules, a liquidator appointed under this section shall, in so far as such powers are necessary for carrying out the purposes of this section, have power to summon and enforce the attendance of witnesses and to compel the production of documents by the same means and (so far as may be) in the same manner as is provided in the case of a Civil Court under the Code of Civil Procedure, 1908.²

(4) Where an appeal from any order made by a liquidator under this section is provided for by the rules, it shall lie to the Court of the District Judge.

Sec. 39 (5)—¹For notification by Chief Commissioner, Central Provinces, that appeals shall lie to the Financial Commissioner, see Central Provinces Gazette, 1912, Pt. I, p. 347.

For notification in Madras that appeals shall lie to the Board of Revenue, see *Fort St. George Gazette*, 1923, Pt. I, p. 1651.

Sec. 42.—The Civil Court cannot interfere with an order passed by a liquidator of a registered Co-operative Society, under S. 42 of the Act, 1912, in order to collect the assets of the Society from persons who, he thinks, are responsible to account to him for the assets. Suit against an auction-purchaser questioning the validity of the sale is not a matter connected with the dissolution of a registered society and does not fall within S. 42. 23 Nag. L. R. 66=103 I. C. 131=A. I. R. 1927 Nag. 217. Liquidation—Mem-

bers of executive committee ask to pay—Suit by them against ordinary members to recoup themselves—Decree passed without any objection to jurisdiction—No appeal—Objection raised in execution proceedings—Maintainability. See 31 C. W. N. 739 ; 22 Bom. L. R. 732=44 Bom. 482.

Sec. 42 (2)—A Civil Court cannot entertain a suit for a declaration that an order of the liquidator under S. 42 (2) of the Act is *ultra vires* and thus cannot be executed. 44 I. C. 353=4 O. L. J. 583.

Sec. 42 (3)—²In its application to British Baluchistan this sub-section shall be read as if the words "or the British Baluchistan Civil Justice Regulation, 1896, as the case may be" were added, see Schedule I of Regulation II of 1913, Bal. Code.

(5) Orders made under this section shall, on application, be enforced as follows :—

(a) when made by a liquidator, by any Civil Court having local jurisdiction in the same manner as a decree of such Court ;

(b) when made by the Court of the District Judge on appeal, in the same manner as a decree of such Court made in any suit pending therein.

(6) Save in so far as is hereinbefore expressly provided, no Civil Court shall have any jurisdiction in respect of any matter connected with the dissolution of a registered society under this Act.

Rules.

¹ 43. (1) The Local Government may, for the whole or any part of the Province and for any registered society or class of such societies, make rules to carry out the purposes of this Act.

Rules.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may—

(a) subject to the provisions of section 5, prescribe the maximum number of shares or portion of the capital of a society which may be held by a member ;

(b) prescribe the forms to be used and the conditions to be complied with in the making of applications for the registration of a society and the procedure in the matter of such applications ;

(c) prescribe the matters in respect of which a society may or shall make by-laws and for the procedure to be followed in making, altered and abrogating by-laws and the conditions to be satisfied prior to such making, alteration or abrogation ;

(a) prescribe the conditions to be complied with by persons applying for admission or admitted as members, and provide for the election and admission of members, and the payment to be made and the interests to be acquired before the exercise of the right of membership ;

(e) regulate the manner in which funds may be raised by means of shares or debentures or otherwise ;

(f) provide for general meetings of the members and for the procedure at such meetings and the powers to be exercised by such meetings ;

(g) provide for the appointment, suspension and removal of the members of the committee and other officers, and for the procedure at meetings of the committee, and for the powers to be exercised and the duties to be performed by the committee and other officers ;

(h) prescribe the accounts and books to be kept by a society and provide for the audit of such accounts and the charges, if any, to be made for such audit, and for the periodical publication of a balance-sheet showing the assets and liabilities of a society ;

(i) prescribe the returns to be submitted by a society to the Registrar and provide for the person by whom and the form in which such returns shall be submitted ;

(j) provide for the persons by whom and the form in which copies of entries in books of societies may be certified ;

(k) provide for the formation and maintenance of a register of members and, where the liability of the members is limited by shares, of a register of shares ;

Sec. 42 (5).—The liquidator cannot order that the debtors are jointly and severally liable for each others' mortgage but may determine the contribution to be made by several debtors to meet the debt. Order passed by liquidator under S. 42 must be enforced by Civil Courts. No appeal lies from the Civil Court's order under this section. 40 All. 89=15 A. L. J. 863.

Sec. 42 (6).—See 84 I.C. 964=1925 Rang. 38. See also 84 I. C 999=1925 Cal. 203 cited under S. 24. Where on a registered Co-operative Society being dissolved, the liquidator issues a warrant of attachment, Civil Courts have no jurisdiction

to question the same. 94 I. C. 40=A. I.R. 1926 Nag. 379=24 N. L. R. 5.

Sec. 43.—¹ For rules by (1) the Government of the United Provinces, see United Provinces Gazette, 1913, Pt. I, p. 248 ; (2) the Government of Bengal, see Calcutta Gazette, 1903, Pt. I, p. 651 ; (3) the Government of Bihar and Orissa, see Bihar and Orissa Gazette, 1913, Pt. II, p. 508 ; (4) the Government of Bombay, see Bombay Government Gazette, 1913, Pt. I, p. 448 ; (5) Chief Commissioner of British Baluchistan, see Gazette of India, 1914, Pt. I, p. 183.

(l) provide that any dispute touching the business of a society between members or past members of the society or persons claiming through a member or past member or between a member or past member or persons so claiming and the committee or any officer shall be referred to the Registrar for decision or, if he so directs, to arbitration, and prescribe the mode of appointing an arbitrator or arbitrators and the procedure to be followed in proceedings before the Registrar or such arbitrator or arbitrators, and the enforcement of the decisions of the Registrar or the awards of arbitrators ;

(m) provide for the withdrawal and expulsion of members and for the payments, if any, to be made to members who withdraw or are expelled and for the liabilities of past members ;

(n) provide for the mode in which the value of a deceased member's interest shall be ascertained, and for the nomination of a person to whom such interest may be paid or transferred ;

(o) prescribe the payments to be made and the conditions to be complied with by members applying for loans, the period for which loans may be made, and the amount which may be lent, to an individual member ;

(p) provide for the formation and maintenance of reserve funds, and the objects to which such funds may be applied, and for the investment of any funds under the control of the society ;

(q) prescribe the extent to which a society may limit the number of its members ;

(r) prescribe the conditions under which profits may be distributed to the members of a society with unlimited liability and the maximum rate of dividend which may be paid by societies ;

(s) subject to the provisions of section 39, determine in what cases an appeal shall lie from the orders of the Registrar, and prescribe the procedure to be followed in presenting and disposing of such appeals ; and

¹(t) prescribe the procedure to be followed by a liquidator appointed under section 42, and the cases in which an appeal shall lie from the order of such liquidator.

(3) The Local Government may delegate, subject to such conditions, if any, as it thinks fit, all or any of its powers to make rules under this section to any authority specified in the order of delegation.

(4) The power to make rules conferred by this section is subject to the condition of the rules being made after previous publication.

(5) All rules made under this section shall be published in the local official Gazette, and on such publication shall have effect as if enacted in this Act.

Sec. 43 (2) (1).—The words "touching the business of a society" in S. 43 (2) (l) are not confined to disputes in connection with the internal management of the affairs of a society or dispute in regard to principles which would regulate the conduct of the business thereof. 28 C. W. N. 131=39 C. L. J. 140=1924 Cal. 467. See also 47 All. 374=23 A. L. J. 129=1925 All. 356. A dispute between a member who happens to be an officer of a co-operative society and the society in regard to sums of money entrusted to the former for purchase of certain articles is within S. 43 (2) (l) of the Act. 44 M.L.J. 382=17 L. W. 346=72 I. C. 838=1923 Mad. 481. A dispute between a member who happens to be an officer of a co-operative society on the one hand and the committee or an officer thereof on the other falls within the words of the section. (*Ibid.*) Where it is sought to entertain or continue proceedings against the legal representatives of a deceased debtor, the arbitrators are competent to decide who are the legal representatives. If a wrong conclusion is arrived with regard to a particular person that person has got a remedy under the Act of filing an appeal to the registrar. The Civil Court has no jurisdiction to interfere.

28 Bom. L. R. 598=A. I. R. 1926 Bom. 352.

Rules 31 and 34 framed under S. 43, provide that awards shall be enforceable as decree of a court having local jurisdiction if application is made to it to enforce it 47 B. 92=65 I. C. 212, 8 Lah. L. J. 310=97 I. C. 288 (2)=A. I. R. 1926 Lah 547. Where the rules provide for reference of disputes to Registrar, Civil Courts have no jurisdiction. 23 A.L.J. 129=47 All. 374=1925 All. 356; 71 I.C. 722=1924 Lah. 418 (Object of Act discussed). But see also 6 Pat. L.T. 452=88 I.C. 671=1925 Pat. 575. A court having power to execute an award can transfer it for execution. 24 Bom. L.R. 909=47 B. 92; 46 Bom. 128=23 Bom. L. R. 909. An award was made at Poona under rules framed under S. 43 and then the Judge of the Small Cause Court, Poona, was requested to transfer the decree under S. 39, C. P. C., but he refused. *Held*, that he was empowered to transfer the decree and he could refuse to retransfer it. 46 Bom. 128=23 Bom. L. R. 909.

Sec. 43 (t).—¹For rules by the Government of Bombay, see Bombay Government Gazette, 1913, Pt. I, p. 110.

Miscellaneous.

44. (1) All sums due from a registered society or from an officer or member or past member of a registered society as such to the Government, including any cost awarded to the Government under section 37, may be recovered in the same manner as arrears of land-revenue.

(2) Sums due from a registered society to Government and recoverable under sub-section (1) may be recovered, firstly from the property of the society; secondly, in the case of a society of which the liability of the members is limited, from the members subject to the limit of their liability; and thirdly, in the case of other societies, from the members.

Power to exempt societies from conditions as to registration.

45. Notwithstanding anything contained in this Act, the Local Government may, by special order in each case and subject to such conditions if any, as it may impose, exempt any society from any of the requirements of this Act as to registration.

Power to exempt registered societies from provisions of the Act.

46. The Local Government may, by general or special order, exempt any registered society from any of the provisions of this Act or may direct that such provisions shall apply to such society with such modifications as may be specified in the order.

Prohibition of the use of the word "co operative."

47. (1) No person other than a registered society shall trade or carry on business under any name or title of which the word "co-operative" is part without the sanction of the Local Government;

Provided that nothing in this section shall apply to the use by any person or his successor in interest of any name or title under which he traded or carried on business at the date on which this Act comes into operation.

(2) Whoever contravenes the provisions of this section shall be punishable with fine which may extend to fifty rupees, and in the case of a continuing offence with further fine of five rupees for each day on which the offence is continued after conviction therefor.

Indian Companies Act, 1882, not to apply.

48. The provisions of the Indian Companies Act, 1882,¹ shall not apply to registered societies.

49. Every society now existing which has been registered under the Co-operative Credit Societies Act, 1904, shall be deemed to be registered under this Act, and its by-laws shall, so far as the same are not inconsistent with the express provisions of this Act, continue in force until altered or rescinded.

Repeal.

50. [* * * * *]2

THE INDIAN COPYRIGHT ACT (III OF 1914).

PREFATORY NOTE · NATURE OF COPYRIGHT AND LAW REGULATING COPYRIGHT.—Copyright is the exclusive right of multiplying for sale copies of works of literature or art allowed to the author thereof or his assignees. As a recognised form of property it is compared with others of very recent origin, being in fact the result of the facility for multiplying copies created by the discovery of printing and kindred arts. Whether it was recognized at all by the common law of

Sec. 44.—Reading S. 44 of the Act with S. 128 of the C. P. Land Revenue Act it could not be said that an agriculturist's house as such should be exempt from attachment. In such a case the provisions of S. 60, C.P.C., could not be invoked. 23 Nag. L. R. 66 = 103 I. C. 131 = A. I. R. 1927 Nag. 217. Attachment and sale of movable property by Collector—Objection to claimant—Dismissal of objection—Remedy is by way of appeal to the Commissioner and not by way of suit in

Civil Court. 49 All. 701 = 101 I.C. 626 = 25 A. L. J. 521 = A. I. R. 1927 All. 532.

Sec. 48 —¹ See now Act VII of 1913.

Sec. 49.—By-laws—Liability of son for debts due by father to Bank of which he was a member—Construction of by-law. 31 I. C. 724 = 18 O. C. 157.

Sec. 50.—² Repealed by Act XVII of 1914 Sch. II.

England was long a legal question of the first magnitude, and the reasons for recognising it, and the extent of the right itself are not quite clear from controversy even now. The short paragraph in Blackstone may still be read with interest. He thinks that "this species of property, being grounded on labour and invention, is more properly reducible to the head of occupancy than any other, since the right of occupancy itself is supposed, by Mr. Locke and many others to be founded on the personal labour of the occupant." But he speaks doubtfully of its existence,—merely mentioning the opposing views, "that on the one hand it hath been thought no other man can have a right to exhibit the author's work without his consent, and that it is urged on the other hand that the right is of too subtle and unsubstantial a nature to become the subject of property in common law, and only capable of being guarded by positive statutes and special provisions of the magistrate." He notices that the Roman Law adjudged, that, if one man wrote anything on the paper or parchment of another the writing should belong to the owner of the blank materials, but as to any other property in the works, the law is silent, and he adds that, "neither with us in England hath there been (till very lately) any final determination upon the rights of authors at common law."

The nature of the right itself, and the reasons why it should be recognized in law, have from the beginning been the subject of bitter dispute. By some it has been described as a monopoly, by others as a kind of property. Each of these words covers certain assumptions from which the most opposite conclusions have been drawn. As a monopoly it is urged that the copyright should be looked upon as a doubtful exception to the general regulating trade, and should at all events be strictly limited in point of duration. As property, on the other hand, it is claimed that it should be perpetual. There would appear to be no harm in describing copyright either as a property or monopoly, if care be taken that the words are not used to cover suppressed arguments as to its proper extent and duration. Historically, and in legal definition, there would appear to be no doubt that copyright, as regulated by statute, is a monopoly.

EARLY LAW OF COPYRIGHT IN ENGLAND.—The first Copyright Act in England is 8 Anne c. 19. The preamble states that "printers, booksellers, and other persons were frequently in the habit of printing, reprinting, and publishing books and other writings without the consent of the authors or proprietors of such books and writings, to their very great detriment, and too often to the ruin of them and their families." "For preventing, therefore, such practices for the future, and for the encouragement of learned men to compose and write useful books, it is enacted that the author of any book or books already printed who hath not transferred to any other the copy or copies of such book or books in order to print or reprint the same, shall have the sole right and liberty of printing such book or books for the term of one and twenty years, and that the author of any book or books already composed, and not printed and published, or that shall hereafter be composed, and his assignee or assignees, shall have the sole liberty of printing or reprinting such book or books for the term of fourteen years, to commence from the day of first publishing the same, and no longer." The penalty for offences against the Act was declared to be the forfeiture of the illicit copies to the true proprietor, and the fine of one penny per sheet, half to the Crown, and half to any person suing for the same. "After the expiration of the said term of fourteen years the sole right of printing or disposing of copies shall return to the authors thereof, if they are then living, or their representatives, for another term of fourteen years." To secure the benefit of the Act registration at Stationers' Hall was necessary. In section 4 is contained the provision that if any person thought the price of a book too high and unreasonable he might complain to Archbishop of Canterbury, the Lord Chancellor, the Bishop of London, the Chiefs of the three Courts at Westminster, and the Vice Chancellors of the two Universities in England, and to the Lord President, Lord Justice General, Lord Chief Baron of the Exchequer, and the Rector of the College of Edinburgh in Scotland, who may fix a reasonable price. Nine copies of each book was to be provided to the royal library, the libraries of the universities of Oxford and Cambridge, the four Scotch Universities, Sion College and the Faculty of Advocates at Edinburgh. The Copyright of the Universities was not to be prejudiced by the Act. (Ency. Brit., 9th Ed., Vol. VI, pp. 356-357.)

The following statement of Objects and Reasons is appended to the Copyright Bill :—

STATEMENT OF OBJECTS AND REASONS TO THIS ACT.—The question of the amendment of the Indian Copyright Act (XX of 1847) has been considered on several occasions since 1864 on the ground that the Act was incomplete and did not provide, among other matters, for the protection of copyright in photographs, translations, newspapers, telegrams, etc. Legislation, however, has been postponed in view of possibility of an amendment of the English Acts on the subject of copyright.

In 1908 a conference and convention, to which Great Britain was a party, was held in Berlin with the object of bringing the domestic laws of all countries concerned into harmony with one another so as to obtain international uniformity of treatment and the ratification of that Convention involved certain changes in the English law. Its provisions were examined by a strong departmental committee appointed by the Board of Trade which came to the unanimous conclusion that the Berlin Convention should be accepted by Great Britain with as few reservations as possible.

An Imperial Copyright Conference was subsequently convened in 1910 containing representations of the self-governing dominions and of the India Office, Colonial Office, etc. It endorsed the recommendation of the Board of Trade Committee and recommended that an Act dealing with the essentials of Imperial Copyright Law should be passed by the Imperial Parliament and that this Act should be expressed to extend to all British possessions subject to the rights of self governing dominions and possessions to modify or add to its provisions by legislation in certain cases affecting only procedure and remedies.

A Draft Bill was approved by the Conference and eventually passed into law as the Copyright Act, 1911 (1 and 2 Geo. V, c. 46), which came into operation in the United Kingdom on 1st July, 1912.

The important changes in the Act are—

- (i) The abolition of the formality of the registration of copyright.
- (ii) The extension of the term of copyright from 42 years to one of life and 50 years subject to certain conditions.
- (iii) The extension of the scope of copyright.
- (iv) The substitution of one Act for several on the subject of copyright.

The Government of India considered that the early introduction of the Act into India was desirable both for Imperial and international as well as domestic reasons and consulted Local Governments in regard to the modifications and additions referred to in section 27 of the Act, that might be necessary to suit the special conditions. On account of non-proclamation in India of the Act of 1911, and having regard to the serious hardship and loss which might thereby be inflicted on the English authors, the Act was brought into force in India by proclamation in the *Gazette of India* on 31st October, 1912, under section 37 (2) (d) of the Act, the question of modification or additions being postponed for subsequent consideration on receipt of the views of Local Governments. These are in substantial agreement with those of the Government of India who propose by virtue of the powers conferred by section 27 of the Act of 1911 to pass the Draft Bill which embodies the modifications in and the addition to the Act which are considered desirable, together with certain formal and necessary alterations due to difference between English and Indian administration and procedure.

It will be observed that the changes proposed are as few as possible in view of the desirability of securing that uniformity throughout the Empire which was advocated by the Imperial Copyright Conference of 1910.

Clause 3.—This contains purely formal modifications necessary for the application of the Act of 1911 to British India.

Clause 4.—Under sections 1-3 of the Act of 1911 the term for which copyright subsists in translations is the life of the author and a period of fifty years after his death.

The special linguistic conditions of India render desirable a substantial relaxation of the above provision. The languages spoken in India are so numerous and differ so widely that the conditions which prevail cannot be compared with those in most European countries and vernacular translations from English and from one vernacular to another are not only common but serve the useful purpose for disseminating knowledge. It is proposed, therefore, that translations of works first published in British India should be permitted after the expiry of five years from the date of first publication, provided that two years' notice of the intention to publish a translation has been given to the author.

This proposal is considered to be a sufficient safeguard of and a reasonable compromise between rights of the author and those of the public.

Clause 5.—The provisions of section 19 of the Act of 1911 are new, and in view of the peculiar conditions of Indian music, objections have been urged against the application of this section *in toto* to Indian works. It is pointed out that it is impossible in most cases to identify the original composer or author and that the majority of the Indian melodies have not been written in staff notation except through the medium of the phonograph and are subject to infinite variety of notation and tune. If, under these circumstances, section 19 is adopted with its retro-active principle there may be fictitious claims of ownership in musical works and much confusion and undesirable litigation. To make it clear that in order to fall within the definition of "musical work" music must have been graphically represented it is proposed to adopt *mutatis mutandis* the definition of the term "musical work" contained in the English Musical Copyright Act, 1902, *viz.*, "musical work" means any combination of melody and harmony or either of them printed, or reduced to writing.

Clause 6.—Section 18 (a) of the Sea Customs Act, 1878, prohibits importation in the case of books alone, the copyright whereof subsists in India. In view of the extension of the Act of 1911, to works other than books and the difference in procedure it is proposed to repeal this section and enact the appropriate provisions as the necessary modifications referred to in section 14 (7) of the Act of 1911.

Clauses 7-12.—The provisions of section 11 of the Act of 1911 have been in the main adopted. Imprisonment, however, will in all cases be simple, and offences will be triable by a Magistrate of the first class only. It is proposed to convert the amount of English fines on the basis of £1 = Rs. 10 in accordance with the usual practice and to insert a clause exempting the case of infringement by the construction of a building from the operation of summary remedies, thus giving effect to the similar exemption provided by section 9 of the English Act.

Clause 13.—On account of the technicalities of the subject of copyright, and of the greater finality that such a tribunal will afford, it has been considered advisable to give jurisdiction to High Courts only in all suits or civil proceedings regarding infringement of copyright.

Clause 14.—This clause which is self-explanatory has been added in view of a recent decision in *Evans v. Morris* reported in the *Law Journal* of 29th March, 1913.

The following is the Select Committee's Report.—We have amended clause 3 of the Bill in two respects. In the first place, we have deleted sub-clause (2) which provided that the reference to the Judicial Committee in section 4 of the Copyright Act should be read in relation to works first published in British India as reference to the Governor-General in Council, as we consider that it is desirable that the power under this section should be exercised by one authority throughout the Empire. Secondly, we have amplified sub-clause (4) so as to provide that all references to arbitration in sub-section (1) of section 24 of the Act shall be read as references to arbitration in accordance with the law in force in British India.

We have modified clause 4 of the Bill in various particulars. We think that the period of copyright as regards translations, which is prescribed by the Bill for works first published in British

India, is too short and we have therefore altered it from five to ten years and have deleted the provisions which required the issue of notice upon an author before the production of a translation by any other person. We have, however, provided that, if within this period of ten years the author himself publishes a translation of the work in any particular language, the limitation upon copyright prescribed by this clause shall not apply to translation into that particular language. This amendment is in accordance with the provisions of the Berlin Convention. We have added a sub-clause to secure the rights of legal representatives of deceased authors.

We have substituted the word "penalties" for the words "summary remedies" in the title of Chapter III in view of the fact that the expression "summary trial" is used in the Code of Criminal Procedure, 1898, to denote a particular procedure in the trial of cases, which might not be applicable to cases under this chapter.

We have provided for an appeal against orders of a Magistrate regarding the disposal of copies and plates which infringe copyright and have authorised the appellate Court to stay execution of such orders pending consideration of the appeal.

In view of the fact that suits relating to infringement of copyright are sometimes of a petty nature, we have given the High Court and the District Judge concurrent jurisdiction in civil suits and proceedings under the Act. It has been pointed out to us that the provisions of clause 13 of the Bill as introduced might cause unnecessary inconvenience and expenses in many cases.

THE INDIAN COPYRIGHT ACT (III OF 1914).

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[24th February, 1914.

An Act to modify and add to the provisions of the Copyright Act, 1911.

WHEREAS it is expedient to modify and add to the provisions of the Copyright Act, 1911, in its application to British India ; it is hereby enacted as follows :—

CHAPTER I.

PRELIMINARY.

Short title and extent.

1. (1) This Act may be called THE INDIAN COPYRIGHT ACT, 1914.

(2) It extends to the whole of British India including British Baluchistan, the District of Angul and the Sonthal Parganas.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

(1) "the Copyright Act" means the Act of Parliament entitled the Copyright Act, 1911 ; and

(2) words and expressions defined in the Copyright Act have the same meanings as in that Act.

CHAPTER II.

CONSTRUCTION AND MODIFICATION OF THE COPYRIGHT ACT.

3. In the application to British India of the Copyright Act (a copy of which Act, except such of the provisions thereof as are expressly restricted to the United Kingdom, is set out in the First Schedule), the following modifications shall be made, namely :—

Application of Copyright Act to British India with adaptations.

(1) the powers of the Board of Trade under section 3 shall, in the case of works first published in British India, be exercised by the Governor-General in Council ;

(2) the powers of the Board of Trade under section 19 shall, as regards records, perforated rolls and other contrivances, the original plate of which was made in British India, be exercised by the Governor-General in Council ; and the confirmation of Parliament shall not be necessary to the exercise of any of these powers ;

(3) the references in section 19, sub-section (4), and in section 24, sub-section (1), to arbitration shall be read as references to arbitration in accordance with the law for the time being in force in that part of British India in which the dispute occurs ;

(4) as regards works the authors whereof were at the time of the making of the works resident in British India, and as regards works first published in British India, the reference in section 22 to the Patents and Designs Act, 1907, shall be construed as a reference to the Indian Patents and Designs Act, 1911, and the reference in the said section to section 86 of the Patents and Designs Act, 1907, shall be construed as a reference to section 77 of the Indian Patents and Designs Act, 1911 ;

(5) as regards works first published in British India, the reference in section 24, sub-section (1), proviso (a), to the London Gazette and two London newspapers shall be construed as a reference to the Gazette of India and two newspapers published in British India ; and the reference in proviso (b) of the same sub-section of the same section to the 26th day of July, 1910, shall, as regards works the authors whereof were at the time of making of the works resident in British India, and as regards works first published in British India, be construed as a reference to the 30th day of October, 1912.

4. (1) In the case of works first published in British India, copyright shall be subject to this limitation that the sole right to produce, reproduce, perform or publish a translation of the work shall subsist only for a period of ten years from the date of the first publication of the work :

Modification of copyright as regards translation of works first published in British India.

Provided that if within the said period the author or any person to whom he has granted permission so to do, publishes a translation of any such work in any language, copyright in such work as regards the sole right to produce, reproduce, perform or publish a translation in that language shall not be subject to the limitation prescribed in this sub-section.

(2) For the purposes of sub-section (1) the expression "author" includes the legal representative of a deceased author.

5. In the application of Copyright Act to musical works the authors whereof were at the time of the making of the works resident in British India, or to musical works first published in British India, the term "musical work" shall, save as otherwise expressly provided by the Copyright Act, mean "any combination of melody and harmony, or either of them, which has been reduced to writing."

Musical works made by resident of, or first published in, British India.

6. (1) Copies made out of British India of any work in which copyright subsists which if made in British India would infringe copyright, and as to which the owner of the copyright gives notice in writing by himself or his agent to the Chief Customs officer, as defined in the Sea Customs Act, 1878, that he is desirous that such copies should not be imported into British India, shall not be so imported, and shall, subject to the provi-

Importation of copies.

sions of this section, be deemed to be prohibited imports within the meaning of section 18 of the Sea Customs Act, 1878.

(2) Before detaining any such copies, or taking any further proceedings with a view to the confiscation thereof, such Chief Customs officer, or any other officer appointed by [the Chief Customs authority]¹ in this behalf, may require the regulations under this section, whether as to information, security, conditions or other matters, to be complied with, and may satisfy himself, in accordance with these regulations, that the copies are such as are prohibited by this section to be imported.

(3) The Governor-General in Council may, by notification in the *Gazette of India*, make regulations, either general or special, respecting the detention and confiscation of copies the importation of which is prohibited by this section, and the conditions, if any, to be fulfilled before such detention and confiscation; and may, by such regulations, determine the information, notices and security to be given, and the evidence requisite for any of the purposes of this section, and the mode of verification of such evidence.

(4) Such regulations may apply to copies of all works the importation of which is prohibited by this section, or different regulations may be made respecting different classes of such works.

(5) The regulations may provide for the informant re-imbursing the Secretary of State for India in Council all expenses and damages incurred in respect of any detention made on his information, and of any proceedings consequent on such detention; and may provide that notices given under the Copyright Act to the Commissioners of Customs and Excise of the United Kingdom, and communicated by that authority to any authority in British India, shall be deemed to have been given by the owner to the said Chief Customs officer.

(6) This section shall have effect as the necessary modification of section 14 of the Copyright Act.

CHAPTER III.

PENALTIES.

Offences in respect of infringing copies.

7. If any person knowingly—

(a) makes for sale or hire any infringing copy of a work in which copyright subsists; or

(b) sells or lets for hire, or by way of trade exposes or offers for sale or hire, any infringing copy of any such work; or

(c) distributes infringing copies of any such work, either for the purposes of trade or to such an extent as to affect prejudicially the owner of the copyright; or

(d) by way of trade exhibits in public any infringing copy of any such work; or

Sec. 6 (2).—¹ The words "the Chief Customs authority" were substituted for the words "the Local Government" by Act IV of 1924, Sch.

Sec. 7.—The mere failure of an author to make the payment prescribed by S. 5 of Act XX of 1847 does not deprive him of his copyright in his book. On the other hand, the proviso to S. 14 of the Act definitely states the contrary. It is only the right to sue under that Act that is prohibited if the registration fee has not been paid. 53 M. L. J. 529. The procedure about payment of fees prescribed by Act XX of 1847 has no place in the present Act III of 1914, and therefore a complaint under S. 7 of the new Act cannot be thrown out on the ground that the complainant has not paid the Rs. 2 which he would have to pay had Act XX of 1847 still remained in force. (*Ibid.*) An acquittal will be set

aside in revision in a case where the Court below has proceeded on a wrong view of the law, and where the matter is of great importance to the complainant in his position as author of a book, which, if the acquittal stands, will be pirated by the accused who will secure for himself the gains that ought legitimately to go to the complainant. (1927) M. W. N. 772 = 26 L. W. 489 = 39 M. L. T. 328 = 105 I. C. 669 = 28 Cr. L. J. 957 — A. I. R. 1927 Mad. 981 = 53 M. L. J. 529.

Sec. 7 (a).—Under the old Act "copyright" did not include the exclusive right of translation but the author of a book who made a translation of it was entitled to a copyright in it as if it were an original work. 13 A. L. J. 636 = 16 Cr. L. J. 656 = 30 I. C. 480; offence when complete. 28 P. R. 1916 (Cr.). On this section, see also 51 Mad. 180.

(e) imports for sale or hire into British India any infringing copy of any such work ;
 he shall be punishable with fine which may extend to twenty rupees for every copy dealt with in contravention of this section, but not exceeding five hundred rupees in respect of the same transaction.

8. If any person knowingly makes, or has in his possession, any plate for the purpose of making infringing copies of any work in which copyright subsists, or knowingly and for his private profit causes any such work to be performed in public without the consent of the owner of the copyright, he shall be punishable with fine which may extend to five hundred rupees.

Possession of plates for purpose of making infringing copies.

9. If any person, after having been previously convicted of an offence punishable under section 7 or section 8 is subsequently convicted of an offence punishable under either of these sections, he shall be punishable with simple imprisonment which may extend to one month, or with fine which may extend to one thousand rupees, or with both.

Punishment on second conviction.

10. (1) The Court before which any offence under this Chapter is tried may, whether the alleged offender is convicted or not, order that all copies of the work or all plates in the possession of the alleged offender, which appear to it to be infringing copies, or plates for the purpose of making infringing copies, be destroyed or delivered up to the owner of the copyright, or otherwise dealt with as the Court may think fit.

Power of Court to dispose of infringing copies or plates for purpose of making infringing copies.

(2) Any person affected by an order, under sub-section (1) may within thirty days of the date of such order, appeal to the Court to which appeals from the Court making the order ordinarily lie ; and such appellate Court may direct that execution of the order be stayed pending consideration of the appeal.

Cognizance of offences against this Act.

11. No Court inferior to that of a Presidency Magistrate or a Magistrate of the first class shall try any offence

Saving in case of infringement by construction of building.

12. The provisions of this Chapter shall not apply to any case to which section 9 of the Copyright Act, regarding the restrictions on remedies in the case of a work of architecture, applies.

CHAPTER IV.

MISCELLANEOUS.

Courts having civil jurisdiction regarding infringement of copyright.

13. Every suit or other civil proceeding regarding infringement of copyright shall be instituted and tried in the High Court or the Court of the District Judge.

14. No suit or other civil proceeding instituted after the 30th of October, 1912, regarding infringement of copyright in any book the author whereof was at the time of making the book resident in British India, or of any book first published in British India, shall be dismissed by reason only that the registration of such book had not been effected in accordance with the provisions of the Indian Copyright Act, 1847.

Effect of non-registration under Act XX of 1847.

Repeals.

15. The enactments mentioned in the Second Schedule are hereby repealed to the extent specified in the fourth column thereof. [Repealed by Act XII of 1927.]

THE FIRST SCHEDULE.

Portions of the Copyright Act applicable to British India.

(See section 3.)

COPYRIGHT ACT, 1911.

[1 & 2 GEO. V, CH. 46.]

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SCHEDULES.

Portions of the Copyright Act applicable to British India.

1 & 2 GEO. V, CHAPTER 46.

An Act to amend and consolidate the law relating to copyright.

[16th December, 1911.]

Be it enacted by the King's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons in this present Parliament assembled, and by the authority of the same, as follows:—

PART I.

IMPERIAL COPYRIGHT.

Rights.

1. (1) Subject to the provisions of this Act, copyright shall subsist throughout the parts of His Majesty's dominion to which this Act extends for the term hereinafter mentioned in every original literary, dramatic, musical and artistic work, if—

(a) in the case of a published work, the work was first published within such parts of His Majesty's dominions as aforesaid; and

(b) in the case of an unpublished work, the author was at the date of the making of the work a British subject or resident within such parts of His Majesty's dominions as aforesaid;

but in no other works, except so far as the protection conferred by this Act is extended by Orders in Council thereunder relating to self-governing dominions to which this Act does not extend and to foreign countries.

(2) For the purposes of this Act, "copyright" means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatsoever, to perform, or in the case of a lecture to deliver, the work or any substantial part thereof in public; if the work is unpublished, to publish the work or any substantial part thereof; and shall include the sole right—

(a) to produce, reproduce, perform, or publish any translation of the work;

(b) in the case of a dramatic work, to convert it into a novel or other non-dramatic work;

(c) in the case of a novel or other non-dramatic work, or of an artistic work, to convert it into a dramatic work, by way of performance in public or otherwise;

(d) in the case of a literary, dramatic, or musical work, to make any record, perforated roll, cinematograph film, or other contrivance by means of which the work may be mechanically performed or delivered;

and to authorise any such acts as aforesaid.

(3) For the purposes of this Act, publication, in relation to any work, means the issue of copies of the work to the public, and does not include the performance in public of a dramatic or musical work, the delivery in public of a lecture, the exhibition in public of an artistic work, or the construction of an architectural work of art, but, for the purposes of this provision, the issue of photographs and engravings of works of sculpture and architectural works of art shall not be deemed to be publication of such works.

2. (1) Copyright in a work shall be deemed to be infringed by any person who,

Infringement of copyright.

without the consent of the owner of the copyright, does anything the sole right to do which is by this Act conferred on the owner of the copyright: Provided that the following acts shall not constitute an infringement of copyright:—

Sec. 2.—COPYRIGHT IN COMPILATION.—Though a book is a compilation from other works and is not original the fact that its contents have been arranged on a new plan will give the compiler a copyright in the book. 43 A. 412=61 I. C. 394=19 A. L. J. 180.

WHAT AMOUNTS TO WAIVER OF COPYRIGHT. 34 I. C. 357=14 A.L.J. 724=38 All. 484.

FINE ARTS.—COPYRIGHT IN—ENGLISH AND INDIAN LAW.—The Fine Arts Copyright Act (25 and 26 Vic. c. 68) does not extend to any part of the British Dominions outside the United Kingdom [(1903) A.C. 496, F.] In England before the Statute of Anne (8 Anne c. 19) there was no copyright at common law for an author or a publisher in his productions. 22 Bom. L.R. 808=57 I.C. 592=44 B. 720. (4 H.L.C. 815; 19 B. 557 F.).

TEST OF INFRINGEMENT OF COPYRIGHT—DAMAGES DIRECTORY. 67 I.C. 983.

UNPUBLISHED WORK—COPYRIGHT IN.—Where purchased the right to publish and sell 90 songs composed by D and shortly afterwards D sold 40 of these to M, who published the same and sold them, *held*, that P was entitled to sue M for an injunction restraining him from publishing and selling the 40 songs in violation of the right exclusively acquired by him. 12 L.W. 151=39 M.L.J. 341=59 I.C. 229=(1920) M.W.N. 426.

LAW REPORTS—EXTRACTS BY REPORTER.—A plaintiff's copyright is infringed when the defendant reproduced not only the judgments but also part of the plaintiff's reports not forming parts of judgments and facts collected by the plaintiff

from the records of cases. The reporter has no copyright in the reports of judgment, but he has protection of the law in selecting and reporting cases which he obtains by expenditure of time, labour and money. 26 I.C. 30=18 C.W.N. 1078.

ABRIDGEMENT—MERELY SELECTING PASSAGES AND KNITTING THEM TOGETHER DOES NOT CONSTITUTE INFRINGEMENT—RAW MATERIAL OR THE ORIGINAL WORKS ARE OPEN FOR CONSULTATION FOR ALL—USE OF ANOTHER'S LABOUR AND SKILL ONLY IS PROHIBITED—48 Bom. 308=26 Bom. L. R. 298; 28 C. W. N. 613=51 I. A. 109=1924 P. C. 75=46 M. L. J. 637. On appeal from 23 Bom. L. R. 1299. The word "original" does not mean that the work must be the expression of original or inventive thought. Copyright Acts are not concerned with the origin of ideas, but with the expression of thought; and in the case of "literary" work with the expression of thought in print or writing. (*Ibid.*) The originality which is required relates to the expression, which must be in an original or novel form, but the work must not be copied from another work, that is, it should not originate from another. (*Ibid.*)

PRESUMPTION—BURDEN OF PROOF.—Where the defendants in an action for damages for infringement of copyright in respect of a work do not put into issue the existence of the copyright in the work, there is an irrebuttable presumption that the alleged work was a work in which copyright existed and that the plaintiff was the owner of the copyright. In this class of cases, the Court

(i) Any fair dealing with any work for the purposes of private study, research, criticism, review, or newspaper summary ;

(ii) Where the author of an artistic work is not the owner of the copyright therein, the use by the author of any mould, cast, sketch, plan, model or study made by him for the purpose of the work, provided that he does not thereby repeat or imitate the main design of that work ;

(iii) The making or publishing of paintings, drawings, engravings, or photographs of a work of sculpture or artistic craftsmanship, if permanently situate in a public place or building, or the making or publishing of paintings, drawings, engravings or photographs (which are not in the nature of architectural drawings or plans) of any architectural work of art ;

(iv) The publication in a collection, mainly composed of non-copyright matter *bona fide* intended for the use of schools, and so described in the title and in any advertisements issued by the publisher, of short passages from published literary works not themselves published for the use of schools in which copyright subsists : Provided that not more than two of such passages from works by the same author are published by the same publisher within five years, and that the source from which such passages are taken is acknowledged ;

(v) The publication in a newspaper of a report of a lecture delivered in public, unless the report is prohibited by conspicuous written or printed notice affixed before and maintained during the lecture at or about the main entrance of the building in which the lecture is given, and, except whilst the building is being used for public worship, in a position near the lecturer ; but nothing in this paragraph shall affect the provisions in paragraph (i) as to newspaper summaries ;

(vi) The reading or recitation in public by one person of any reasonable extract from any published work.

(2) Copyright in a work shall also be deemed to be infringed by any person who—

(a) sells or lets for hire, or by way of trade exposes or offers for sale or hire ; or

(b) distributes either for the purposes of trade or to such an extent as to affect prejudicially the owner of the copyright ; or

(c) by way of trade exhibits in public ; or

(d) imports for sale or hire into any part of His Majesty's dominions to which this Act extends,

any work which to his knowledge infringes copyright or would infringe copyright if it had been made within the part of His Majesty's dominions in or into which the sale or hiring, exposure, offering for sale or hire, distribution, exhibition, or importation took place.

(3) Copyright in a work shall also be deemed to be infringed by any person who for his private profit permits a theatre or other place of entertainment to be used the performance in public of the work without the consent of the owner of the copyright, unless he was not aware, and had no reasonable ground for suspecting, that the performance would be an infringement of copyright.

3. The term for which copyright shall subsist shall, except as otherwise expressly provided by this Act, be the life of the author and

Term of copyright.

a period of fifty years after his death :

Provided that at any time after the expiration of twenty-five years, or in the case of a work in which copyright subsists at the passing of this Act thirty years, from the death of the author of a published work, copyright in the work shall not be deemed to be infringed by the reproduction of the work for sale if the person reproducing the work proves that he has given the prescribed notice in writing of his intention to produce the work and that he has paid in the prescribed manner to, or for

should be reluctant to sit as experts and to decide the question of infringement of copyright without the aid of expert evidence. The proper course, in such cases, is to get the opinion of experts who might be appointed Commissioners to

investigate and report on the matters in issue. The opinion and findings of experts are not conclusive on the Court, but may be reviewed on exceptions. 39 C.L.J. 134-81 I.C. 754=1924 Cal. 595.

the benefit of, the owner of the copyright royalties in respect of all copies of the work sold by him calculated at the rate of ten per cent. on the price at which he publishes the work ; and, for the purposes of this proviso, the Board of Trade may make regulations prescribing the mode in which notices are to be given, and the particulars to be given in such notices, and the mode, time, and frequency of the payment of royalties, including (if they think fit) regulations requiring payment in advance or otherwise securing the payment of royalties.

4. If, at any time after the death of the author of a literary, dramatic, or musical work which has been published or performed in public, a complaint is made to the Judicial Committee of the Privy Council that the owner of the copyright in the work has refused to republish or to allow the republication of the work or has refused to allow the performance in public of the work, and that by reason of such refusal the work is withheld from the public, the owner of the copyright may be ordered to grant a licence to reproduce the work or perform the work in public, as the case may be, on such terms and subject to such conditions as the Judicial Committee may think fit.

5. (1) Subject to the provisions of this Act, the author of a work shall be the first owner of the copyright therein ;

Ownership of copyright,
etc.

Provided that—

(a) where, in the case of an engraving, photograph, or portrait, the plate or other original was ordered by some other person and was made for valuable consideration in pursuance of that order, then, in the absence of any agreement to the contrary, the person by whom such plate or other original was ordered shall be the first owner of the copyright ;

(b) where the author was in the employment of some other person under a contract of service or apprenticeship and the work was made in the course of his employment by that person, the person by whom the author was employed shall, in the absence of any agreement to the contrary, be the first owner of the copyright, but where the work is an article or other contribution to a newspaper, magazine, or similar periodical, there shall, in the absence of any agreement to the contrary, be deemed to be reserved to the author a right to restrain the publication of the work, otherwise than as part of a newspaper, magazine, or similar periodical.

(2) The owner of the copyright in any work may assign the right, either wholly or partially, and either generally or subject to limitations to the United Kingdom or any self-governing dominion or other part of His Majesty's dominions to which this Act extends, and either for the whole term of the copyright or for any part thereof, and may grant any interest in the right by licence, but no such assignment or grant shall be valid unless it is in writing signed by the owner of the right in respect of which the assignment or grant is made, or by his duly authorized agent :

Provided that, where the author of a work is the first owner of the copyright therein, no assignment of the copyright, and no grant of any interest therein, made by him (otherwise than by will) after the passing of this act, shall be operative to vest in the assignee or grantee any rights with respect to the copyright in the work beyond the expiration of twenty-five years from the death of the author, and the reversionary interest in the copyright expectant on the termination of that period shall, on the death of the author, notwithstanding any agreement to the contrary, devolve on his legal personal representatives as part of his estate, and any agreement entered into by him as to the disposition of such reversionary interest shall be null and void, but nothing in this proviso shall be construed as applying to the assignment of the copyright in a collective work or a licence to publish a work or part of a work as part of a collective work.

(3) Where, under any partial assignment of copyright, the assignee becomes entitled to any right comprised in copyright, the assignee, as respects the right so assigned, and the assignor as respects the rights not assigned, shall be treated for the purposes of this Act as the owner of the copyright, and the provisions of this Act shall have effect accordingly.

Civil Remedies.

6. (1) Where copyright in any work has been infringed, the owner of the copy-
Civil remedies for infringe-
 ment of copyright. right shall, except as otherwise provided by this Act, be
 entitled to all such remedies by way of injunction or inter-
 dict, damages, accounts, and otherwise, as are or may be
 conferred by the law for the infringement of a right.

(2) The costs of all parties in any proceedings in respect of the infringement
 of copyright shall be in the absolute discretion of the Court.

(3) In any action for infringement of copyright in any work, the work shall be
 presumed to be a work in which copyright subsists and the plaintiff shall be presumed
 to be the owner of the copyright, unless the defendant puts in issue the existence of
 the copyright, or, as the case may be, the title of the plaintiff, and where any such
 question is in issue then—

(a) if a name purporting to be that of the author of the work is printed or
 otherwise indicated thereon in the usual manner, the person whose name is so printed
 or indicated shall, unless the contrary is proved, be presumed to be the author of the
 work ;

(b) if no name is so printed or indicated, or if the name so printed or indi-
 cated is not the author's true name or the name by which he is commonly known, and
 a name purporting to be that of the publisher or proprietor of the work is printed or
 otherwise indicated thereon in the usual manner, the person whose name is so printed
 or indicated shall, unless the contrary is proved, be presumed to be the owner of the
 copyright in the work for the purposes of proceedings in respect of the infringement of
 copyright therein.

7. All infringing copies of any work in which copyright subsists, or of any sub-
Rights of owner against per-
 sons possessing or dealing with
 infringing copies, etc substantial part thereof, and all plates used or intended to
 be used for the production of such infringing copies shall
 be deemed to be the property of the owner of the
 copyright, who accordingly may take proceedings for the
 recovery of the possession thereof or in respect of the conversion thereof.

8. Where proceedings are taken in respect of the infringement of the copyright
Exemption of innocent in-
 fringer from liability to pay
 damages, etc in any work and the defendant in his defence alleges that
 he was not aware of the existence of the copyright in the
 work, the plaintiff shall not be entitled to any remedy
 other than an injunction or interdict in respect of the
 infringement if the defendant proves that at the date of the infringement he was not
 aware and had not reasonable ground for suspecting that copyright subsisted in the
 work.

9. (1) Where the construction of a building or other structure which infringes
Restriction on remedies in
 the case of architecture. or which, if completed, would infringe the copyright in
 some other work has been commenced, the owner of the
 copyright shall not be entitled to obtain an injunction or
 interdict to restrain the construction of such building or structure or to order its
 demolition.

(2) Such of the other provisions of this Act as provide that an infringing copy
 of a work shall be deemed to be the property of the owner of the copyright, or as
 impose summary penalties, shall not apply in any case to which this section applies.

Limitation of actions. 10. An action in respect of infringement of copy-
 right shall not be commenced after the expiration of three
 years next after the infringement.

11.	*	*	*	*
12.	*	*	*	*
13.	*	*	*	*

Sec. 7.—The offence is complete as soon as the
 book infringing the copyright is printed and con-
 sequence contemplated in section 179, Cr.P.C. are

not necessary for the completion of the offence.
 28 P. R. 1916 (Cr.) = 38 I. C. 737 — 18 Cr. L. J.
 353.

Importation of copies.

14. (1) Copies made out of the United Kingdom of any work in which copyright subsists which if made in the United Kingdom would infringe copyright, and as to which the owner of the copyright gives notice in writing by himself or his agent to the Commissioners of Customs and Excise, that he is desirous that such copies should not be imported into the United Kingdom, shall not be so imported, and shall, subject to the provisions of this section, be deemed to be included in the table of prohibitions and restrictions contained in section forty-two of the Customs Consolidation Act, 1876, and that section shall apply accordingly.

(2) Before detaining any such copies or taking any further proceedings with a view to the forfeiture thereof under the law relating to the Customs, the commissioners of Customs and Excise may require the regulations under this section, whether as to information, conditions, or other matters, to be complied with, and may satisfy themselves in accordance with those regulations that the copies are such as are prohibited by this section to be imported.

(3) The Commissioners of Customs and Excise may make regulations, either general or special, respecting the detention and forfeiture of copies, the importation of which is prohibited by this section, and the conditions, if any, to be fulfilled before such detention and forfeiture, and may, by such regulations, determine the information, notice, and security to be given, and the evidence requisite for any of the purposes of this section, and the mode of verification of such evidence.

(4) The regulations may apply to copies of all works, the importation of copies of which is prohibited by this section, or different regulations may be made respecting different classes of such works.

(5) The regulations may provide for the informant reimbursing the Commissioners of Customs and Excise all expenses and damages incurred in respect of any detention made on his information, and of any proceedings consequent on such detention; and may provide for notices under any enactment repealed by this Act being treated as notices given under this section.

(6) The foregoing provisions of this section shall have effect as if they were part of the Customs Consolidation Act, 1876; Provided that, notwithstanding anything in that Act, the Isle of Man shall not be treated as part of the United Kingdom for purposes of this section.

(7) This section shall, with the necessary modifications, apply to the importation into a British possession to which this Act extends of copies of works made out of that possession.

Delivery of Books to Libraries.

15. (1) The publisher of every book published in the United Kingdom shall, within one month after the publication, deliver, at his own expense, a copy of the book to the trustees of the British Museum, who shall give a written receipt for it.

(2) He shall also, if written demand is made before the expiration of twelve months after publication, deliver within one month after receipt of that written demand or, if the demand was made before publication, within one month after publication, to some depot in London named in the demand a copy of the book for, or in accordance with the directions of, the authority having the control of each of the following libraries, namely: the Bodleian Library, Oxford, the University Library, Cambridge, the Library of the Faculty of Advocates at Edinburgh, and the Library of Trinity College, Dublin; and, subject to the provisions of this section, the National Library of Wales. In the case of an encyclopædia, newspaper, review, magazine or work published in a series of numbers or parts, the written demand may include all numbers or parts of the work which may be subsequently published.

(3) The copy delivered to the trustees of the British Museum shall be a copy of the whole book with all maps and illustrations belonging thereto, finished and coloured in the same manner as the best copies of the book are published, and shall be bound, sewed, or stitched together, and on the best paper on which the book is printed.

(4) The copy delivered for the other authorities mentioned in this section shall be on the paper on which the largest number of copies of the book is printed for sale, and shall be in the like condition as the books prepared for sale.

(5) The books of which copies are to be delivered to the National Library of Wales shall not include books of such classes as may be specified in regulations to be made by the Board of Trade.

(6) If a publisher fails to comply with this section, he shall be liable on summary conviction to a fine not exceeding five pounds and the value of the book, and the fine shall be paid to the trustees or authority to whom the book ought to have been delivered.

(7) For the purposes of this section, the expression "book" includes every part or division of book, pamphlet, sheet of letter-press, sheet of music, map, plan, chart or table separately published, but shall not include any second or subsequent edition of a book unless such edition contains additions or alterations either in the letter-press or in the maps, prints, or other engravings belonging thereto.

Special Provisions as to certain Works.

16. (1) In the case of a work of joint authorship, copyright shall subsist during the life of the author who first dies and for a term of fifty years after his death, or during the life of the author who dies last, whichever period is the longer, and references in this Act to the period after the expiration of any specified number of years from the death of the author shall be construed as references to the period after the expiration of the like number of years from the death of the author who dies first or after the death of the author who dies last, whichever period may be the shorter, and in the provisions of this Act with respect to the grant of compulsory licences a reference to the date of the death of the author who dies last shall be substituted for the reference to the date of the death of the author.

Works of joint authors.

(2) Where, in the case of a work of joint authorship some one or more of the joint authors do not satisfy the conditions conferring copyright laid down by this Act, the work shall be treated for the purposes of this Act as if the other author or authors had been the sole author or authors thereof :

Provided that the term of the copyright shall be the same as it would have been if all the authors had satisfied such conditions as aforesaid.

(3) For the purposes of this Act, "a work of joint authorship" means a work produced by the collaboration of two or more authors in which the contribution of one author is not distinct from the contribution of the other author or authors.

(4) Where a married woman and her husband are joint authors of a work the interest of such married woman therein shall be her separate property.

17. (1) In the case of a literary, dramatic or musical work, or an engraving, in which copyright subsists at the date of the death of the author or, in the case of a work of joint authorship, at or immediately before the date of the death of the author who dies last, but which has not been published, nor, in the case of a dramatic or musical work, been performed in public, nor, in the case of a lecture, been delivered in public, before that date, copyright shall subsist till publication, or performance or delivery in public, whichever may first happen, and for a term of fifty years thereafter, and the proviso to section three of this Act shall, in the case of such a work, apply as if the author had died at the date of such publication or performance or delivery in public as aforesaid.

Posthumous works.

(2) The ownership of an author's manuscript after his death, where such ownership has been acquired under a testamentary disposition made by the author and the manuscript is of a work which has not been published nor performed in public nor delivered in public, shall be *prima facie* proof of the copyright being with the owner of the manuscript.

18. Without prejudice to any rights or privileges of the Crown, where any work has, whether before or after the commencement of this Act, been prepared or published by or under the direction or control of His Majesty or any Government department,

Provisions as to Government publications.

the copyright in the work shall, subject to any agreement with the author, belong to His Majesty, and in such case shall continue for a period of fifty years from the date of the first publication of the work.

19. (1) Copyright shall subsist in records, perforated rolls, and other contrivances by means of which sounds may be mechanically reproduced, in like manner as if such contrivances were musical works, but the term of copyright shall be fifty years from the making of the original plate from which the contrivance was directly or indirectly derived, and the person who was the owner of such original plate at the time when such plate was made shall be deemed to be the author of the work, and, where such owner is a body corporate, the body corporate shall be deemed for the purposes of this Act to reside within the parts of His Majesty's dominions to which this Act extends if it has established a place of business within such parts.

(2) It shall not be deemed to be an infringement of copyright in any musical work for any person to make within the parts of His Majesty's dominions to which this Act extends, records, perforated rolls or other contrivances by means of which the work may be mechanically performed, if such person proves—

(a) that such contrivances have previously been made by, or with the consent or acquiescence of, the owner of the copyright in the work; and

(b) that he has given the prescribed notice of his intention to make the contrivances, and has paid in the prescribed manner to, or for the benefit of, the owner of the copyright in the work royalties in respect of all such contrivances sold by him, calculated at the rate hereinafter mentioned:

Provided that—

(i) nothing in this provision shall authorise any alterations in, or omissions from, the work reproduced, unless contrivances reproducing the work subject to similar alterations and omissions have been previously made by, or with the consent or acquiescence of, the owner of the copyright, or unless such alterations or omissions are reasonably necessary for the adaptation of the work to the contrivances in question; and

(ii) for the purposes of this provision, a musical work shall be deemed to include any words so closely associated therewith as to form part of the same work, but shall not be deemed to include a contrivance by means of which sounds may be mechanically reproduced.

(3) The rate at which such royalties as aforesaid are to be calculated shall—

(a) in the case of contrivances sold within two years after the commencement of this Act by the person making the same, be two and one-half per cent; and

(b) in the case of contrivances sold as aforesaid after the expiration of that period, be five per cent.,

on the ordinary retail selling price of the contrivance calculated in the prescribed manner, so however that the royalty payable in respect of a contrivance shall in no case be less than a half-penny for each separate musical work in which copyright subsists reproduced thereon, and, where the royalty calculated as aforesaid includes a fraction of a farthing, such fraction shall be reckoned as a farthing:

Provided that, if, at any time after the expiration of seven years from the commencement of this Act, it appears to the Board of Trade that such rate as aforesaid is no longer equitable, the Board of Trade may, after holding a public inquiry, make an order either decreasing or increasing that rate to such extent as under the circumstances may seem just, but any order so made shall be provisional only and shall not have any effect unless and until confirmed by Parliament; but, where an order revising the rate has been so made and confirmed, no further revision shall be made before the expiration of fourteen years from the date of the last revision.

(4) If any such contrivance is made reproducing two or more different works in which copyright subsists and the owners of the copyright therein are different persons, the sums payable by way of royalties under this section shall be apportioned amongst the several owners of the copyright in such proportions as, failing agreement, may be determined by arbitration.

(5) When any such contrivances by means of which a musical work may be mechanically performed have been made, then, for the purposes of this section, the owner of the copyright in the work shall, in relation to any person who makes the prescribed inquiries, be deemed to have given his consent to the making of such contrivances if he fails to reply to such inquiries within the prescribed time.

(6) For the purposes of this section, the Board of Trade may make regulations prescribing anything which under this section is to be prescribed, and prescribing the mode in which notices are to be given and the particulars to be given in such notices, and the mode, time, and frequency of the payment of royalties, and any such regulations may, if the Board think fit, include regulations requiring payment in advance or otherwise securing the payment of royalties.

(7) In the case of musical works published before the commencement of this Act, the foregoing provisions shall have effect, subject to the following modifications and additions :

(a) The conditions as to the previous making by, or with the consent or acquiescence of, the owner of the copyright in the work, and the restrictions as to alterations in or omissions from the work shall not apply :

(b) The rate of two and one-half per cent. shall be substituted for the rate of five per cent. as the rate at which royalties are to be calculated, but no royalties shall be payable in respect of contrivances sold before the first day of July, nineteen hundred and thirteen, if contrivances reproducing the same work had been lawfully made, or placed on sale, within the parts of His Majesty's dominions to which this Act extends before the first day of July, nineteen hundred and ten :

(c) Notwithstanding any assignment made before the passing of this Act of the copyright in a musical work, any rights conferred by this Act in respect of the making, or authorising the making, of contrivances by means of which the work may be mechanically performed shall belong to the author or his legal personal representatives and not to the assignees, and the royalties aforesaid shall be payable to, and for the benefit of, the author of the work or his legal personal representatives :

(d) The saving contained in this Act of the rights and interests arising from, or in connexion with, action taken before the commencement of this Act shall not be construed as authorising any person who has made contrivances by means of which the work may be mechanically performed to sell any such contrivances, whether made before or after the passing of this Act, except on the terms and subject to the conditions laid down in this section :

(e) Where the work is a work on which copyright is conferred by an Order in Council relating to a foreign country, the copyright so conferred shall not, except to such extent as may be provided by the Order, include any rights with respect to the making of records, perforated rolls, or other contrivances by means of which the work may be mechanically performed.

(8) Notwithstanding anything in this Act where a record, perforated roll, or other contrivance by means of which sounds may be mechanically reproduced has been made before the commencement of this Act, copyright shall, as from the commencement of this Act, subsist therein in like manner and for the like term as if this Act had been in force at the date of the making of the original plate from which the contrivance was directly or indirectly derived :

Provided that—

(i) the person who, at the commencement of this Act, is the owner of such original plate shall be the first owner of such copyright ; and

(ii) nothing in this provision shall be construed as conferring copyright in any such contrivance if the making thereof would have infringed copyright in some other such contrivance, if this provision had been in force at the time of the making of the first-mentioned contrivance.

Provision as to political speeches.

20. Notwithstanding anything in this Act, it shall not be an infringement of copyright in an address of a political nature delivered at a public meeting to publish a report thereof in a newspaper.

21. The term for which copyright shall subsist in photographs shall be fifty years from the making of the original negative from which the photograph was directly or indirectly derived, and the person who was owner of such negative at the time when such negative was made shall be deemed to be the author of the work, and, where such owner is a body corporate, the body corporate shall be deemed for the purposes of this Act to reside within the parts of His Majesty's dominions to which this Act extends if it has established a place of business within such parts.

22. (1) This Act shall not apply to designs capable of being registered under the Patents and Designs Act, 1907, except designs which, though capable of being so registered, are not used or intended to be used as models or patterns to be multiplied by any industrial process.

(2) General rules under section 86 of the Patents and Designs Act, 1907, may be made for determining the conditions under which a design shall be deemed to be used for such purposes as aforesaid.

23. If it appears to His Majesty that a foreign country does not give, or has not undertaken to give, adequate protection to the works of British authors, it shall be lawful for His Majesty by Order in Council to direct that such of the provisions of this Act as confer copyright on works first published within the parts of His Majesty's dominions to which this Act extends, shall not apply to works published after the date specified in the Order, the authors whereof are subjects or citizens of such foreign country, and are not resident in His Majesty's dominions, and thereupon those provisions shall not apply to such works.

24. (1) Where any person is immediately before the commencement of this Act entitled to any such right in any work as is specified in the first column of the First Schedule to this Act, or to any interest in such a right, he shall, as from that date, be entitled to the substituted right set forth in the second column of that schedule, or to the same interest in such a substituted right, and to no other right or interest, and such substituted right shall subsist for the term for which it would have subsisted if this Act had been in force at the date when the work was made and the work had been one entitled to copyright thereunder

Provided that—

(a) if the author of any work in which any such right as is specified in the first column of the First Schedule to this Act subsists at the commencement of this Act has, before that date, assigned the right or granted any interest therein for the whole term of the right, then at the date when, but for the passing of this Act, the right would have expired the substituted right conferred by this section shall, in the absence of express agreement, pass to the author of the work, and any interest therein created before the commencement of this Act and then subsisting shall determine; but the person who immediately before the date at which the right would so have expired was the owner of the right or interest shall be entitled at his option either—

(i) on giving such notice as hereinafter mentioned, to an assignment of the right or the grant of a similar interest therein for the remainder of the term of the right for such consideration as, failing agreement, may be determined by arbitration; or

Sec. 24.—An entry in the Copyright Register Book under section 3 of the previous Copyright Act is *prima facie* evidence of the proprietorship of the person mentioned therein, but the absence of that provision from the new Copyright Act does not make it any the less evidence when the new Act grants to the owners of existing copyrights, rights at least as valuable as

the rights given under the repealed Act. Section 14 of the Indian Evidence Act can, therefore, be invoked to make such evidence admissible. A High Court can in such cases interfere under section 15 of the Charter Act. 30 I. C. 721 = 16 Cr. L. J. 673; (21 I. C. 681; 25 M. L. J. 510; 14 Cr. L. J. 633; 38 M. 512 Fol.).

(ii) without any such assignment or grant, to continue to reproduce or perform the work in like manner as theretofore subject to the payment, if demanded by the author within three years after the date at which the right would have so expired, of such royalties to the author as, failing agreement, may be determined by arbitration, or, where the work is incorporated in a collective work and the owner of the right or interest is the proprietor of that collective work, without any such payment ;

The notice above referred to must be given not more than one year nor less than six months before the date at which the right would have so expired, and must be sent by registered post to the author, or, if he cannot with reasonable diligence be found advertised in the London Gazette and in two London newspapers ;

(b) where any person has, before the twenty-sixth day of July, nineteen hundred and ten, taken any action whereby he has incurred any expenditure or liability in connexion with the reproduction or performance of any work in a manner which at the time was lawful, or for the purpose of or with a view to the reproduction or performance of a work at a time when such reproduction or performance would, but for the passing of this Act, have been lawful, nothing in this section shall diminish or prejudice any rights or interest arising from or in connexion with such action which are subsisting and valuable at the said date unless the person who by virtue of this section becomes entitled to restrain such reproduction or performance agrees to pay such compensation as, failing agreement, may be determined by arbitration.

(2) For the purposes of this section, the expression "author" includes the legal personal representatives of a deceased author.

(3) Subject to the provisions of section 19, sub-sections (7) and (8) and of section 33 of this Act, copyright shall not subsist in any work made before the commencement of this Act, otherwise than under, and in accordance with the provisions of this section.

Application to British Possessions.

25. (1) This Act, except such of the provisions thereof as are expressly restricted to the United Kingdom, shall extend throughout His Majesty's dominions : Provided that it shall not extend

Application of Act to British dominions.

to a self-governing dominion, unless declared by the Legislature of that dominion to be in force therein either without any modifications or additions, or with such modifications and additions relating exclusively to procedure and remedies, or necessary to adapt this Act to the circumstances of the dominion, as may be enacted by such Legislature.

(2) If the Secretary of State certifies by notice published in the London Gazette that any self-governing dominion has passed legislation under which works, the authors whereof were at the date of the making of the works British subjects resident elsewhere than in the dominion or (not being British subjects) were resident in the parts of His Majesty's dominions to which this Act extends, enjoy within the dominion rights substantially identical with those conferred by this Act, then, whilst such legislation continues in force, the dominion shall, for the purposes of the rights conferred by this Act, be treated as if it were a dominion to which this Act extends ; and it shall be lawful for, the Secretary of State to give such a certificate as aforesaid, notwithstanding that the remedies for enforcing the rights, or the restrictions on the importation of copies of works, manufactured in a foreign country, under the law of the dominion, differ from those under this Act.

26. (1) The Legislature of any self-governing dominion may, at any time, repeal all or any of the enactments relating to copyright passed by Parliament (including this Act) so far as they are operative within that dominion : Provided that no such repeal shall prejudicially affect any legal rights existing at the time of the repeal, and that, on this Act or any part thereof being so repealed by the Legislature of a self-governing dominion, that dominion shall cease to be a dominion to which this Act extends.

(2) In any self-governing dominion to which this Act does not extend the enactments repealed by this Act shall, so far as they are operative in that dominion, continue in force until repealed by the Legislature of that dominion.

(3) Where his Majesty in Council is satisfied that the law of a self governing dominion to which this Act does not extend provides adequate protection within the dominion for the works (whether published or unpublished) of authors who at the time of the making of the work were British subjects resident elsewhere than in that dominion, His Majesty in Council may, for the purpose of giving reciprocal protection, direct that this Act, except such parts (if any) thereof as may be specified in the Order, and subject to any conditions contained therein, shall, within the parts of His Majesty's dominions to which this Act extends, apply to works the authors whereof were, at the time of the making of the work, resident within the first-mentioned dominion, and to works first published in that dominion; but, save as provided by such an Order, works the authors whereof were resident in a dominion to which this Act does not extend shall not, whether they are British subjects or not, be entitled to any protection under this Act except such protection as is by this Act conferred on works first published within the parts of His Majesty's dominions to which this Act extends:

Provided that no such Order shall confer any rights within a self-governing dominion, but the Governor in Council of any self-governing dominion to which this Act extends, may, by Order, confer within that dominion the like rights as His Majesty in Council is, under the foregoing provisions of this sub-section, authorized to confer within other parts of His Majesty's dominions.

For the purposes of this sub-section, the expression "a dominion to which this Act extends" includes a dominion which is for the purposes of this Act to be treated as if it were a dominion to which this Act extends.

27. The Legislature of any British possession to which this Act extends may modify or add to any of the provisions of this Act in its application to the possession, but, except so far as such modifications and additions relate to procedure and remedies, they shall apply only to works the authors whereof were, at the time of the making of the work, resident in the possession, and to works first published in the possession.

28. His Majesty may, by Order in Council, extend this Act to any territories under his protection and to Cyprus, and, on the making of any such Order, this Act shall, subject to the provisions of the Order, have effect as if the territories to which it applies or Cyprus were part of His Majesty's dominions to which this Act extends.

PART II.

INTERNATIONAL COPYRIGHT.

29. (1) His Majesty may, by Order in Council direct that this Act (except such parts, if any, thereof as may be specified in the Order) shall apply—

(a) to works first published in a foreign country to which the Order relates, in like manner as if they were first published within the parts of His Majesty's dominions to which this Act extends;

(b) to literary, dramatic, musical, and artistic works, or any class thereof, the authors whereof were, at the time of the making of the works, subjects or citizens of a foreign country to which the Order relates, in like manner as if the authors were British subjects;

(c) in respect of residence in a foreign country to which the Order relates, in like manner as if such residence were residence in the parts of His Majesty's dominions to which this Act extends; and thereupon, subject to the provisions of this Part of this Act and of the Order this Act shall apply accordingly;

Provided that—

(i) before making an Order in Council under this section in respect of any foreign country (other than a country with which His Majesty has entered into a convention relating to copyright), His Majesty shall be satisfied that that foreign country has made, or has undertaken to make, such provisions, if any, as it appears to His Majesty expedient to require for the protection of works entitled to copyright under the provisions of Part I of this Act ;

(ii) the Order in Council may provide that the term of copyright within such parts of His Majesty's dominions as aforesaid shall not exceed that conferred by the law of the country to which the Order relates ;

(iii) the provisions of this Act as to the delivery of copies of books shall not apply to works first published in such country, except so far as is provided by the Order ;

(iv) the Order in Council may provide that the enjoyment of the rights conferred by this Act shall be subject to the accomplishment of such conditions and formalities (if any) as may be prescribed by the Order ;

(v) in applying the provisions of this Act as to ownership of Copyright, the Order in Council may make such modifications as appear necessary having regard to the law of the foreign country ;

(vi) in applying the provisions of this Act as to existing works, the Order in Council may make such modifications as appear necessary, and may provide that nothing in those provisions as so applied shall be construed as reviving any right of preventing the production or importation of any translation in any case where the right has ceased by virtue of section five of the International Copyright Act, 1886.

(2) An Order in Council under this section may extend to all the several countries named or described therein.

30. (1) An Order in Council under this Part of this Act shall apply to all His Majesty's dominions to which this Act extends except self-governing dominions and any other possession specified in the Order with respect to which it appears to His Majesty expedient that the Order should not apply.

(2) The Governor in Council of any self-governing dominion to which this Act extends may, as respects that dominion, make the like Orders as under this Part of this Act His Majesty in Council is authorized to make with respect to His Majesty's dominions other than self-governing dominions, and the provisions of this Part of this Act shall, with the necessary modifications, apply accordingly.

(3) Where it appears to His Majesty expedient to except from the provisions of any Order any part of his dominions, not being a self-governing dominion, it shall be lawful for His Majesty by the same or any other Order in Council to declare that such Order and this Part of this Act shall not, and the same shall not, apply to such part, except so far as is necessary for preventing any prejudice to any rights acquired previously to the date of such Order.

PART III.

SUPPLEMENTAL PROVISIONS.

31. No person shall be entitled to copyright or any similar right in any literary, dramatic, musical, or artistic work, whether published or unpublished, otherwise than under and in accordance with the provisions of this Act, or of any other statutory enactment for the time being in force, but nothing in this section shall be construed as abrogating any right or jurisdiction to restrain a breach of trust or confidence.

32. (1) His Majesty in Council may make Orders for altering, revoking, or varying any Order in Council made under this Act, or under any enactments repealed by this Act, but any Order made under this section shall not affect prejudicially any rights or interests acquired or accrued at the date when the Order comes into operation, and shall provide for the protection of such rights and interests.

(2) Every Order in Council made under this Act shall be published in the *London Gazette* and shall be laid before both Houses of Parliament as soon as may be after it is made, and shall have effect as if enacted in this Act.

33 Nothing in this Act shall deprive any of the universities and colleges mentioned in the Copyright Act, 1775, of any copyright they already possess under that Act, but the remedies and penalties for infringement of any such copyright shall be under this Act and not under that Act.

34. There shall continue to be charged on, and paid out of, the Consolidated Fund of the United Kingdom such annual compensation as was immediately before the commencement of this Act payable in pursuance of any Act as compensation to a library for the loss of the right to receive gratuitous copies of books :

Provided that this compensation shall not be paid to a library in any year unless the Treasury are satisfied that the compensation for the previous year has been applied in the purchase of books for the use of and to be preserved in the library.

35. (1) In this Act, unless the context otherwise requires,—

Interpretation.

“Literary work” includes maps, charts, plans, tables, and compilations ;

“Dramatic work” includes any piece for recitation, choreographic work or entertainment in dumb show, the scenic arrangement or acting form of which is fixed in writing or otherwise, and any cinematograph production where the arrangement or acting form or the combination of incidents represented give the work an original character ;

“Artistic work” includes works of painting, drawing, sculpture and artistic craftsmanship, and architectural works of art and engravings and photographs ;

“Work of sculpture” includes casts and models ;

“Architectural work of art” means any building or structure having an artistic character or design, in respect of such character or design, or any model for such building or structure, provided that the protection afforded by this Act shall be confined to the artistic character and design, and shall not extend to processes or methods of construction ;

“Engravings,” include etchings, lithographs, wood-cuts, prints, and other similar works, not being photographs ;

“Photograph” includes photo-lithograph and any work produced by any process analogous to photography ;

“Cinematograph” includes any work produced by any process analogous to cinematography ;

“Collective work” means—

(a) an encyclopædia, dictionary, year book, or similar work ;

(b) a newspaper, review, magazine, or similar periodical ; and

(c) any work written in distinct parts by different authors, or in which works or parts of works of different authors are incorporated ;

“Infringing,” when applied to a copy of a work in which copyright subsists means any copy, including any colourable imitation, made, or imported in contravention of the provisions of this Act ;

“Performance” means any acoustic representation of a work and any visual representation of any dramatic action in a work, including such a representation made by means of any mechanical instrument ;

“Delivery,” in relation to a lecture, includes delivery by means of any mechanical instrument ;

“Plate” includes any stereotype or other plate, stone, block, mould, matrix, transfer, or negative used or intended to be used for printing or reproducing copies of any work, and any matrix or other appliance by which records, perforated rolls or other contrivances for the acoustic representation of the work are or intended to be made ;

“Lecture” includes address, speech, and sermon ;

"Self-governing dominion" means the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, and Newfoundland.

(2) For the purposes of this Act (other than those relating to infringements of copyright), a work shall not be deemed to be published or performed in public, and a lecture shall not be deemed to be delivered in public, if published, performed in public, or delivered in public, without the consent or acquiescence of the author, his executors, administrators or assigns.

(3) For the purposes of this Act, a work shall be deemed to be first published within the parts of His Majesty's dominions to which this Act extends, notwithstanding that it has been published simultaneously in some other place, unless the publication in such parts of His Majesty's dominions as aforesaid is colourable only and is not intended to satisfy the reasonable requirements of the public, and a work shall be deemed to be published simultaneously in two places if the time between the publication in one such place and the publication in the other place does not exceed fourteen days, or such longer period as may, for the time being, be fixed by Order in Council.

(4) Where, in the case of an unpublished work, the making of a work has extended over a considerable period, the conditions of this Act conferring copyright shall be deemed to have been complied with, if the author was during any substantial part of that period, a British subject or a resident within the parts of His Majesty's dominions to which this Act extends.

(5) For the purposes of the provisions of this Act as to residence, an author of a work shall be deemed to be a resident in the parts of His Majesty's dominions to which this Act extends if he is domiciled within any such part.

36. Subject to the provisions of this Act, enactments mentioned in the Second Schedule to this Act are hereby repealed to the extent specified in the third column of that schedule :

Repeal.

Provided that this repeal shall not take effect in any part of His Majesty's dominions until this Act comes into operation in that part.

Short title and commencement.

37. (1) This Act may be cited as the Copyright Act, 1911.

(2) This Act shall come into operation—

(a) in the United Kingdom, on the first day of July nineteen hundred and twelve or such earlier date as may be fixed by Order in Council ;

(b) in a self-governing dominion to which this Act extends, at such date as may be fixed by the Legislature of that dominion ;

(c) in the Channel Islands, at such date as may be fixed by the States of those islands respectively ;

(d) in any other British possession to which this Act extends, on the proclamation thereof within the possession by the Governor.

FIRST SCHEDULE.

EXISTING RIGHTS.

Existing Right.

Substituted Right.

(a) *In the case of Works other than Dramatic and Musical Works.*

Copyright | Copyright as defined by this Act.¹

(b) *In the case of Musical and Dramatic Works.*

Both copyright and performing right.

Copyright, but not performing right.

Performing right, but not copyright.

Copyright as defined by this Act.¹

Copyright as defined by this Act, except the sole right to perform the work or any substantial part thereof in public.

The sole right to perform the work in public, but none of the other rights comprised in copyright, as defined by this Act.

¹ In the case of an essay article, or portion forming part of and first published in a review, magazine or other periodical or work of a like nature, the right shall be subject to any right of

SECOND SCHEDULE.
ENACTMENTS REPEALED.

Session and Chapter.	Short Title.	Extent of Repeal.
8 Geo. 2, c. 13	The Engraving Copyright Act, 1734 ..	The whole Act.
7 Geo. 3, c. 38	The Engraving Copyright Act, 1767 ..	Ditto.
15 Geo. 3, c. 53	The Copyright Act, 1775 ..	Ditto.
17 Geo. 3, c. 57	The Prints Copyright Act, 1777 ..	Ditto.
14 Geo. 3, c. 56	The Sculpture Copyright Act, 1814 ..	Ditto.
3 & 4 Will. 4, c. 15	The Dramatic Copyright Act, 1833 ..	Ditto.
5 & 6 Will. 4, c. 65	The Lectures Copyright Act, 1835 ..	Ditto.
6 & 7 Will. 4, c. 59	The Prints and Engravings Copyright (Ireland) Act, 1836.	Ditto.
6 & 7 Will. 4, c. 110	The Copyright Act, 1836 ..	Ditto.
5 & 6 Vict., c. 45	The Copyright Act, 1842 ..	Ditto.
7 & 8 Vict., c. 12	International Copyright Act, 1844 ..	Ditto.
10 & 11 Vict., c. 95	The Colonial Copyright Act, 1847 ..	Ditto.
15 & 16 Vict., c. 12	The International Copyright Act, 1852 ..	Ditto.
25 & 26 Vict., c. 68	The Fine Arts Copyright Act, 1862 ..	Sections one to six. In section eight the words "and pursuant to any Act for the protection of copyright engravings," and "and in any such Act as aforesaid". Sections nine to twelve.
38 & 39 Vict., c. 12	The International Copyright Act, 1875 ..	The whole Act.
39 & 40 Vict., c. 36	The Customs Consolidation Act, 1876 ..	Section forty-two from "Books wherein" to "such copyright will expire." Sections forty-four, forty five, and one hundred and fifty-two.
45 & 46 Vict., c. 40	The Copyright (Musical Compositions) Act, 1882.	The whole Act.
49 & 50 Vict., c. 33	The International Copyright Act, 1886 ..	Ditto.
51 & 52 Vict., c. 17	The Copyright (Musical Compositions) Act, 1888.	Ditto.
52 & 53 Vict., c. 42	The Revenue Act, 1889 ..	Section one, from "Books first published" to "as provided in that section."

publishing the essay, article or portion in a separate form to which the author is entitled at the commencement of this Act, or would, if this Act had not been passed, have become entitled under section eighteen of the Copyright Act, 1842.

For the purposes of this Schedule the following expressions, where used in the first column thereof, have the following meanings :

"Copyright," in the case of a work which according to the law in force immediately before

the commencement of this Act has not been published before that date and statutory copyright wherein depends on publication, includes the right at common law (if any) to restrain publication or other dealing with the work ;

"Performing right," in the case of a work which has not been performed in public before the commencement of this Act, includes the right at common law (if any) to restrain the performance thereof in public.

Session and Chapter.	Short Title.	Extent of Repeal.
6 Ewd. 7, c. 36 ..	The Musical Copyright Act, 1906 ..	In section three the words "and which has been registered in accordance with the provisions of the Copyright Act, 1842, or of the International Copyright Act, 1844 which registration may be effected notwithstanding anything in the International Copyright Act, 1886."

THE SECOND SCHEDULE.¹

REPEAL OF ENACTMENTS.

(See Section 15.)

Year.	No	Short title.	Extent of Repeal.
1847	XX	The Indian Copyright Act, 1847.	So much as has not already been repealed.
1867	XXV	The Press and Registration of Books Act, 1867.	In section 18 the following words, namely :— " Every registration under this section shall, upon the payment of the sum of two rupees to the office keeping the said Catalogue, be deemed to be an entry in the Book of Registry kept under Act No. XX of 1847 (for the encouragement of learning in the territories subject to the Government of the East India Company, by the defining and providing for the enforcement of the right called copyright therein); and the provisions contained in that Act as to the said Book of Registry shall apply <i>mutatis mutandis</i> to the said Catalogue."
1878	VIII	The Sea Customs Act, 1878.	Clause (a) of section 18.

THE COURT-FEES ACT (VII OF 1870)

LEGISLATIVE CHANGES.—

Rep. in pt., Act 14 of 1870; Act 8 of 1871; Act 13 of 1889; Act 8 of 1890, (in Punjab) Act 17 of 1887; and am.
 Act 20 of 1870;
 Act 6 of 1889, s. 18;
 Act 12 of 1891.
 S. 16, Sch. II, art. 15, rep., Sch. I, art. 1, Sch. II, art. 9, am., Sch. II, art. 11, rep. in pt., Act 5 of 1908.
 Am., Act 15 of 1872, S. 2; Act 13 of 1875, S. 6; Act 7 of 1889, S. 13; Act 11 of 1899, Ss. 2 and 3; Act 10 of 1901.
 S. 7 (xi) am., Act 6 of 1905.
 Sch. I, arts. 11, 12-A am., Act 87 of 1910, s. 2.

¹Repealed by Act XII of 1927.

Sch. II, art. 1-A ins., Act 14 of 1911.

Sch. II, art. 6 am., Act 17 of 1914.

Sch. I, art. 13 rep. (in Punjab), Punj. Act II of 1912, S. 5 (as substituted by Punj. Act 4 of 1912).

S. 7 (v) (b) am. (in Punjab) Punj. Act 3 of 1914, S. 49 (c). Am. Act XXIV of 1917; Act XVIII of 1919; Act XXXVIII of 1920; Act XIX of 1922; Act XI of 1923.

Ss. 20 to 23—operation restricted (in Burma), Bur. Act I of 1910, S. 2.

Am. (in Lower Burma)—

Act II of 1889, S. 84 and Act 6 of 1900, S. 47.

Am. (in Upper Burma)—

Reg. 1 of 1896, S. 36 (partially rep. by Reg. 5 of 1903, S. 4).

Am. in the former Province of Bengal (except the Sambalpur District)—

Bengal Act 3 of 1898, S. 7.

Declared in force—in the Sonthal Parganas, Reg. 3 of 1872, S. 3, as amended by Reg. 3 of 1899, S. 3.

in the Angal Sub-division, Reg. 3 of 1913, S. 3;

in Upper Burma (except the Shan States,) Act 13 of 1898, S. 4;

in the British Baluchistan, Reg. 2 of 1913, S. 3 (with a modification).

PREFATORY NOTE :—The practice in our country in respect of the levy of fees, is similar to the practice prevailing in England and other European countries.

The origin of court-fees in British India may be described in the following words of the first report of the Commissioners appointed to consider the reform of the judicial Establishment, etc., of India, 1856. The report says:

"No institution fee has ever been paid in the Supreme Court; nor under the original system of Lord Cornwallis was there any such fee in the Courts of the Company. The state defrayed the expense of all the judicial establishments. An institution fee, in the case of civil suits, was first established by Bengal Regulation XXXVIII of 1795, not as a source of revenue, but as appears from the preamble to the Regulation, for the purpose of preventing vexatious litigation. By Bengal Regulation VI of 1797, the institution fees were converted into stamp duties; the preamble there assigns the same object; but adds also that of increasing the public revenue. The last purpose is the only one mentioned in Bengal Regulation I of 1814 which further regulates these payments.

The old regulations and Acts as to Court-fees in the three Presidencies are no longer of any practical application. The Madras and Bombay Regulations proceeded to a great extent on the lines of the Bengal Regulations.

With regard to criminal cases it was found that there were no means of checking litigious complaints, in trifling matters before the magistrate, and therefore a fee of eight annas was first directed to be paid on all complaints of a petty nature before the magistrate by Bengal Regulation X of 1797. Subsequently a duty of one rupee was levied on complaints as to offences of a heinous nature. This continued to be the state of the law till 1829, when it was amended by the imposing of a fee of eight annas on complaints of offences of a bailable nature. When this provision was sought to be introduced in Bombay and Madras by the Bill of 1860 there was opposition and consequently fees on complaints were altogether abolished, but were introduced again by the Act of 1867.

The Stamp Act, XXXVI of 1860, was the first general Act of the Governor-General in Council relating to judicial and non-judicial stamps in British India and repeated the previous Regulations in force in the three Presidencies. This Act was in turn repealed by Act X of 1862. It was represented to the Government of India that the scale of 1862 was too low and capriciously arranged. Mr. Roberts was proposing from time to time that a scheme should be introduced the object of which were that there should be a uniform rate of duty of 12 per cent. and that duty shall be charged up to certain sum and beyond that sum a small duty should be levied and that the money so obtained should be employed in the improvement of the Courts. The last of these recommendations reached the Government of India in 1866. Lord Lawrence had formed the opinion that the greatest evils in the administration of justice arose from the under-payments of the lower moffusil judges and the officers of their courts. The plans which he had been considering for remedying the evil came to maturity in 1866. The first reason which led to the Stamp Bill of 1867 was a proposition on the part of Mr. Strachey that a certain sum of money should be expended in enhancing the salaries of ministerial officers and of the judicial officers of certain courts. That proposition involved an extra expenditure of several lakhs of rupees, and the finances of the country then were ill able to bear the additional burden. To meet that expenditure and generally that incurred on account of the Courts, a Commission was appointed for considering the stamp laws, and before them was laid the proposals of Mr. Roberts in respect of the amendment of the scale of fees leviable under schedule B to Act X of 1862. The Commission was appointed with the object, namely, if possible to derive out of the stamp duties levied in judicial proceedings sufficient revenue not only to meet the increased expenditure to be incurred for the Courts, but also to make the Courts, to a more considerable extent than they did, pay for themselves.

The scheme which the Stamp Commission submitted was accepted in its entirety by the Executive Council and the scale of 1867 was the result of this Commission.

Act XXVI of 1867 proved repressive of litigation, but a considerable increase of revenue was obtained through its operation. Moreover, the Act of 1867 was intended only to be a tentative measure. To give some measure of relief, Act VII of 1870 was passed. The provisions relating to

Court-fees were scattered over a number of enactments and the present Act consolidated these provisions relating to Court-fees.

The law relating to Court-fees and that relating to stamps proper were contained in one and the same regulation or Act till Act XXVI of 1867 was passed when they were dealt with each separately. In order that for the future there might be no confusion between stamp revenue proper (non-judicial) and the revenue derived "from judicial stamp" the proceeds of Act VII of 1870 were designated the Court-fees and the Act is entitled accordingly.

As regards the general policy of levying a tax on the administration of justice, it may be noted the Bentham was of opinion that justice ought not to be taxed. Mr. Hobhouse, when he asked for leave to introduce the Bill of 1867 remarked, that he was aware that there was an opinion among certain writers in England that justice should not be taxed, but as far as he knew that theory did not meet with entire approbation in England.

Mr. Maine observed thus on the objection to judicial taxation—

'This astounding fact (i.e., 75 per cent. of demonstrable false accusations which was the practical result of the relaxation of the stamp law) might well make them cautious as to minor and therefore less hazardous generalities on the subject of judicial taxes in India. But it still remained to refute the more sweeping generalisation that judicial taxes in all countries were mischievous and improper. It may be observed that the opinion against judicial taxation was extremely modern. For centuries and centuries there had seemed to be nothing more simple or natural than that the parties to a dispute should remunerate the authority by whom their differences were arranged. No doubt in modern Europe the mistake had been made of allowing judicial fees to go into the pocket of the judge himself and not into the exchequer of the State that paid him. This had led in France before the Revolution by a perfectly logical association to the sale of judicial offices, and in England though it had always been illegal to traffic in such offices, the same result had practically been obtained by the creation of sinecures which were conferred on the relations of the judge. Against such scandals and abuses Jeremy Bentham, now not far short of a hundred years ago, protested with all the vehemence of which he was capable, and it may be stated that the opinion against the judicial taxation was entirely produced by Jeremy Bentham and was not older. It was true that Jeremy Bentham's opinions, in this respect, had not been practically carried out even in England, and that still large amounts were levied in the forms of judicial taxes in aid of the payments which the State made to its judicial officers. But the truth was that Bentham's name was so great in England that even those views of his which had never been acted upon obtained currency and importance in the shape of common places. If it should be enquired into as to what were the reasons of Bentham for denouncing judicial taxation as mischievous the following points may be noticed: Bentham's idea was that all litigation or all but very little, was entirely the fault of Government and therefore he naturally objected that the Government which cause litigation should profit by it. Bentham believed that litigation was owing to the complexity of the law, and this litigation might be almost entirely removed by legislation adapted to true principles. He thought that litigation and therefore the expense of litigation might be reduced to a minimum, if it were not for the blindness, the stupidity or the cupidity of legislatures in not simplifying the laws. Mr. Maine would quote the panacea expressly prescribed by Bentham for all but complete suppression of fees and costs, an all comprehensive code of substantive law having for its end in view the greatest happiness of the greatest number each part of it presented to the minds of all persons on whom conformity to its enactments, the attainment of its end depends, and an all-comprehensive code of adjective law, otherwise called a code of procedure having for its end the giving, to the utmost possible amount, execution and effect to the enactments of the substantive Code. This passage was quoted from the principles of judicial procedure as a statement of Bentham's expedient for preventing judicial taxation and accordingly he argued with perfect logic that it is the State and not the litigant that ought to pay them.

Now without entering into the question of the truth of these views, had they any application whatever to India? The simple fact was that the people of India objected to having their laws and institutions simplified, and resented such interference as a breach of the conditions on which the country was governed. The truth appeared to be that the people of the country were not only wedded by custom and religious feeling to a complex system of law, but prided themselves on their usages in proportion to the complexity of those usages. If this were so, the foundation of Bentham's doctrine collapsed and the doctrine itself had no application to India. The legislature was estopped by the conditions of our tenure of the country, from so simplifying the law as to render judicial taxation mischievous. He (Mr. Maine) did not mean to imply that indefinite judicial taxation was legitimate to this country. All the argued was that it was governed by the same principles as the levying of any other tax, and not by any special consideration of the mischievousness of judicial taxation.

Mr. Maine again remarked in the Council that the question whether justice might be taxed for the general purposes of the State did not arise in India, and that the last thing which could be attributed to the Commission or to the Government was policy of taxing litigants as a separate class for the benefit of the general finance.

The above observations of Mr. Maine were made in vindication of the policy of the Government in levying taxes for the administration of justice. The Court-Fees Act (VII of 1870) were passed into law; and it prescribes certain fees to be paid by suitors before the Court can take action in their suit or on their application. (Abstract Proceedings in the Indian Legislative Council, Vol. VI, pp. 70, 123-125, 290, 291.)

THE COURT-FEES ACT (VII OF 1870).

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THE COURT-FEES ACT (VII OF 1870).¹

[11th March 1870.

CHAPTER I.
PRELIMINARY.

1. This Act may be called THE COURT-FEES

Short title. Extent of Act. ACT, 1870.
Commencement of Act.

It extends to the whole of British India ;
And it shall come into force on the first day of April, 1870.

¹ For the Statement of Objects and Reasons, see Gazette of India, 1869, Pt. V. p. 57 ; for proceedings in Council, see *ibid.*, 1869, Supplement, pp. 1179 and 1452 ; *ibid.*, 1870, Supplement, pp. 52, 378, 421, 427 and 434.

For rules under the Act by the High Court, Madras, Appellate Side, see Fort St. George Gazette, Supplement, dated 20th December 1904, p. 1, and for Civil Rules of Practice by the same Court, under this Act, the Civil Procedure Code and certain other Acts; for observance of the Subordinate Civil Courts in that Province, except the Small Cause Court at Madras, see *ibid.*, 1905 Supplement, p. 1.

Act VII of 1870 has been declared in force—
in Upper Burma generally (except the Shan States) by the Burma Laws Act (XIII of 1898), S. 4 (1), Sch. I, Bur. Code ;

in British Baluchistan, by the British Baluchistan Laws Regulation (I of 1890), S. 3, Bal. Code ; in the Sonthal Parganas, by the Sonthal Parganas Settlement Regulation (III of 1872), as amended by the Sonthal Parganas Justice and Laws Regulation (III of 1899), Ben. Code ; in the sub-division of Angul, by the Angul District Regulation (I of 1894), S. 3, Ben. Code.

It has further been declared, by notification under S. 3 (a) of the Scheduled Districts Act (XIV of 1874), to be in force in the following Scheduled Districts, namely :—

the District of Azaribagh, Gazette of India, 1881, Pt. I, p. 507 ;

the District of Lohardaga (now called the Ranchi District, see Calcutta Gazette, 1899, Pt. I, p. 44 ; the District of Lohardaga then included the present District of Palamau, separated in 1894), see Gazette of India, 1881, Pt. I, p. 508 ;

the District of Manbhum, Gazette of India, 1881, Pt. I, p. 509 ;

the Pargana Dhalbhum in the District of Singbhum, Gazette of India, 1881, Pt. I, p. 510 ;

the Scheduled Districts in Ganjam and Vizagapatam, see Gazette of India, 1898, Pt. I, p. 869 ;
the Tarai of the Province of Agra, see Gazette of India, 1876, Pt. I, p. 505.

It has been extended by notification under S. 5 of the same Act to the Kolhan in the District of Singbhum, see Gazette of India, 1907, Pt. I, p. 655, and under Ss. 5 and 5 A of that Act to the following Scheduled Districts, namely :—the Garo Hills District, the Khasi and Jaintia Hills District, the Naga Hills District, the North Cachar Sub-division of the Cachar District, the Mikir Hill Tract in the Nowgong District and

the Dibrugar Frontier Tract in the Lakhimpur District, provided that the Act does not apply to natives of these districts and tracts who are assessed to house-tax except in such places and cases as the Deputy Commissioner may withdraw from the operation of the exemption, see Assam Gazette, 1887, Pt. I, p. 851 ; Gazette of India, 1884, Pt. I, p. 164 ; the Lushai Hills, with the same proviso, see Gazette of India, 1904, Pt. I, p. 915, and Assam Gazette, 1904, Pt. II, p. 787.

The Act came into permanent operation in Aden on 1st April, 1876, see Bombay Government Gazette, 1876, Pt. I, p. 956.

It has been declared inapplicable to proceedings before officers making a settlement, and in certain other cases under the Sonthal Parganas Settlement Regulation (III of 1872), S. 8, as amended by the Sonthal Parganas Justice and Laws Regulation (III of 1899), Ben. Code.

The Act has been amended in Upper Burma by the Upper Burma Civil Courts Regulation (I of 1896), S. 35, Bur. Code ; in the Punjab by the Punjab Courts Act (XVIII of 1884), S. 71, P. and N. W. Code ; and in Lower Burma by the Lower Burma Courts Act (VI of 1900), S. 47.

Sec. 1. OBJECT AND SCOPE OF THE ACT.—The object of the Act is not to arm a litigant with a weapon of technicality but to secure revenue to the state and its provisions are to be so construed. 43 B. 507 = 45 I. A. 24 = 35 M. L. J. 437 = 50 I. C. 280 (P. C.). The Act not only prescribes the fees, but provides how these are to be ascertained, how questions as to sufficiency of fees are to be determined, etc. 12 A. 129 = 10 A. W. N. 393 (1890). See also 32 M. 305 (310) = 19 M. L. J. 340 (F. B.).

CONSTRUCTION OF THE ACT.—The Act is a fiscal enactment, and must, in cases of doubt, be interpreted strictly in favour of the subject. 39 C. L. J. 209 ; 8 A. 438 ; 9 M. 148 (F. B.) ; 23 Cr. L. J. 121 = 1922 U. B. 14 ; 115 P. R. 1918 = 44 I. C. 261 (F. B.). See also 15 A. L. J. 163 = 38 I. C. 993 ; 14 A. L. J. 850 = 36 I. C. 877 ; 37 A. 159 = 27 I. C. 731 ; 34 B. 239 = 5 I. C. 610. See also the observations of Justice Mahmood and Chief Justice Edge on the point in 12 A. 129 = 10 A. W. N. (1890) 39 (F. B.). The Act must be taken as a whole and individual sections should not be considered by themselves in order to give effect to the legislative intent upon a particular matter. 21 I. C. 502 = 18 C. W. N. 121. Practice of Court though long established cannot override the express provisions of the Act. See 12 A. 129 = 10 A. W. N. (1890) 39. See also 41 I. C. 445 (Cal.) ; 43 B. 507 (P. C.) ; 27 C. 503 ; 13 C.

"Chief controlling Revenue-authority" defined.

12. In this Act, unless there is anything repugnant in the subject or context, "Chief Controlling Revenue-authority" means—

(a) in the Presidency of Fort St. George (The Presidency of Fort William in Bengal)² and the territories respectively under the administration of the Lieutenant-Governors of [Bihar and Orissa]³ and the North-Western Provinces⁴ and the Chief Commissioner⁴ of Oudh—the Board of Revenue ;

(b) in the Presidency of Bombay outside Sindh and the limits of the town of Bombay—a Revenue Commissioner ;

(c) in Sindh—the Commissioner ;

(d) in the Punjab⁵ and Burma, including Upper Burma—the Financial Commissioner ; and

(e) elsewhere—the Local Government or such officer as the Local Government may, by notification in the official Gazette,⁶ appoint in this behalf.

W. N. 815 at p. 821. Provisions of other statutes which are in *pari materia* may be referred to, but when the Acts are different in their scope and character, they cannot be read together. 22 M. 494=9 M. L. J. 37 ; 4 B 515. Thus Limitation Act cannot be consulted. 23 A. 749 ; 22 M. 494 ; 9 M. 134.

OPERATION OF THE ACT.—Notification increasing Court-fees issued and published on a certain date in the official Gazette even if it was received at 5 p. m. after office hours, would apply to plaints filed on the same date earlier in the day. 45 M. L. J. 557=16 Mad. 685 (F. B.). Plaint returned for presentation to proper court—New Court-Fees Act coming into force before actual presentation—Court-fee is payable under the new Act. 30 C. W. N. 90=91 I. C. 862=A. I. R. 1926 Cal. 355.

DETERMINATION OF COURT-FEES UNDER THE ACT.—In order to determine the amount of Court-fee payable in a suit, the Court has to look at and see in each particular case what the nature of the relief claimed is, and for that purpose it must look at the allegations contained in the plaint. 21 C. W. N. 375=35 I. C. 797. See also 40 C. L. J. 150=79 I. C. 982. In other words, the cause of action as stated in the plaint must be seen. 20 C. 762. The substance and not the mere language of the plaint must be looked to. 28 I. C. 79=38 M. 922, following 30 M. 18=1 M. L. T. 412 and 40 C. 15=21 I. C. 404. It is the duty of Court to see that proper value is put on the relief claimed. Where it is too small on the face of the plaint, the Court can question the same. 21 I. C. 404=40 C. 615. Basis of taxation under the Act is the actual value of the property and not its probable value under more efficient management. 62 I. C. 513=6 P. L. J. 411. Interest *pendente lite* ; There is no provision of law authorising assessment of additional court-fee by reason of accrual of interest *pendente lite* where the plaintiff appeals. A. I. R. 1927 Pat. 230. In an appeal by the defendant it might be otherwise. 8 P. L. T. 555=103 I. C. 592=A. I. R. 1927 Pat. 230. Where in a mortgage suit the plaintiff's claim was allowed in part by the trial court and in appeal the High Court decreed the claim in full and it appeared that the sum so allowed was larger than that claimed in the plaint. *Held*, that there was no provision in

the Court Fees Act under which the plaintiff-appellant may be called upon to pay additional court-fee upon the amount found due. 105 I. C. 395 (1)=1 P. L. T. 331. A Court has jurisdiction to order the issue of a certificate to enable the plaintiff to apply to the Revenue authorities to obtain a refund of the excess Court-fee paid under a *bona fide* mistake. (40 Cal. 365 and 3 P. L. J. 452, Foll.) ; 102 I. C. 193 (1)=A. I. R. 1927 Sind 192. See also the cases cited on the point under section. The plaintiff's estimate of the value of the land, if contrary to the section of the Court Fees Act, cannot be allowed to operate to the prejudice of the defendant at any stage of the suit. The defendant can object to the valuation whenever it is in his interest to do so. 49 A. 398=100 I. C. 35=25 A. L. J. 258=A. I. R. 1927 A. 308.

"BRITISH INDIA".—See General Clauses Act, S. 3 (7). See also 9 B. 244 and notes under S. 3, C. P. Code.

Sec. 2 —¹ The present section 2 was added by S. 2 of the Court-Fees (Amendment) Act (X of 1901). The original section relating to repeal of enactments was repealed by the Repealing Act (XIV of 1870).

² The words "The Presidency of Fort William in Bengal" were inserted by Act XXIV of 1917.

³ The words "Bihar and Orissa" were substituted for the word "Bengal" by Act XXIV of 1917.

⁴ These Provinces are now known as the United Provinces of Agra and Oudh and the Lieutenant-Governor and Chief Commissioner as the Lieutenant-Governor of these Provinces, see Proclamation No. 9196-P., dated the 22nd March, 1902, Gazette of India, 1902, Pt. I, p. 228 and the United Provinces Designation Act (VII of 1902).

⁵ As to the N. W. F. Province, see the N. W. F. Province Law and Justice Regulation (VII of 1901), S. 6 (1) (d), P. and N.-W. Code.

⁶ For officer appointed for—(1) the Island of Bombay, see Bombay Government Gazette, 1902, Pt. I, p. 35 ; (2) Baluchistan, see Gazette of India, 1908, Pt. I, p. 389 ; and (3) The Assam Valley Districts and certain parts of the district of Cachar, see E. B. & A. Gazette, 1905, Pt. I, p. 5.

CHAPTER II.

FEES IN THE HIGH COURTS AND IN THE COURTS OF SMALL CAUSES AT THE PRESIDENCY-TOWNS.

3. The fees payable for the time being to the clerks and officers (other than the sheriffs and attorneys) of the High Courts established by

Levy of fees in High Courts on their original sides.

Letters Patent, by virtue of the power conferred by [section 15 of the Indian High Courts Act, 1861, or section 107 of the Government of India Act, 1915];¹

or chargeable in each of such Courts under No. 11 of the first, and Nos. 7, 12, 14, [*]² 20 and 21 of the second schedule to this Act annexed;

Levy of fees in Presidency Small Cause Courts.

and the fees for the time being chargeable in the Courts of Small Causes at the Presidency-towns³ and their several offices,

shall be collected in manner hereinafter appearing.

4. No document of any of the kinds specified in the first or second schedule to

Fees on documents filed, etc., in High Courts in their extraordinary jurisdiction;

this Act annexed, as chargeable with fees, shall be filed, exhibited or recorded in, or shall be received or furnished by, any of the said High Courts in any case coming before such Court in the exercise of its extraordinary original

civil jurisdiction;

or in the exercise of its extraordinary original criminal jurisdiction;

or in the exercise of its jurisdiction as regards appeals from the [judgments (other than judgments passed in the exercise of the ordinary original civil jurisdiction of the Court) of one]⁴ or more Judges of the said Court, or of a division Court;

in their appellate jurisdiction;

or in the exercise of its jurisdiction as regards appeals from the Courts subject to its superintendence;

as Courts of reference and revision.

or in the exercise of its jurisdiction as a Court of reference or revision;

unless in respect of such document there be paid a fee of an amount not less than that indicated by either of the said schedules as the proper fee for such document.

5. When any difference arises between the officer whose duty it is to see that

Procedure in case of difference as to necessity or amount of fee.

any fee is paid under this chapter and any suitor or attorney, as to the necessity of paying a fee or the amount thereof, the question shall, when the difference arises in any of the said High Courts, be referred to the taxing-

officer, whose decision thereon shall be final, except when the question is, in his

¹ Sec. 3.—¹ The words "Section 15 of the Indian High Courts Act, . . . 1915" were substituted for the words "St. 24 and 25 Vic., Ch. 104, S. 15 by Act XXIV of 1917.

² The number "sixteen" was repealed by the Repealing and Amending Act (XII of 1891).

³ See the Presidency Small Cause Courts Act (XV of 1882), Ch. X.

⁴ Secs. 3 and 4. SCOPE OF THE SECTIONS.—Section 4 has no application to the ordinary original civil and criminal jurisdiction, or admiralty and matrimonial jurisdictions, etc. But section 3 enacts that the procedure laid down in Chapter V, Ss. 25 to 28 for collection and the mode of levying the fees shall apply to the original jurisdiction as well as the appellate jurisdiction from the High Court, Original Side. Section 4 is not applicable to Letters Patent appeal from the judgment of a single Judge of the High Court and no Court-fee is leviable thereon except Rs. 2 prescribed for an application to the High Court. 44 A. 13=19 A. L. J. 677. See also 65 I. C. 675; 3 Lah. 420=1923 Lah. 275; 1 Pat. 384=3 P. L. T. 194; nor

to appeals under Agency Rules referred by Government to High Court for disposal. 22 M. 162. Suit transferred to High Court under Cl. 13 of the Letters Patent (Mad.) from Presidency Small Cause Court—Deficiency must be paid according to Court Fees Act. 22 L. W. 15=91 I. C. 751=A. I. R. 1925 Mad. 1216.

MEMORANDUM OF APPEAL.—Under section 4 "documents" includes memorandum of appeal. 12 All. 129 (F.B.). Appeal should not be entertained without payment of proper Court-fee. 30 I. C. 379 (Pat.); 3 P. L. J. 74=42 I. C. 675; 25 M. 24 (memorandum of cross-objections). The appeal is liable to be rejected if the deficiency is not made up within the period of limitation. 1924 Lah. 401. See also 46 I. C. 509=3 P. L. J. 484. See also S. 28 *infra*.

⁵ Sec. 4.—⁴ The words "judgments (other than . . . Court) of one" were substituted for the words "judgment of two" by Act XIX of 1922.

⁶ Sec. 5. SCOPE OF THE SECTION.—See the observations of Collins, C. J., in 21 M. 269 (270). Conditions necessary for the operation of

opinion, one of general importance, in which case he shall refer it to the final decision of the Chief Justice of such High Court, or of such Judge of the High Court as the Chief Justice shall appoint either generally or specially in this behalf.

When any such difference arises in any of the said Courts of Small Causes, the question shall be referred to the Clerk of the Court, whose decision thereon shall be final, except when the question is, in his opinion, one of general importance, in which case he shall refer it to the final decision of the first Judge of such Court.

The Chief Justice shall declare who shall be taxing-officer within the meaning of first paragraph of this section.

CHAPTER III.

FEES IN OTHER COURTS AND IN PUBLIC OFFICES.

6. Except in the Courts hereinbefore mentioned, no document of any of the kinds

specified as chargeable in the first or second schedule to this Act annexed shall be filed, exhibited or recorded in any Court of Justice, or shall be received or furnished by any

the section, *see* 12 All. 129 (F. B.); 4 P. L. J. 700; 3 P. L. J. 92=43 I. C. 521. The jurisdiction of a Taxing Officer does not arise like the jurisdiction of an arbitrator upon a difference of opinion between a Court clerk and a suitor and upon formal reference to decide the dispute. The intention of S. 5 is merely to ensure that the question should be raised before the Taxing Officer, that he should bring his mind to bear on the question and decide it. 52 C. 871=29 C. W. N. 879=1925 Cal. 1201. *See also* 20 M. 398. The power of the Taxing Officer under S. 5 is not confined merely to memoranda of appeal filed in the High Court, but extends to deficiencies in stamp on a plaint or memorandum of appeal in the Courts below when the fact of detriment to the revenue is brought to his notice. 22 A. L. J. 1038=84 I. C. 822=1925 All. 184. Under S. 5 it is competent to the Chief Justice to refer a dispute *re*: Court-fee between a suitor or his attorney and the Officer of the Court, to the decision of a particular Judge of the High Court. 45 M. 849=43 M. L. J. 436=1922 Mad. 421. The decision of such Judge is final. 29 Bom. L. R. 1511=A. I. R. 1927 Bom. 643=52 B. 61=106 I. C. 66 (2). It is not proper for a Judge to whom a Court-fee matter is referred to refer the matter to a Bench. 3 Pat. 146=4 P. L. T. 638=75 I. C. 871. Nor has the division bench jurisdiction to decide the reference. 33 A. 20=7 A. L. J. 842. (30 M. 96, Foll.) A Division Bench of the High Court has no jurisdiction to re-open the valuation of the appeal after it is admitted. 4 Pat. L. J. 700=52 I. C. 508.

FINALITY OF THE DECISION OF THE TAXING OFFICER.—A decision of the Taxing Officer is final and is not open to appeal, review or revision. 4 P. L. J. 700=52 I. C. 508; 3 P. L. J. 92=43 I. C. 521; 12 All. 129; 26 L. W. 378=105 I. C. 119=A. I. R. 1927 Mad. 940=53 M. L. J. 457. The decision is final both as to the category under which the suit falls and the amount of fee payable by the suitor. 12 All. 129; 23 A. W. N. 214; 32 A. 19=6 A. L. J. 972=4 I. C. 123; 15 A. 117. The decision is final though wrongly given. The Bench hearing appeal will not interfere with it. 2 P. 919=5 P. L. T. 315. *See also* 2 P. 198=4 P. L. T. 71; 4 Pat. 336=87 I. C. 137=1925 P. 392 (F. B.); 1925 P. H. C. C. 339; 52 C. 871=29 C. W. N. 879=1925 Cal. 1201. The remedy of the party aggrieved by such a decision is to move the Board of Revenue

to grant a refund. 1925 P. H. C. C. 359. *See also* 39 P. R. 1907. The effect of a wrong decision, however, by the Taxing Officer cannot be to prejudice the rights of the parties. 15 A. 117=13 A. W. N. (1893) 45.

OBJECTIONS AS TO INSUFFICIENCY OF COURT-FEE.—When once the Taxing Officer has decided the amount of Court-fee no objection can be taken by the respondent at the time of hearing. 20 M. 398; 20 A. 11 at p. 17. Where, however, no reference under S. 5 has been made at all the Court hearing the appeal must decide such question. 47 A. 756=23 A. L. J. 725. *See also* 20 M. 328; 37 C. 914; 21 M. 269.

TAXING OFFICER.—The Taxing Officer of the High Court is the Registrar on the Appellate Side. 37 C. 914=8 I. C. 1145. In Madras, the Registrar was the *ex-officio* Taxing Officer—*Fort St. George Gazette*, 29th Sep. 1915, Pt. II, p. 1769. But under a recent Notification the master has been appointed as the Taxing Officer. The Deputy Registrar is not the Taxing Officer and his order is not final under the section. The question decided by him can be raised at the hearing of the appeal. 37 C. 914=8 I. C. 1145.

POWERS OF THE TAXING OFFICER.—To determine the amount of Court-fee payable, the Taxing Officer has power to investigate for himself the proper valuation of the appeal. He can take evidence for that purpose and should not exercise his powers in a summary manner. 4 Pat. 336=6 P. L. T. 262.

REFUND OF EXCESS COURT-FEE PAID.—The High Court has no power to issue a certificate authorizing the Collector to refund the excess stamp duty paid by a suitor by reason of over-valuation of his suit. 11 B. L. R. 370=20 W. R. 106; 102 I. C. 193=A. I. R. 1927 Sind 192. So also with regard to the excess fee paid according to a wrong decision of the Taxing Officer. 39 P. R. 1907. *See also* 1925 P. H. C. C. 359; 92 I. C. 626 (1)=A. I. R. 1926 Pat. 147. But *see* 3 Pat. L. J. 452=46 I. C. 27; 40 Cal. 365=20 I. C. 428. Government however may order such refund, notwithstanding the absence of any special provision in the law authorizing them to do so, 39 P. R. 1917. Where excess Court-fee is paid in the suit, credit for the excess paid in the Original Court may be allowed in appeal to the plaintiff-appellant by the appellate Court. A. W. N. (1886) 228.

Sec. 6. DOCUMENTS.—A memorandum of appeal is a document within the meaning of this

public officer, unless in respect of such document there be paid a fee of an amount not less than that indicated by either of the said schedules as the proper fee for such document.

7. The amount of fee payable under this Act in the suits¹ next hereinafter mentioned shall be computed as follows :—

- (i) In suits for money (including suits for damages or compensation, or arrears of maintenance of annuities, or of other sums payable periodically)—according to the amount claimed :

section, as also a plaint, and an application for review. 12 A. 57 = A. W. N. (1889) 197. Documents not required to be stamped, *see* Ss. 33 and 19 *infra*. Application not required to be in writing do not fall within the section. 2 N. W. P. 418. Thus an application by an auction-purchaser for a certificate of sale need bear no stamp. 13 B. 670. So also an application for issue of succession certificate. 17 W. R. 489. Also an application for refund of stamp duty. 9 W. R. 357. No additional Court-fees are payable on a plaint returned for presentation to the proper Court. 8 B. 313. *See also* 1 B. 538 ; 7 C. 157 ; 2 A. 357. When a suit properly instituted before the Settlement Officer without a Court fee under S. 8 of Reg. III of 1872 was under S. 5 of the Regulation transferred to the Civil Court, no institution Court-fee had to be paid in the Civil Court also. 12 C. W. N. 917. Under the section, a certificate under Act XL of 1853 cannot come into existence until the person, who has the permission of the Court to obtain it, deposits the requisite amount of stamp duty. 12 C. 542.

"FILED."—Meaning of, *see* 20 All. 11 (17).

"FURNISHED."—*See* 17 W. R. 489.

Sec. 7.—¹ For the amount of fee payable in certain suits and proceedings under the Agra Tenancy Act (U. P. Act II of 1901), *see* S. 170 of that Act, U. P. Code.

SCOPE OF THE SECTION.—S. 7 states the various processes by which the values in different suits are to be ascertained and the schedule then applies the proper Court-fee to these values. 6 N. L. R. 164 = 8 I. C. 1125. Once the value of a relief is ascertained for the purposes of a plaint, the first schedule rates the relief at the same value for the purposes of appeal. The value of the same relief remains unchanged all through the succeeding stages though the appeal is made against its grant or its refusal by the lower Court. (*Ibid.*) *See also* 49 I. C. 962 (Pat.); 30 M. L. J. 402 = 39 M. 725. The provisions of S. 7 are applicable equally to appeals as to original suits. But the Court-fee payable in appeal need not be the same as in the suit, as the nature of the litigation may be changed in appeal. *See* 25 O. C. 30 = 1922 Oudh 82. *See also* cases cited under Sch. I, Art. 1 on the point. The value of the suit thus artificially ascertained is quite distinct from valuation for jurisdiction although it may be the same in many cases. 5 C. 489 = 4 C. L. R. 491 ; 4 B. 515 ; 15 C. 104 ; 12 B. L. R. 115 (Note) = 18 W. R. 109. *See* Suits Valuation Act. Trees standing on specific items of land claimed need not be separately valued. They are included in the valuation of the items themselves. 105 I. C. 881 = A. I. R. 1927 Mad. 1002. Nor where they were on porambokes and the only rights claimed in

them being accessory to ownership of other plots in the village. (*Ibid.*)

The application of any particular clause of S. 7 must depend on the substance of the claim and not on the mere words used in the plaint. 22 L. W. 515 = 1925 Mad. 248 = 91 I. C. 709 = 50 M. L. J. 406. Court-fee is payable on the footing of the plaint and not on what is afterwards decided by the Court. 79 I. C. 913 = 5 Pat. L. T. 655.

Clause (i). SCOPE AND APPLICATION.—This clause has no application to suits or appeals in which no amount is claimed. 30 M. 96 = 16 M. L. J. 458. Suits for recovery of money by the sale of mortgaged property fall under this clause and not under cl. (ix). 30 All. 103. Where in a suit for redemption of a *Kanom*, the plaintiff seeks to deduct from the *Kanom* amount certain damages to which he claimed to be entitled, he is not bound to pay any Court-fee on the amount of damages till after it is ascertained and a set-off is allowed. A. I. R. 1926 Mad. 764 = 50 M. L. J. 493 (reviewing the decision in 50 M. L. J. 213). The stamp on a plaint on an instalment bond should be calculated not on the amount of the whole bond but on the amount claimed in the suit. 4 W. R. 12.

WHAT ARE MONEY SUITS.—A suit for the balance due on a commission agency account is a money suit under S. 7 (1). 64 I. C. 626 = 15 S. L. R. 82. *See also* 18 Bom. 696. So also suit for arrears of maintenance in which no declaration as to future maintenance is asked for. 87 I. C. 911 = 1925 Nag. 435. A suit for an order that the defendant should specifically perform a contract of guarantee or for compensation for breach of the contract falls under cl. (1). Bom. P. J. (1890) p. 204. A suit for specific moveable property of different kinds or their value as compensation, must be stamped under S. 7 (1) on the total value of the claim. 3 A. 131.

SUITS FOR MESNE PROFITS.—A suit for mesne profits falls under this clause and not under cl. 6 of Art. 17 of Sch. II. Court-fee should be paid on the amount claimed antecedent to the suit. 13 C. W. N. 815 = 1 I. C. 670. *See also* 1 P. L. W. 781 = 40 I. C. 579. No Court-fee need be paid on the amount claimed subsequent to the suit. 21 M. 371 ; 15 B. 416 ; 20 M. L. J. 98. As to recovery of fee after ascertainment of such profits, *see* S. 11. Where the mesne profits are left to be ascertained in execution, an appeal from a decree awarding mesne profits must be valued at the same valuation as the suit. 49 I. C. 962 ; 1 I. C. 670 = 13 C. W. N. 815. In an appeal from a decree directing ejectment and awarding mesne profits, Court-fee must be calculated on the value of land and the mesne profits. 16 M. 310. *See also* 23 M. 84 ; 49 I. C. 962.

(ii) In suits for maintenance and annuities or other sums payable periodically—

for maintenance and annuities ;

according to the value of the subject-matter of the suit, and such value shall be deemed to be ten times the amount claimed to be payable for one year :

for moveable property having a market value ;

(iii) In suits for moveable property other than money, where the subject-matter has a market-value—according to such value at the date of presenting the plaint ;

(iv) In suits—

CLAIM FOR INTEREST.—Claim for interest from institution of suit until payment stands on the same footing as claim for future mesne profits and no additional Court-fee need be paid thereon. 17 B. 41. An appeal against dismissal of a bond need not be valued, including the amount of interest accrued subsequent to the date of the suit. 10 M. L. J. 144 ; on this point, see also 18 B. 696 ; 11 A. L. J. 20=35 A. 94. But where the mortgagee appealed on the ground that interest ought to have been allowed till the date of realisation Court-fee is payable under Art. 17 (vi) of Schedule II. 27 A. 559.

APPEAL IN MONEY SUITS.—Where the valuation of the original suit is over Rs. 5,000, but the appellant is interested only to the extent of Rs. 200, he can value his appeal at Rs. 200. 13 A. L. J. 283=37 A. 208. An appeal against one defendant only to establish his liability on a hypothecation bond must bear court-fee calculated on the amount of the debt sought to be recovered. 13 M. 508 ; 24 B. L. R. 313. See also 86 P. R. 1912=222 P. L. R. 1912.

APPEALS IN MORTGAGE SUITS COMING UNDER THE CLAUSE.—An *ad valorem* fee is payable in appeals against decrees under O. 34, R. 6 of the C. P. C. 30 I. C. 497=18 O. C. 121 ; see also 6 N. L. R. 164. In a suit for sale on the basis of a mortgage, a decree was passed declaring the separate liabilities of the different properties. One of the defendants whose property has been held liable for a specific sum of money appealed, *held*, Court-fee must be calculated on the sum for which the appellant's property had been held liable. 35 A. 92=11 A. L. J. 33.

Clause (ii).—Suits for declaration of right to periodical payment fall under the clause 42 A. 353=18 A. L. J. 328=55 I. C. 809. If in addition to such declaration, arrears are claimed, Court-fee must be paid also on such claim under cl. (1). (*Ibid.*) See also 24 Bom. 386. Where a suit is to secure a certain sum as arrears of annuity and also to call upon the defendants to furnish security for the payment of a certain sum per mensem the second part of the prayer is chargeable under S. 7 (ii). A. W. N. (1886) 228. A suit to obtain a reduction in the amount of maintenance decreed to a Hindu widow on a change of circumstances does not come under the clause and may be presented on a Court-fee stamp of Rs. 10. 24 B. 386=2 Bom. L. R. 191. See also 1 A. 594. A suit by A against B and C for a declaration of title to certain property and injunction restraining C from paying, and B from receiving an allowance of Rs. 2,400 a year out of the income thereof falls under S. 7, cl. (4) (c) and (d) and not under S. 7, cl. (2). 17 B. 56.

OTHER SUMS PAYABLE PERIODICALLY.—*Re:* Court-fee payable for suits for arrears of maintenance, see 1 Luck. C. 648. See also Madras

Amending Act V of 1922. In construing S. 7, cl. (ii) the expression "The sums payable periodically" must be limited by the specific words that precede it. Court-fee on a suit for assessment of rent and recovery of a specific sum of money as damages for use and occupation should be computed under cl. (iv) (c) of S. 7. 51 I. C. 15=4 Pat. L. J. 561.

Clause (iii).—A suit for the recovery of moveable property pledged falls under this clause. See D. C. R. (Central Provinces), Part V, p. 3. Bonds have a certain market-value. A suit for bonds must be valued according to the amount secured by them and not on the value of the stamp paper. 10 P. R. 1871. See also 4 C. 322=3 C. L. R. 375.

Clause (iv).—**PLAINTIFF'S RIGHT TO PUT HIS OWN VALUATION IN SUITS COMING UNDER THE CLAUSE.**—"The nature of the suits comprised in the six articles of the clause, which in some instances renders it impossible, and in others either impossible or generally extremely difficult to lay down even approximately fair *ad valorem* scale as a means of fixing the Court-fee in such suits would appear fully to account for the legislature leaving it to the plaintiff to name the valuation".—Per *Westropp, C. J.*, in 2 B. 219. There is a conflict of rulings as to whether the Court has power to question or interfere with the plaintiff's valuation or whether the Court is bound to accept the valuation of the plaintiff, however arbitrary it may be. The Calcutta High Court is of the view that it was never intended that the plaintiff should assign an arbitrary value and that if he puts an arbitrarily low value, it is open to the Court to determine the true value. 40 C. 245=16 C. L. J. 194=17 C. W. N. 591 ; 11 C. W. N. 705=6 C. L. J. 427. See also 31 C. 301 ; 14 C. L. J. 47=15 C. W. N. 823 ; 40 C. L. J. 150=79 I. C. 982=1924 Cal. 969 ; 27 C. W. N. 627=86 I. C. 853=1925 Cal. 814. The Patna High Court and the Allahabad High Courts are of the same view. 2 P. 198=4 P. L. T. 71 ; 56 I. C. 316=4 P. L. J. 703 ; 41 I. C. 95=2 P. L. W. 173 ; 5 P. L. J. 394 ; 36 A. 500=12 A. L. J. 844=24 I. C. 679. But the Bombay and Madras High Courts hold that the plaintiff has the right to put his own valuation on the claim and that the court cannot revise such valuation. 44 B. 331=22 Bom. L. R. 289 ; 33 B. 307=11 Bom. L. R. 30. See also 2 B. 219 cited *infra* and 17 B. 56 ; 23 M. 490=10 M. L. J. 240 ; 38 M. 922=28 M. I. J. 118=28 I. C. 79 ; see also 27 M. 480 ; 30 M. 18 ; 24 M. L. J. 233 (F. B.). The Privy Council ruling in 23 C. W. N. 753=43 B. 376 would seem to support this view. There it was held that where a plaintiff sues for a declaratory decree and asks for consequential relief, then for purposes of court-fee and for purposes of jurisdiction, it is the value that the plaintiff

for moveable property of no market-value ;

(a) for moveable property where the subject-matter has no market-value, as, for instance, in the case of documents relating to title,

to enforce a right to share in joint family property ;

(b) to enforce the right to share in any property on the ground that it is joint family property,

puts upon the plaintiff that determines both. In Punjab also the court does not interfere with plaintiff's valuation of the suit. 1922 Lah. 236 ; 111 P. R. 1913 = 22 I. C. 503 ; 9 Lah L. J. 579 = 29 Punj. L. R. 27. So also in Burma. See 3 Bur. L. J. 128 = 1924 Rang. 378 (2). For decisions of Nagpur Judicial Commissioner's Court, see 1924 Nag. 295 ; 1924 Nag. 316. See also 79 I. C. 582.

APPEAL.—In the light of the reference to the memorandum of appeal in the last paragraph of the clause, the appellant can set his own value where the subject-matter of the appeal is not co-extensive with the original claim. 23 M. 490. But a party cannot differently value the relief sought by him at different stages of the same litigation. 24 M. 331. See also 82 I. C. 614 = 5 Lah. 481 = 1925 Lah. 1.

Clause (iv) (a).—A suit to recover title-deeds, although it may involve a question of title, is not a suit to obtain possession of land. 4 C. 322 = 3 C. L. R. 375. See also 26 C. 204 = 2 C. W. N. 718 ; 10 P. R. 1871. As to whether a suit for recovery of mortgage deed falls under this clause, see 39 P. R. 1875. Suit by minor to set aside guardian's transaction—Prayer for possession unnecessary—S. 7, cl. (4) (a) does not apply. (1928) M. W. N. 389 = A. I. R. 1928 Mad. 816. Where a decree affecting in moveable property is sought to be set aside the subject-matter of that decree is the value of the immovable property in the suit. In such a case the statutory value should be adopted. 39 M. L. T. 193 = 105 I. C. 171 = 26 L. W. 159 = A. I. R. 1927 Mad. 825 = 53 M. L. J. 267.

Clause (iv) (b).—SCOPE AND APPLICATION.—The term 'any property' is wide enough to include moveable property. A suit for partition of moveable property would therefore fall under this sub-clause and not under cl. (iii) of this section. There is a conflict of rulings as to whether a suit for bare partition, as where the plaintiff is in joint possession and claims separate possession and enjoyment, is to be stamped under this sub-clause or under Art. 17 of Sch. II. According to the following decisions such a suit is impossible to be valued and the sub-clause has no application to the case. 10 C. 97 = 13 C. L. R. 249 ; 8 C. 757 = 11 C. L. R. 95 ; 12 C. W. N. 37 = 6 C. L. J. 651 (it is enough if plaintiff's possession of some part of the joint property is admitted or established) ; 20 C. 762 ; 27 I. C. 465 (Cal.) ; 34 A. 184 = 8 A. L. J. 1329 = 13 I. C. 185 ; 43 M. 396 = 38 M. L. J. 92 ; 21 M. L. J. 21 = 8 I. C. 512 (F. B.) ; 5 P. L. J. 540 = 58 I. C. 236 ; 15 C. P. L. R. 120 ; 61 P. L. R. 1916 = 34 I. C. 587. The principle extends also to a case where the co-owner is to be presumed to be in constructive possession on the ground that possession of one member of the family is possession on behalf of all the members. 79 I. C. 713 = 5 P. L. T. 655 ; 40 C. 762. The valuation depends upon whether the relief sought is merely a change in the mode of enjoyment of the property or the enforcement of a disputed right. 20 N. L. R. 43 = 81 I. C. 766

= 1924 Nag. 86. See also 23 N. L. R. 73 = 101 I. C. 770 = A. I. R. 1927 Nag. 248. The Bombay High Court however, is of the view that a suit for partition and separate possession of the plaintiff's share of joint family property requires *ad valorem* fee on the value of the share. 18 B. 209. The Madras High Court was also of the same view in earlier cases. (24 M. L. J. 233 = 18 I. C. 363 ; 4 M. L. J. 110) but subsequently changed its view in 43 M. 396 cited *supra*. But in a very recent case (21 L. W. 207 = 1925 Mad. 468) that court has held that the sub-clause applies to a suit for partition, where the coparcener is admitted to be in joint possession and is not ousted from participation in the family properties. The value of the shares should be determined according to the plaintiff's valuation of the share which he seeks to recover. 21 B. 315 ; 24 M. L. J. 233 = 18 I. C. 363 (F. B.).

There is again difference of opinion as to whether this sub-clause or clause (v) would apply to a case where plaintiff seeking partition is neither in actual or constructive possession but the property is in the possession of the defendant. In such cases the Calcutta High Court has held that the suit must be a suit for possession and partition. 12 C. W. N. 37 = 6 C. L. J. 651 ; 21 I. C. 465 (Cal.). See also 21 C. L. J. 253 = 27 I. C. 465 = 20 C. W. N. 51 ; 9 C. L. J. 128 = 3 I. C. 304. Where the plaintiffs prayed in a suit for a partition and in the alternative for delivery of possession of his share, the court-fee has to be paid as in a partition suit. 6 Pat. 506 = 8 Pat. L. T. 34 = A. I. R. 1927 Pat. 145. A mere denial however on the part of the defendant of the plaintiff's title and possession does not convert the suit into one of declaration of title and recovery of possession. 12 C. W. N. 37 = 6 C. L. J. 651. The Bombay High Court also has held that a suit for separate possession by partition falls under S. 7 (v). 33 B. 658 = 11 Bom. J. R. 1074 = 4 I. C. 243. As to the view held by the Madras High Court, see 20 Mad. 389 ; 14 Mad. 183. According to Patna High Court, where defendants are in possession of any part of the property to be partitioned and have denied the plaintiff's title thereto, the suit is not merely for partition and *ad valorem* court-fee must be paid on the share claimed in that part. 56 I. C. 570 = 1 P. L. T. 529. See also 6 P. L. J. 662 = 3 P. L. T. 293 ; 5 P. L. J. 540 = 1 P. L. T. 595. In Punjab the sub-clause is applicable to a suit to enforce a right to share in any joint family property. 2 Lah. 114 = 61 I. C. 628. A suit to establish separate possession of admitted share in the joint family property on the allegation that his right to separate possession was denied falls under this sub-clause. 104 P. R. 1895. The Judicial Commissioner's Court at Nagpur held that where there is a clear denial of the plaintiff's right to share the suit is one to enforce the right to share in the property falling under S. 7, cl. (iv) (b). 20 N. L. R. 43 = 1924 Nag. 86. See also 9 Bur. L. T.

for a declaratory decree and consequential relief;

(c) to obtain a declaratory decree or order,

97=35 I. C. 731. See also the judgment of Westropp, C. J., in 2 Bom. 219.

Clause (iv) (c).—CONSEQUENTIAL RELIEF.—Consequential relief means a substantial remedy in accordance with the title of which declaration is prayed for. 24 I. C. 316=1 L. W. 398. See also 24 C. W. N. 33 (P. C.). One declaration may be consequential relief to another. 44 C. 352=21 C. W. N. 834. The question whether there is really a prayer for consequential relief must depend upon the substance of the claim and not the words which the plaintiff chooses to use. 20 M.L.J. 791=5 I. C. 927; 30 M. 18; 38 M. 922 (F. B.). See also 35 I. C. 797=21 C. W. N. 375; 3 Pat. 915=80 I. C. 544. See also 1925 Mad. 713=48 M. L. J. 688. When the first relief in the suit relates to a declaration as to the general title of the plaintiff to all the properties she inherited and the second to set aside a particular deed of transfer in respect of a particular property inherited by her, *held*, the reliefs are separate and necessary and *ad valorem* court-fee must be paid 5 Pat. 476=A.I.R. 1926 Pat. 453. The prayer for the appointment of a receiver in a suit by a Hindu reversioner for a declaration that an alienation by the widow is not binding on the reversion cannot be regarded as a 'consequential relief' since both the reliefs are unconnected and independent of each other. The proper court-fee payable is for declaration under Sch. II, Art. 17-A (Mad. Am. Act) and for Receiver under Sch. I, Art. 117 B (Mad. Am. Act) 23 L. W. 581=96 I. C. 129=A. I. R. 1926 Mad. 678=51 M.L.J. 67; but see 38 M. 922; 19 I. C. 859=93 P. R. 1913.

CLAUSE INAPPLICABLE TO SUITS FOR BARE DECLARATION.—SCH. II, ART. 17.—Under Sch. II Art. 17 a fixed fee of Rs. 10 has to be paid on a plaint for a declaratory decree where no consequential relief is prayed for. 43 B. 507=46 I. A. 24=36 M. L. J. 437=21 Bom. L. R. 489. See also 69 I. C. 577; 23 A. L. J. 344=47 All. 501=1925 All. 632. A suit for a declaration that a certain alienation made by the plaintiff's father should not be binding upon their reversionary interest comes under Art. 17 of Sch. II 5 Lah. 137=1924 Lah. 530=83 I. C. 332. So also a suit for a declaration that the plaintiff is the real owner of a decree obtained by defendants against a third party and praying for transfer of the decree to the plaintiff. 47 P. R. 1911=9 I. C. 673. Also a suit for a bare declaration that a certain decree is ineffectual and not binding on the plaintiff. 30 C. 788. Also suit for a declaration that plaintiffs were occupancy tenants and not tenure holders and that the survey entry describing them as tenants was wrong and not binding on them falls under Art. 17 (iii) 50 I. C. 298=4 P. L. J. 302. Also a suit for declaration that certain property belonged to plaintiff and was not liable to be sold under a mortgage decree for sale, to which plaintiff was not a party. 1 O. W. N. 582.

WHAT DETERMINES THE VALUE IN A SUIT UNDER THE CLAUSE.—Where the plaintiff prays for a declaration and consequential relief, the value of the consequential relief determines the court fee. 3 P. 640=80 I. C. 563; see also 4 P.L.J. 297=46 I. C. 24=5 P. L. J. 394. A suit was

filed for a declaration, but pending the suit an injunction was obtained. The suit being dismissed, an appeal was preferred, the injunction subsisting at the time of the appeal. *Held*, for purposes of court-fees, the appeal fell within S. 7 (iv) (c) and *ad valorem* was payable on the consequential relief. 5 Pat. 211=94 I. C. 22=A. I. R. 1926 Pat. 249. Where however an appeal is preferred only against the declaration, it may be valued under Sch. II, Art. 17. 3 P. 640=2 P. L. R. 193=80 I. C. 563=1924 P. 582. A suit for a declaration that a certain decree is not binding on the plaintiffs or the properties in their hands and for possession of a portion of those properties which had been sold in execution of the decree is a suit for declaration and consequential relief and court-fee is to be paid only on the relief for possession. 38 M. 1184=25 I. C. 683=1 L. W. 824. In a suit for a declaration and consequential relief, the plaintiff is bound to pay *ad valorem* fees in proportion to the loss from which he seeks to be relieved. 56 I. C. 316=4 P.L.J. 703.

SUITS WHICH FALL UNDER THE SUB-CLAUSE.—Suits for declaration and injunction, 17 B. 56; 18 B. 100; 17 S.L.R. 15=80 I.C. 969; 36 A. 500=24 I. C. 679=12 A. L. J. 844; 1922 Nag. 264. If there are other consequential reliefs prayed for along with an injunction, they should be valued according to law and the proper court-fee would depend upon the total value. 43 I. C. 995=(1918) M. W. N. 40. A suit for a declaration that plaintiff is the sole shebait, and for an injunction restraining the defendant from interfering with his possession of the endowed properties, falls within S. 7 (iv) (c). 40 C. 245=16 C. L. J. 194=17 C. W. N. 591; see also 1922 Lah. 236. Also a suit for a declaration of plaintiff's right to a jungle and for an injunction restraining defendants from cutting trees. 32 C. 734=9 C. W. N. 690. Also a suit for declaration that a tax is illegal and for injunction to restrain collection 105 I.C. 80. Also a suit for declaration that a will is a forgery and that plaintiff is the legal heir and for an injunction restraining the defendant from interfering his property. 9 Lah. L. J. 579=29 Punj. L. R. 27. In such a suit, the plaintiff is entitled to fix any arbitrary value and the court need not see if the value fixed by him is proportionate to the value of the property. (*Ibid.*) See the cases cited *infra* on this point. In a suit for declaration of title to immoveable property and injunction, valuation under the proviso to cl. (c) (Madras Act), shall not be less than half the value of the property calculated according to cl. (v); such portion of the property only, as is the subject matter of dispute need be valued. 21 L. W. 699=89 I. C. 930=1925 Mad. 1143.

PRAYER FOR CONFIRMATION OF POSSESSION.—A prayer for confirmation of possession includes a prayer for recovery of possession if the court thinks the plaintiff is out of possession. 2 P. 198=4 P. L. T. 71. Where a Magistrate passes an order under S. 146, Cr.P.C., and interferes with possession relief regarding possession should also be prayed for. 103 I. C. 351=1927 Nag. 316. A suit for declaration that a revenue sale is invalid and for confirmation or restoration of possession falls under the clause. 46 I.C. 385=3 P.L. J. 448.

where consequential relief is prayed.

Also a suit for declaration of title as adopted son, a challenge having been directly thrown on the title, and for possession. 1922 Pat. 6 (C.W.N.) = 1923 P. 100; 56 I. C. 422 = 5 P.L.J. 339. Also a suit by reversioner, after the death of the widow for a declaration and possession against an alienee of the widow. 2 P. L. T. 607 = 61 I. C. 565 = 6 P. L. J. 10. Also a suit to set aside an illegal sale held for arrears of revenue and a declaration of right and for possession. 6 C. W. N. 157.

The following suits have been held to come within the sub-clause :—A suit for a declaration that a sale held in execution of a decree against some members of a Hindu family was null and void. 1 P. 197 = 1922 P. 404. A suit for assessment of rent and recovery of a specific sum of money as damages for use and occupation. 4 Pat. L. J. 561 = 51 I. C. 16. A suit under S. 104-H of the B. T. Act for a declaration that the plaintiff is a riyat and not a tenure-holder, and for settlement of fair rent. 18 I. C. 188 = 17 C. L. J. 426; see also 11 C. L. J. 156 = 5 I. C. 141. See also 6 P. 17 = 100 I. C. 913 = 8 Pat. L. T. 366 = A.I.R. 1927 Pat. 123. A suit for a declaration that the plaintiff is a riyat and the defendants, his under-riyats and for ejectment of the latter. 65 I. C. 240 (Pat.). A suit for a declaration that plaintiff is entitled to a certain annuity and to recover the same as an heir. 27 Bom. L. R. 247 = 87 I. C. 801 = 1925 Bom. 282 (1). A suit for a declaration that certain alienation made by a Hindu widow does not affect plaintiff's reversionary rights, for appointment of a receiver and for restoration of property to the *status quo ante*. 19 I. C. 859 = 93 P. R. 1913; see also 36 I. C. 831 (Mad.); 38 M. 922; 62 I. C. 36 (Pat.); but see 23 L.W. 581 = 96 I. C. 129 = A. I. R. 1926 Mad 678 = 51 M. L. J. 67 cited *infra*. A suit for declaration of right to administration of the estate and appointment of an interim Receiver. 27 C. W. N. 457 = 1923 Cal. 326. A suit by an insolvent to declare a sale-deed by Official Receiver not binding upon him and for appointment of another Receiver. 32 M.L.J. 447 = 40 I. C. 620. A suit for a declaration that defendant is the wife of the plaintiff and for the restitution of conjugal rights. 28 C. 567. A suit to set aside a lease and to have the buildings erected by the lessee demolished. 4 A. 320 (F.B.). A suit to set aside a trust deed and for recovery of trust money. 10 C. 380.

SUITS NOT COMING UNDER THE SUB-CLAUSE.—A suit for declaration and consequential relief *prima facie* comes within S. 7, cl. (iv) (c) but if at the same time it comes within any of the other classes of suits specified in the section, it must be so treated. 38 M. 922 = 28 M. L.J. 118.

CASES UNDER CL. (V) & CL. (IV) (C)—A suit to set aside an execution sale of certain properties on the ground that the decree having been previously adjusted could not be executed and that the sale was therefore null and void, is one substantially for possession and comes under Cl. (v) and not under S. 7 (iv) (c). 49 C. 880 = 27 C. W. N. 566 = 38 C.L.J. 74 = 1922 C. 506; see also 94 I. C. 179 = 13 O.L.J. 124 = A.I.R. 1926 Oudh 380. Where the prayer was that upon the determination of the plaintiff's proprietary interest in a house, the defendants who were merely tenants at will may be ordered to vacate the

house, held, the suit was one for ejectment falling under S. 7, cl. 5. 5 Pat. 631. As to a suit for the removal of the manager of the religious institution on the ground that it is a private one and that the plaintiff alone has the power to appoint and dismiss the manager. 17 I. C. 270 = 216 P.L.R. 1912. On the point, see also 12 M. 223; 15 M. 501.

SUITS FOR CANCELLATION OF A DECREE OR DOCUMENT.—(Now separately provided for, so far as Madras is concerned, by clause (v-a) inserted by Madras Act V of 1922). (1) Decrees :—A suit to declare a decree or document to which plaintiff was a party is not binding on him falls within this clause. 38 M. 922 = 28 M. L. J. 118; see also 43 I.C. 962 = 3 P. L. J. 92. But the Bombay High Court has held that a suit in which the only prayer was to have the decree set aside as null and void is a suit for declaration without consequential relief falling under Art. 17 of Schedule II. 20 B. 736. A suit to set aside a decree on the ground of fraud would fall under this sub-clause. 7 Lah. L. J. 15 = 86 I. C. 680 = 1925 Lah. 346; 16 N. L. R. 84 = 36 I. C. 360. See also 8 Lah. 531 = 9 Lah. L. J. 400 = 102 I. C. 46 = 1927 Lah. 499. A suit for a declaration that a decree was fraudulent and incapable of execution and that the family property should be released from execution falls under S. 7 (iv) (c) and is not a suit for possession under Cl. (v). 40 C. 615 = 21 I. C. 404; see also 51 I. C. 536 = 24 M.L.T. 254; 56 I. C. 550. A suit for declaration that the decree obtained by the defendant is fraudulent and for an injunction restraining the defendant from interfering with the plaintiffs' possession of the property in suit falls under Cl. (iv) (c). 40 C. L. J. 150 = 79 I. C. 982 = 1924 Cal. 969. Suit, by a minor on attaining majority to set aside a mortgage decree against him as void, falls within Cl. (iv) (c). 65 I. C. 980 = 24 O. C. 361. A person not a party to the decree, may sue to have it declared void without asking for any consequential relief and the suit is not governed by Cl. (iv) (c). 5 Lah. L. J. 537 = 1923 Lah. 373.

(2) Documents :—A suit for declaration of the invalidity of a mortgage deed, for cancellation and for an injunction restraining the defendant from enforcing its terms, would fall within the sub-clause (iv) (c). 13 I. C. 861 = 7 N.L.R. 190. So also a suit to declare a gift deed executed by the plaintiff's husband in favour of the defendant was void, as he was a lunatic, and praying that possession be delivered to plaintiff as manager on behalf of her lunatic husband comes under Cl. (iv) (c). 22 A.L.J. 945 = 47 A. 78. Also a suit for declaration by a member of a joint Hindu family that a mortgage deed executed by a deceased coparcener is not binding on him and also for possession of the property. 26 A. L. J. 316 = A. I. R. 1928 All. 248. Even where the suit is framed as one for possession, the suit would fall under the sub-clause (iv) (c) if the defendant holds the property under a document executed by the plaintiff and it is necessary first to obtain cancellation. 38 M. 321; 24 M.L.J. 592. And the court-fee must be calculated on the actual value of the property. 3 Pat. L. J. 92 = 43 I. C. 962. A suit for cancellation of a registered instrument under S. 39 of the Sp. Rel. Act, is a suit for declaration and consequential relief. 45 I. C. 238 = 3 P.L.J. 194. See also 23 M.

for an injunction ;

(d) to obtain an injunction,

for easements ;

(e) for a right to some benefit (not herein otherwise provided for) to arise out of land, and

for accounts ;

(f) for accounts—

490 ; 29 B. 207=6 Bom. L. R. 1125 ; 35 P. R. 1914=25 I.C. 435. So also suit for cancellation of a will falls under the clause. 36 I.C. 95=87 P.R. 1916. A suit for a declaration that a deed is inoperative is in substance one for its cancellation. 20 M. L. J. 791=5 I.C. 927. Persons who are not parties to a document need not sue for its cancellation. Thus a suit for a declaration that mortgage deed is not binding on the plaintiff who was not a party to the same, falls under Sch. II, Art. 17-A and not S. 7 (4) (c). 87 I.C. 660 (2)=1925 Mad. 713=48 M.L.J. 688; see also 5 A. 331 ; (1924) M.W.N. 210=78 I.C. 118 (2)=1924 Mad. 611 (2). Where however cancellation is specifically asked though unnecessarily, the suit would fall under this sub-clause. 44 A. 629=20 A. L. J. 587=1922 All. 358.

VALUATION IN SUCH SUITS.—The insertion of clause (v-a) by Madras Act V of 1922 provides that the valuation in such suits should not be arbitrary at the pleasure of the plaintiff, but must be according to the value of the subject-matter of the suit where it has got a money-value. This was so even according to the Original Act according to the decisions of the Calcutta High Court. See 40 C. L. J. 150=79 I. C. 982=1924 Cal. 969. See also 1 Bom. 18 ; 3 Pat. L. J. 92=43 I.C. 962. Where the plaintiff is interested only in a portion of the property in respect of which the decree was passed, the suit must be valued only according to the extent of the plaintiff's claim. 42 C 370=36 I. C. 111=19 C. W. N. 895 ; see also 4 P. L. J. 191=44 I. C. 891=1918 Pat. 223 (C. W. N.).

Clause (iv) (d).—See 45 B. 567=59 I. C. 777 ; 46 I. C. 884=63 P. R. 1902. In a suit for injunction, relief cannot be valued differently for court-fees and jurisdiction. 22 Bom. L.R. 1450 ; 99 I. C. 868 ; 92 I. C. 730=A. I. R. 1926 Mad. 591. (See Suits Valuation Act, S. 8). Plaintiff can put his own valuation and where the Lower Court finds that the valuation is reasonable, the High Court will not interfere with it. 94 I. C. 103 (2)=1926 P. H. C. C. 102=A. I. R. 1926 Pat. 334. As to declaratory suits where the plaintiffs asked for injunction, see 21 I. C. 771=19 C. L. J. 15 ; 11 Bom. 100 ; 31 C. W. N. 1045=A. I. R. 1927 Cal. 775 ; 48 All. 412=94 I. C. 951=24 A. L. J. 478=A. I. R. 1926 All. 423 ; see also the cases noted under cl. (iv) (c). A suit for rent and for declaration of title with injunction falls under S. 7 (1) and (iv) (d) as the injunction is a distinct and independent relief. 17 I. C. 44=6 S. L. R. 114 ; 19 A. 607; see also 4 A. 329 on the sub-clause.

Clause (iv) (e).—This sub clause would apply to suits in respect of rights of way, right to light and air and other rights of easements over immovable property.

Clause (iv) (f).—The value of a suit for accounts is the approximate value stated in the plaint, which determines the court-fees as well as the forum. 6 C.L.J. 225. See also 100 I.C. 632=8 P. L. J. 145. The plaintiff is entitled to value the relief at any figure he chooses and the

stamp will have to be made up subsequently if relief of greater value is granted to him. 8 Lah. L.J. 78=94 I.C. 650=A.I.R. 1926 Lah 242 (1). The court trying such suit does not lose its jurisdiction because the amount found due exceeds the jurisdiction of the Court. 9 N.L.R. 112=20 I.C. 928 ; 25 M. 543 ; 40 M. 1=32 M. L.J. 221 ; 16 A. 286 ; 33 A. 97. The Calcutta High Court has however held that the Court can only award a sum up to the limits of its pecuniary jurisdiction. 13 C. W. N. 493. S. 11 provides the means of recovery of excess Court-fee due on the excess decreed. 46 I.C. 165=22 C.W.N. 669 ; 45 C. 634.

SCOPE OF THE SUB CLAUSE (IV) (F).—The sub-clause would cover all suits which involve accounting between parties. Thus a claim for accounts in a partnership suit would fall under the sub-clause. 46 I.C. 165=22 C.W.N. 669 ; 15 Bom. L.R. 1123=22 I.C. 71 ; 7 B. 125 ; 13 C.L.R. 160. So also a suit for administration and accounts. 39 B. 545=29 I.C. 940=17 Bom. L. R. 574 ; 45 C. 634=22 C. W. N. 115 ; see also 100 P. R. 1914=26 I. C. 342 ; 55 I. C. 258=12 Bur. L. T. 207 ; 41 C. 890=24 C. L. J. 448=21 C. W. N. 310 ; 24 I. C. 643=7 O. L. J. 281. A claim for mesne profits is not a claim, the value of which cannot be ascertained, and *ad valorem* Court-fee is to be paid thereon and plaintiff cannot recover anything in excess of the valuation put by him. 1 P. L. W. 781=40 I. C. 579=3 P. L. J. 67.

APPEAL IN CASES FALLING UNDER THE SUB-CLAUSE (IV) (F).—Where a person appeals from a preliminary decree in a suit for account, he is allowed the option of placing his own valuation upon the memorandum of appeal and he is not bound by the valuation put upon the claim in the plaint. 44 A. 542=20 A. L. J. 416=1922 All. 228 ; 47 A. 756=23 A. L. J. 725=L. R. 6 A. 362=89 I. C. 122=1925 All. 887 ; 3 P. 146=4 P. L. T. 638=1924 P. 161 ; 91 I. C. 32=26 Punj. L. R. 825=A. I. R. 1926 Lah. 189. But see *contra* (1921) M. W. N. 558=70 I. C. 392 ; 39 M. 725=33 I. C. 602=30 M. L. J. 402 ; 23 M. 490 ; 20 I. C. 928=9 N. I. R. 112 ; 79 I. C. 923 (Sind) ; 7 P. R. 1915=28 I. C. 262 ; see also 1924 P. 211. It was held in a recent case in Sind that in an appeal from a preliminary decree passed in a suit for accounts the valuation once fixed by the plaintiff must be adhered to in appeal unless the subject-matter of the appeal is not identical with that of the suit, in which case, it is open to the appellant to value the subject-matter of the appeal differently and to pay the court-fee thereon. 21 S. L. R. 377=98 I. C. 909=A. I. R. 1927 Sind 100. On an appeal against the preliminary decree for winding up a partnership, a Court-fee of Rs. 10 is sufficient, other questions relating to allowing or disallowing certain items being incidental. 1 Lah. 6=19 P. L. R. 1920=57 I. C. 185=6 P. W. R. 1920. Where a plaintiff definitely fixes a certain sum as the amount of his claim, this must be considered as the value of the original suit as well as the appeal. But

according to the amount at which the relief sought is valued in the plaint or memorandum of appeal :

In all such suits the plaintiff shall state the amount at which he values the relief sought [* * * *]1 :

(v) In suits for the possession of land, houses and gardens—according to the value of the subject-matter ; and such value shall be deemed to be—

where the subject-matter is land, and

(a) where the land forms an entire estate, or a definite share of an estate, paying-annual revenue to Government, or forms part of such an estate and is recorded in the Collector's register as separately assessed with such revenue, and such revenue is permanently settled—ten times the revenue so payable :

(b) where the land forms an entire estate, or a definite share of an estate, paying annual revenue to Government, or forms part of such estate and is recorded as aforesaid ;

and such revenue is settled, but not permanently—five times the revenue so payable :

(c) where the land pays no such revenue, or has been partially exempted from such payment, or is charged with any fixed payment in lieu of such revenue,

when he fixes a certain sum as the amount of his claim only approximately, the amount found due by the Court determines the forum of appeal. 34 C. 954 = 11 C.W.N. 1133 = 6 C.L.J. 255 ; 31 C. 365 ; 9 Lah. 23. But see 40 M. 8 = 32 M.L.J. 221.

Sec. 7 (iv) (f).—¹The words " and the provisions of the Code of Civil Procedure, section thirty-one, shall apply as if for the word 'claim' the words 'relief sought' were substituted" were repealed by the Repealing and Amending Act (XII of 1891).

Clause (v). APPLICABILITY.—A suit for declaration of title as adopted son and for possession is a suit that comes within Cl. (4) (c) and not within cl. (5). 1922 Pat. 6 (C.W.N.) = 1923 P. 100 ; 5 P.L.J. 339 = 56 I.C. 422. See also 38 M 1184 = 1 L.W. 824 = 25 I.C. 683. (Suit for declaration that a decree is void and for possession of properties sold in execution thereof). A suit by Hindu reversioners to recover possession of property gifted by Hindu widow after her death falls under Cl. (v) though the prayer was for declaration and consequential relief. 3 P L. T. 704 = 1922 Pat. 291 (C. W. N.) = 1922 P. 615 (F. B.) ; see also 57 I.C. 494 = 18 A.L.J. 903. A suit by a tenant against the landlord and other tenants is governed by S. 7 (v) not cl. (xi). 25 I.C. 507 = 19 C. L. J. 418. See also 17 M. L. J. 478 = 31 M. 14. Suit for possession against a tenant holding over in defiance of a notice to quit, is one against a trespasser and is governed by this clause and not by cl. (xi) (cc). 1923 Nag. 310 = 8 N. L. J. 63. A suit for possession and also for an order to compel defendant to execute and register a sale deed, the plaintiff alleging that the land had been sold to him and that the defendant had received part of the consideration is a suit for possession only within the clause and not also for specific performance. 60 I. C. 512 ; 14 C. L. J. 159. An appeal by alienee defendant against a decree setting aside a sale of joint family property on condition that plaintiff paid a certain sum of money, should be stamped under

S. 7 (v). 47 M. L. J. 919 = 48 M. 652 = 1925 Mad. 323. An appeal claiming that the appellant must be appointed trustee of the durgas in suit in the place of plaintiffs appointed by the Court falls under S. 7, Cl. (5) and not under Art. 17-B, Sch. II. 88 I. C. 209 = 1925 Mad. 804 = 48 M. L. J. 571.

Clause (v) (a).—A share in an under-proprietary tenure in a village is a definite share within sub-clause (a). 24 O. C. 29 = 58 I. C. 132. See also 2 C. 192. Government of India Notification No. 358, dated 10th Sept. 1921, " Fractional share " in the notification covers also a case where the plaintiff claims a definite share. 105 I. C. 881 = A. I. R. 1927 Mad. 1002.

Clause (v) (b).—' Definite share ' of an estate means an undivided tangible fraction of an estate. 10 M. L. T. 206 = 33 I. C. 683. As to the meaning, see also 3 A. L. T. 511 ; 16 A. 286. Individual filed plots forming part of a holding but not separately assessed not a definite share. 2 Bur. L. J. 39 = 75 I. C. 217. On the point, see also 46 M. L. J. 345 = 77 I. C. 781. Suits for possession of inam lands wrongly classed as ryotwari may be valued as such under Cl. (b). 41 I. C. 167 (Mad.).

Clause (v) (c).—' Such revenue ' means an annual revenue payable to Government on an entire estate or defined share thereof, fixed permanently or not. Lands subject to fluctuating assessment are within this sub-clause and not within S. 7 (v) (d) 40 P. R. 1919 = 50 I. C. 142. " The year next before the date of presenting the plaint "—meaning, see 3 A. L. J. 244 = 28 A. 411. If the subject-matter of the suit is land paying no revenue and has produced no profits during the year next preceding the suit, the valuation should be made with reference to similar land in the neighbourhood, irrespective of the fact that the land is ' Religious land '. 60 I. C. 5 = (1920) 3 U. B. R. 236. A defendant is not estopped from valuing the appeal correctly simply because he did not object to the valuation of the plaintiff in the suit. The plaintiff paid court-fee

and nett profits have arisen from the land during the year next before the date of presenting the plaint—

fifteen times such nett profits :

but where no such nett profits have arisen therefrom—the amount at which the court shall estimate the land with reference to the value of similar land in the neighbourhood :

(d) where the land forms part of an estate paying revenue to Government, but is not a definite share of such estate and is not separately assessed as above-mentioned—the market-value of the land :

Provided that, in the territories subject to the Governor of Bombay in Council the value of the land shall be deemed to be—

(1) where the land is held on settlement for a period not exceeding thirty years and pays the full assessment to Government—a sum equal to five times the survey-assessment :

(2) where the land is held on a permanent settlement, or on a settlement for any period exceeding thirty years, and pays the full assessment to Government—a sum equal to ten times the survey-assessment ; and

(3) Where the whole or any part of the annual survey-assessment is remitted—a sum computed under paragraph (1) or paragraph (2) of this proviso, as the case may be, in addition to ten times the assessment, or the portion of assessment, so remitted :

Explanation.—The word “ estate ”, as used in this paragraph, means any land subject to the payment of revenue, for which the proprietor or farmer or raiyat shall have executed a separate engagement to Government, or which, in the absence of such engagement, shall have been separately assessed with revenue :

For houses and gardens ; (e) Where the subject-matter is a house or garden—according to the market-value of the house or garden :

to enforce a right of pre-emption ; (vi) In suits to enforce a right of pre-emption—according to the value (computed in accordance with paragraph v of this section) of the land, house or garden in respect of which the right is claimed :

for interest of assignee of land revenue ; (vii) In suits for the interest of an assignee of land revenue—fifteen times his nett profits as such for the year next before the date of presenting the plaint :

in the market-value. The suit was decreed. The defendant in appeal paid Court-fee on fifteen times the net profits. Defendant's valuation was incorrect. 49 A. 398 = 100 I. C. 35 = 25 A. L. J. 58 = A. I. R. 1927 All. 308.

Sub Cl. (v) (d).—A suit for possession of a plot of land but not of a definite fractional share, sold out of a holding is governed by S. 7 (d) and the Court-fee should be calculated on the market-value of the land where it is impossible to find out the actual revenue on the said plot. 33 A. 630 = 8 A. L. J. 798 ; see also 1 R. 92 = 2 Bur. L. J. 39 = 1923 Rang. 246 ; 6 P. R. 883 ; 16 A. 403. So also a suit for a portion of a survey number not separately assessed. 34 M. J. 558 = 47 I. C. 543 = 8 L. W. 88 ; and a suit for a land forming an indefinite share of an estate. 41 C. 812 = 18 C. W. N. 659.

Sub-Cl. (v). (e).—As to the meaning of the word ‘ garden ’ see 40 M. 824 = 5 L. W. 270 = 39 I. C. 254 = 21 M. L. T. 251 = 2 Lah. L. J. 362 ; 68 I. C. 345 ; 30 I. C. 845 = 18 M. L. T. 243. A suit for possession of garden land, though assessed on land revenue is governed by S. (v) (e). 71 P. R. 1914 = 25 I. C. 545. In a suit for land,

trees standing thereon need not be separately valued. 40 M. 824 = 39 I. C. 254. There is no market-value for a temple and a suit for recovery of possession of temple falls under Sch. II, Art. 17 (b) and not under S. 7, V (e). 46 M. 782 = 45 M. L. J. 274 (F.B.). Easement over land or building suit to establish right of—Court-fee. 25 L. W. 158 = 38 M. L. T. (H.C.) 18 = 100 I. C. 263 = A. I. R. 1927 Mad. 348 = 52 M. L. J. 121.

Cl VI.—The Court-fees in a pre-emption suit in respect of a sale of land paying revenue should be calculated according to S. 7 (v). 15 P. R. 1919 = 49 I. C. 358 ; see also 32 A. 19 = 6 A. L. J. 905 ; 3 A. L. J. 244 = 28 A. 411. The market-value of the property in a suit for pre-emption is to be determined with reference to its value at the date of the sale and not with reference to its value at the date of the institution of the suit 1924 Lah. 380.

APPEAL IN CASES COMING UNDER THE CLAUSE.—Where appeal is by the vendees objecting that plaintiff is not entitled to the land, the Court fee to be fixed will be in accordance with S. 7 (VI). 76 P. R. 1913 = 19 I. C. 961 ; see also 6 A. 488. But where the objection is

(viii) In suits to set aside an attachment of land or of an interest in land or revenue—according to the amount for which the land or to set aside an attachment; interest was attached :

Provided that, where such amount exceeds the value of the land or interest, the amount of fee shall be computed as if the suit were for the possession of such land or interest.

(ix) In suits against a mortgagee for the recovery to redeem ; of the property mortgaged.

only to the amount to be paid by the pre-emptor, it should be calculated *ad valorem* on the difference between the amount awarded and that claimed or admitted. 32 A. 19. See also 40 A. 353=44 I. C. 666=16 A. L. J. 174.

CL. VIII.—A suit to set aside a sale on the ground that the attachment was not binding is virtually a suit to set aside the attachment within the clause. 14 M. L. J. 144. As to suit by unsuccessful claimant of property attached, see 35 C. 202 (P. C.)=12 C. W. N. 169; see also 80 P. R. 1886. A suit by decree-holder for restoration of attachment falls under this clause. U. B. R. 1897 1901, Vol. II, p. 355.

CL. IX.—The court-fee payable in a suit to redeem *K'anom* is in accordance with the provisions of this clause. 23 L. W. 758=95 I. C. 26 (1)=A. I. R. 1926 Mad 667.

SUITS FOR REDEMPTION, FORECLOSURE, ETC.—In such suits Court-fee is payable only upon the principal amount secured by the mortgage. 57 I. C. 673. The plaintiff is not bound to pay Court-fee upon the surplus amount claimed as *mesne profits*. L. R. 3 A. 628=45 A. 154=1923 All. 261; see also 1924 Nag. 346; 31 A. 44. Nor on interest due on the mortgage 13 A. 94; 14 M. 480. Suit for sale on mortgage is not governed by the clause. 7 B. L. R. 194. Also a suit for possession brought after a decree for foreclosure has been obtained. 1 C. L. R. 473. The proper valuation of a suit for redemption is the amount of the mortgage admitted by the plaintiff to be binding on him and not that of the mortgages set up by the defendant. 37 M. 420=15 I. C. 587. In a suit for redemption by a co-mortgagor of his share of the mortgaged property, the Court fee is to be calculated on the amount of the mortgage debt charged on his share of the property. 45 I. C. 300=5 O. L. J. 43; see also 6 B. 324. A suit merely to redeem mortgage without praying for additional relief falls under S. 7, cl. ix. But if there is also a prayer for payment of money found due on accounts being taken, additional Court-fees should be paid on the amount so claimed. 17 I. C. 442=12 M. L. T. 493; see also 13 O. C. 32=C. 442=12 M. L. T. 493; see also 13 O. C. 32=5 I. C. 444. But see *contra* 29 A. 471; 38 M. 25. Where the plaintiff merely asks that accounts be taken and arrears of rent deducted from the mortgage amount, the Court fee should be calculated according to the principal sum only. 19 M. 16.

APPEALS IN SUITS FOR REDEMPTION AND FORECLOSURE.—There is a conflict of rulings on the question whether the clause is applicable to appeals and whether the fee in such appeals should be also calculated on the principal amount under the Clause or on the amount in dispute under Art. I, Sch. 1. According to Allahabad High Court, the Court-fee should be calculated on the value of the sub-

ject, matter of the appeal. 35 A. 94=11 A. L. J. 20=18 I. C. 365; 30 A. 547=5 A. L. J. 531; 36 A. 40=11 A. L. J. 1016=21 I. C. 723 (F. B.); 31 A. 295=6 A. L. J. 115; 47 All. 926=L. R. 6 A. 457=23 A. L. J. 853=88 I. C. 888=1925 All. 734 (13 All. 94 not now good law). So also according to the Punjab High Court. 122 P. W. R. 1912=14 I. C. 78=54 P. R. 1912; 1 Lah. 234=3 Lah. L. J. 370. See also 2 O. L. J. 257=30 I. C. 322. (54 I. C. 733=22 O. C. 289 *contra*). The Madras High Court also was of the same view in 29 M. 367=16 M. L. J. 287, but in a later case (20 M. L. J. 121=6 M. L. T. 245=3 I. C. 459) it was held that, where there is a denial of the right to redeem; the fee should be computed according to the principal amount secured by the mortgage. This view is to be found also in earlier cases (14 M. 480 and 16 M. 326). In Bombay it was held that court-fee should be calculated on the principal debt as in original suits. 10 B. 44. See also under Art. I, Sch. 1. In an appeal, where the question raised is the right to redeem or foreclosure for an adjudged sum court-fee is payable on the principal mortgage money. 54 I. C. 733=22 O. C. 289; 67 I. C. 130=3 Lah. L. J. 156; see also 20 I. C. 257=9 N. L. R. 80; 6 N. L. R. 164=8 I. C. 1125. But in an appeal by the mortgagor against a decree for redemption, seeking reduction of the decretal amount, *ad valorem* Court fee must be paid on the amount sought to be reduced; and not on the principal amount of the mortgage. 1 Lah. 234=57 I. C. 215; 1923 Lah. 309; 58 P. R. 1915=30 I. C. 104; 55 I. C. 177=156 P. W. R. 1910 (second appeal against enhancement of the amount by the appellate Court); see also 30 I. C. 322=2 O. L. J. 257; 5 N. L. R. 130=3 I. C. 920. So also where the respondents in an appeal by the mortgagee, file cross objections to the same effect 134 P. W. R. 1911=11 I. C. 198=213 P. L. R. 1911. So also where enhancement of, amount is sought, fee is to be paid on the amount sought to be recovered. 54 I. C. 733=22 O. C. 289; See also 25 O. C. 30=1922 Oudh 82; 11 N. L. R. 83=29 I. C. 609. Where the plaintiffs in a redemption suit file appeals both from the preliminary decree and final decree, claiming a reduction of amount fixed as payable by them, the appeal against the final decree is only of a formal nature and it is enough if a Court-fee of Rs. 2 is paid thereon, if *ad valorem* Court fees are paid in the other appeal. 4 Lah. 406=6 L. L. J. 72=1923 Lah. 632. See also 39 All. 452=41 I. C. 346=15 A. L. J. 464. Members of a joint Mitakshara family have no specified shares in the family property and where some of them appeal against a decree in a suit to enforce a mortgage of the family property, court-fees must be paid on the amount decreed and not on the appellants' share of that amount. 55 I. C. 233 (Pat.).

to foreclose ; and in suits by a mortgagee to foreclose the mortgage or, where the mortgage is made by conditional sale, to have the sale declared absolute—

according to the principal money expressed to be secured by the instrument of mortgage :

for specific performance ;

(x) In suits for specific performance—

- (a) of a contract of sale—according to the amount the consideration ;
- (b) contract of mortgage—according to the amount agreed to be secured ;
- (c) of a contract of lease—according to the aggregate amount of the fine or premium (if any) of the rent agreed to be paid during the first year of the term ;
- (d) of an award—according to the amount or value of the property in dispute ;

between landlord and tenant.

(xi) In the following suits between landlord and tenant :—

- (a) for the delivery by a tenant of the counterpart of a lease.
- (b) to enhance the rent of a tenant having a right of occupancy,
- (c) for the delivery by a landlord of a lease,
- [(cc) for the recovery of immovable property from a tenant, including a tenant holding over after the determination of a tenancy,]
- (d) to contest a notice of ejectment.
- (e) to recover the occupancy of ¹ [immovable property] from which a tenant has been illegally ejected by the landlord, and

Cl. X (a).—S. 7. X (a) applies to a suit for specific performance of a contract to sell, in which the plaintiff seeks to force the vendor to execute and register a sale deed and also to hand over possession of the property. 38 A. 292 = 14 A.L.J. 434 (All.); 45 M.L.J. 431 = 47 M. 150. But in Punjab such suit has been held to fall under S. 7 (v) and not under S. 7 (X) (a). 128 P. W. R. 1918 = 46 I. C. 534 ; 107 P. W. R. 1916 = 34 I. C. 192. So also in Calcutta. 14 C. L. J. 159 = 11 I. C. 228. For court-fee for such suits in Bombay see Bom. P. J. 1890, p. 204. Court-fees are payable on both the reliefs according to 60 I. C. 654 (Oudh). The clause covers also exchange. 1923 Lah. 456.

Cl. X (c).—A suit for specific performance of a contract of lease should first be valued for court-fees under S. 7 X (c) and the same is the value for purposes of jurisdiction. 34 C. L. J. 94 = 66 I. C. 268 = 25 C. W. N. 768. As to suits falling under the clause see 17 C. W. N. 160 = 15 I. C. 46 ; 25 C. W. N. 768 = 34 C. L. J. 94. A suit for possession by lessee is not a suit for specific performance but one falling under cl. V. 16 C. L. J. 375 = 16 I. C. 963 ; 5 A. L. J. 886.

Cl. XI (cc).—This clause was inserted by the Court-fees (Amendment) Act (VI of 1905), S. 2. (1). This Section is not confined to cases where the defendant is clearly estopped from denying the plaintiff's title. 25 L. W. 76 = 99 I. C. 981 = A. I. R. 1927 Mad. 331 = 52 M. 1. J. 100.

Suits between landlord and tenant have to be valued for court-fees upon the rent for the previous year and the same is the value for jurisdiction. 25 I. C. 975 = 12 A. L. J. 933. A suit to recover possession of land from a tenant is valued according to a year's rental next before date of presenting the plaint under S. 7, XI (cc) and not under S. 7, cl. V (d). 39 M. 873 = 29 M. L. J. 572 ; 27 P. R. 1910 = 5 I. C. 910 ; 2 P. 260 = 4 P.L.T. 666 ; L.R. 5 All. 709 ; 83 I. C. 1 = 1925 All. 142. See

also 38 M. 795 = 24 I. C. 374 = 26 M.L.J. 573. See also 99 I. C. 438 (2) = 23 N. L. R. 5 = A.I.R. 1927 Nag. 156 ; 93 I. C. 291. This is so even where plaintiff is in possession of part of a house and wants to recover another part from his alleged tenant. 104 I. C. 412 = A. I. R. 1927 Sind 248. So also a suit by a landlord against his tenants and others holding over after the period of their tenancy, for recovery of possession. 55 I. C. 178 = 24 C. W. N. 151. But where the tenant holds over in spite of notice to quit, he is a trespasser and a suit for possession against him falls under S. 7 (V) 1923 Nag. 310 = 8 N.L.J. 63 ; 20 N.L.R. 124 ; 84 I. C. 202 = 1925 Nag. 131. Where a relief against a trespasser is claimed along with a relief against a tenant, the former portion does not fall under the clause 91 I. C. 488 = A. I. R. 1926 Cal. 504. In suits under the clause, the court will not go into the question of title. 1 L. W. 641 = 27 I. C. 162 = 27 M. L. J. 475 ; 5 Pat. 208 = 94 I. C. 19 = A.I.R. 1926 P. 251 ; but see 91 I. C. 488 = A.I.R. 1926 Cal. 504.

Cl. XI (e).—¹A suit for possession by a tenant against his landlord falls within S. 7, cl. (xi) (e) 16 C. L. J. 375. The clause should not be limited to suits where the landlord and tenant alone are parties. It applies to cases where to avoid delay, etc. other persons also are impleaded. 87 I. C. 1002 = 1925 Sind 275. But see 32 C. 268 where the clauses have been held not to apply to such cases. A suit for possession by a tenant against the landlord and persons claiming only melwaram rights is not governed by this clause but by Cl. 5. 31 M. 11 = 17 M. L. J. 478 = 3 M. L. T. 3. In a suit falling under this clause the Court will not try a question of title. If the suit is one for possession of land after a determination of the tenant's title to it, the case falls within S. 7 (V). 5 Pat. 208 = 94 I. C. 19 = A. I. R. 1926 Pat. 251. The value for purposes of jurisdiction also is the same, 39 M. 873 = 29 M. L. J. 572 = 31 I. C. 104.

(f) for abatement of rent—

according to the amount of the rent of the ¹ [immovable property] to which the suit refers, payable for the year next before the date of presenting the plaint.

8. The amount of fee payable under this Act on a memorandum of appeal against an order relating to compensation under any Act for the time being in force for the ² acquisition of land for public purposes shall be computed according to the difference between the amount awarded and the amount

claimed by the appellant.

9. If the Court sees reason to think that the annual nett profits or the market-value of any such land, house or garden as is mentioned in section 7, paragraphs 5 and 6, have or has been wrongly estimated, the Court may, for the purpose of computing the fee payable in any suit therein mentioned, issue a commission to any proper person directing him to make such local or other investigation as may be necessary, and to report thereon to the Court.

10. (i) If in the result of any such investigation the Court finds that the nett profits or market-value have or has been wrongly estimated, the Court, if the estimation has been excessive, may in its discretion refund the excess paid as such fee : but if the estimation has been insufficient, the Court shall require the plaintiff to pay so much additional fee as would have been payable had the said market-value or nett profits been rightly estimated.

(ii) In such case the suit shall be stayed until the additional fee is paid. If the additional fee is not paid within such time as the Court shall fix, the suit shall be dismissed.

(iii) [* * * * *] 3

¹ These words were substituted for the word "land" by S. 2 (2) of the Court-fees (Amendment) Act (VI of 1905).

² Sec. 8.—² See now the Land Acquisition Act (1 of 1894.)

Scope and applicability.—S. 8 is a special provision applicable to appeals against all orders of awards relating to compensation under the Land Acquisition Act, and overrides the general provision contained in Art. 17 (IV) of Sch. II. 21 M. 269; see also, on the section, 21 A. 354; 21 M. 309; 39 C. 906; 17 I. C. 724=17 C. W. N. 933. Section inapplicable to appeal by the Crown on the ground that the award is excessive. 46 M.L.J. 150=1924 Mad. 489 (2). The memorandum of appeal by a claimant to land acquired in a Land Acquisition proceeding should bear a Court Fee Stamp *ad valorem* on the value of the land claimed. 45 B. 277=64 I. C. 582 (584)=23 Bom. L. R. 148.

Secs. 9 to 11. SCOPE AND APPLICATION.—Ss. 9 to 11 do not relate to appeals. 12 A. 129 (F. B.) The sections are not in conflict with S. 28 (*Ibid.*). As to the effect of dismissal of a suit under the sections. See 12 A. 129; 8 A. 282.

Sec. 9.—The Court is not bound to appoint a commissioner to hold an investigation. 29 A. 749=4 A.L.J. 636. The decision of the Court as to the market value of immoveable property passed after objection made, if final, even though no enquiry was made under a commission. 14 W.R. 451. The Commission may issue at any stage of the suit. 2 M. 308=4 Ind. Jur. 285.

Sec. 10. SCOPE AND APPLICATION.—See 12 A. 129; The specific provisions of S. 28 are not cut down by the section. (*Ibid.*) If the Court finds that sufficient Court-fee has not been paid

it is bound to stay the suit and to fix a time within which the additional fee can be paid, without any regard to the fact, whether that be a time within or beyond, the period of limitation. 4 A. L. J. 636=29 A. 749. If the fee is paid within the time so fixed, the plaint is as valid as if it had been properly stamped in the first instance. (*Ibid.*) A plaintiff who fails to pay additional court fee within the time allowed by the court is liable to have his suit dismissed under S. 10 and not to have his plaint rejected under O. 7, R. 11, C. P. C. 26 I. C. 746=16 Bom. L. R. 763; 24 A. 749. But only a Court having jurisdiction to try the suit can so dismiss it. 51 Bom. 236=29 Bom. L. R. 280=101 I. C. 343=A. I. R. 1927 Bom. 257. The dismissal, however, as the same effect as rejection. 12 A. 129. It could not operate as *res judicata*. 8 A. 282. A suit can be dismissed under the section at any stage of the case. 2 M. 308; see also 56 I. C. 316=4 P. L. J. 703. The plaintiff can abandon a portion of the claim and retain that part for which he had already paid court-fee. 27 A. 151; But see *contra*. 16 Bom. L. R. 763=26 I. C. 746. Where a Court returns a plaint for presentation to a proper Court the latter Court to which the plaint is presented should give credit to the fee already paid. 51 Bom. 236=29 Bom. L. R. 280=101 I. C. 343=A. I. R. 1927 Bom. 257.

Sec. 10.—³ Cl. (iii) was repealed by the Repealing and Amending Act, 1891 (XII of 1891).

The clause was as follows:—"S. 180 of the Code of Civil Procedure shall be construed as if the words 'the market value of any property or' were inserted after the word 'ascertaining' and as if the words 'or annual nett profits' were inserted after the word 'damages.'"

11. In suits for mesne profits or for immoveable property and mesne profits, or for an account, if the profits or amount decreed are or is

Procedure in suits for mesne profits or account when amount decreed exceeds amount claimed.

in excess of the profits claimed or the amount at which the plaintiff valued the relief sought, the decree shall not be executed until the difference between the fee actually paid and the fee which would have been payable had the suit

comprised the whole of the profits or amount so decreed shall have been paid to the proper officer.

Where the amount of mesne profits is left to be ascertained in the course of the execution of the decree, if the profits so ascertained exceed the profits claimed, the further execution of the decree shall be stayed until the difference between the fee actually paid and the fee which would have been payable had the suit comprised the whole of the profits so ascertained is paid. If the additional fee is not paid within such time as the Court shall fix, the suit shall be dismissed.

Sec. 11. SCOPE AND APPLICATION.—See 12 A. 129. S. 11 refers only to suits for mesne profits for immovable property or for accounts, and does not apply to mortgage suits where on account of the interest *pendente lite* a decree for a much larger amount than was claimed is passed. 3 P. L. T. 146 = 1922 P. 59. The penalty mentioned in the final provisions of S. 11 does not apply to the cases coming under the 1st paragraph. 11 I. C. 73 (Cal.). The court has no power to fix any time for payment, in such cases; only the decree cannot be executed until the additional fee is paid. 59 I. C. 385 (Mad.). See also 30 M. 82. If the appellate court grants a decree for an amount larger than that claimed in the court below, court-fee must be paid on the difference and unless this is done the decree cannot be executed. 3 P. L. T. 813 = 1923 P. 28. The words 'decree' in S. 11, para. 2 as applied to a suit for partition and mesne profits means the final and not the *interim* decree. 59 I. C. 385 (Mad.). Where the value of the relief is ascertained after trial, the court-fee on the difference between the plaintiff valuation and the amount decreed should be paid, under the 2nd paragraph. 24 I. C. 643 = 1 O. L. J. 281. A court has discretionary power under S. 11 to enlarge the time originally fixed for the payment of the court-fees in such cases, even when application to enlarge the time is made after the expiry of the time originally granted. 10 I. C. 268 = 13 C. L. J. 432.

MESNE PROFITS.—A decree for mesne profits does not become operative till after the amount has been ascertained and the Court-fee under S. 11 paid. 27 I. C. 300 (Cal.). The court-fee payable is an *ad valorem* fee. 55 I. C. 24 = 1 P. L. T. 235. On this point see also 50 Mad. 488 = 52 M. L. J. 128. The plaintiff can obtain execution of a portion of the decree granting reliefs other than mesne profits without paying court-fee on such mesne profits. 12 B. 98; see also 24 C. 174. The term '*suit*' is to be construed as confined to that part of the suit which relates to mesne profits. 12 B. 98. So in case of default, the claim in respect of mesne profits alone is to be dismissed. 24 C. 173 = 1 C. W. N. 243. After such dismissal application for execution of the decree for mesne profits cannot be

entertained. (*Ibid.*) Approximate amount to be stated for mesne profits accrued due before suit. 24 I. C. 232. (Cal.)

FUTURE MESNE PROFITS.—As to Court-fee payable on future mesne profits under the section, there is a conflict of ruling between the Allahabad and other High Courts. See 20 M. L. J. 98 = 5 I. C. 880. See also 15 B. 416; 17 B. 41; 6 O. C. 351; 13 C. W. N. 815; 24 I. C. 232; 21 M. 371 (appeal); 2 A. 642. On the point, see also 3 C. L. J. 94; 16 C. L. J. 564; 15 I. C. 572. A direction in a decree for payment of extra fee in respect of such mesne profits does not form part of the decree. The execution of the decree is not conditional upon the payment of the extra fee. 30 M. 32 = 16 M. L. J. 543; see also 33 C. 1232. The law on the subject has been made clear so far as Madras is concerned. See para. 3 of S. 11 substituted by Madras Act V of 1922. Court-fee is payable on future mesne profits but it can only be enacted after the amount has been ascertained by enquiry and the Court has jurisdiction to dismiss such an application for non-payment of Court-fee in advance. 5 Pat. 361 = (1926) P. H. C. C. 49 = 93 I. C. 939 = A. I. R. 1926 Pat. 218 (F. B.). Fees are payable on the difference between the amount paid on the mesne profits claimed in the plaint and the amount ascertained to be due subsequent to the filing of the suit. 10 L. B. R. 276 = 62 I. C. 175 = 13 Bnr. L. T. 165.

ACCOUNT SUITS.—The plaintiff has a right to value his claim on estimate and the Court has power to decree larger amount. 24 O. C. 209 = 64 I. C. 101. See also 25 M. 543; 12 M. L. J. 35; 9 B. 22; 8 Lah. L. J. 78 = 27 Punj. L. R. 187 = 94 I. C. 650 = A. I. R. 1926 Lah. 242 (1).

POWER OF COURT TO PASS DECREES FOR SUMS BEYOND PECUNIARY JURISDICTION.—In suits for accounts and mesne profits, even if the sum found due exceeds the pecuniary jurisdiction of the Court it is competent to the Court to give a decree for such amount. 40 M. 1 = 32 M. L. J. 221 = 39 I. C. 439 (F. B.) But see the decisions of the Calcutta High Court to the contrary. 21 C. W. N. 310; 43 C. 650 = 15 C. W. N. 506 = 13 C. L. J. 132; See also 49 P. R. 1906 = 94 P. L. R. 1906.

12. (i) Every question relating to valuation for the purpose of determining the amount of any fee chargeable under this chapter on a

Decision of question as to valuation. **plaint or memorandum of appeal shall be decided by the**

Court in which such plaint or memorandum, as the case may be, is filed, and such decision shall be final as between the parties to the suit.

(ii) But whenever any such suit comes before a Court of appeal, reference or revision, if such Court considers that the said question has been wrongly decided to the

Sec. 12. CONSTRUCTION OF SECTION.—The provisions of section are to be strictly construed. The additional fees should be levied in exact conformity with the words of the statute. 39 C. L. J. 217=82 I. C. 292=1924 Cal. 953.

SCOPE OF THE SECTION.—A decision on the questions of Court-fee in the Court of First Instance is final between the parties under S. 12 (1) but can be re-opened by an Appellate Court under S. 12 (2) in the interest of revenue. 25 I. C. 506 (Mad.); *see also* 43 B. 507 (P. C.); 40 I. C. 904=106 P. W. R. 1917; 90 I. C. 321 (2)=1925 P. 488. If an objection is taken that a plaint is insufficiently stamped, all that the Court has to do, is to see whether the Court-fee is sufficient assuming the allegations in the plaint to be true. The Court does not decide on evidence, that those allegations are true. 30 I. C. 73 (Oudh). *See also* 16 I. C. 773=6 S. L. R. 72.

FINALITY OF DECISIONS UNDER SUB-S. (1).—An appeal would lie from the decision of a Court in respect of the class in which a suit ranks but no appeal would lie from a decision in respect of the valuation of the suit in that class. 28 A. 411; 23 B. 486; *see also* 27 B. 140; 17 B. 56; 15 B. 82; 16 I. C. 963=16 C. L. J. 375; 6 C. 249; 23 C. 723; 28 C. 334; 51 C. 216=28 C. W. N. 683=81 I. C. 763=1924 Cal. 731; 14 M. 169; (1925) M. W. N. 276=87 I. C. 660 (2)=1925 Mad. 713=48 M. L. J. 688; (1925) P. H. C. C. 167=90 I. C. 321 (2)=1925 Pat. 488; 3 P. 930=(1924) P. H. C. C. 254=80 I. C. 667 (2)=1924 P. 673; 87 I. C. 911=1925 Nag. 4=26 Punj. L. R. 163=49 I. C. 442=4 P. L. J. 57; 16 P. R. 1919=49 I. C. 711; 16 I. C. 773=6 S. L. R. 72; 105 I. C. 610; 106 I. C. 817. Where an order rejecting a plaint necessarily involves a decision of the category or class under which a suit falls, even though it incidentally decides a question of valuation, the order is appealable. 49 I. C. 442=4 P. L. J. 57. If the dispute involves not questions of principles as to the nature of the suit and the retrospective operation of statutes an appeal against an order for payment of Court-fee is maintainable. 51 C. 216=28 C. W. N. 683=81 I. C. 763=1924 Cal. 731. The section does not also apply where the question relates to the competency of the Court of first instance to entertain the suit. 17 C. W. N. 503=16 I. C. 575=16 C. L. J. 371; 3 P. 930=(1924) P. H. C. C. 254=80 I. C. 667 (2)=1924 P. 673. Thus an order returning a plaint for representation on the basis of the valuation made by the Court, is appealable. 10 L. W. 178=26 M. L. T. 153=52 I. C. 1001=(1919) M. W. N. 599. *See also* 47 I. C. 7=151 P. W. R. 1918. The decision to be final must be a decision made between the parties on the record after plaint is filed. 20 All. 11 (F.B.).

Sub-Sec. (2). **SCOPE OF.**—An Appellate Court cannot under S. 12 (2) order payment of additional Court-fee stamps, unless the first Court has decided the question of valuation. 36 I. C. 957=

10 Bur. L. T. 242. But *see contra* 31 C. W. N. 1045=A. I. R. 1927 Cal. 775. But where the Court proceeds to the trial of the suit, it must be assumed that the Court has tacitly decided that the fees paid is correct. 109 P. R. 1912=15 I. C. 463. The act of the chief ministerial officer entrusted with the duty of receiving plaints and seeing that proper Court-fee is paid thereon, in accepting the plaint amounts to such decision. (1925) M. W. N. 826=91 I. C. 729=1926 Mad. 96=49 M. L. J. 608. The question of deficit Court-fees should be dealt with by the Appellate Court as soon as it is discovered, though it may be postponed at the Court's discretion in exceptional cases. 62 I. C. 43=6 P. L. J. 293=1921 Pat. 161 (C. W. N.). If the question arises on appeal, the appeal should first be admitted so as to remove doubts, as to jurisdiction, and this point should be decided before other issues and the appeal should be stayed till the deficit is paid. 62 I. C. 43=6 P. L. J. 293=1921 Pat. 161 (C. W. N.); *see also* 58 I. C. 271=5 P. L. J. 508. Until the appeal is admitted, it is not competent to the appellate Court to pass an order dismissing the suit for non-payment of Court-fee. 1 M. L. J. 528. Where a party prefers an appeal on a smaller court fee the proper course for the Registrar is to register the appeal and then place the appeal before the court for orders under this rule as regards the deficient court-fee 31 C. W. N. 1045=A. I. R. 1927 Cal. 775. It is duty of the High Court to see that proper Court-fees are paid to the High Courts as well as in the Courts below. 43 I. C. 489=3 P. L. J. 101. *See also* 235 P. L. R. 1913=19 I. C. 856. If the appellant has failed to pay sufficient Court-fees in the Court below his appeal will not be heard till the deficiency has been made good. Where it was the respondent who was in default, no decree shall be executed in his favour till the deficiency has been made good. 3 P. L. J. 443=44 I. C. 53; *see also* 58 I. C. 271=5 P. L. J. 508. If a plaintiff respondent fails to make good a deficiency in the Court-fee paid on the plaint, it is competent to the Appellate Court to call upon him to pay the deficit; and in the event of his failure, dismiss the suit. 56 I. C. 316=4 P. L. J. 703; 60 I. C. 654=23 O. C. 388; the procedure prescribed in S. 10 (2) being applicable. 20 A. 362. Where there was deficiency in the Court-fee paid on cross objections in the lower Appellate Court, the High Court can insist on the payment of the same, even though the second appeal does not relate to the subject-matter of such memorandum of cross-objections. 1 P. 471=3 P. L. T. 327=1922 P. 284. Once an appeal has been dismissed, the High Court ceases to have seisin of the appeal or case and is powerless to call upon the Respondent to pay any deficiency. 4 P. L. J. 472=51 I. C. 756=1919 Pat. 276 (F. B.); *see also* 58 I. C. 271=5 P. L. J. 508; 1925 Lah. 131 (1); 7 A. 528; 18

detriment of the revenue, it shall require the party by whom such fee has been paid to pay so much additional fee as would have been payable had the question been rightly decided, and the provisions of S. 10, paragraph ii, shall apply.

13. If an appeal or plaint, which has been rejected by the lower Court on any of the grounds mentioned in the Code of Civil Procedure, is ordered to be received, or if a suit is remanded in appeal, on any of the grounds mentioned in S. 35¹ of the same Code for a second decision by the lower Court, the Appellate Court shall grant to the appellant a certificate, authorizing him to receive back from the Collector the full amount of fee paid on the memorandum of appeal :

Fee paid on memorandum of appeal.

Provided that if, in the case of a remand in appeal, the order of remand shall not cover the whole of the subject-matter of the suit, the certificate so granted shall not authorize the appellant to receive back more than so much fee as would have been originally payable on the part or parts of such subject-matter in respect whereof the suit has been remanded.

14. Where an application² for a review of judgment is presented on or after the ninetieth day from the date of the decree, the Court, unless the delay was caused by the applicant's laches, may, in its discretion, grant him a certificate authorizing

Refund of fee on application for review of judgment.

M. 415. The Act does not apply to decided cases but applies only to pending cases. 32 I. C. 534 = 9 Bur. L. T. 43; 1925 Lah. 131. Thus the court has no jurisdiction to order the deficit court-fee to be paid by the plaintiff after dismissal of his suit and on his default, to order the attachment of his properties. 46 C. 520 = 52 I. C. 435.

WHETHER APPELLANT CAN ABANDON A PORTION OF CLAIM.—The appellant who has not properly stamped the appeal and is unable to do so may leave a part of the claim retaining only that much as is covered by the stamp. 10 I. C. 207 = 11 P. R. 1912; 29 Punj. L. R. 64; A. I. R. 1926 Lah. 477. There is nothing to prevent an appellant from attacking only a portion of the decree by paying Court-fee only there on, though the reason for the attack might cover the whole decree. 38 M. 18 = 16 I. C. 877. A defendant appealing on the ground that the suit ought to have been dismissed *in toto* as time barred must appeal on the whole case and pay stamp duty on the whole claim. 44 I. C. 890 = 14 P. W. R. 1918. Whether an Appellate Court has power to allow a valuation of claim in the Court below to be reduced in order to relieve a party from liability to pay the proper Court-fee. See 43 I. C. 489 = 3 P. L. J. 101.

Sec. 13.—¹This reference should now be read as applying to the corresponding provision of Act V of 1908, O. XII, R. 23.

APPLICABILITY OF THE SECTION.—The section applies where a decree in favour of the respondents is set aside and the case is sent back for a second decision. Where the decision in favour of the respondents is set aside *qua* a portion only of the subject-matter of the suit, the proviso applies. 39 I. C. 28 = 14 A. L. J. 671. But where the decree is set aside against some respondents only and the case remanded, the successful appellant cannot get a refund of Court-fee. *Ibid.* If an appeal is remanded, the Court is bound to grant a certificate under S. 13. Refusal to grant such certificate is a material irregularity within S. 115, C. P. C. 42 B. 363 = 45 I. C. 552. Where the High Court reverses the decision of the first Court on a preliminary point,

an order under S. 13 for refund of fee should be made. 15 I. C. 610 = 15 C. L. J. 658. Where an appellate Court remands a case for re-trial in a case not coming within O. 41, R. 23; C. P. C., no order for refund of Court-fee can be passed. 42 I. C. 304; See also 36 I. C. 241 = 12 N. L. R. 126; 3 P. L. J. 116 = 43 I. C. 855. Also 100 I. C. 49 = A. I. R. 1927 Lah. 196. See also (1927) C. W. N. 761. A Certificate under this rule should be granted when the suit is dismissed because a document relied upon is inadmissible. 102 I. C. 298 (1) = A. I. R. 1927 Lah. 592. S. 13 does not apply to the case of an appeal against a preliminary decree. 3 P. L. J. 116 = 43 I. C. 855. Court-fees paid on appeal from final decree filed during pendency of appeal from preliminary decree should be refunded. 83 I. C. 829 = 1925 Oudh 39. As to the scope of the proviso, see 6 W. R. 65.

REFUND IN GENERAL.—Where a counsel stamps the memorandum of a time barred appeal and is heard on the point of limitation and the appeal is dismissed, he cannot set up the plea of the failure of the Court Clerk to inform him of the practice about stamping in appeal memoranda as a ground of claiming refund of the Court-fee paid. 22 I. C. 884 = 7 L. B. R. 90. Where excess Court-fee is paid in the suit, credit for the excess paid in the original Court may be allowed in appeal to the plaintiff appellant A. W. N. (1836) 228 The Court has power to make an order for refund of excess Court-fee where the excess was paid under a *bona fide* mistake. 107 I. C. 320 = 9 Pat. L. T. 240; 102 I. C. 193 (1) = A. I. R. 1927 Sind 192; 40 C. 365 = 20 I. C. 498. Where appeal is dismissed for non-payment of additional court-fee. Court-fee already paid cannot be refunded. 105 I. C. 742 = 6 Pat. 602. Whether High Court can order refund of Court-fee when second appeal is dismissed for want of jurisdiction. See 6 Pat. 599. Refund of excess fee paid could be granted only by Collector of the district and not by the High Court. 57 I. C. 26.

Sec. 14.—In calculating 89 days referred to in Art. 5, Sch. 1, the time during which the Court is closed for vacation cannot be excluded. 9 M. 134.

him to receive back from the Collector so much of the fee paid on the application as exceeds the fee which would have been payable had it been presented before³ such day.

15. Where an application for a review of judgment is admitted, and where, on

Refund where Court reverses or modifies its former decision on ground of mistake.

the rehearing, the Court reverses or modifies its former decision on the ground of mistake in law or fact, the applicant shall be entitled to a certificate from the Court

authorizing him to receive back from the Collector so much of the fee paid on the¹ [application] as exceeds the fee payable on any other application to such Court under the second schedule to this Act; No. 1, clause (b) or clause (d).

But nothing in the former part of this section shall entitle the applicant to such certificate where the reversal or modification is due, wholly or in part, to fresh evidence which might have been produced at the original hearing.

16. [Additional fee where respondent takes objection to unappealed part of decree.] *Rep. by Act V of 1908.*

17. Where a suit embraces two or more distinct subjects, the plaint or memoran-

Multifarious suits.

dum of appeal shall be chargeable with the aggregate amount of the fees to which the plaints or memoranda

The apparent intention of S. 14 is to require full stamp in every case of delay after the 89th day from the date of the decree and to permit refund at the discretion of the judge when the delay is not due to the appellant's laches. (*Ibid.*) See also 9 C. L. R. 479. On the section see also 39 C. L. J. 344=80 I. C. 794=1924 Cal. 994.

Sec. 14.—²As to refund of fees paid on applications to the Chief Court or the Court of the Financial Commissioner of the Punjab for the exercise of its revisional jurisdiction under the Code of Civil Procedure—see the Punjab Courts Act (XVIII of 1884), *Sec. 2*, as amended by the Punjab Courts Act, (XXV of 1829) P. and N.W. Code.

As to application for review of judgment, see the Code of Civil Procedure, 1908 (Act V of 1908).

Sec. 14.—³See Sch. I, Nos. 4 and 5, *infra*.

Sec. 15.—¹The word "application" was substituted for the original words "plaint or memorandum of appeal" by the Court-fees Act. Amendment Act (XX of 1870), S. 1 (amending this Act)

Sec. 17. SCOPE AND APPLICATION OF SECTION.—The object of the section is to prevent loss of revenue to the state 6 I. C. 715. This section applies to cumulative reliefs for several distinct causes of action and has no application to distinct reliefs arising out of the same cause of action, 2 B. 219; 21 A. 200; see also (1924) P.H.C.C. 175=78 I. C. 415=1924 P. 596. The 'words distinct subjects' are synonymous with distinct causes of Action. 5 L. B. R. 95 (F. B.) See also 16 A. 421; 27 A. 184; 2 A. 679 (F. B.); 1 Pat. L. T. 444=57 I. C. 685. They are not to be interpreted with reference to S. 7. 1922 Pat. 79 (C. W. N.)=1922 P. 359; 57 I. C. 685=1 Pat. L. T. 444; 50 I. C. 470=4 P. L. J. 195. As to the meaning of the word 'subject'. See 47 M. 150=45 M.L.J. 431=1924 Mad. 360; 9 Pat.L.T. 199 Where a suit comprises several claims arising out of the same cause of action, the Court-fee should be charged on aggregate of the values of all the claims and not on the value of each claim separately. 50 I. C. 470=4 P. L. J. 195. A suit

for *khass* possession of *zairat* lands against several persons holding the same, is based upon a single right and the court fee payable is upon a single cause of action. 9 Pat. L. T. 199. S. 17 applies to alternative reliefs claimed with reference to more causes of action than one. The section is not necessarily confined to cases where cumulative reliefs are claimed. 47 I. C. 866 (Nag.); 11 O. C. 173; 16 M. L. J. 462=30 M. 61. But see 44 I. C. 143 (Pat.) where it has been held that court-fee must be paid on the relief which appears to be of the higher value. See also 78 I. C. 530=1925 Pat. 193 (2); 6 B. 362; 16 O.C. 354; 15 B. 82. Where plaintiff has paid court-fee on smaller of two alternative reliefs, that relief alone should be tried. 1923 Lah. 456. Where however the alternative reliefs are based exactly on the same cause of action they are not two distinct subjects within the section. 5 Lah. 114=1924 Lah. 494; 39 C. L. J. 209; 8 Lah. L. J. 449=56 I. C. 826=A.I.R. 1926 Lah. 467. The maximum fee leviable in a multifarious suit is Rs. 3000 under the proviso to Sch. I, Art. 1, 3 A. 108 (F. B.). See also 29 C. 149.

SUITS FALLING WITHIN THE SECTION.—

Suits on different hundies affording distinct causes of action (9 A. 252); Suit on several promissory notes executed in plff.'s favour by deft. (5 L.B.R. 94=4 I. C. 289); suit against the principal debtor and several persons who have guaranteed the amount by separate pro-notes or mortgages (8 Bur. L. T. 217=30 I. C. 705). A suit to enforce two different mortgages executed by the same person in respect of the same properties (2 P. 874=4 P. L. T. 546=(1923) Pat. 293 (C. W. N.)=1924 P. 77; 57 I. C. 685=1 Pat. L. T. 444.) Suit to enforce specific performance of an agreement to sell land with an alternative claim for pre-emption (29 A. 155=4 A.L.J. 127; 96 P. R. 1895); claims for rent in suits for redemption (16 M. 415); suit by landlord against several sets of tenants for declaration that their several lands were held under the *Batai* system (4 Pat. L. J. 293=51 I. C. 767); suit for declaration arising from distinct causes of action, (1923 A. 306; 18 M. 459—declarations in re-

of appeal in suits embracing separately each of such subjects would be liable under this Act.

Nothing in the former part of this section shall be deemed to affect the power conferred by the Code of Civil Procedure, section 9.¹

18. When the first or only examination of a person who complains of the offence of wrongful confinement, or of wrongful restraint, or of any offence other than an offence for which police-officers

Written examinations of complainants.

may arrest without a warrant, and who has not already presented a petition on which a fee has been levied under this Act, is reduced to writing under the provisions of the Code of Criminal Procedure,² the complainant shall pay a fee of eight annas, unless the Court thinks fit to remit such payment.

Exemption of certain documents.

19. Nothing contained in this Act shall render the following documents chargeable with any fee :

(i) Power-of-attorney to institute or defend a suit when executed by an officer, warrant-officer, non-commissioned officer or private of Her Majesty's army not in civil employment.

(ii) [*Rep. by the Repealing and Amending Act, 1891 (XII of 1891).*]

(iii) Written statements called for by the Court after the first hearing of a suit.

(iv) [*Rep. by the Cantonments Act, 1889 (XIII of 1889).*]

(v) Plaints in suits tried by Village Munsifs³ in the Presidency of Fort St. George.

(vi) Plaints and processes in suits before District Panchayats in the same Presidency.

(vii) Plaints in suits before Collectors under Madras Regulation XII of 1816.

(viii) Probate of a will, letters of administration, [and, save as regards debts and securities, a certificate under Bombay Regulation VIII of 1827],⁴ where the

pect of various alienations); and claim for costs on appeal independently of the result of the main contest between the parties (3 P. L. J. 443 = 4 P. L. W. 223 = 44 I. C. 50), have been held to come within the section. Where the plaintiff in whose favour the first deft. had surrendered the suit lands for consideration, finding the land to belong to another person files a suit against both, asking for possession against the latter or for refund from the former of the consideration paid the suit embraces two distinct reliefs. 78 I. C. 703 = 1924 Nag. 169. Where the plaintiffs who are not in possession of any portion of the properties sought to be partitioned, pray for joint possession and partition they are bound to pay court-fee on two subject-matters within S. 17. The plaintiffs must pay the fixed fee for partition in addition to *ad valorem* fee as in a suit for possession. 3 P. 618 = 81 I. C. 1052 = 1924 P. 558. A declaratory suit in respect of properties, partly in the Collector's possession and partly in the plff.'s possession, each valued separately, is for two distinct subjects and the aggregate value of both the properties constitutes the value of the suit. 36 B. 628 = 14 Bom. L. R. 757 = 16 I. C. 1005. [On appeal 50 I. C. 280 = 43 B. 507 (P. C.)]

SUITS NOT COMING WITHIN THE SECTION.—Suit for pre-emption of shares in two villages conveyed by a single sale deed does not comprise two distinct subjects as there was only one cause of section. 27 A. 186 = A. W. N. (1904) 210. So also a suit to recover rent or mesne profits for a number of years. 7 A. 761; a suit to recover land and trees thereon. 40 M. 824 = 39 I. C. 254. A suit for possession and for mesne profits is not a suit embracing two distinct subjects. 16 A. 401 = A. W. N. (1894) 124. See also 8 C. 593 (F. B.); 19 C. 615; 11 M. 151. For decisions to the

contrary, see 28 M. L. J. 127 (F. B.) 12 B. 96; 2 A. 676; 4 P. L. J. 195 = 50 I. C. 470. (Each case depends on its own peculiar circumstances.) Claim for possession and damages for use and occupation after the tenancy terminates are not distinct subjects within S. 17 as they arise out of the tenancy having come to an end. A claim for rent however, is a distinct subject as it arises out of the contract of tenancy and can be enforced by a separate suit. 10 Bur. L. T. 60 = 36 I. C. 883 = 8 L. B. R. 529.

In a suit for specific performance and possession, court-fee need be paid only for one prayer. 47 M. 150 = 45 M. L. J. 431. But see 60 I. C. 654 = 23 O. C. 388. See also the cases noted under S. 7 cl. X. In a suit for a balance on a Khata, (accounts) which would ordinarily contain a number of items, each item does not constitute a distinct subject. The subject-matter of the suit is the balance due on the account and Court-fee is payable on the aggregate amount. 64 I. C. 486 (2) = 23 Bom. L. R. 995.

Sec. 17.—¹The reference to S. 9 of Civ. Pro. Code, 1889, should be read as applying to O. II, r. 6 of Act V of 1908.

Sec. 18.—²This reference should now be read as referring to the Code of Criminal Procedure (Act V of 1898)—see s. 3 of that Act.

Sec. 19.—³See the Madras Village Courts Act, 1889 (I of 1889), Mad. Code.

⁴These words were substituted for the original words and figures "and certificate mentioned in the First Schedule to this Act annexed, No. 12," by the Succession Certificate Act (VII of 1889), S. 13 (2).

Sec. 19, Cl. III.—Written statement pleading a set-off is not exempt.

CL. VIII.—No duty is payable in respect of a grant of probate or Letters of Administration

amount or value of the property in respect of which the probate or letters or certificate shall be granted does not exceed one thousand rupees.

(ix) Application or petition to a Collector or other officer making a settlement of land-revenue, or to a Board of Revenue, or a Commissioner of Revenue, relating to matters connected with the assessment of land or the ascertainment of rights thereto or interests therein, if presented previous to the final confirmation of such settlement.

(x) Application relating to a supply for irrigation of water belonging to Government.

(xi) Application for leave to extend cultivation, or to relinquish land, when presented to an officer of land-revenue by a person holding, under direct engagement with Government, land of which the revenue is settled, but not permanently.

(xii) Application for service of notice of relinquishment of land or of enhancement of rent.

(xiii) Written authority to an agent to distrain.

(xiv) First application (other than a petition containing a criminal charge or information) for the summons of a witness or other person to attend either to give evidence or to produce a document or in respect of the production or filing of an exhibit not being an affidavit made for the immediate purpose of being produced in Court.

(xv) Bail-bonds in criminal cases, recognizances to prosecute or give evidence, and recognizances for personal appearance or otherwise.

(xvi) Petition, application, charge or information respecting any offence when presented, made or laid to or before a Police-officer, or to or before the Heads of Villages or the Village Police² in the territories respectively subject to the Governors in Council of Madras and Bombay.

(xvii) Petition by a prisoner, or other person in duress or under restraint of any Court or its officers.

(xviii) Complaint of a public servant (as defined in the Indian Penal Code), a municipal officer, or an officer or servant of a Railway Company.

(xix) Application for permission to cut timber in Government forests, or otherwise relating to such forests.

(xx) Application for the payment of money due by Government to the applicant.

(xxi) Petition of appeal against the³ *chaukidari* assessment under Act No. XX of 1856, or against any municipal tax.

(xxii) Applications for compensation under any law for the time being in force relating to the acquisition of property for public purposes.⁴

(xxiii) Petitions presented to the Special Commissioner appointed under Bengal Act No. II of 1869 (*to ascertain, regulate and record certain tenures in Chota Nagpore*).

⁵(xxiv) [Petitions under the Indian Christian Marriage Act, 1872, sections 45 and 48.]

where the net value of the estate after the reductions specified in Sch. III, Annexures A and B is less than Rs. 1,000. 40 A. 279=46 I. C. 865; 7 Bur. L. T. 275=24 I. C. 823. (21 I. C. 502; 24 I. C. 793 Fol.) According to the Calcutta High Court, where the gross value is above and the net value below Rs. 1,000 a fee of 2 per cent. is payable on the net value. 15 I. C. 621=17 C. W. N. 21. See also 18 C. W. N. 121=18 C. L. J. 308; 24 I. C. 823=20 C. W. N. 591.

¹See Madras Regulations XI of 1816 and IV of 1821, s. 6, Mad. Code.

²See Bombay Village Police Act (VII of 1867), Ss. 14, 15 and 16, Bom. Code.

CL. XVII.—No Court-fee is leviable on the memorandum of appeal against an order rejecting an application by a judgment-debtor whilst in custody, to be declared insolvent. 10 C. 61. A petition of appeal or revision presented by a pleader on behalf of the prisoner is exempted from Court-fees; 45 I. C. 158=14 N. L. R. 77;

1 Rang. 510=25 Cr. L. J. 277=1924 R. 160; So also an application for bail by the advocate of a prisoner in jail. 23 Cr. L. J. 121=4 U. B. R. (1921) 72=1922 U. B. 14. But a petition from an accused in his defence in summons cases, appears to be liable to the payment of Court-fee. U. B. R. 1892—1896 Vol. I, p. 9.

CL. XVIII.—See 5 B. H. C. Cr. 104; 16 M. 423.

CL. XX.—An application for refund of money deposited for the costs of preparing a paper book etc. is not an application for payment of money due by Government within cl. xx. On the other hand it is an application or petition presented to the High Court within the provisions of Sch. II, Art. 1. 27 C. W. N. 646=1923 Cal. 599

⁸U. P. Code.

⁴See now the Land Acquisition Act, 1894 (I of 1894).

⁵This clause was substituted for the original clause by the Indian Christian Marriage Act,

CHAPTER III-A¹.

PROBATES, LETTERS OF ADMINISTRATION AND CERTIFICATES OF ADMINISTRATION.

19-A. Where any person on applying for the probate of a will or letters of ad-

ministration has estimated the property of the deceased to be of greater value than the same has afterwards proved to be, and has consequently paid too high a court-fee thereon, if, within six months after the true value of the property has been ascertained, such person produces the probate or letters to the Chief Controlling Revenue-authority [for the local area]² in which the probate or letters has or have been granted,

and delivers to such Authority a particular inventory and valuation of the property of the deceased, verified by affidavit or affirmation,

and if such Authority is satisfied that a greater fee was paid on the probate or letters than the law required,

the said Authority may—

(a) cancel the stamp on the probate or letters if such stamp has not been already cancelled ;

(b) substitute another stamp for denoting the court-fee which should have been paid thereon ; and

(c) make an allowance for the difference between them as in the case of spoiled stamps, or repay the same in money, at his discretion.

19-B. Whenever it is proved to the satisfaction of such Authority that an exe-

Relief where debts due from a deceased person have been paid out of his estate.

cutor or administrator has paid debts due from the deceased to such an amount as, being deducted out of the amount or value of the estate, reduces the same to a sum which, if it had been the whole gross amount or value of the estate, would have occasioned a less court-fee to be paid on the probate or letters of administration granted in respect of such estate than has been actually paid thereon under this Act.

Such Authority may return the difference, provided the same be claimed within three years after the date of such probate or letters.

But when, by reason of any legal proceeding, the debts due from the deceased have not been ascertained and paid, or his effects have not been recovered and made available, and in consequence thereof the executor or administrator is prevented from claiming the return of such difference within the said term of three years, the said Authority may allow such further time for making the claim as may appear to be reasonable under the circumstances.

19-C. Whenever³ a grant of probate or letters of administration has been or is

Relief in case of several grants.

made in respect of the whole of the property belonging to an estate, and the full fee chargeable under this Act has been or is paid thereon, no fee shall be chargeable under

(XV of 1872), S. 2. The original clause was as follows :—"petitions under the 14th and 15th of Victoria, Ch. 40 (*an Act for marriages in India*), S. 5, or under Act No. V of 1852, S. 9.

Ch. III-A.—¹Chapter III-A was inserted by the Probate and Administration Act (XIII of 1875), S. 6.

Sec. 19 A.—²Substituted for the words "of the Province" by S. 3 (1) of the Court-fees (Amendment) Act (X of 1901).

On an application for probate, the Court-fee chargeable is to be assessed on the value of the estate at the time of application. Subsequent changes in value do not alter the amount of Court-fee payable. 80 I. C. 4=5 Bur. L. T. 39. The uncertainty of recovering a debt is no ground for reducing the proportionate duty pay-

able thereon. 24 C. 567; nor the fact that an item of property is the subject of litigation. 24 M. 241.

Sec. 19 B.—On this section, see 6 N.W.P. 214; 1 B. 118; 8 B.L.R. App. 43=16 W.R. 253.

Sec. 19-C.—³The word "such" was repealed by the Repealing and Amending Act (XII of 1891).

The section does not apply where property in question has never yet paid any duty in India under the Succession Act. 4 C. 725; *But see also* 21 B. 673. Where a full fee chargeable on the probate at the time it was granted has been paid no further fee shall be chargeable when the second grant is made in respect of that property as comprised in that estate; 43 C. 625=20 C. W.N. 472=30 I.C. 394=22 C.L.J. 370. T 4

the same Act when a like grant is made in respect of the whole of any part of the same property belonging to the same estate.

Whenever such a grant has been or is made in respect of any property forming part of an estate, the amount of fees then actually paid under this Act shall be deducted when a like grant is made in respect of property belonging to the same estate, identical with or including the property to which the former grant relates.

19-D. The probate of the will or the letters of administration of the effects of any person deceased heretofore or hereafter granted shall

Probates declared valid as to trust-property though not covered by court-fee.

be deemed valid and available by his executors or administrators for recovering, transferring or assigning any movable or immovable property whereof or whereto the

deceased was possessed or entitled, either wholly or partially as a trustee, notwithstanding the amount or value of such property is not included in the amount or value of the estate in respect of which a court-fee was paid on such probate or letters of administration.

19-E. ¹Where any person on applying for probate or letters of administration has

Provision for case where too low a court-fee has been paid on probates, etc.

estimated the estate of the deceased to be of less value than the same has afterwards proved to be, and has in consequence paid too low a court-fee thereon, the Chief Controlling Revenue-authority [for the local area]² in

which the probate or letters has or have been granted may, on the value of the estate of the deceased being verified by affidavit or affirmation, cause the probate or letters

full fee chargeable must be determined with reference to the point of time when the second grant is sought. *Ibid.* When an executor to whom probate is granted dies leaving a part of the testator's estate unadministered and a new representative is appointed for completing the administration, there is no new succession and no new devolution of the estate. Therefore no fresh succession duty should be levied. (*Ibid.*) (3 C. 733 Foll.) In the case of an appointment *de bonis non* there is no new succession and no new devolution of the estate, which would justify demand of fresh court-fees. 3 Rang. 90=4 Bur. L.J. 97=88 I.C. 759=1925 Rang. 217. An applicant for probate of his wife's will is bound to pay the full Court fees due even though the bulk of the property dealt with in the will was included in the wife's father's will of which Probate had been granted on full payment of Court-fees. 5 Pat. L.J. 36=54 I.C. 703=1920 Pat. 84.

Sec 19-D.—Trust properties are exempted from payment of 2 per cent *ad valorem* fee prescribed by Sch. I, Art. 11; 11 B.L.R. (App) 39=19 W.R. 230; see also 33 M. 93=19 M. L. J. 591=4 I.C. 1064; 29 B. 161. Where property is jointly purchased by four brothers and one of them dies leaving a will and appointing others as trustees, such property is not liable to probate duty. 23 C. 980=1 C.W.N. 31. A son applying for letters of Administration limited to joint family property left by his father, need not pay any Court-fee. 25 Bom. L.R. 1240=48 B. 75=1924 Bom. 228 (F.B.) But see *contra*. 6 M.L.T. 286=19 M.L.J. 591=4 I.C. 1064=33 M. 93. As to the conflict of rulings on this point see also cases noted *supra*. In obtaining probate on a will, the legatees must pay full duty leviable on the property comprised in the will. No exemption is allowed to persons capable of inheriting in their natural rights. A Hindu getting

the residue of his father's property under the will, is not entitled to any exemption on the ground that he is entitled to the property by survivorship. 5 P. I. J. 510=58 I.C. 1007=1 P.L.T. 710. (23 C. 980 not foll.) 39 B. 245 Foll.; 33 M. 93 Ref.) A will purporting to dispose of properties held jointly between the testator and his minor son as members of a joint Hindu family, is not exempt from probate duty. 39 B. 245=28 I.C. 475=17 Bom. L.R. 169. A widow who was an executor under a will owning life interest in the property bequeathed jointly to her and certain others was not a trustee and the other legatees applying for letters of Administration after her death, under the will cannot claim exemption under the section read with Sch. III, Annex. B. 30 Bom. L.R. 54. A person is bound to pay stamp duty for probate only on the amount of the right, title and interest of the testator in the property bequeathed. 100 I.C. 111=38 M.L.T. 7 (H.C.)

Sec. 19-E. APPLICATION OF THE SECTION.

—S. 19-E contemplates an application on the part of a person who has taken out probate and produces the same as duly stamped. Where the estimated value of the estate is less than what the value has afterwards been proved to be, then only a Revenue Court can impose penalty. Where there is no determination of value by the Probate Court, S. 19-E. has no application. 43 C. 230=20 C.W.N. 504. A suit lies in the Civil Court by the Secretary of State for recovery of a penalty lawfully imposed under S. 19-E. (*Ibid.*)

¹As to power of Chief Controlling Revenue Authority to remit the whole or part of any penalty or forfeiture payable under section 19-E, see the Probate and Administration Act (VI of 1889), S. 20 (2).

²Substituted for the words "of the Province" by S. 3 (1) of the Court-fees (Amendment) Act (X of 1901).

of administration to be duly stamped on payment of the full court-fee which ought to have been originally paid thereon in respect of such value and of the further penalty, if the probate or letters is or are produced within one year from the date of grant, of five times, or, if it or they is or are produced after the one from such date, of twenty times, such proper court fee, without any deduction of the court-fee originally paid on such probate or letters :

Provided that, if the application be made within six months after the ascertainment of the true value of the estate and the discovery that too low a court-fee was at first paid on the probate or letters, and if the said Authority is satisfied that such fee was paid in consequence of a mistake or of its not being known at the time that some particular part of the estate belonged to the deceased, and without any intention of fraud or to delay the payment of the proper court-fee, the said Authority may remit the said penalty, and cause the probate or letters to be duly stamped on payment only of the sum wanting to make up the fee which should have been at first paid thereon.

19-F. In case of letters of administration on which too low a court-fee has been paid at first, the said Authority shall not cause the same

Administrator to give proper security before letters stamped under section 19-E.

to be duly stamped in manner aforesaid until the administrator has given such security to the Court by which the letters of administration have been granted as ought by

law to have been given on the granting thereof in case the full value of the estate of the deceased had been then ascertained.

19-G. Where too low a court-fee has been paid on any probate or letters of

Executors, etc., not paying full court fee on probates, etc., within six months after discovery of under payment.

administration in consequence of any mistake, or of its not being known at the time that some particular part of the estate belonged to the deceased, if any executor or administrator acting under such probate or letters does not within six months [* * * * *]¹ after the discovery of

the mistake or of any effects not known at the time to have belonged to the deceased apply to the said Authority and pay what is wanting to make up the court-fee which ought to have been paid at first on such probate or letters, he shall forfeit the sum of one thousand rupees and also a further sum at the rate of ten rupees per cent. on the amount of the sum wanting to make up the proper court-fee.

Notice of applications for probate or letters of administration to be given to Revenue authorities, and procedure thereon.

2 19-H. (1) Where an application for probate or letters of administration is made to any Court other than a High Court, the Court shall cause notice³ of the application to be given to the Collector.

(2) Where such an application as aforesaid is made to a High Court, the High Court shall cause notice of the application to be given to the Chief Controlling Revenue Authority [for the local area in which the High Court is situated].⁴

(3) The Collector within the local limits of whose revenue-jurisdiction the property of the deceased or any part thereof is, may at any time inspect or cause to be inspected, and take or cause to be taken copies of, the record of any case in which application for probate or letters of administration has been made ; and if, on such inspection or otherwise, he is of opinion that the petitioner has under-estimated the

Sec. 19 G.—As to recovery of penalties or for forfeitures under S. 19-G. *see infra*, S. 19-J.

¹ The words and figures "after the first day of April 1875, or" were repealed by the Repealing and Amending Act (XII of 1861).

19-H.—² Sections 19-H, 19-I, 19-J. & 19-K were inserted by the Court fees Amendment Act, 1899 (XI of 1899), S. 2.

³ For form of notice under this clause prescribed by the Chief Court of Lower Burma, *see* Burma Gazette, 1902, Pt. IV, p. 625.

⁴ Substituted for the words "of the Provinces" by S. 3 (2) of the Court-fees Amendment

Act (X of 1901)

Sec. 19-H.—The grant of probate to petitioner cannot be delayed on account of the Collector's omission in making the motion under S. 19 H (4). 40 I. C. 576 (Cal.). As to procedure under the section *see* 6 C. W. N. 898. The valuation fixed by the Judge after objection made by Collector is final and no appeal lies therefrom. 78 I. C. 901 = 1925 Cal. 357. A proceeding under S. 19-H merely decides a revenue dispute between the Collector and the holder of probate. The Court has no power to award costs in such a proceeding. 50 C. 239 = 1923 Cal. 406.

alue of the property of the deceased, the Collector may, if he thinks fit, require the attendance of the petitioner (either in person or by agent) and take evidence and inquire into the matter in such manner as he may think fit, and, if he is still of opinion that the value of the property has been under-estimated, may require the petitioner to amend the valuation.

(4) If the petitioner does not amend the valuation to the satisfaction of the Collector, the Collector may move the Court before which the application for probate or letters of administration was made, to hold an inquiry into the true value of the property :

Provided that no such motion shall be made after the expiration of six months from the date of the exhibition of the inventory required by section 277 of the Indian Succession Act, 1865, or, as the case may be, by section 98 of the Probate and Administration Act, 1881.

(5) The Court, when so moved as aforesaid, shall hold, or cause to be held, an inquiry accordingly, and shall record a finding as to the true value, as near as may be, at which the property of the deceased should have been estimated. The Collector shall be deemed to be a party to the inquiry.

(6) For the purposes of any such inquiry, the Court or person authorized by the Court to hold the inquiry may examine the petitioner for probate or letters of administration on oath (whether in person or by commission), and may take such further evidence as may be produced to prove the true value of the property. The person authorized as aforesaid to hold the inquiry shall return to the Court the evidence taken by him and report the result of the inquiry, and such report and the evidence so taken shall be evidence in the proceeding, and the Court may record a finding in accordance with the report, unless it is satisfied that it is erroneous.

(7) The finding of the Court recorded under sub-section (5) shall be final, but shall not bar the entertainment and disposal by the Chief Controlling Revenue authority of any application under section 19-E.

(8) The Local Government may make rules for the guidance of Collectors in the exercise of the powers conferred by sub-section (3).

119-I. (1) No order entitling the petitioner to the grant of probate or letters of administration shall be made upon an application for such grant until the petitioner has filed in the Court a valuation of the property in the form set forth in the third schedule, and the Court is satisfied that the fee mentioned in No. 11 of the first schedule has been paid on such valuation.

(2) The grant of probate or letters of administration shall not be delayed by reason of any motion made by the Collector under section 19-H, sub-section (4).

119-J. (1) Any excess fee found to be payable on an inquiry held under section 19-H, sub-section (6), and any penalty or forfeiture under section 19-G, may, on the certificate of the Chief Controlling Revenue Authority, be recovered from the executor or

Sec. 19-I.—See 1 L. B. R. 228; 26 C. 404; 26 C. 407. Court fee payable on the value as on the date of the application and subsequent alteration of law, enhancing the Court-fee does not affect the petitioner's rights. 3 J. C. L. J. 209=81 I. C. 751=1024 Cal. 987. The practice in Calcutta is to pay Court-fees to the Registrar whose certificate should be produced in court to obtain the grant. 26 C. 404; 26 C. 407; L. B. R. 1893—1900, 623. In subordinate Courts the fees must be paid to the Court clerk who will certify the amount to the Court. L. B. R. (1893—1900) 623. A Court will hear the application for Probate or Letters of Administration where the applicant has not paid but has undertaken to pay whatever fees would be found due. 14 O. C. 14=8 I. C. 695. On this section see also 31 I. C. 460.

On a Petition for letters of administration for part of property Court-fee on the value of the whole property cannot be levied. 7 Lah. L. J. 288=26 Punj. L. R. 608=90 I. C. 620=1925 Lah. 493. The section does not apply to Provident Fund money. 1925 Nag. 178 (1)=82 I. C. 128.

Secs. 19-I and J.—¹Inserted by S. 2 of the Court fees Amendment Act (XI of 1899).

Sec. 19-J.—Where S. 19-J is properly applicable, the petitioner is entirely in the hands of the Chief Controlling Revenue authority who is at liberty to refuse to stamp probate till the penalty has been paid. 43 C. 230=20 C. W. N. 504=31 I. C. 460=22 C. L. J. 375. Therefore the question of recovery by summary process or by suit, of the penalty imposed cannot arise. (*Ibid.*)

administrator as if it were an arrear of land-revenue by any Collector in any part of British India.

(2) The Chief Controlling Revenue-authority may remit the whole or any part of any such penalty or forfeiture as aforesaid, or any part of any penalty under section 19-E or of any court-fee under section 19-E in excess of the full court-fee which ought to have been paid.

Sections 6 and 28 not to apply to probate or letters of administration.

1 19-K. Nothing in section 6 or section 28 shall apply to probates or letters of administration.

CHAPTER IV.

PROCESS-FEES.

Rules as to cost of processes

20. The High Court shall, as soon as may be, make rules as to the following matters :—

(i) The fees chargeable for serving and executing processes issued by such Court in its appellate jurisdiction, and by the other Civil and Revenue Courts established within the local limits of such jurisdiction ;

(ii) the fees chargeable for serving and executing processes issued by the Criminal Courts established within such limits in the case of offences other than offences for which police officers may arrest without a warrant ; and

(iii) the remuneration of the peons and all other persons employed by leave of a Court in the service or execution of processes.

The High Court may from time to time alter and add to the rules so made.

All such rules, alterations and additions shall, after being confirmed by the

Confirmation and publication of rules.

Local Government | * * * * *
* * * * *
*]2 be published in the local official Gazette, and shall thereupon have the force of law.

Until such rules shall be so made and published, the fees now leviable for serving and executing processes shall continue to be levied, and shall be deemed to be fees leviable under this Act.

21. A table in the English and Vernacular languages, showing the fees chargeable for such service and execution, shall be exposed to view in a conspicuous part of each Court.

Tables of process fees.
Number of peons in District and Subordinate Courts.

22. Subject to rules to be made by the High Court and approved by the Local Government [* * *

every District Judge and every Magistrate of a District shall fix, and may from time to time alter, the number of peons necessary to be employed for the service and execution of processes issued out of his Court and each of the Courts subordinate thereto,

and for the purposes of this section, every Court of Small Causes established under

Number of peons in Municipal Small Cause Court.

Act No. XI of 1865 (*to Consolidate and amend the law relating to Courts of Small Causes beyond the local limits of the ordinary original civil jurisdiction of the High Courts of Judicature*)⁴ shall be deemed to be subordinate to the Court of the District Judge.

Sec 19 K.—¹ Inserted by S. 2 of Act XI of 1899.

Sec. 20.—A commission issued to an Ameen to make local investigation, is not a process within S. 20. 17 C. 281. The provisions of S. 93, C. P. Code (now O 48, R. 1) do not appear to give a Court any power to depart from the Rules of the High Court on the subject of the levy of process fees or to remit these fees. 26 C. 124.

² The words " and sanctioned by the Governor-General of India in Council " were omitted by Act XXXVIII of 1920, Sch. II.

³ Sec. 22.—The words " and the Governor-General of India in Council " were omitted by Act XXXVIII of 1920, Sch. II.

⁴ The reference to Act XI of 1865 should now be read as to the Provincial Small Causes Courts Act (IX of 1887), S. 2 (2) and (3).

123. Subject to rules² to be framed by the Chief Controlling Revenue-Authority and approved by the Local Government [* * *]³ every officer performing the functions of a Collector of a District shall fix, and may from time to time alter, the number of peons necessary to be employed for the service and execution of processes issued out of his Court or the Courts subordinate to him.

24. [Process served under this Charter to be held to be process within meaning of Code of Civil Procedure.] Rep. by the Repealing and Amending Act (XII of 1891).

CHAPTER V.

OF THE MODE OF LEVYING FEES.

25. All fees referred to in section 3 or chargeable under this Act shall be collected by stamps.

26. The stamps used to denote any fees chargeable under this Act shall be impressed or adhesive, or partly impressed and partly adhesive, as the [Local Government]⁴ may, by notification in the [Local Official Gazette]⁴ from time to time direct.⁵

27. The Local Government may, from time to time, make rules for regulating—

- ⁵(a) the supply of stamps to be used under this Act ;
- (b) the number of stamps to be used for denoting any fee chargeable under this Act ;
- (c) the renewal of damaged or spoiled stamps ; and
- (d) the keeping accounts of all stamps used under this Act ;

Provided that, in the case of stamps used under section 3 in a High Court, such rules shall be made with the concurrence of the Chief Justice of such Court.

All such rules shall be published in the local official Gazette, and shall thereupon have the force of law.

28. No document which ought to bear a stamp under this Act shall be of any validity, unless and until it is properly stamped.

¹ Sec. 23.—In the Punjab, S. 23 is repealed—see the Punjab Land-revenue Act (XVII of 1887) P. and N. W. Code.

² For rules framed under the powers conferred by this section in—

Madras see Mad R. and O.,

Central Provinces see Cen. Prov. Gazette, 1905, Pt. III, p. 570.

Assam see Assam Rules Manual.

As to Burma, see s. 41 of the Lower Burma Courts Act (VI of 1900).

³The words "and the Governor-General in Council of India" were omitted by Act XXXVIII of 1920, Sch.

Sec. 25.—Whether several stamps may be used to make up the full amount chargeable. See 16 W. R. 152 ; 12 W. R. C. R. 449 ; 17 W. R. C. R. 220.

Sec. 26.—The words "Local Government" and "Local Official Gazette" were substituted respectively for the words "Governor-General of India in Council" and "Gazette of India" by Act XXXVIII of 1920, Sch.

⁵ For rules as to levy of court-fees by adhesive and impressed stamps, see Gazette of India, 1883, Pt. I, p. 189.

Sec. 27.—Stamps impressed with "for use in

the High Court only" are not invalidated for use in subordinate Courts. 8 Pat. L. T. 33 = 97 I. C. 822 = A. I. R. 1926 Pat. 408.

Sec. 28. SCOPE OF THE SECTION.—The specific provisions of the section are not cut down either by Ss. 9 to 11 of this Act or by O. VII, R. 11 (Old Sec. 54) of C. P. Code, 12 A. 129 (F. B.). The mistake or inadvertence referred to in this section is that of the Court and its officers and not of the party. (1901) A. W. N. 21 ; 12 A. 129 ; 20 M. 319. On this point see also 4 A. L. J. 636 = 29 A. 749. Where an appeal is not properly stamped, whole appeal will not be dismissed but amount covered by court-fee will be decreed. 96 I. C. 135 = A. I. R. 1926 Lah. 558. Even Revenue officer has the powers under S. 28 to direct the payment of Court-fees in revision. 30 I. C. 862 (2) = 22 C. L. J. 57. But this power must be exercised before making the final decision in the case. 7 A. 528 = 5 A. W. N. 140. (But see the judgment of Mahmood, J. *contra* in the same case). Where a plaint is returned by one Court for presentation to another Court the latter Court should give credit to the stamp on the plaint. 35 M. 567 = 21 M. L. J. 533 = 10 I. C. 2 ; 1. 29 Bom. L. R. 280 ; see also 8 B. 313 ; 8 B. 380. Where a plaint with insufficient court-fee stamp is presented, opportunity must be given to the party to pay the proper stamp, 106 I. C. 817.

But, if any such document is through mistake or inadvertence received, filed or used in any Court or office without being properly stamped, the presiding Judge or the head of the office, as the case may be, or, in the case of a High Court, any Judge of such Court, may, if he thinks fit, order that such document be stamped as he may direct; and, on such document being stamped accordingly, the same and every proceeding relative thereto shall be as valid as if it had been properly stamped in the first instance.

29. Where any such document is amended in order merely to correct a mistake and to make it conform to the original intention of the parties, it shall not be necessary to impose a fresh stamp.

Amended document.

30. No document requiring a stamp under this Act shall be filed or acted upon in any proceeding in any Court or office until the stamp has been cancelled.

Cancellation of stamp.

Such officer as the Court or the head of the office may from time to time appoint shall, on receiving any such document, forthwith effect such cancellation by punching out the figure-head so as to leave the amount designated on the stamp untouched, and the part removed by punching shall be burnt or otherwise destroyed.

CHAPTER VI.

MISCELLANEOUS.

31. (i) Whenever an application or petition containing a complaint or charge of an offence, other than an offence for which police-officers may arrest without warrant, is presented to a Criminal Court, the Court, if it convict the accused person, shall, in addition to the penalty imposed upon him, order him to repay to the complainant the fee paid on such application or petition.

Repayment of fees paid on applications to Criminal Courts.

LIMITATION.—Doubts as to whether payment of deficit Court-fee after limitation time would save limitation, have been set at rest by the enactment of S. 149 of C. P. Code. Under that section it is in the discretion of the Court to exercise the powers. The Court will not exercise the discretion unless it is satisfied that some ground exists. 1 Lah. 234. Where a deficiency in Court-fee is made good within the time allowed by the Court but beyond the period of limitation prescribed for the suit, the suit is not barred by time. 23 I. C. 408. Plaint and memorandum of appeal insufficiently stamped—Second appeal to High Court properly stamped—High Court has power, on levying the additional stamp duty on the plaint and memorandum of appeal, to hear the second appeal as there was an existing suit at the time the period of limitation expired and the provisions of S. 28 were applicable. 24 M. 331; 25 M. 380 = 11 M. L. J. 119. *See also* 18 M. 29 = 1 M. L. J. 598; 2 A. 682 (F. B.); 29 A. 749; 2 C. L. J. 68. Payment of Court-fee after the period of limitation but during the enquiry into pauperism of the plaintiff, saves limitation. 2 A. 241; 24 M. 493. *See also* 22 B. 849; 26 C. 592 (Court-fee paid after rejection of pauper application).

Sec. 29.—A party who filed a suit in a Revenue Court which referred him to the Civil Court regarding a portion of the claim is not exempted under S. 29 from paying the usual Court-fees. 132 P. R. 1892.

Sec. 30.—*See* 35 M. 567 = 21 M. L. J. 533 = 10 I. C. 201 = 10 M. L. J. 29 and 29 Bom. L. R. 280 cited under S. 23 (Stamp on plaint returned for presentation to proper court).

Sec. 31.—As to applicability of section, *see* 7 M. 345 = 1 Weir 713; 1 Weir 721. *See also* 2 Bur. L. J. 37 = 1923 Rang 245; 1923 All. 86. Where in a non-cognisable case, conviction is for cognisable offence, no order under section can be passed. Rat. 397 = Cr. Fg 56 of 1888; 1 Weir 721; 24 M. 305. Provisions of the section are obligatory. L.B.R. 1872-1892, 595; 24 M. 305 = 2 Weir 722; 1 Weir 723. Expenses incurred in the prosecution other than court and process-fees can be awarded only out of the fine levied from the accused under S. 545 of the Cr. P. Code. L. B. R. 1872-1892, 595; 24 M. 305 = 2 Weir 722; 1 Weir 723. *See also* 1 L. B. R. 209. The fee ordered to be paid is an integral part of the sentence and must be treated as a fine imposed by the Court. 5 M. H. C. App 28; 2 Weir 724. But *see contra* 1 Weir 724 (No imprisonment in default of payment). *See also* 26 M. 421 = 2 Weir 488; 20 C. 687. Under the section only recovery is to be as if they were fines. 26 M. 421 = 2 Weir 488. *See also* 1925 Mad. 136 = 47 M.L.J. 355. The making of an order under S. 31 does not amount to an enhancement of sentence and an appellate Court can order the accused to pay the complainant's court fees. 47 M. 914 = 47 M.L.J. 355 = 20 L. W. 293 = 35 M. L. T. (H. C.) 39 = (1924) M. W. N. 489 = 25 Cr. L. J. 1213 = 82 I. C. 141 (Old rulings to the contrary are not now good law). *See also* 1925 Mad. 136 = 47 M. L. J. 305.

APPEAL AND REVISION.—The appellate court cannot set aside an order passed by a criminal court under S. 31. 5 M. L. T. 223 = 11 Cr. L. J. 194 = 4 I. C. 1130. But *see also* 1923 All. 86 *infra*. If under S. 31 the order directing payment to complainant is not proper, it can be

(ii) In the case mentioned in section 18, the Court, if it convict the accused person, shall, in addition to the penalty imposed upon him, order him to repay to the complainant the fee, if any, paid by the latter for the examination.

(iii) When the complainant has paid fees for serving processes in either of the cases mentioned in the first and second paragraphs of this section, the Court, if it convict the accused person, shall, in addition to the penalty imposed upon him, order him to repay such fees to the complainant.

(iv) All fees ordered to be repaid under this section may be recovered as if they were fines imposed by the Court.

32. [*Amendment of Act VIII of 1859 and Act IX of 1869.*] *Rep. by the Repealing and Amending Act, 1891 (XII of 1891).*

33. Whenever the filing or exhibition in a Criminal Court of a document in respect of which the proper fee has not been paid is, in the opinion of the presiding Judge, necessary to prevent a failure of justice, nothing contained in section 4 or section 6 shall be deemed to prohibit such filing or exhibition.

Admission in criminal cases of documents for which proper fee has not been paid.

1 34. (1) The Local Government may from time to time make rules for regulating the sale of stamps to be used under this Act, the persons by whom alone such sale is to be conducted, and the duties and remuneration of such persons.

Sale of stamps.

(2) All such rules shall be published in the local official Gazette, and shall thereupon have the force of law.

(3) Any person appointed to sell stamps who disobeys any rule made under this section, and any person not so appointed who sells or offers for sale any stamp, shall be punished with imprisonment for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both.

35. The [Local Government]² may, from time to time by notification³ in the [Local Official Gazette]² reduce or remit,⁴ in the whole or in any part of [the territories under its administration]² all or any of the fees mentioned in the first and second schedules to this Act annexed,

Power to reduce or remit fees.

and may in like manner cancel or vary such order.

36. Nothing in Chapters II and V of this Act applies to the commission payable to the Accountant-General of the High Court at Fort William, or to the fees which any officer of a High Court is allowed to receive in addition to a fixed salary.

Saving of fees to certain officers of High Courts.

corrected in appeal or revision. L. R. 3 A. 187 (Cr.) = 1923 All. 86.

Sec. 34.—¹ This section was substituted for the original section by the Repealing and Amending Act (XII of 1891).

Sec. 35.—² The words "Local Government," "Local Official Gazette" and "the territories under its administration" were substituted respectively for the words "Governor-General of India in Council," "Gazette of India" and "British India" by Act XXXVIII of 1920, Sch.

³ See Gen. R. and O.

⁴ For remission of duty payable under the Act, in respect of Indian probates, letters of administration or succession certificates on the share or other interest of a deceased member of a com-

pany formed under Act VI of 1882, provided that the said share or interest was registered in a branch register in the United Kingdom under Act IV of 1900, and that such member was at the date of his decease domiciled elsewhere than in India, see Notification No. 881 L. R., Gazette of India, 1900, Pt. I, p. 100.

For remission of duty on applications for suspension or remission of land-revenue, see Notification No. 4385 L. R., dated 19th August, 1901, Gazette of India, 1901, Pt. I, p. 608.

For remission of fees on applications for issue of permits for transport of country spirits, see Notification No. 6260 L. R., dated 12th December, 1901, Gazette of India, 1901, Pt. I, p. 1030.

SCHEDULE I. AD VALOREM FEES.

Number.		Proper Fee.
1. ¹ Plaint [written statement pleading a set-off or counter-claim] ² or memorandum of appeal (not otherwise provided for in this Act) or of cross-objection presented to any Civil or Revenue Court except those mentioned in section 3.	When the amount or value of the subject-matter in dispute does not exceed five rupees.	Six annas.
	When such amount or value exceeds five rupees, for every five rupees, or part thereof, in excess of five rupees, up to one hundred rupees.	Do.

Art. I.—¹ To ascertain the proper fee leviable on the institution of a suit, *see* the table annexed to this schedule

² These words were inserted by S. 155 and the 4th Schedule of the Code of Civil Procedure Act V of 1908.

SCOPE OF SCHEDULE I.—Schedule is supplementary and not alternative to S. 7. 6 N.L.R. 164 = 8 I. C. 1125. The proviso to Art. I is of general application and is not confined to plaints and memoranda of appeals under Art. I only. 3 A. 108, 112; 29 C. 140. Multifarious suits under S. 17 are also subject to it. 3 A. 108.

Art. I. APPLICABILITY.—Art. I applies only to those cases which are not otherwise specially provided for under the Act. 61 P. R. 1910 = 47 I. C. 992. There is no particular section in the Court-fees Act for assessment of fair rent and so *ad valorem* fee has to be paid. 6 A. 17 = 100 I. C. 913 = 8 Pat. L. T. 366 = A. I. R. 1927 Pat. 123. An application for restitution under S. 144, C. P. C., may be stamped as a mere application. *Ad valorem* fee is not necessary. 21 C. W. N. 544. But an appeal against an order passed under S. 144, C. P. C., is an appeal against a decree and an *ad valorem* stamp duty is payable thereon. 82 I. C. 321 = 22 A. L. J. 881. (But *see also* under Sch. II, Art. 1). So also on an appeal against an order under O. 21, R. 50 (2). 10 Bur. L. T. 42 = 35 I. C. 429; also on an appeal against an order under O. 21, R. 99. 10 B. 238; 8 C. 720. *See also* 29 M. 172; 4 M. 221. An appeal from an order under S. 144, C. P. C., does not, according to the practice of Lahore High Court, require *ad valorem* fee but a court-fee stamp of Rs. 4 is sufficient. 103 I. C. 657 = A. I. R. 1927 Lah. 635. Regarding court-fees in appeals in land acquisition cases, *see* A. I. R. 1927 Cal. 45 = 97 I. C. 140.

COURT-FEES ON SET-OFF—Where the defendant claims right of set-off, he has to pay *ad valorem* court-fee on the same, 45 A. 218 = 20 A. L. J. 1005 = 1923 A. 118. *See also* 8 A. 396; 13 B. 672; 15 M. 29. In a suit for accounts and to recover moneys of a dissolved partnership, the defendants' claim for a decree on accounts is not a counter-claim. No court fee need be paid thereon until the amount has been ascertained. 27 I. C. 316 = 8 S. L. R. 122; 27 I. C. 320 = 8 S. L. R. 124. Pending a suit, the disputes were referred to arbitration out of court and it was found that money was payable to defendant. The court could

direct the defendant to plead the award as an adjustment and claim the amount awarded, paying court fee thereon. 18 S. L. R. 111 = 88 I. C. 61 (2) = 1925 Sind 266.

CROSS-OBJECTIONS.—A memorandum of cross-objections must bear court fees *ad valorem* on the value of the subject-matter in dispute. 46 C. 160 = 45 I. C. 939 = 27 C. L. J. 443; 15 A. L. J. 886. Petition stating reasons on which the respondents supported the decree, does not amount to cross-objection for which *ad valorem* fee is payable. 44 A. 577 = 1922 All. 280. Nor mere criticism of judgment. 1 P. 258 = 1922 P. 483 (2); 25 O. C. 275 = 1923 Oudh 44 (1). In the case of cross-objections relating to possession of land, *ad valorem* fee is payable on its value and not on the basis calculated under S. 7 (v). L. R. 5 A. 712 = 22 A. L. J. 911. This is so even if the party could have raised the question in an appeal stamped under Art. 17 of Sch. II as the latter Article does not refer to cross-objection. 3 P. L. J. 197 = 45 I. C. 568 = 4 P. I. W. 368. *See also* 40 A. 93. On a cross-objection as to the finding of the Lower Court on a portion of sale consideration being not for legal necessity, court-fees should be paid on the amount held to be not for legal necessity. 45 A. 537 = 1924 All. 175 = 83 I. C. 780. *See also* 40 A. 93 = 43 I. C. 179 = 15 A. L. J. 886. A respondent who files a memorandum of objections cannot claim to have court-fees reduced simply because the appellant has paid more than what he should have paid. 46 C. 160 = 45 I. C. 939 = 27 C. L. J. 443. A memo. of cross-objections filed in the High Court on the question of costs only does not fall under Art. 1, Sch. I, but may be treated as a petition under Art. 1 (d) of Sch. II and a court-fee of Rs. 2 is leviable thereon. 64 I. C. 606 = 25 C. W. N. 934. But *see contra* 2 Rang. 637 = 1925 Rang. 145; 8 I. L. J. 434 = 98 I. C. 272 = A. I. R. 1926 Lah. 645.

THE AMOUNT OR VALUE OF THE SUBJECT-MATTER IN DISPUTE.—S. 7 prescribes the value that shall remain unchanged in all stages of a case. Once the value of the relief is ascertained for the purposes of the plaint, the 1st schedule rates the relief at the same value for the purposes of the appeal. 6 N.L.R. 164 = 8 I. C. 1125. *See also* 25 P. R. 1916 = 32 I. C. 121 = 16 P. W. R. 1916.

ILLUSTRATIVE CASES.—The value of an appeal is not in all cases the value of the suit as originally filed but the value of the relief granted

Number.		Proper Fee.
1. Complaint, etc.—(Contd.)	When such amount or value exceeds one hundred rupees, for every ten rupees, or part thereof, in excess of one hundred rupees, up to one thousand rupees.	Twelve annas.

which is sought to be got rid of. 45 M. 246 = 41 M. L. J. 587 = 68 I. C. 444 = 1922 Mad. 211. Where a decree for possession is given to the plaintiff conditional on his paying a certain amount to the defendant an appeal by him against the condition must be valued *ad valorem* on the amount he was asked to pay. (*Ibid.*) 59 I. C. 667 = 21 P. W. R. 1921; (1926) M. W. N. 169 (2) = 92 I. C. 624 = A. I. R. 1926 Mad 225; 108 I. C. 379 (2) = 10 Lah. L. J. 55. Where the plaintiff's suit for possession was decreed on condition of the plaintiff paying off the encumbrances on the property, an appeal against the condition should bear an *ad valorem* court fee on the value of the encumbrance. 5 P. L. J. 455 = 1 P. L. T. 73 = 57 I. C. 481. See also 59 I. C. 667. Where in the decree of the Lower Court a charge is created over the lands purchased by the defendants for payment of a certain amount to the plaintiff and the defendants appeal to remove the charge, they should pay *ad valorem* court-fee on the value of the properties or on the decretal amount which ever is less. 5 Pat. 721 = 8 Pat. L. T. 284 = A. I. R. 1927 Pat. 46; 7 Lah. 215 = 27 Punj. L. R. 412 = 96 I. C. 473 = A. I. R. 1926 Lah. 408 (Appeal from the decree rendering a property liable for the decree amounts). Where a decree gives the plaintiff a partial relief, the plaintiff-appellant is bound to pay court fee on the difference between the value of the relief he claims and that granted by the decree appealed from. 19 C. 272. See also 6 P. 17 = 100 I. C. 913 = 8 Pat. L. T. 366 = A. I. R. 1927 Pat. 123. In an appeal from instalment decree court-fee must be paid on the difference to the appellant between getting his money on the date of the decree and getting it by instalments as ordered. 12 P. R. 1915 = 24 I. C. 931. See also 19 C. 272. In an appeal against a decree for redemption or foreclosure claiming a higher amount than that fixed by the court, court-fee should be paid on the excess amount claimed. 5 P. R. 1911 = 48 P. L. R. 1911 = 9 I. C. 676; 74 I. C. 88 (1) = 1924 Oudh 170; 22 I. C. 642 = 16 O. C. 354; 29 I. C. 609. See also the cases noted under S. 7 cl. (ix) on the point. In an appeal against a pre-emption decree, seeking reduction of the amount ordered by the first court, *ad valorem* fee should be paid on the difference between the amount ordered to be paid and the amount admitted. 76 P. R. 1913 = 19 I. C. 961. An appeal seeking to remove a charge created on property by a decree should bear *ad valorem* court-fee on the amount of the charge. 11 P. R. 1916 = 33 I. C. 138 = 59 P. W. R. 1916. Where the defendants' plea in a suit for possession that the plaintiff cannot get possession without payment of her dower debt, was rejected by the lower Court and the suit decreed, and the defendant appealed, *held*, that she was not bound to pay any court-fee

on the dower amount and the court could grant a decree to plaintiffs conditional on payment of dower debt to defendant. 36 All. 322 = 25 I. C. 395 = 12 A. L. J. 481. Value of decree appealed from decides court-fees. 48 M. 652 = 47 M. L. J. 919 = 1925 Mad. 323. In all original appeals, the court-fees should be levied on the sum due at the date of the original decree and in all second appeals, it should be levied on the sum due at the date of the decree of the Lower Appellate Court. 3 P. L. J. 443 = 4 P. L. W. 221 = 44 I. C. 50.

COURT FEES IN PARTICULAR CASES—AC-COUNT SUITS.—In a suit for a certain amount as damages, deducting a certain sum as the price of goods, *ad valorem* court fee is payable on the amount actually claimed. 61 P. R. 1919 = 47 I. C. 992. Ten rupees stamp is sufficient for an appeal in a preliminary decree for dissolution of partnership dealing with certain items disallowed, as such disallowance is only incidental to the main relief. 1 Lah. 6 = 6 P. W. R. 1920 = 57 I. C. 185 = 19 P. L. R. 1920.

MORTGAGE SUITS.—Where the plaintiff in a mortgage suit for sale appeals against the decree for sale, in order to establish the liability to the debt of certain property exonerated by the Lower Court, court-fee is payable on the decree amount but not exceeding the market-value of the property. 16 M. L. J. 458 = 30 M. 96 = 1 M. L. T. 311 (F. B.). See also 37 C. 914, 33 A. 20. So also where the defendant appeals on the ground that certain property was not liable under the mortgage. 10 M. 187. See also 5 O. L. J. 663 = 43 I. C. 535. Where a mortgage decree for sale declares the separate liabilities of different properties for different sums of money, the court-fee on appeal by one of the defendants whose property had been held liable for a specific sum of money, must be calculated on the sum for which the property had been held liable. 35 A. 92 = 18 I. C. 577 = 11 A. L. J. 33. Art. I of Sch I applies to appeals in mortgage suits and court-fee is payable on the subject-matter in dispute in the appeal and not on the principal money secured by the mortgage. 30 A. 547 = 5 A. L. J. 531. See also 47 All. 926 = 23 A. L. J. 853 = 88 I. C. 888 = 1925 All. 714; 1 Lah. 234 = 3 Lah. L. J. 370; 29 A. 171 = 107 I. C. 671 (1). On this point, see also the cases noted under S. 7, cl. (ix). Where the amount due could be ascertained from the judgment and decree appealed from that should be the value of the appeal or cross-objection and future interest need not be taken into account. 36 A. 40 = 21 I. C. 723 = 11 A. L. J. 1016. See also 3 P. L. J. 443 = 44 I. C. 50 = 1918 Pat. 264 (C. W. N.); 3 P. L. T. 813 = 1923 P. 28; 6 P. L. J. 676 = 3 P. L. T. 310 = 1922 Pat. 73 (C. W. N.) = 1922 P. 386. But if any future interest is determined by the trial court and is entered in the decree, additional

Number.		Proper Fee.
1. Plaintiff, etc.—(Contd.)	When such amount or value exceeds one thousand rupees, for every one hundred rupees, or part thereof, in excess of one thousand rupees, up to five thousand rupees.	Five rupees.
	When such amount or value exceeds five thousand rupees, for every two hundred and fifty rupees, or part thereof, in excess of five thousand rupees, up to ten thousand rupees.	Ten rupees.
	When such amount or value exceeds ten thousand rupees, for every five hundred rupees, or part thereof, in excess of ten thousand rupees, up to twenty thousand rupees.	Fifteen rupees.
	When such amount or value exceeds twenty thousand rupees, for every one thousand rupees, or part thereof, in excess of twenty thousand rupees, up to thirty thousand rupees.	Twenty rupees.
	When such amount or value exceeds thirty thousand rupees, for every two thousand rupees, or part thereof, in excess of thirty thousand rupees, up to fifty thousand rupees.	Do.
	When such amount or value exceeds fifty thousand rupees, for every five thousand rupees, or part thereof, in excess of fifty thousand rupees :	Twenty five rupees.
	Provided that the maximum fee leviable on a plaint or memorandum of appeal shall be three thousand rupees.	..

court-fee on such interest has to be paid. 3 P. L. T. 813=1923 P. 28; see also 1 P. 19=3 P. L. T. 790=1922 P. 387 (2); 104 I. C. 391=A. I. R. 1927 Sindh 251. Appeal against a mortgage decree on the ground that a condition of priority should be removed requires an *ad valorem* fee. 4 P. L. J. 323=51 I. C. 786. *Ad valorem* Court-fees must be paid on an appeal from an order refusing to make a personal decree under O. 34, R. 6, C.P.C. 40 A 553=47 I. C. 562=16 A. L. J. 437. So also on an appeal against an order passing such personal decree. 1924 A. 292. In partition suits whether the plaintiff is in joint possession or out of possession the plaint or memorandum of appeal must bear *ad valorem* court-fees on the value of share. Art. 17 (6), Sch. II, will not apply. 73 I. C. 788. See also the cases noted under S. 7, Cl. (iv) (b).

APPEALS IN PRE-EMPTION SUITS.—Where one of the grounds of appeal in a suit for pre-emption, is that the right to pre-empt has or has not been established as the case may be, the subject-matter of the dispute continues to be the right of pre-emption and its value must be determined with reference to S. 7, cls. (v) and (vi). 6 A. 488=A. W. N. (1884), 179. But when the question in appeal relates solely to the amount to be

paid by the pre-emptor, the court-fee must be calculated on the difference between the amounts allowed as the sale price and that claimed or admitted by the party. (*Ibid.*)

MESNE PROFITS.—No court-fee is payable on future mesne profits in suit or in the appeal from the preliminary decree. 20 M. L. J. 98=5 I. C. 880; 21 M. 371; 13 C. W. N. 815. An appeal from a final decree under O. 20, R. 12 (2), C. P. C., in respect of subsequent mesne profits is chargeable with *ad valorem* fee. 45 M. 280=42 M. L. J. 184=1923 M. 19. Where the appellants have paid full court-fee on the claim for mesne profits, in appeal against the preliminary decree, they need not pay any additional fee on their appeal against the mesne profits ascertained subsequent to their original appeal. 15 I. C. 572=16 C. L. J. 564. See also 3 P. 875=1924 P. 694. Where several defendants who could have preferred a single appeal prefer separate appeals against a decree, each must pay full court-fee on his appeal. 48 I. C. 424=91 P. R. 1918. Two second appeals by the same party against two decrees passed in the appeals filed by both the parties against a mortgage decree, must be stamped separately and cannot be consolidated. 43 A. 56=58 I. C. 230=18 A. L. J. 894.

Number.		Proper Fee.
2. Plaint [. . .] ¹ in a suit for possession under [the Specific Relief Act, 1877, Sec. 9]. ²	.. .. .	A fee of one half the amount prescribed in the foregoing scale.
3. [Repealed by Act VIII of 1871].		
4. Application for review of judgment, ³ if presented on or after the ninetieth day from the date of the decree.	.. .. .	The fee leviable on the plaint or memorandum of appeal.
5. Application for review of judgment, ⁴ if presented before the ninetieth day from the date of the decree.	.. .. .	One-half of the fee leviable on the plaint or memorandum of appeal.
6. Copy or translation of a judgment or order not being, or having the force of, a decree.	When such judgment or order is passed by any Civil Court other than a High Court, or by the presiding Officer of any Revenue Court or Office, or by any other Judicial or Executive Authority— (a) If the amount or value of the subject-matter is fifty or less than fifty rupees. (b) If such amount or value exceeds fifty rupees. When such judgment or order is passed by a High Court.	Four annas. Eight annas. One rupee.

Art. 2.—See Bom. P. J. 1894, 346.

¹ The words " or memorandum of appeal " were repealed by Act XX of 1870.

² The words " the Specific Relief Act, 1877, section 9 " were substituted for the words " Act No. XIV of 1859 " (to provide for the limitation of suits) by Act XII of 1891.

Art. 4.—³As to application for review of judgment, see the Code of Civil Procedure, 1908. The decision of a Court dismissing an appeal under O. 41, R. 11, C.P.C., is a judgment and an application for review of the decision comes within the Article. 30 C.W.N. 334=93 I. C. 909 (2)=A. I. R. 1926 Cal. 638.

Upon an application for review, no matter what may be the actual relief sought, the court-fee payable is the fee actually leviable upon the plaint or memorandum of appeal upon which the judgment, of which review is sought was passed. 20 I. C. 3=254 P. L. R. 1913; 31 A. 294=6 A. L. J. 215=1 I. C. 209. The fee would be the same whether the application affects the whole or part of a decree. 31 A. 294=1 I. C. 209. See also 6 P. L. T. 40=86 I. C. 143=1925 Pat. 368; 11 O. L. J. 339. The word "leviable" is used to provide for an application for review *in forma pauperis*. 31 A. 294=6 A. L. J. 215. On the point, see also 20 A. 410; 91 P. R. 1895. An application for review of the judgment in a second appeal passed before the Court Fees Amendment Act of 1922 was presented after the passing of the Act. *Held*, the court-fee leviable

was that which fell to be levied under the amended Act calculated as if the application for review were a plaint or memorandum of appeal for the relief sought for. 50 M. 488=100 I. C. 72=A. I. R. 1927 Mad. 360=52 M. L. J. 128.

Art. 5.—⁴As to application for review of judgment, see the Code of Civil Procedure, 1908. See 26 O. C. 23=74 I. C. 255; 1924 Oudh 108. In computing the period of 89 days, the applicant cannot deduct the time which may have been spent in obtaining a copy of the judgment. 2 O. C. 302. See also 39 P. R. 1879. Nor the days during which the court is closed for vacation. 9 M. 134; 9 C. P. L. R. 479; see also 39 C. L. J. 344. Application presented on 90th day, 89th day being Sunday must be stamped with full fee under Art. 4. 15 C. L. J. 505=15 I. C. 455. Where after the appeal was dismissed and before the application for review was presented, the court-fee was enhanced, the application is correctly stamped with half the court-fees paid on the memorandum of appeal. 28 C. W. N. 403=39 C. L. J. 222=82 I. C. 297=1924 Cal. 881.

Arts. 6 and 7.—Both articles apply where the subject-matter of the suit has an ascertainable money value. Cases not covered by Arts. 6 and 7 as for instance where there is no ascertainable money value, are provided for by Art. 9 *infra*. Notes of judgment furnished to parties under the Rules of Practice for the guidance of Small Cause Courts are copies of decrees and require a stamp under Art. 7. 6 M. H. C. R. App. xxlii.

Number.		Proper Fee.
7. Copy of a decree or order having the force of a decree.	When such decree or order is made by any Civil Court other than a High Court, or by any Revenue Court— (a) If the amount or value of the subject-matter of the suit wherein such decree or order is made is fifty or less than fifty rupees. (b) If such amount of value exceeds fifty rupees.	Eight annas. One rupee.
8. Copy of any document liable to stamp duty under the Indian Stamp Act, 1879, ¹ when left by any party to a suit or proceeding in place of original withdrawn.	When such decree or order is made by a High Court. (a) When the stamp duty chargeable on the original does not exceed eight annas. (b) In any other case.	Four rupees. The amount of the duty chargeable on the original. Eight annas.
9. Copy of any revenue or judicial proceeding or order not otherwise provided for by this Act, or copy of any account, statement, report or the like, taken out of any Civil or Criminal or Revenue Court or Office, or from the office of any Chief Officer charged with the executive administration of a Division.	For every three hundred and sixty words or fraction of three hundred and sixty words	Do.
10. [Repealed by Act VIII of 1890.]		
11. Probate of a will or letters of administration with or without will annexed.	[When the amount or value of the property in respect of which the grant of probate or letters is made exceeds one thousand rupees, but does not exceed ten thousand rupees.] ³	[Two per centum on such amount or value.] ³

Art. 8.—¹ See now the Indian Stamp Act (II of 1899).

This Article is intended to authorise the levy of 8 annas in the case contemplated under O. 13, R. 9 of the C. P. Code, which deals with the return of admitted documents. 136 P. W. R. (1917)=43 I. C. 383. A copy of a general power of attorney produced in court for verification does not require a court-fee stamp of annas 8 under this Article. (*Ibid.*)

Arts. 11, 12, 12-A.—² These articles were substituted for the original Arts. 11 and 12 by Act VII of 1889, S. 13 (1).

Art. 11.—³ Matters within brackets in columns 2 and 3 of Art. 11 were substituted by VII of 1910.

SCOPE.—The fee prescribed by this Article is only in respect of probates or letters of administration, and not in respect of the application for probate (for which see Art. 1 of Sch. II).

AMOUNT OR VALUE OF THE PROPERTY.—'Value' means market value and the market

value of a mortgaged property is that of the equity of redemption. 6 N. W. P. 214. See also 3 C. 736. The value of an annuity for determining the amount of probate fee payable thereon is the market value and not ten times the annual payment. 1 B. 118. In the case of shares of companies the court fee is chargeable on the values at the date of the application for probate and subsequent changes do not alter the amount of court-fee payable. 5 Bur. L. T. 39=14 I. C. 804. The expression, "the amount or value of the property" signifies the net value obtained by deduction of the debt and expenses from the gross value. 22 C. L. J. 160=30 I. C. 958=20 C. W. N. 501. See also 18 C. W. N. 121=21 I. C. 502=18 C. L. J. 308; 7 Bur. L. T. 272=24 I. C. 793; 1 B. 118; 40 A. 279. But see *contra* 13 B. L. R. App. 24; 24 C. 567. The uncertainty of recovering a debt is no ground for reducing the proportionate duty payable thereon or probate. 24 C. 567. See also 13 B. L. R.

Number		Proper Fee.
11. Probate, etc.—(Contd).	[When such amount or value exceeds ten thousand rupees, but does not exceed fifty thousand rupees.] [When such amount or value exceeds fifty thousand rupees.] [Provided that, when, after the grant of a certificate under the Succession Certificate Act, 1889, or under the Regulation of the Bombay Code No. VIII of 1827, in respect of any property included in an estate, a grant of probate or letters of administration is made in respect of the same estate, the fee payable in respect of the latter grant shall be reduced by the amount of fee paid in respect of the former grant.]	[Two and one half per centum on such amount or value.] [Three per centum on such amount or value.]
¹ 12. Certificate under the Succession Certificate Act, VII of 1889.	In any case	.. Two per centum on the amount or value of any debt or security specified in the certificate under section 8 of the Act, and three per centum on the amount or value of any debt or security to which the certificate is extended under S. 10 of the Act. NOTES.—(1) The amount of a debt is its amount, including interest, on the day on which the inclusion of the debt in the certificate is applied for, so far as such amount can be ascertained.

App. 24. Nor the fact that an item of property is the subject of litigation. 24 M. 241. Where property is not reduced into possession when probate is taken out but the right to recover it is the subject of suit, the valuation of such property by the applicant at less than Rs. 1,000 may be accepted by the Court. 23 C. 577.

PROPERTY OUTSIDE BRITISH INDIA.—Probate duty payable, to be calculated only upon the property which at the date of the death of the testator was in British India. 21 B. 139. But see also 4 C. 725. See also 51 P. R. 1902.

TRUST PROPERTY IS EXEMPT FROM COURT-FEES. 6 Beng. L. R. App. 138 = 15 W. R. 45; 14 Beng. L. R. 184; 11 Beng. L. R. App. 39; 33 Mad. 93. Where married parties held property under the Code Napolan, and one of them died, it was held that one half of the property was chargeable with duty the other h. If being exempted under S. 19-D. 20 C. 575. See also 25 Mad. 515. So also in the case of Letters of Administration granted to a Buddhist Burmese widow. 50 I. C. 545 = 11 Bur. L. T. 258. No duty is leviable a second time where full duty was paid on the

property on the first application. 6 B. L. R. App. 139.

APPEAL.—The court-fee payable on a memorandum of appeal against an order in probate proceedings is governed by Art. I, Sch. II. Therefore an *ad valorem* duty on the value of the estate need not be levied. (1911) 1 M. W. N. 237 = 9 I. C. 538 = 9 M. L. T. 314 = 21 M. L. J. 481. (16 B. 408; 23 C. 723, Foll.) See also 4 C. W. N. 600.

Art. 12.—¹ Substituted by Act VII of 1889, S. 13 (1).

Moneys due under a Ry. Provident Fund are exempt from succession duty and pass on to the nominee of the holder. 92 I. C. 525 = A. I. R. 1926 Nag. 306. If a debt has been partly discharged, duty need be paid only on the amount of the balance of debt still due and not on the whole amount. 19 A. 129. Court-fee should be paid by a Hindu daughter on an application for certificate in succession to mother who succeeded to her husband's properties though duty was paid by the latter on her application. 36 I. C. 125 = 20 C. W. N. 1125.

Number.		Proper Fee.
12. Certificate, etc.— (Contd.)		(2) Whether or not any power with respect to a security specified in a certificate has been conferred under the Act; and where such a power has been so conferred, whether the power is for the receiving of interest or dividends on, or for the negotiation or transfer of the security, or for both purposes, the value of the security is its market value on the day on which the inclusion of the security in the certificate is applied for, so far as such value can be ascertained.
¹ 12-A. Certificate under the Regulation of the Bombay Code, No. VIII of 1827.	(1) As regards debts and securities.	The same fee as would be payable in respect of a certificate under the Succession Certificate Act, 1889, or in respect of an extension of such a certificate, as the case may be.
	(2) As regards other property in respect of which the certificate is granted—	
	When the amount or value of such property exceeds one thousand rupees, but does not exceed ten thousand rupees;	Two per centum on such amount or value
	When such amount or value exceeds ten thousand rupees, but does not exceed fifty thousand rupees;	Two and one-half per centum on such amount or value.
	When such amount or value exceeds fifty thousand rupees. ²	Three per centum on such amount or value. ²
³ 13. Application to the [High Court of Judicature at Lahore] ⁴ for the exercise of its jurisdiction under section 70 of the Punjab Courts Act, 1884, as amended by the Punjab Courts Act, 1899, [or to the Court of the Financial Commissioner of the Punjab for the exercise of its revisional jurisdiction under Sec. 84 of the Punjab Tenancy Act, 1887]. ⁵	When the amount or value of the subject-matter in dispute does not exceed twenty-five rupees.	Two rupees.
	When such amount or value exceeds twenty-five rupees.	The fee leviable on a memorandum of appeal.

Art. 12-A.—¹ This Article was substituted by Act VII of 1889, S. 13 (1).

² Columns 2 and 3 of this article were substituted by Act VII of 1910.

Art. 13.—³ Inserted by the Punjab Courts Act (XVIII of 1884), S. 71, as amended by the Punjab Courts Act (XXV of 1899), S. 6.

⁴ The words "High Court of Judicature at Lahore" were substituted for the words "Chief Court in the Punjab" by Act XVIII of

1919, Sch. I.

⁵ The words "or to the Court.....Tenancy Act, 1887," were added by S. 1 of Act IX of 1901, Sch. 1.

An application for revision against an order refusing to set aside an award is really one against the award decree and is chargeable with *ad valorem* fee under Sch. I, Art. 13. 13 P. W. R. 1911 = 9 I. C. 388 = 4 P. L. R. 1911.

Number.		Proper Fee.
¹ 14. [Application to the (High Court of Judicature at Rangoon) ² for the exercise of its revisional jurisdiction under S. 622 of the Code of Civil Procedure or S. 25 of the Provincial Small Cause Courts Act, 1887.]	When the amount or value of the subject-matter in dispute does not exceed twenty-five rupees.	Two rupees.
	When such amount or value exceeds twenty-five rupees.	The fee leviable on a memorandum of appeal.
15. [Repealed by Act XI of 1923, Sch. II.]		

Table of rates of ad valorem fees leviable on the institution of suits.

When the amount or value of the subject-matter exceeds	But does not exceed	Proper Fee.	When the amount or value of the subject-matter exceeds	But does not exceed	Proper Fee.
RS.	RS.	RS. A. P.	RS.	RS.	RS. A. P.
..	5	0 6 0	290	300	22 8 0
5	10	0 12 0	300	310	23 4 0
10	15	1 2 0	310	320	24 0 0
15	20	1 8 0	320	330	24 12 0
20	25	1 14 0	330	340	25 8 0
25	30	2 4 0	340	350	26 4 0
30	35	2 10 0	350	360	27 0 0
35	40	3 0 0	360	370	27 12 0
40	45	3 6 0	370	380	28 8 0
45	50	3 12 0	380	390	29 4 0
50	55	4 2 0	390	400	30 0 0
55	60	4 8 0	400	410	30 12 0
60	65	4 14 0	410	420	31 8 0
65	70	5 4 0	420	430	32 4 0
70	75	5 10 0	430	440	33 0 0
75	80	6 0 0	440	450	33 12 0
80	85	6 6 0	450	460	34 8 0
85	90	6 12 0	460	470	35 4 0
90	95	7 2 0	470	480	36 0 0
95	100	7 8 0	480	490	36 12 0
100	110	8 4 0	490	500	37 8 0
110	120	9 0 0	500	510	38 4 0
120	130	9 12 0	510	520	39 0 0
130	140	10 8 0	520	530	39 12 0
140	150	11 4 0	530	540	40 8 0
150	160	12 0 0	540	550	41 4 0
160	170	12 12 0	550	560	42 0 0
170	180	13 8 0	560	570	42 12 0
180	190	14 4 0	570	580	43 8 0
190	200	15 0 0	580	590	44 4 0
200	210	15 12 0	590	600	45 0 0
210	220	16 8 0	600	610	45 12 0
220	230	17 4 0	610	620	46 8 0
230	240	18 0 0	620	630	47 4 0
240	250	18 12 0	630	640	48 0 0
250	260	19 8 0	640	650	48 12 0
260	270	20 4 0	650	660	49 8 0
270	280	21 0 0	660	670	50 4 0
280	290	21 12 0	670	680	51 0 0

Art. 14.—¹ Art. 14 was substituted by Act VI of 1900, S. 47 and Sch. I. This article was originally inserted by Act XI of 1889, S. 84.

² The words "High Court....Rangoon" were substituted for the words "Chief Court of Lower Burma" by Act XI of 1923, Sch.

When the amount
or value of the
subject matter
exceeds

But does not
exceed

Proper Fee.

RS.	RS.	RS.	A.	P.
680	690	51	12	0
690	700	52	8	0
700	710	53	4	0
710	720	54	0	0
720	730	54	12	0
730	740	55	8	0
740	750	56	4	0
750	760	57	0	0
760	770	57	12	0
770	780	58	8	0
780	790	59	4	0
790	800	60	0	0
800	810	60	12	0
810	820	61	8	0
820	830	62	4	0
830	840	63	0	0
840	850	63	12	0
850	860	64	8	0
860	870	65	4	0
870	880	66	0	0
880	890	66	12	0
890	900	67	8	0
900	910	68	4	0
910	920	69	0	0
920	930	69	12	0
930	940	70	8	0
940	950	71	4	0
950	960	72	0	0
960	970	72	12	0
970	980	73	8	0
980	990	74	4	0
990	1,000	75	0	0
1,000	1,100	80	0	0
1,100	1,200	85	0	0
1,200	1,300	90	0	0
1,300	1,400	95	0	0
1,400	1,500	100	0	0
1,500	1,600	105	0	0
1,600	1,700	110	0	0
1,700	1,800	115	0	0
1,800	1,900	120	0	0
1,900	2,000	125	0	0
2,000	2,100	130	0	0
2,100	2,200	135	0	0
2,200	2,300	140	0	0
2,300	2,400	145	0	0
2,400	2,500	150	0	0
2,500	2,600	155	0	0
2,600	2,700	160	0	0
2,700	2,800	165	0	0
2,800	2,900	170	0	0
2,900	3,000	175	0	0
3,000	3,100	180	0	0
3,100	3,200	185	0	0
3,200	3,300	190	0	0
3,300	3,400	195	0	0
3,400	3,500	200	0	0
3,500	3,600	205	0	0
3,600	3,700	210	0	0
3,700	3,800	215	0	0
3,800	3,900	220	0	0
3,900	4,000	225	0	0

When the amount
or value of the
subject-matter
exceeds

But does not
exceed

Proper Fee.

RS.	RS.	RS.	A.	P.
4,000	4,100	230	0	0
4,100	4,200	235	0	0
4,200	4,300	240	0	0
4,300	4,400	245	0	0
4,400	4,500	250	0	0
4,500	4,600	255	0	0
4,600	4,700	260	0	0
4,700	4,800	265	0	0
4,800	4,900	270	0	0
4,900	5,000	275	0	0
5,000	5,250	285	0	0
5,250	5,500	295	0	0
5,500	5,750	305	0	0
5,750	6,000	315	0	0
6,000	6,250	325	0	0
6,250	6,500	335	0	0
6,500	6,750	345	0	0
6,750	7,000	355	0	0
7,000	7,250	365	0	0
7,250	7,500	375	0	0
7,500	7,750	385	0	0
7,750	8,000	395	0	0
8,000	8,250	405	0	0
8,250	8,500	415	0	0
8,500	8,750	425	0	0
8,750	9,000	435	0	0
9,000	9,250	445	0	0
9,250	9,500	455	0	0
9,500	9,750	465	0	0
9,750	10,000	475	0	0
10,000	10,500	490	0	0
10,500	11,000	505	0	0
11,000	11,500	520	0	0
11,500	12,000	535	0	0
12,000	12,500	550	0	0
12,500	13,000	565	0	0
13,000	13,500	580	0	0
13,500	14,000	595	0	0
14,000	14,500	610	0	0
14,500	15,000	625	0	0
15,000	15,500	640	0	0
15,500	16,000	655	0	0
16,000	16,500	670	0	0
16,500	17,000	685	0	0
17,000	17,500	700	0	0
17,500	18,000	715	0	0
18,000	18,500	730	0	0
18,500	19,000	745	0	0
19,000	19,500	760	0	0
19,500	20,000	775	0	0
20,000	21,000	795	0	0
21,000	22,000	815	0	0
22,000	23,000	835	0	0
23,000	24,000	855	0	0
24,000	25,000	875	0	0
25,000	26,000	895	0	0
26,000	27,000	915	0	0
27,000	28,000	935	0	0
28,000	29,000	955	0	0
29,000	30,000	975	0	0
30,000	32,000	995	0	0
32,000	34,000	1,015	0	0

When the amount or value of the subject-matter exceeds	But does not exceed	Proper Fee.			When the amount or value of the subject-matter exceeds	But does not exceed	Proper Fee.		
RS.	RS.	RS.	A.	P.	RS.	RS.	RS.	A.	P.
34,000	36,000	1,035	0	0	2,15,000	2,20,000	2,025	0	0
36,000	38,000	1,055	0	0	2,20,000	2,25,000	2,050	0	0
38,000	40,000	1,075	0	0	2,25,000	2,30,000	2,075	0	0
40,000	42,000	1,095	0	0	2,30,000	2,35,000	2,100	0	0
42,000	44,000	1,115	0	0	2,35,000	2,40,000	2,125	0	0
44,000	46,000	1,135	0	0	2,40,000	2,45,000	2,150	0	0
46,000	48,000	1,155	0	0	2,45,000	2,50,000	2,175	0	0
48,000	50,000	1,175	0	0	2,50,000	2,55,000	2,200	0	0
50,000	55,000	1,200	0	0	2,55,000	2,60,000	2,225	0	0
55,000	60,000	1,225	0	0	2,60,000	2,65,000	2,250	0	0
60,000	65,000	1,250	0	0	2,65,000	2,70,000	2,275	0	0
65,000	70,000	1,275	0	0	2,70,000	2,75,000	2,300	0	0
70,000	75,000	1,300	0	0	2,75,000	2,80,000	2,325	0	0
75,000	80,000	1,325	0	0	2,80,000	2,85,000	2,350	0	0
80,000	85,000	1,350	0	0	2,85,000	2,90,000	2,375	0	0
85,000	90,000	1,375	0	0	2,90,000	2,95,000	2,400	0	0
90,000	95,000	1,400	0	0	2,95,000	3,00,000	2,425	0	0
95,000	1,00,000	1,425	0	0	3,00,000	3,05,000	2,450	0	0
1,00,000	1,05,000	1,450	0	0	3,05,000	3,10,000	2,475	0	0
1,05,000	1,10,000	1,475	0	0	3,10,000	3,15,000	2,500	0	0
1,10,000	1,15,000	1,500	0	0	3,15,000	3,20,000	2,525	0	0
1,15,000	1,20,000	1,525	0	0	3,20,000	3,25,000	2,550	0	0
1,20,000	1,25,000	1,550	0	0	3,25,000	3,30,000	2,575	0	0
1,25,000	1,30,000	1,575	0	0	3,30,000	3,35,000	2,600	0	0
1,30,000	1,35,000	1,600	0	0	3,35,000	3,40,000	2,625	0	0
1,35,000	1,40,000	1,625	0	0	3,40,000	3,45,000	2,650	0	0
1,40,000	1,45,000	1,650	0	0	3,45,000	3,50,000	2,675	0	0
1,45,000	1,50,000	1,675	0	0	3,50,000	3,55,000	2,700	0	0
1,50,000	1,55,000	1,700	0	0	3,55,000	3,60,000	2,725	0	0
1,55,000	1,60,000	1,725	0	0	3,60,000	3,65,000	2,750	0	0
1,60,000	1,65,000	1,750	0	0	3,65,000	3,70,000	2,775	0	0
1,65,000	1,70,000	1,775	0	0	3,70,000	3,75,000	2,800	0	0
1,70,000	1,75,000	1,800	0	0	3,75,000	3,80,000	2,825	0	0
1,75,000	1,80,000	1,825	0	0	3,80,000	3,85,000	2,850	0	0
1,80,000	1,85,000	1,850	0	0	3,85,000	3,90,000	2,875	0	0
1,85,000	1,90,000	1,875	0	0	3,90,000	3,95,000	2,900	0	0
1,90,000	1,95,000	1,900	0	0	3,95,000	4,00,000	2,925	0	0
1,95,000	2,00,000	1,925	0	0	4,00,000	4,05,000	2,950	0	0
2,00,000	2,05,000	1,950	0	0	4,05,000	4,10,000	2,975	0	0
2,05,000	2,10,000	1,975	0	0	4,10,000	..	3,000	0	0
2,10,000	2,15,000	2,000	0	0					

SCHEDULE II.
FIXED FEES.

Number.	Proper Fee.
1. Application or petition.	(a) When presented to any officer of the Customs or Excise Department or to any Magistrate by any person

Sch. II, Art. 1.—The term ' application ' must be construed to mean a documentary and not an oral application. 2 N. W. P. (H. C.) 418.
APPLICATIONS FALLING WITHIN THE ARTICLE.—A petition to withdraw suit on the basis of an agreement to compromise. 8 M. 15 (F. B.) ; see also 8 W. R. 214. A petition for a new trial in a Small Cause Court. 7 B. H.C.A. C. J. 109. An application for enforcing an award. 13 C. L. R. 171. Written objections to an award being a n

Number.		Proper Fee.
1. Application or petition.— (<i>Contd.</i>)	having dealings with the Government, and when the subject-matter of such application relates exclusively to those dealings ;	
	or when presented to any officer of land-revenue by any person holding temporarily settled land under direct engagement with Government and when the subject-matter of the application or petition relates exclusively to such engagement ;	
	or when presented to any Municipal Commissioner under any Act for the time being in force for the conservancy or improvement of any place, if the application or petition relates solely to such conservancy or improvement ;	One anna.
	or when presented to any Civil Court other than a principal Civil Court of original jurisdiction [* * *] ¹ or to any Court of Small Causes constituted under Act XI of 1865, ² or under Act XVI of 1868, ³ section 20, or to a Collector or other officer of revenue in relation to any suit or case in which the amount or value of the subject-matter is less than fifty rupees ;	Do.
	or when presented to any Civil, Criminal or Revenue Court, or to any Board or Executive Officer for the purpose of obtaining a copy or translation of any judgment, decree or order passed by such Court Board or officer, or of any other document on record in such Court or Office.	
	(b) When containing a complaint or charge of any offence other than an offence for which police-officers may, under the Criminal Procedure Code ⁴ arrest without warrant, and presented to any Criminal Court ;	Eight annas.
	or when presented to a Civil, Criminal or Revenue Court, or to a Collector, or any Revenue-officer having juris-	

application to set aside an award. 107 I. C. 233. An application for probate of a will. 15 W.R.C. R. 40. An appeal against an order in probate proceedings 21 M. L. J. 481=9 I. C. 538= (1911) 1 M. W. N. 237 ; 4 C. W. N. 602. An appeal from order granting letters of administration. 9 A. W. N. 27. Applications for review of interlocutory orders passed in appeal 31 A. 262 =6 A. L. J. 151=1 I. C. 1000. An appeal from an order absolute for foreclosure or sale. 14 C. P. L. R. 100. Memo. of objections under O. 41, R. 26, C. P. C. See 105 I. C. 108.

¹ The words "or to any Cantonment Magistrate sitting as a Court of Civil Judicature under Act III of 1859" were repealed by the Cantonments Act (XIII of 1889).

² See now the Provincial Small Causes Courts Act (IX of 1887), by which Act XI of 1865 was repealed.

³ See now S. 25 of the Bengal, North-Western Provinces and Assam Civil Courts Act (XII of 1887).

⁴ See now the Code of Criminal Procedure (Act V of 1898).

Number.		Proper Fee.
1 Application or petition,— (Contd.)	diction equal or subordinate to a Collector, or to any Magistrate in his executive capacity and not otherwise provided for by this Act ; or to deposit in Court revenue or rent ; or for determination by a Court of the amount of compensation to be paid by landlord to his tenant. (c) When presented to a Chief Commissioner or other Chief Controlling Revenue or Executive Authority, or to a Commissioner of Revenue or Circuit, or to any chief officer charged with the executive administration of a Division and not otherwise provided for by this Act. (d) When presented to a High Court.	One rupee. Two rupees.
¹ 1-A. Application to any Civil Court that records may be called for from another Court.	When the Court grants the application and is of opinion that the transmission of such records involves the use of the post.	Twelve annas in addition to any fee levied on the application under clause (a), clause (b) or clause (d) of Article 1 of this Schedule.
2. Application for leave to sue as a pauper.	.. ..	Eight annas.
3. Application for leave to appeal as a pauper.	(a) When presented to a District Court. (b) When presented to a Commissioner or a High Court.	One rupee. Two rupees.
4. Complaint or memorandum of appeal in a suit to obtain possession under Act No. XVI of 1838, or [the ² Mamlatdars' Courts Act, 1876]. ³	.. ..	Eight annas.
5. Complaint or memorandum of appeal in a suit to establish or disprove a right of occupancy.	.. ..	Do.

¹ Art. 1-A — Was added by Act XIV of 1911.

Art. 4.—² These words were substituted for the words "Bombay Act V of 1864" (to give Mamlatdars' Courts jurisdiction in certain cases to maintain existing possession, or to restore possession to any party dispossessed otherwise than by course of law), by the Repealing and Amending Act (XII of 1891).

³ See now the Bombay Mamlatdars' Courts Act, 1906 (Bom. Act II of 1906).

Art. 5.—In a suit to establish or disprove a right of occupancy, the plaint or memorandum of appeal shall bear a court-fee of 8 annas under Article. 40 A. 358=16 A. L. J. 167=44 I. C. 608. As to case where the plaintiff sues to eject defendant as being a tenant at will with the mere intention of contesting the right of occupancy claimed by the latter, see 11 C. L. R. 91; 16 M.

310. Security bonds filed by a claimant in a claim case, being an instrument of obligation given in pursuance of an order of Court, is governed by Sch. II, Art. 6. 49 C. 997=1923 Cal. 269 (2). See also 29 C. W. N. 851=42 C. L. J. 5=1925 Cal. 906 (F. B.). They will also be chargeable under the Stamp Act if they are of the kind described in Art. 40 or 57 thereof. 29 C. W. N. 851 (F. B.) Security bonds given in pursuance of an order of the Court for stay of execution must be written on paper properly stamped under the Stamp Act and not on a plain paper bearing a court-fee stamp of Rs. 8. 43 I. C. 376=21 C. W. N. 1150; 7 Lah. I. J. 343=1925 Lah. 552. Stamp on security bond by receiver pledging immoveable property. 43 M. 363=38 M. L. J. 503. Security bond for the production of attached live-stock is a bond given in pursuance of an

Number.		Proper Fee.
16. Bail-bond or other instrument of obligation given in pursuance of an order made by a Court or Magistrate under any section of the Code of Criminal Procedure, 1882, or the Code of Civil Procedure, 1908, and not otherwise provided for by this Act.	.. ..	Eight annas.
7. Undertaking under section 49 of the Indian Divorce Act.	.. ..	
8. [<i>Rep. by the Repealing and Amending Act, 1891 (XII of 1891).</i>]		
9. [<i>Repealed by Act XII of 1891.</i>]		
10. Mukhtarnama or Wakalatnama.	When presented for the conduct of any one case—	
	(a) to any Civil or Criminal Court other than a High Court, or to any Revenue Court, or to any Collector or Magistrate, or other executive officer, except such as are mentioned in clauses (b) and (c) of this number.	Do.
	(b) to a Commissioner of Revenue, Circuit or Customs or to any officer charged with the executive administration of a Division, not being the Chief Revenue or Executive Authority.	One rupee.
	(c) to a High Court, Chief Commissioner, Board of Revenue, or other Chief Controlling Revenue or Executive Authority.	Two rupees.
11. Memorandum of appeal when the appeal is not [* * *] ² from a decree or an order having the force of a decree, and is presented—	(a) to any Civil Court other than a High Court, or to any Revenue Court or Executive Officer other than the High Court or Chief Controlling Revenue or Executive Authority.	Eight annas.

order made by a Court within Art. 6 and the stamp leviable on such a bond is under the Court Fees Act, and not under Arts. 15 and 57 of the Stamp Act. 37 M. 17 = 20 I. C. 775 = 24 M. L. J. 637.

Art. 6.—¹ This Article was substituted by Act XVII of 1914, Sch. The original Article ran as follows:—"Bail bond or other instrument of obligation not otherwise provided for by this Act, when given by the direction of any Court or executive authority". As to security bond executed in pursuance of an order of court, *see* 53 Cal. 101 = A. I. R. 1925 Cal. 906 = 89 I. C. 289 = 29 C. W. N. 851. A security bond taken on an order for stay of execution must be stamped under the Stamp Act. 7 Lah. L. J. 343 = 26 Punj. L. R. 634 = A. I. R. 1925 Lah. 552.

Art. 10.—A power to a Vakil authorising him to present an application for copies to Collector, falls under Article and does not require to be stamped under Art. 50 of Sch. I of Stamp Act. 9 M. 146 (F. B.); 33 A. 487 = 9 I. C. 617 = 8 A. I. J. 878. *See also* 108 P. W. R. 1912 = 15 I. C. 122 = 202 P. L. R. 1912 (F. R.); 5 Pat. 255 = 94 I. C. 841 = A. I. R. 1926 P. 246. Single vakalatnama is sufficient for a number of appeals consolidated by order of Court. 27 L. W. 36 = (1923) M. W. N. 271.

Art. 11.—² The words "from an order rejecting a plaint or" were omitted by S. 155 (Sch. 4) of the Code of Civil Procedure (Act V of 1908).

SCOPE OF ARTICLE.—An order in probate proceedings has the force of a decree and so Art. 11 is not applicable to an appeal there-

Number.		Proper Fee.
11. Memorandum, etc.— (Contd.)	(b) to a High Court or Chief Commissioner, or other Chief Controlling Executive or Revenue Authority.	Two rupees.
12. Caveat ..	....	Five rupees
13. Application under Act No. X of 1859, ¹ section 26, or Bengal Act No. VI of 1862, ² section 9, or Bengal Act No. VIII of 1869, ³ section 37.	....	Do
14. Petition in a suit under the Native Converts' Marriage Dissolution Act, 1866.	....	Do
15. [Repealed by Act V of 1908.]		
16. [Repealed by Act VI of 1889, S. 18 (1)]		
17. Plaint or memorandum of appeal in each of the following suits :—		
(i) to alter or set aside a summary decision or order of any	....	Ten rupees.

from. 21 M. L. J. 481=9 I. C. 538. So also an order under O. 21, R. 50 (2), C. P. Code. 10 Bar. L. T. 42=35 I. C. 429; also an order under O. 21, R. 99, C. P. Code. 10 B. 238; 8 C. 720; 29 M. 172. But though decision under S. 47 of the C. P. Code is a decree, an appeal therefrom should be stamped under this Article by a Notification of the Governor General. The Madras Court Fees Act removes all doubts by specially including orders under S. 47 and S. 144 of the C. P. Code. An application by way of restitution under S. 144, C. P. Code, is one under S. 47 and hence an appeal from an order on such application would be chargeable with court-fees under this article under the Government Notification. 11 C. L. J. 541=6 I. C. 125. *See also* 20 M. 448; 8 A. 545; 21 C. 340; 18 N. L. R. 15=1922 Nag. 62; 39 I. C. 640=21 C. W. N. 544; 17 L. W. 623= (1922) M. W. N. 831=1923 M. 270; 107 I. C. 491=A. I. R. 1928 Lah. 143. So also an appeal against an order directing the mortgagee who obtained a decree for sale, to pay out of the sale proceeds a certain amount as interest due to a prior mortgagee decree-holder. 4 P. 294=1925 Pat. 577=92 I. C. 474. The directing of the Lower Court to readmit a case is an order not having the force of a decree and an appeal therefrom is to be stamped under the Article. 21 A. 178=A. W. N. (1898) 23. So also an appeal from an order under S. 104 (f), C. P. C. 107 I. C. 756=A. I. R. 1928 Lah. 137. So also an appeal to the High Court from an order of the District Judge under S. 214 (now S. 235) of the Companies Act. 17 A. 238=A. W. N. (1895) 56. An appeal against an order dismissing an application for the ascertainment of mesne profits must be stamped with an *ad valorem* stamp on the amount claimed. 3 P. L. J. 101=43 I. C. 489. So also

an appeal from an order granting application for final decree in a mortgage suit. 27 O. C. 225=84 I. C. 742=1925 Oudh 102. Also an appeal from order rejecting a plaint for non-payment of court-fee. 67 I. C. 901=3 Lah. L. J. 237. For an appeal under S. 104 (f) against an order filing an award without the intervention of the Court, the requisite court-fee is eight annas. 50 A. 128=103 I. C. 315=25 A. L. J. 741.

Art. 12.—A petition by which a party upon whom citation has been issued, opposes the grant of probate is not a caveat and need not be stamped as such. 36 I. C. 38=20 C. W. N. 787.

Art. 13.—¹ Act X of 1859 was repealed by the Bengal Tenancy Act, 1885 (VIII of 1885), Beng. Code, in those portions of the Lower Provinces to which that Act extends and in the Chota Nagpur Division (except Manbhum and the Tributary Mahals) by the Chota Nagpur Landlord and Tenant Procedure Act, 1879 (Bengal Act I of 1879), Bengal Code; in the Province of Agra by Act XVIII of 1873; and in the Central Provinces, by the Central Provinces Tenancy Act, 1883 (IX of 1883), C. P. Code.

² Bengal Act VI of 1862 was repealed by the Bengal Tenancy Act, 1885 (VIII of 1885), so far as it affected those portions of the Lower Provinces to which that Act extends; and in the Chota Nagpur Division (except Manbhum and the Tributary Mahals) by the Chota Nagpur Landlord and Tenant Procedure Act, 1879 (I of 1879), Bengal Code.

³ Bengal Act VIII of 1869 was repealed by the Bengal Tenancy Act, 1885 (VIII of 1885).

Art. 17, Cl. (1).—**SUIT TO SET ASIDE SUMMARY ORDER.**—A plaint in a suit under O. 21, R. 63, C. P. C. (re-claim in execution proceedings) is governed by this Article. 26 C. W. N. 126=1922

Number.		Proper Fee.
of the Civil Courts not established by Letters Patent or of any Revenue Court ;		
(ii) to alter or cancel any entry in a register of the names of proprietors of revenue paying estates ;	....	
(iii) to obtain a declaratory decree where no consequential relief is prayed ;	....	
(iv) to set aside an award ;	....	Ten rupees
(v) to set aside to adoption ;		

Cal. 166 ; 64 I. C. 49 ; 3 P. L. T. 832 = 1923 P. 152 ; 22 I. C. 676 = (1913) U. B. R. 181. *See also* 6 A. 341 = A. W. N. (1884), 113 ; 6 A. 466 = A. W. N. (1884) 175 ; 51 P. R. 1897 ; 35 C. 202 = 35 I. A. 22 ; 10 B. 610 ; But *see* 27 I. C. 265 = (1914) M. W. N. 910, holding that the quantum of interest which the plaintiff wants to establish must be considered. A suit under Madras Act XXVII of 1860 to contest the award of a settlement officer falls within this clause 4 M. 204.

Cl. (iii).—*See* Cl. (i) of Art. 17-A of Madras Act

SUITS FOR DECLARATION WHERE NO CONSEQUENTIAL RELIEF IS PRAYED.—Where a plaintiff or a memorandum of appeal asks only for a pure declaration, the Court in calculating court-fees cannot go into the question whether he should also have asked for consequential relief. The effect of failing to ask consequential relief is for the final decision of the Court. A fixed fee under Article is sufficient. 27 C. W. N. 972 = 1924 Cal. 183. Even where relief is prayed for it may be a mere surplussage in which case, the suit may be stamped as a mere declaratory suit under this Art. 3 P. 795 = 80 I. C. 655 = 1925 P. 44. A suit to declare that a previous declaratory decree is not binding on the plaintiff on ground of fraud, is governed by Article because no consequential relief is needed or sought for. 35 I. C. 797 = 12 C. W. N. 375. A suit by a reversioner for mere declaration that conveyance by a Hindu widow is void in respect of anything beyond her life interest comes under this Article. 75 P. R. 1877. *See also*, 24 C. 833 ; 12 M. 234. For a similar suit where a prayer for the appointment of Receiver is added, *see* 23 L. W. 581 = 96 I. C. 29 = A. I. R. 1926 Mad. 678 = 51 M. L. J. 67. Cited under S. 7, Cl. iv (c). A suit for bare declaration that a decree is ineffectual and not binding on the plaintiff comes under the Article. 30 C. 788 ; 20 B. 736 ; also a suit by a member of a joint Hindu family for declaration that an alienation made by a managing member is not binding on him. 7 M. 134 ; 78 I. C. 782 ; 1925 Lah. 90 ; also a suit for declaration that plaintiff is the real owner of a decree obtained by the defendant against another and for transfer of the decree to him. 1 P. R. 1911 = 17 P. L. R. 1911. Also a suit for a declaration that plaintiffs were occupancy tenants and not tenure-holders and that the survey

entry describing them as tenure-holders was wrong 4 P. L. J. 302 = 50 I. C. 298. Also a suit for declaration that certain property belongs to the plaintiff and is not liable to be sold in execution of a mortgage decree to which he is not a party. 85 I. C. 349 = 1925 Oidh 500. A suit to set aside a compromise decree for maintenance falls under the Article (Art. 17 A of the Madras Act.) 27 L. W. 286 = A. I. R. 1928 Mad. 416. A suit under S. 106, B. T. Act which is transferred to the Civil Court is a suit for declaratory decree within this article. 48 I. C. 552 = 28 A. L. J. 301. *See also* 18 I. C. 275 = 17 C. L. J. 416. In a suit for recovery of possession with mesne profits and the alternative for assessment of fair rent, the prayer for assessment is not in the nature of a declaratory relief. 6 P. 17 = 100 I. C. 913 = 8 Pat. L. T. 366 = A. I. R. 1927 Pat. 123. The plaintiff sued for possession as the transferee of one G. The first Court gave him a decree on condition that his possession should continue only during the lifetime of his transferor. An appeal by the plaintiff against the condition is for a mere declaration and need bear a court-fee of Rs. 10 only. 33 A. 795 = 11 I. C. 977 = 8 A. L. J. 821. The Bombay practice of valuing suits for declaration at Rs. 130 and paying a court fee of Rs. 10 thereon is misleading and unwarranted by law. A fixed fee of Rs. 10 is to be paid thereon. 43 B. 507 = 46 I. A. 24 = 36 M. L. J. 437 = 50 I. C. 280 (P. C.) No *ad valorem* fee need be paid, when a suit is brought for a declaration that money is jointly due, plaintiff not objecting to its being received by the defendants. 1923 Lah. 359. A declaratory suit that a registered release deed be considered cancelled, must be valued for court-fees at the amount at which the relief is valued. 35 P. R. 1914 = 25 I. C. 435. So also a suit for the reversal of a *patni* sale is not solely for a declaration that the sale is a nullity. 51 C. 216 = 28 C. W. N. 683 = 1924 Cal. 731. So also an *ayo* claim = 5 Bur. L. J. 107 = 98 I. C. 196 = A. I. R. 1926 Rang. 184 (F. B.).

Cl. (iv).—*See* Cl. (ii) of Art. 17-A of Madras Act. Inapplicable to compensation awards under the Land Acquisition Act covered by S. 8. 21 M. 260. But S. 8 applies only to appeals by persons who claim compensation. For an appeal by the Secretary of State against the compensation award of the Court, a

Number.		Proper Fee.
(vi) every other suit where it is not possible to estimate at a money-value the subject-matter in dispute, and which is not otherwise provided for by this Act.		

court-fee of Rs. 10 only is required under Article, 57 P. R. 1913=17 I. C. 764. On this clause see also 7 C. L. J. 36=12 C. W. N. 169=35 C. 202=35 I. A. 22 (P.C.).

Cl. (v).—Where a suit for declaration that plaintiff is the adopted son of the last male owner and therefore entitled to property in his possession was dismissed, the court-fee payable on the appeal is an *ad valorem* fee on the value of the property in possession of the appellant as the adopted son of the last owner. 43 I. C. 64=15 N. L. R. 24. The plaintiff may value the relief claimed in his suit to set aside an adoption and that valuation determines the court which is to decide the suit. 37 C. 860=14 C. W. N. 929=6 I. C. 630; See also 15 A. 378. In a suit for declaration, that an adoption never took place, court-fee is payable on the value of the property, title to which is affected. 58 I. C. 965 (1). A suit for mere declaration that an adoption is valid does not admit of being satisfactorily valued and falls under Art. 17, cl. (vi). 24 I. C. 286=17 O. C. 90. A suit for declaration that certain adoption deed executed by a widow shall be of no effect on the plaintiff's reversionary rights is not a suit to annul an adoption. 6 I. A. L. J. 585=84 I. C. 486=1925 Lah. 229.

Cl. (vi).—See Art. 17-B of the Madras Act.—To bring a case within the scope of this clause, it must be established that it is not possible even to state approximately a money value for the subject-matter in dispute. 1 I. C. 670=13 C. W. N. 815. Thus a suit for restitution of conjugal rights would fall under the clause. 34 C. 352=11 C. W. N. 458=5 C. L. J. 400; 8 C. W. N. 705=31 C. 849; 28 A. 545, 9 I. C. 186=8 A. L. J. 889; 33 A. 767=11 I. C. 186. So also a suit under S. 92, Civil Procedure Code. 14 C. W. N. 932=12 C. L. J. 211=7 I. C. 92. 26 L. W. 378=105 I. C. 119=A. I. R. 1927 Mad 940=53 M. L. J. 457; 8 I. A. 730=A. I. R. 1928 Lah. 113. See now Cl. (iii) of Art. 17 of Madras Act). Also a suit for removal of a trustee of a religious endowment. 23 M. 537; 19 A. 104; 24 C. 418; 21 B. 48. A prayer for temporary mandatory injunction to compel debt, to deposit in court an amount due by him to the trust, in a Scheme suit under S. 92, Civil Procedure Code, does not alter the character of the suit and the fee fixed in Sch. II, Art. 17 (ii) is sufficient. 47 M. L. J. 656=1924 Mad. 882=85 I. C. 801. See also 48 M. L. J. 514=1925 Mad. 722. As to a prayer for the appointment of a receiver see A. I. R. 1926 Mad. 678=51 M. L. J. 67 cited under S. 7, Cl. iv (c). A suit under Registration Act, S. 77 to compel Registration falls under the Article, 21 P. R. 1895; 3 C. 515. An appeal against an order refusing grant of Letters of Administration

is governed by Art. 17 (vi) as the subject matter in dispute cannot be estimated at a money value. 22 I. C. 98=35 All. 448. The memo. of appeal against a redemption decree absolute on the ground that the money was deposited at a later date than that allowed, and that it should not have been so received falls within the clause. 10 I. C. 736=7 N. L. R. 41. Also an appeal against an order rejecting an appeal memo. for non-payment of Court-fees 98 I. C. 663 (2)=A. I. R. 1927 Nag. 100. As *kyaung* cannot be transferred by sale, mortgage or gift, it has no market value and the plaint in a suit by *Hypongyi* to recover possession of *kyaung* should bear a fixed stamp. 57 I. C. 953=13 Bur. L. T. 40. An appeal preferred against the decree in an interpleader suit, which declares the title of one of the claimants and directs the delivery of the property to him upon payment of costs to the plaintiff should be stamped under the Art. 2 Pat. L. T. 280=61 I. C. 820. An objection on appeal as to the manner in which a decree in a suit for dissolution of partnership is to be enforced is covered by this Art. 7 Lah. L. J. 364=90 I. C. 629=1925 Lah. 496.

CASES NOT COMING UNDER THE CLAUSE.—Where in a suit for the enforcement of a mortgage or charge against certain property, the trial court held the charge to be enforceable only against a portion of the property, an appeal to have the charge declared against the whole property must bear *ad valorem* fee on the value of the property in dispute. 65 I. C. 114=24 O. C. 295. When a plaintiff who obtained a decree for the full amount sued for against one of the debts, appealed with a view to make the other debts, also liable, *held*, he was bound to pay *ad valorem* court fee on the amount for which the other debts, were sought to be made liable and not a fixed fee under this Art. 24 Bom. L. R. 313=46 B. 840; See also 86 P. R. 1912=16 I. C. 777.

SUITS FOR PARTITION.—A suit for partition, pure and simple, where the plaintiff is in joint possession of his share and there is no dispute as to his title or share falls within the clause. But the value of the entire subject-matter is the value for jurisdiction. 2 Pat. 432=4 P. L. T. 257; 49 I. C. 115 (Pat.); 13 C. L. R. 253; 8 C. 757; 34 A. 184=13 I. C. 185=8 A. L. J. 1329; (28 A. 340; 6 C. L. J. 651 Foll.) 90 I. C. 843=A. I. R. 1926 Mad. 122. (Partition claimed after division in status). The Article applies even if the plaintiff asks for declaration of titles a cloud having been cast upon the same. 29 C. W. N. 76. A suit by a Mohamedan co-sharer in joint possession, for partition and separate possession of her share, falls under Art. 17. (vi). (1923) M. W. N. 564 (2)=1924 Mad. 207. It is enough

Number.		Proper Fee.
18. Application under section 326 of the Code of Civil Procedure. ¹	....	Ten Rupees.
² [19. Agreement in writing stating a question for the opinion of the Court under the Code of Civil Procedure, 1908.]		
20. Every petition under the Indian Divorce Act, except petitions under section 44 of the same Act, and every memorandum of appeal under section 55 of the same Act.	....	Twenty rupees.
21. Complaint or memorandum of appeal under the Parsi Marriage and Divorce Act, 1865.	....	

SCHEDULE III.³

(See section 19 I.)

FORM OF VALUATION (TO BE USED WITH SUCH MODIFICATIONS, IF ANY, AS MAY BE NECESSARY).

IN THE COURT OF
Re. Probate of the Will of
and credits of

), deceased.

(or administration of the property

I

{ solemnly affirm }
make oath , }

and say that I am executor (or one of the executors or one of next of kin) of deceased, and that I have truly set forth in Annexure A to this affidavit all the property and credits of which the abovenamed deceased died possessed or was entitled to at the time of his death, and which have come or are likely to come, to my hands.

2. I further say that I have also truly set forth in Annexure B all the items I am by law allowed to deduct.

3. I further say that the said assets, exclusive only of such last-mentioned items, but inclusive of all rents, interest, dividends and increased values since the date of the death of the said deceased are under the value of

if the person claims to be in joint possession of the property. 16 I. C. 771 = 6 S. L. R. 74 (Note). (18 B 209 ; 8 C. 257 Foll.). On the application of one of the co-shares in a partition suit the court directed the properties to be sold as they were not capable of partition. Another sharer appealed against this order. Held, that the court-fee payable was Rs. 10 under this article. 100 I. C. 17 (2) = A. I. R. 1927 Lah. 189. A decision as to the amount of court-fee should be founded solely on a consideration of the cause of action on which the plaintiff is suing and not pleas of debt. 16 I. C. 773 = 6 S. L. R. 72. A suit however, in which plaintiff prays for declaration of his title and partition as a consequential relief, falls within S. 7, cl. (iv) (c) and the plaintiff's share becomes also the valuation of the suit for jurisdiction. 2 Pat. 432 = 4 P. L. T. 257. See also 7 N. L. J. 91 = 81 I. C. 643 = 1924 Nag. 105 ; 84 I. C. 538 = 1925 Pat. 703. So also a suit intended to recover possession must pay *ad valorem* fee upon

the value of the share. 8 C. 757. See also cases noted under S. 7, cl. 4 (b). A memorandum of appeal against an order of the court in a partition suit, directing the debts to put in properly stamped applications if they wished to have their respective shares separated off by the Court, must be stamped with a court fee of Rs. 10 under Sch. II, Art. 17, cl. (vi). 274 P. L. R. 1913 = 20 I. C. 177 = 183 P. W. R. 1913

Art. 18.—¹ See now the Code of Civil Procedure, 1908 (Act V of 1908), second schedule.

Art. 19.—² Substituted by S. 155 (4th Sch.) of the Code of Civil Procedure (Act V of 1908) for the original entry which was as follows:—“Agreement under section 328 of the same Code.”

Sch. III.—³ This schedule was inserted by the Court-fees Amendment Act (XI of 1899), S. 3. The Original Schedule III was repealed by Act XIV of 1870.

ANNEXURE A.

RS. A. P.

VALUATION OF THE MOVEABLE AND IMMOVEABLE PROPERTY OF
DECEASED.Cash in the house and at the Banks, household goods, wearing-apparel, books, plate,
jewels, etc. ..*(State estimated value according to best of Executor's or Administrator's belief)*

Property in Government securities transferable at the Public Debt Office ..

*(State description and value at the price of the day ; also the interest separately, calculat-
ing it to the time of making the application.)*

Immoveable property consisting of ..

*(State description, giving, in the case of houses, the assessed value, if any and the
number of years' assessment the market-value is estimated at, and, in the case
land, the area, the market-value and all rents that have accrued.)*

Leasehold property ..

*(If the deceased held any leases for years determinable, state the number of years' pur-
chase the profit rents are estimated to be worth and the value of such, inserting
separately arrears due at the date of death and all rents received or due since that
date to the time of making the application.)*

Property in public companies. ..

*(State the particulars and the value calculated at the price of the day, also the interest
separately calculating it to the time of making the application.)*Policy of insurance upon life, money out on mortgage and other securities, such as
bonds, mortgages, bills, notes and other securities for money. ..*(State the amount of the whole ; also the interest separately, calculating it to the time of
making the application.)*

Book debts. ..

(Other than bad).

Stock in trade ..

(State the estimated value, if any)

Other property not comprised under the foregoing heads ..

(State the estimated value, if any.)

TOTAL.. _____

Deduct amount shown in Annexure B not subject to duty

NET TOTAL .. _____

ANNEXURE B.

SCHEDULE OF DEBTS, ETC.

RS. A. P.

Amount of debts due and owing from the deceased, payable by law out of the estate ..

Amount of funeral expenses ..

Amount of mortgage incumbrances ..

Property held in trust not beneficially or with general power to confer a beneficial
interest ..

Other property not subject to duty ..

TOTAL .. _____

THE COURT-FEES (AMENDMENT) ACT (VII OF 1910).¹

[4th March, 1910]

An Act further to amend the Court-fees Act, 1870.

WHEREAS it is expedient further to amend the Court-fees Act, 1870 ; It is
hereby enacted as follows :—1. This Act may be called THE COURT-FEES
Short title. (AMENDMENT) ACT, 1910.

Sch. III, Annexure B.—Property held in trust within Annexure B in the form set out in Sch. III is property held in trust by the testator and not one as to which the testator has created a trust. 2 Pat. L. T. 683=62 I.C. 513=6 P. L. J. 411 ; 45 I.C. 578=2 P.L.J. 611.

¹For Statement of Objects and Reasons, see Gazette of India, 1910, Pt. V, p. 34 ; and for Proceedings in Council, see *Ibid.* 1910 Pt. VI, pp. 117 and 163, dated 12th March, 1910, and 9th March, 1910, respectively.

2. [Inserted in its proper place.]

Exemption of certain probates, letters of administration and certificates.

which have not been issued.

3. Nothing in this Act shall apply to any probate, letters of administration or certificate in respect of which the fee payable under the law for the time being in force has been paid prior to the commencement of this Act, but

THE CROWN GRANTS ACT (XV OF 1895).¹

S. 1 Rep. in pt., Act X of 1914.

Declared in force in Upper Burma (except the Shan States) Act XIII of 1898, S. 3.

Declared in force in British Baluchistan, Reg. II of 1913, S. 3.

[10th October, 1895.]

An Act to explain the Transfer of Property Act, 1882,² so far as relates to grants from the Crown, and to remove certain doubts as to the powers of the Crown in relation to such grants.

WHEREAS doubts have arisen as to the extent and operation of the Transfer of Property Act, 1882,² and as to the power of the Crown to impose limitations and restrictions upon grants and other transfers of land made by it or under its authority, and it is expedient to remove such doubts; It is hereby enacted as follows:—

Title, extent and commencement.

1. (1) This Act may be called THE CROWN GRANTS ACT, 1895.

(2) It extends to the whole of British India; [*] 3

(3) [* * * *] 3

2. Nothing in the Transfer of Property Act, 1882,² contained shall apply or be deemed ever to have applied to any grant or other transfer of land or of any interest therein heretofore made or hereafter to be made by or on behalf of Her Majesty the Queen Empress, her heirs or successors, or by or on behalf of the Secretary of State for India in Council to, or in favour of, any person whomsoever; but every such grant and transfer shall be construed and takes a effect if the said Act had not been passed.

Transfer of Property Act, 1882, not to apply to Crown grants.

¹For Statement of Objects and Reasons, see Gazette of India, 1895, Pt. V, p. 169, and for Proceedings in Council, see *ibid.* Pt. VI, pp. 339 and 355.

²This Act was declared in force in Upper Burma (except the Shan States) by the Burma Laws Act, 1898 (XIII of 1898). Bur. Code.

Sec. 1.—⁸ The words "and" at the end of cl. (2) and "it shall come into force at once" in cl. (3) were repealed by Act X of 1914, Sch. II.

CASE LAW.—In Bengal Crown has conferred no market franchise or right of holding markets. Therefore, a proprietor cannot acquire such a right by prescription, as the right is treated as an incident to the ownership of land; and he has no remedy at law if any competitor holds a market in his proximity. 24 C. W. N. 800=58 I. C. 879=47 C. 1079. A trader usually haunting one market for the sale of his goods, can take the same to another without committing any unlawful act. *Ibid.*

Sec. 2.—The Crown in British India has power to grant or transfer lands and limit after descent in any way it pleases; but a subject has no power to impose on lands or other property, any limitation of descent at variance with the ordinary law applicable. 40 All. 470=23 C. W. N. 101=45 I.A. 134=48 I.C. 213 (P.C.).

Secs. 2 and 3.—The provisions of Ss. 2 and 3 do not include all leases executed by or on behalf of Government from the operations either of S. 107, T. P. Act or of the Registration Act which provides for the cases of documents exempt from registration when executed by or on behalf of Government. 36 All. 176=22 I.C. 933=12 A.L.J. 219. A provision in a lease granted by Government of land situate in Malabar that the lessee will not erect buildings on the ground, is not consistent with S. 19 of the Malabar Com. for Ten. Impr. Act and is saved by S. 3 of the Crown Grants Act. 43 Mad. 65=53 I. C. 345=37 M.L.J. 332. The expression "grant" in S. 2 denotes not only the transfer of prerogative rights possessed by the Crown but also transfers of land of every description. 43 Mad. 65=53 I.C. 345=37 M.L.J. 332. Where a Crown grant consists of a lease of land in the Malabar District containing a reservation of the right to terminate the tenancy on six months' notice and the lessee expressly covenanted to surrender, held, that under S. 3, the lease must take effect according to its tenor and the Government is entitled to a decree for ejectment without paying for improvements. 14 L. W. 386=41 M. L. J. 494=69 I. C. 475=(1921) M. W. N. 694.

3. All provisions, restrictions, conditions and limitations over contained in any such grant or transfer as aforesaid shall be valid and take effect according to their tenor any rule of law, statute or enactment of the Legislature to the contrary notwithstanding.
- Crown grants to take effect according to their tenor.

THE CURRENCY ACT (IV OF 1927).

[26th March, 1927.]

An Act further to amend the Indian Coinage Act, 1906 and the Indian Paper Currency Act, 1923, for certain purposes, and to lay upon the Governor-General in Council certain obligations in regard to the purchase of gold and the sale of gold or sterling.

Whereas it is expedient further to amend the Indian Coinage Act, 1906, and the Indian Paper Currency Act, 1923, for certain purposes, and to lay upon the Governor-General in Council certain obligations in regard to the purchase of gold and the sale of gold or sterling; It is hereby enacted as follows:—

Short title, extent and commencement.

1. (1) This Act may be called THE CURRENCY ACT, 1927.

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas.

(3) It shall come into force on the 1st day of April, 1927.

Amendment of Act III of 1906.

2. (Amendments carried out in their proper places.)

Amendment Act X of 1923.

3. (Amendments carried out in their proper places.)

4. Any person who

Obligation upon Government to purchase gold bullion tendered for sale.

offers for sale to the Governor-General in Council at the office of the Master of the Mint, Bombay, or at any other place notified in this behalf by the Governor-General in Council in the *Gazette of India*, gold in the form of bars containing not less than forty tolas of fine gold shall, subject to such conditions as the Governor-General in Council may, by notification in the *Gazette of India*, prescribe, be entitled to receive payment for the same at the rate of twenty-one rupees, three annas and ten pies per tola of fine gold.

5. (1) The Governor-General in Council shall sell, to any person who makes a

Obligation upon Government to sell gold or sterling.

demand in that behalf at the office of the Controller of the Currency, Calcutta, or of the Deputy Controller of the Currency, Bombay, and pays the purchase price in legal

tender currency, gold for delivery at the Bombay Mint at the rate of twenty-one rupees, three annas and ten pies per tola of fine gold or, at the option of the Controller or the Deputy Controller, as the case may be, sterling for immediate delivery in London at an equivalent rate:

Provided that no person shall be entitled to demand an amount of gold or sterling of less value than that of 1,065 tolas of fine gold.

(2) For the purpose of determining the equivalent rate applicable to the sale of sterling under this section, twenty-one rupees, three annas and ten pies shall be deemed to be equivalent to such sum in sterling as is required to purchase one tola of fine gold in London at the rate at which the Bank of England is bound by law to give sterling in exchange for gold, after deduction therefrom of an amount representing the normal cost per tola of transferring gold bullion in bulk from Bombay to London, including interest on its value during transit.

(3) The Governor-General in Council shall, from time to time determine the equivalent rate in accordance with the provisions of sub-section (2), and shall notify the rate so determined in the *Gazette of India*.

THE CUTCHI MEMONS ACT (XLVI OF 1920).

PREFATORY NOTE.—The following is the Statement of Objects and Reasons annexed to the Bill :—

The Cutchi Memons claim that they are the descendants of the Muhammadans who settled in Cutch after migrating from the coast of Oman. Except for the historical fact that they were originally Hindus and were converted to Muhammadanism about four or five hundred years ago, they are at the present day good and strict Moslems. It has been held by the courts on more than one occasion since the judgment of Sir Erskine Perry in the year 1847, in what is commonly known as the Khojas and Memons case, that in some particulars they are still governed by the Hindu customs instead of Muhammadan Law, the Cutchi Memons have always felt aggrieved and considered the principle so established was incorrect both in law and in practice. Realising this grievance of the Cutchi Memons a Bill was brought in by Mr. Justice Amir Ali about the end of 1885. That Bill intended to make it permissive to the members of the Cutchi Memons community to declare themselves subject to Muhammadan Law. The Bill provided for such a declaration to be made in a prescribed form. By reason of certain difference of opinion as to its provisions the Bill was not proceeded with.

In the year 1896 another Bill was submitted to the Imperial Legislative Council. That Bill was drafted on practically the same lines as the Bill of 1885. The Government of India would appear to have been still of opinion that it would not be right to accept such a measure unless it were shown to be in accordance with the wishes of the entire community. The Bill was referred to a Select Committee. The Committee made its report on the Bill and the matter was allowed to rest there and as no motion with respect to the Bill was made for 2 years and the Bill was removed from the list of business on the 24th March, 1900 by an order of the President under rule 43 of the Rules for the Conduct for Legislative Business. From the manner in which the Cutchi Memons have been agitating the question in their community it would appear they are unanimous that they should be governed in all particulars by Muhammadan Law of the Hanafi School. (*See Statement of Objects and Reasons, Fort St. George Gazette, Pt. III, 9th March, 1920, pp 35—36.*)

[17th September, 1920.

An Act to enable Cutchi Memons to be governed in matters of succession and inheritance by Muhammadan Law.

WHEREAS it is expedient to enable those Cutchi Memons who so desire to be governed in matters of succession and inheritance by Muhammadan law; It is hereby enacted as follows :—

Short title.

1. This Act may be called THE CUTCHI MEMONS ACT, 1920.

Power to make a declaration.

2. (1) [Any person who satisfies the prescribed authority—

(a) that he is a Cutchi Memon and is the person whom he represents himself to be ;

(b) that he is competent to contract within the meaning of section 11 of the Indian Contract Act, 1872 ; and

(c) that he is resident in British India ;]¹

may by declaration in the prescribed form and filed before prescribed authority declare that he desires to obtain the benefit of this Act, and thereafter the declarant and all his minor children and their descendants shall in matters of succession and inheritance be governed by the Muhammadan law.

[(2) Where the prescribed authority refuses to accept a declaration under subsection (1), the person desiring to make the same may appeal to such officer as the Local Government may, by general or special order, appoint in this behalf, and such officer may, if he is satisfied that the appellant is entitled to make the declaration, order the prescribed authority to accept the same]².

Rule-making power of Local Government.

3. [(1) The Local Government may make rules to carry into effect the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing powers, such rules may provide for all or any of the following matters, namely:—

Sec. 2 (1).—¹ The words " Any person.... British India " were substituted for the words " Any Cutchi Memon who—

(a) has attained the age of majority, and

(b) is resident in British India," by Act XXXIV of 1923, S. 2.

²Sec. 2 (2) was added newly by Act XXXIV of 1923, S. 2.

(a) for prescribing the authority before whom and the form in which declarations under this Act shall be made,

(b) for prescribing the fees to be paid for the filing of declarations and for the attendance at private residences of any person in the discharge of his duties under this Act, and for prescribing the times at which such fees shall be payable and the manner in which they shall be levied¹

(3) Rules made under the provisions of this section shall be published in the local official Gazette and thereupon have effect as if enacted in this Act.

THE DELHI LAWS ACT (XIII OF 1912).

(Supplemented and Amended Act VII of 1915.)

CONTENTS

SECTIONS.

1. Short title and commencement
2. Saving of territorial application of enactments.
3. Construction of certain enactments in force in the territories mentioned in Schedule A.
4. Powers of Courts and Local Government for purposes of facilitating application of enactments.

SECTIONS.

5. Vesting of powers of separate Officers in single Officer
6. Pending proceedings
7. Power to extend enactments in force in other parts of British India with modifications and restrictions
- SCHEDULE A.
- SCHEDULE B.

[18th September, 1912.

An Act to provide for the application of the law in force in the Province of Delhi and for the extension of other enactments thereto.

WHEREAS by Proclamation published in Notification No. 911, dated the seventeenth day of September, 1912, the Governor-General in Council, with the sanction and approbation of the Secretary of State for India, has been pleased to take under his immediate authority and management the territory mentioned in Schedule A, which was formerly included within the Province of the Punjab and to provide for the administration thereof by a Chief Commissioner as a separate Province to be known as the Province of Delhi,

And whereas it is expedient to provide for the application of the law in force in the said territory, and for the extension of other enactments thereto, It is hereby enacted as follows —

Short-title and commencement.

1. (1) This Act may be called THE DELHI LAWS ACT, 1912, and

(2) It shall come into force on the first day of October, 1912.

2. The Proclamation referred to in the preamble shall not be deemed to have effected any change in the territorial application of any enactment notwithstanding that such enactment may be expressed to apply or extend to the territories for the time being under any particular administration.

Saving of territorial application of enactments.

3. All enactments made by any authority in British India and all notifications, orders, schemes, rules, forms and by-laws issued, made or prescribed under such enactments which immediately before the commencement of this Act were in force in, or prescribed for, any of the territory mentioned in Schedule A, shall in their application to that territory be construed as if references therein to the authorities, or gazette mentioned in column 1

Construction of certain enactments in force in the territories mentioned in Schedule A

¹The words "(1) The Local Government shall be levied" in S. 3 were substituted for "(1) The Local Government may make rules prescribing the authority before whom and the

form in which the declarations under this Act shall be made" and the Sub-Sec. (2) renumbered as Sub-Sec. (3) by Act XXXIV of 1923, S. 3.

of Schedule B were references to the authorities or gazette respectively mentioned or referred to opposite thereto in column 2 of that Schedule :

Provided that the Governor General in Council may, by notification in the Gazette of India, direct that any power or duty conferred or imposed on the Local Government under any such enactment shall be exercised or performed by the Governor-General in Council or by such other authority as he may specify in this behalf, and not by the Chief Commissioner of Delhi.

Powers of Courts and Local Government for purposes of facilitating application of enactments

4. For the purpose of facilitating the application to the territory mentioned in Schedule A or any part thereof of any enactment passed before the commencement of this Act or of any notification, order, scheme, rule, form or by-law issued, made or prescribed under any such enactment---

(1) Any Court may, subject to the other provisions of this Act, construe the enactment, notification, order, scheme, rule, form or by-law with such alterations not affecting the substance as may be necessary or proper to adapt it to the matter before the Court, and

(2) the Local Government may, subject to the other provisions of this Act by notification in the Gazette of India, direct by what Officer any power or duty shall be exercised or discharged, and any such notification shall have effect as if enacted in this Act.

Vesting of powers of separate Officers in single Officer

5. (1) A notification issued under S. 4, sub-section (2), may direct that any powers or duties vested in separate Officers may be consolidated and vested in, and discharged

by, a single Officer.

(2) Where by such a notification appellate powers are consolidated and vested in a single Officer, the period of limitation for the consolidated appeal shall be the longest period provided in the case of an appeal to any of the Officers whose powers are so consolidated.

6. Nothing in this Act shall affect and proceeding which at the commencement thereof is pending in respect of any of the territory mentioned in Schedule A, and every such proceeding shall be continued as if this Act had not been passed.

Pending proceedings.

Provided, that all proceedings which at the commencement of this Act are pending before the Commissioner of the Division or any other authority within the territory mentioned in Schedule A shall be transferred to, and disposed of by, such authorities in the Province of Delhi as the Local Government may, by notification in the Gazette of India, direct.

7. The Governor-General in Council may, by notification in the Gazette of India, extend with such restrictions and modifications as he thinks fit to [the Province of Delhi]¹ or any part thereof any enactment which is in force in any part of British India at the date of such notification.

Power to extend enactments in force in other parts of British India with modifications and restrictions.

SCHEDULE A.

(See section 3.)

THE PROVINCE OF DELHI.

That portion of the District of Delhi comprising the Tahsil of Delhi and the police station of Mahrauli.

Sec. 7 - ¹ The words "the Province of Delhi" mentioned in A. Schedule" by Act VII of 1915, were substituted for the words "The territory S. 7.

SCHEDULE-B.

(See section 3.)

1 Reference.	2 Construction.
1. The Local Government. ..	The Chief Commissioner of Delhi.
2. The Lieutenant-Governor of the Punjab ..	
3. The Chief Controlling Revenue Authority..	
4. The Chief Revenue Authority ..	
5. The Chief Customs Authority ..	
6. The Financial Commissioner ..	
7. The Commissioner of Revenue ..	
8. The Commissioner of the Division ..	
9. The Commissioner ..	
10. The Chief Secretary to Government ..	
11. A Secretary to Government or to the Local Government ..	
12. All officers and official bodies not mentioned in the foregoing clauses except the Treasurer of Charitable Endowments whose authority extended immediately before the commencement of this Act over the territory mentioned in Schedule-A.	Such officials or official bodies respectively as the Local Government may, by notification in the Gazette of India, direct.
13. The local official Gazette of the Punjab.	The Gazette of India.

THE DELHI LAWS ACT (VII OF 1915).

[Amended Act XVIII of 1919].

PREFATORY NOTE.—The following is the Statement of Objects and Reasons annexed to the Bill :—

“Owing to the issue of the proclamation cited in the preamble, adding certain territory, previously included in the United Provinces of Agra and Oudh, to the Province of Delhi, it has become necessary to take steps to declare the law in force in the territory so added.

Save in respect of a few enactments which are referred to below, the law in force in the Province of Delhi is declared to be in force in the territory now added to that province.

The enactments in force in the province of Delhi which are declared not to be in force in this territory are set forth in Schedule II.

In place of them the enactments specified in Schedule III, which are already in force in this area, are continued in force there. It is clearly undesirable to make any change in these laws, which mainly relate to land, if such a course can be avoided”.—(*Fort St. George Gazette*, Part III, 1st March, 1915).

CONTENTS.

SECTIONS.

1. Short title and commencement.
2. Application to added area, of law in force in existing Provinces of Delhi.
3. Continuance in added area of certain laws now in force in the United Provinces.
4. Provision for facilitating application of certain enactments.
5. Exclusion of certain enactments from

SECTIONS.

- the added area.
6. Pending Proceedings.
7. Amendment of section 7 of Act XIII of 1912.
8. Construction.
- SCHEDULE I.
- SCHEDULE II.
- SCHEDULE III.

[22nd March, 1915.]

An Act to declare the law in force in certain territory added to the Province of Delhi.

WHEREAS by Proclamation published in Notification No. 984-C., dated 22nd day of February, 1915, the Governor-General in Council, with the sanction and approbation of the Secretary of State for India, has been pleased to take under his immediate authority and management the territory mentioned in Schedule I, which was formerly included within the United Provinces of Agra and Oudh, and to include the said territory in the Province of Delhi with effect from the 1st April, 1915 ;

And whereas it is expedient to declare the law in force in the said territory ;

It is hereby enacted as follows :—

Short title and commencement.

1. (1) This Act may be called THE DELHI LAWS ACT, 1915.

(2) It shall come into force on the first day of April, 1915.

2. All enactments (except the enactments specified in Schedule II) for the time

Application to added area of law in force in existing Province of Delhi.

being in force in the territory specified in Schedule A to the Delhi Laws Act, 1912, and all notifications, orders, schemes, rules, forms and by-laws issued, made or prescribed under such enactments shall be deemed to be in

force in the territory specified in Schedule I in the same manner and subject to the same modifications as they are for the time being in the territory specified in the said Schedule to the said Act.

Continuance in added area of certain laws now in force in the United Provinces.

3. The enactments specified in Schedule III, and all notifications, orders, schemes, rules, forms and by-laws issued, made or prescribed under those enactments shall continue to be in force in the territory specified in Schedule I :

Provided that in the enactments so continued and in all notifications, orders, schemes, rules, forms and by-laws issued, made or prescribed thereunder, reference to a Local Government, the Lieutenant-Governor of the United Provinces of Agra and Oudh, or the Board of Revenue for the United Provinces shall be read as referring to the Chief Commissioner of Delhi ; references to a High Court or the High Court of Judicature of the North-Western Provinces as referring to the [High Court of Judicature at Lahore,]¹ and references to the official Gazette for the United Provinces as referring to the Gazette of India.

Provision for facilitating application of certain enactments

4. For the purpose of facilitating the application to the territory mentioned in Schedule I of the enactments referred to in section 3 the powers conferred by sections 4 and 5 of the Delhi Laws Act, 1912, shall be exercisable

in respect thereof.

Exclusion of certain enactments from the added area.

5. Save as provided in sections 2 and 3 no enactment which is in force in the United Provinces of Agra and Oudh or any part thereof shall continue to be in force in the territory specified in Schedule I.

6. Nothing in this Act shall affect any proceeding which at the commencement thereof is pending in respect of any of the territory mentioned in Schedule I or of anything arising in such territory

Pending proceedings;

and every such proceeding shall be continued as if this Act had not been passed:

Provided that the Local Government may, by notification in the Gazette of India, direct that any proceeding, criminal, civil or revenue, other than a proceeding pending before the High Court of Judicature for the North-Western Provinces, shall be transferred to, and disposed of by, the corresponding authority of the Delhi Province.

Amendment of S. 7 of Act XIII of 1912.

7. In S. 7 of the Delhi Laws Act, 1912, for the words "the territory mentioned in Schedule A" the words "the Province of Delhi" shall be substituted.

Construction.

8. This Act shall be construed with, and deemed to be part of, the Delhi Laws Act, 1912.

SCHEDULE I.

TERRITORY ADDED TO THE PROVINCE OF DELHI.

(See section 2.)

Revenue estates of—

1. Subehpur.

2. Jagatpur.

3. Baqiabad.

4. Beharipur.

5. Saadatpur Mahal Gujran.

¹ Sec. 3.—The words "High Court of Judicature at Lahore" were substituted for the words "Chief Court of the Punjab" by Act XVIII of 1919.

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| 6. Saadatpur Musalmanan. | 36. Ghonda patti Gujran Bangar. |
| 7. Saadatpur Amad Delhi. | 37. Ghonda patti Chauhan Bangar. |
| 8. Wazirabad. | 38. Jafraabad. |
| 9. Khajuari Paramad. | 39. Udanpur. |
| 10. Khajuri Khas. | 40. Babarpur. |
| 11. Garhi Mendu. | 41. Siqdarpur. |
| 12. Timarpur. | 42. Gokalpur. |
| 13. Chandrawal. | 43. Sabauli. |
| 14. Usmanpur. | 44. Mandauli. |
| 15. Ghonda patti Gofan Khadar. | 45. Taharpur. |
| 16. Ghonda patti Chauhan Khadar. | 46. Jhilmila. |
| 17. Andhavli. | 47. Chandavli urf Shadara. |
| 18. Kaithwara. | 48. Silampur Bangar. |
| 19. Silampur Amad Delhi. | 49. Silampur Khadar. |
| 20. Ghondli Khadar. | 50. Ghondli Bangar. |
| 21. Jatwara Khurd. | 51. Kakulduman. |
| 22. Muhrakur Reti. | 52. Khureji Khas. |
| 23. Shakarpur Khadar. | 53. Khureji Baramad. |
| 24. Nagla Manchi. | 54. Shakarpur Khas Bangar. |
| 25. Shampur. | 55. Mandavli Fazilpur. |
| 26. Gharaunda Nimka Khadur. | 56. Hasanpur Bhuapur. |
| 27. Nagli Razapur. | 57. Ghazipur. |
| 28. Chilla Sarauda Khadar. | 58. Khichripur. |
| 29. Qarawalnagar urf Dharauli Kalan. | 59. Gharaunda Nimka Bangar (Patparganj) |
| 30. Jivanpur Johilpur. | 60. Shakarpur Baramad. |
| 31. Mustafabad. | 61. Kotla. |
| 32. Mirpur Turk. | 62. Chilla Sarauda Bangar. |
| 33. Ziauddinpur. | 63. Dalupura |
| 34. Khanpur Dhani. | 64. Kondli. |
| 35. Maujpur. | 65. Gharauli. |

SCHEDULE II.

ENACTMENTS IN FORCE IN THE DELHI PROVINCE WHICH WILL NOT BE IN
FORCE IN THE TERRITORY ADDED TO THAT PROVINCE.

(See section 2.)

Year.	Number.	Short title.	Remarks.
1	2	3	4
		<i>Acts of the Governor-General of India in Council.</i>	
1887	XVI	The Punjab Tenancy Act, 1887.	
" *	XVII	The Punjab Land Revenue Act, 1887.	
	**	* *] ¹	
		<i>Punjab Acts.</i>	
1900	II	The Punjab Land Preservation (Chos) Act, 1900.	
1912	V	The Colonization of Government Lands (Punjab) Act, 1912.	
1913	I	The Punjab Pre-emption Act, 1913.	
"	II	The Redemption of Mortgages (Punjab) Act, 1913.	

¹ The entry relating to the Punjab Alienation of land Act (XIII of 1900) was repealed by Act X of 1927.

SCHEDULE III.

ENACTMENTS IN FORCE IN THE UNITED PROVINCES OF AGRA AND OUDH
WHICH WILL CONTINUE TO BE IN FORCE IN THE TERRITORY ADDED TO
THE DELHI PROVINCE.

(See Section 3.)

Year.	Number.	Short title.	Remarks.
1	2	3	4
		<i>Acts of the Governor General of India in Council.</i>	
1882	IV	The Transfer of Property Act, 1882.	
"	V	The Indian Easements Act, 1882	
1891	VIII	An Act to extend the Indian Easements Act, 1882, to certain areas, in which that Act is not in force.	
		<i>United Provinces Acts.</i>	
1901	II	The Agra Tenancy Act, 1901	In so far as it applies to the Agra Tenancy Act, 1901, and the United Provinces Land Revenue Act, 1901.
"	III	The United Provinces Land Revenue Act, 1901.	
1904	I	The United Provinces General Clauses Act, 1904.	

THE DESTRUCTION OF RECORDS ACT (V OF 1917).

PREFATORY NOTE—The following is the Statement of Objects and Reasons annexed to the Bill :—

" In present conditions documents are required to be placed in the custody of Government officers under a large number of enactments. In many of these Acts no provision exists for the destruction of such of them as have become valueless. For example, there is no provision for the destruction of documents lodged with the Registrar of Joint Stock Companies under the Registration of Societies Act (XXI of 1860), the Provident Insurance Societies Act (V of 1912) the Indian Life Assurance Companies Act (VI of 1912), and the Indian Companies Act (VII of 1913); nor could such papers be dealt with under the Destruction of Records Act (III of 1879), as it stands. It is accordingly proposed to repeal and re-enact the Act of 1879 so as to make it conform to modern requirements. The principal feature of the draft Bill is that it empowers certain authorities to frame rules for the disposal by destruction or otherwise of documents which they may consider not of sufficient public value to justify preservation, and provides for the delegation to subordinate officers of the rule-making powers vested in the Local Government. The rule making powers already vested in the High Courts and the Chief Controlling Revenue authorities by Act III of 1879 will not be affected by this Bill. To avoid overlapping, it is proposed to repeal the provisions of the enactments mentioned in this Schedule.—(*Fort St. George Gazette*, Part III, 20th February, 1917, p. 2.)

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SECTIONS.

1. Short title.
2. Definitions.
3. Power to certain authorities to make rules for disposal of documents.

SECTIONS.

4. Validation of former rules for disposal of documents.
5. Saving of certain documents.
6. Repeals.

SCHEDULE.

[28th February, 1917.

An Act to consolidate and amend the law providing for the destruction or other disposal of certain documents in the possession or custody of Courts and Revenue and other public officers.

WHEREAS it is expedient to consolidate and amend the law providing for the destruction or other disposal of certain documents in the possession or custody of Courts and Revenue and other public officers ; It is hereby enacted as follows :—

Short title.

1. This Act may be called THE DESTRUCTION OF RECORDS ACT, 1917.

Definitions.

2. In this Act—

(1) "The Chief Controlling Revenue authority" means—

(a) in the presidencies of Fort William in Bengal and Fort St. George and in the United Provinces and Bihar and Orissa,—the Board of Revenue ;

(b) in the presidency of Bombay outside Sindh and the limits of the town of Bombay—a Commissioner ;

(c) in Sindh,—the Commissioner ;

(d) in the Punjab and Burma, the financial Commissioner ; and

(e) elsewhere,—the Local Government or such officer as the Local Government may, by notification in the local official Gazette, appoint in this behalf.

(2) "High Court" means the highest Civil Court of appeal in any local area.

3. (1) The authorities hereinafter specified may, from time to time, make rules

Power to certain authorities to make rules for disposal of documents.

for the disposal, by destruction or otherwise of such documents as are, in the opinion of the authority making the rules, not of sufficient public value to justify their preservation.

(2) The authorities shall be—

(a) in the case of documents in the possession or custody of a High Court or of the Courts of Civil or Criminal jurisdiction subordinate thereto,—the High Court ;

(b) in the case of documents in the possession or custody of Revenue Courts and officers,—the Chief Controlling Revenue-authority ; and

(c) in the case of documents in the possession or custody of any other public officer,—the Local Government or any officer specially authorised in that behalf by the Local Government.

(3) Rules made under this section by the High Court of Judicature at Fort William in Bengal shall be subject to the previous approval of the Governor-General in Council, and rules made by any other High Court, or by a Chief Controlling Revenue authority or by an officer specially authorised in that behalf by a Local Government, shall be subject to the previous approval of the Local Government.

4. All rules and orders directing or authorising the destruction or other disposal

Validation of former rules for disposal of documents.

of documents in the possession or custody of any public officer, heretofore made by a Local Government, or with the approval of the Local Government by any authority

not empowered to make such rules under the Destruction of Records Act, 1879, shall be deemed to have had the force of law from the date on which they were made, and all such rules and orders now in force shall continue to have the force of law until they are superseded by rules made under this Act.

Saving of certain documents.

and maintained.

5. Nothing in this Act shall be deemed to authorise the destruction of any document which, under the provisions of any law for the time being in force, is to be kept

Repeals.

column thereof.]¹

6. [The enactments mentioned in the Schedule are hereby repealed to the extent specified in the fourth

THE SCHEDULE.
REPEAL OF ENACTMENTS¹.
(See section 6.)

Year.	Number.	Short title.	Extent of repeal.
(1)	(2)	(3)	(4)
1879	III	The Destruction of Records Act, 1879..	The whole.
1908	XVI	The Indian Registration Act, 1908 ..	The words "and also for the destruction of such books, papers and documents as need no longer be kept" in clause (a) of sub section (1) of section 69.
1913	II	The Official Trustees Act, 1913 ..	Clause (ee) of sub-section (2) of section 30.
"	III	The Administrator-General's Act, 1913.	Clause (ff) of sub-section (2) of section 50.

THE DIVORCE ACT (IV OF 1869).

PREFATORY NOTE.—This Act is framed on the corresponding English Statute Law.

This Act extends to India the principal provisions of the Matrimonial Causes Act, 1857 (20 and 21 Vic., C. 85) as amended by the Matrimonial Causes Act, 1859 (22 & 23 Vict. C. 61), and the Matrimonial Causes Act, 1860 (23 and 24 Vic. C. 144) and the Matrimonial Causes Act, 1866 (29 and 30, Vic. C. 12). It also embodies many rulings of Sir Cresswell and Lord Penzance. (*See Statement of Objects and Reasons.*) Mr. Maine in moving that the Report of the Select Committee on the Bill to amend the law relating to Divorce and Matrimonial Causes in India be taken into consideration, said :—"This measure is obviously one of great social importance; It is substantially a consolidation measure. It puts together the English Statute Law on the subject in a more orderly form and in clearer language, and it incorporates the recent decisions of the Divorce Court. But, in the main, its principles are those of the statute regulating the jurisdiction of the English Court of Divorce and Matrimonial Causes." 26th March, 1879—*Fort St. George Gazette* (Supplement), March 1869, p. 44.

The object of the Act was to give effect to the policy embodied in the High Courts Act passed in 1861 (24 and 25 Vic. C. 104), and the Letters Patent issued by Her Majesty for constituting the High Courts. The object of the High Courts Act, seemed to have been, not so much to create new branches of jurisdiction, as to constitute and redistribute the power which already existed. The 9th clause gave power to Her Majesty to confer on the High Court such matrimonial jurisdiction as she thought fit; but Her Majesty did not attempt to confer on the High Court such a jurisdiction as was exercised by the Divorce Court in England. The Secretary of State, therefore requested the Governor-General to introduce a measure, conferring a jurisdiction on the High Courts here similar to that exercised by the Divorce Court sitting in London. Hence the Act (*See the remarks of Mr. Maine in moving for leave to introduce the Bill.*)

"Thus, it would be seen that the object of the Divorce Act was to place the Matrimonial Law administered by the High Courts, in the exercise of their original jurisdiction, on the same footing as the Matrimonial Law administered by the Court for Divorce and Matrimonial Causes in England."

The 9th section of the Act of Parliament for establishment of High Courts of Judicature in India (24 and 25 Vic. C. 104) provided that the High Courts shall exercise such matrimonial jurisdiction as Her Majesty by Letters Patent shall grant and direct. Under the authority thus conferred by Parliament, the 35th section of the Letters Patent constituting the High Courts of Judicature provided as follows :—

'And we do further ordain that the said High Court of Judicature at Fort William in Bengal shall have jurisdiction in matters Matrimonial between our subjects professing the Christian religion, and that such jurisdiction shall extend to the local limits within which the Supreme Court now has ecclesiastical jurisdiction : provided always that nothing herein contained shall be held to interfere with the exercise of any jurisdiction in matters Matrimonial by any Court not established by Royal Charter within the said Presidency law fully possessed thereof."

¹ Schedule repealed by Act XII of 1927.

In the Despatch of the Secretary of State transmitting the Letters Patent, 33rd and 34th paragraphs are to the following effect :—

" Her Majesty's Government are desirous of placing the Christian subjects of the Crown within the Presidency in the same position under the High Court, as to matters Matrimonial, in general, as they now are under the Supreme Court, and this they believe to be effected by clause 35 of the Charter. But they consider it expedient that the High Court should possess, in addition, the power of decreeing divorce which the Supreme Court does not possess, in other words, that the High Court should have the same jurisdiction as the Court for Divorce and Matrimonial Causes in England, established in virtue of the Act Sess. 20 and 21 Vic. C. 85 and in regard to which further provisions were made by Sess. 22 and 23, Vic. C. 61 and 23 and 24 Vic. C. 144. The Act of Parliament for establishing the High Courts, however, does not purport to give to the Crown the power of importing into the Charter all the provisions of the Divorce Court Act, and some of them the Crown clearly could not so import, such, for instance, as those which prescribe the period of re-marriage, and those which exempt from punishment clergymen refusing to remarry adulterers. All these are in truth, matters for Indian Legislation, and I request that you immediately take the subject into your consideration and introduce into your Council a bill for conferring upon the High Court, the jurisdiction and powers of the Divorce Court in England, one of the provisions of which should be to give an appeal to the Privy Council in those cases in which the Divorce Court Act gives an appeal to the House of Lords.

" The object of the provision at the end of clause 35 is to obviate any doubt that may possibly arise as to whether, by vesting the High Court with the powers of the High Court for Divorce and Matrimonial Causes in England, it was intended to take away from the Court within the Division of the Presidency not established by Royal Charter, any jurisdiction which they might have in matters Matrimonial, as for instance in a suit for alimony between Armenians or Native Christians. With any such jurisdiction it is not intended to interfere."

In addition to the Act of Parliament mentioned by the Secretary of State as regulating the jurisdiction of the English Divorce Court, the statute 25 and 26 Vic. C. 81 had been passed in the year (1862). The object of this statute was to render perpetual 23 and 24 Vic. C. 144, the duration of which had been originally limited to two years.

The draft of a bill had been prepared to give effect to the Secretary of State's instructions, but some variations from the English Statutes in respect of procedure had to be adopted.

With a view to uniformity in practice in the several branches of jurisdiction the Bill provided that the procedure of the Code of Civil Procedure shall be followed, instead of the Rules of Her Majesty's Court for Divorce and Matrimonial causes in England; and it also omitted the provision in 20 and 21, Vic. C. 85 respecting the occasional trial of questions of fact by juries.

There were also some other variations of a minor and verbal character.

The Bill was then introduced into the Council, and after several amendments, was passed into Act IV of 1869. (See Statement of Objects and Reasons to the Indian Divorce Act, 1869.

LEGISLATIVE CHANGES.—Rep. in Pt., Act 7 of 1870;

Rep. in Pt., Act 12 of 1873; Rep. in Pt. (in Punjab), Act XVIII of 1884; Rep. in Pt. (in the Central Provinces and the District of Sambalpur) Act 4 of 1901, S. 8.

S. 7 am., Act X of 1912.

S. 30 ins., Act 6 of 1909.

Am. (in Lower Burma), Act 11 of 1889, S. 97 (rep. by Act 6 of 1900), and Act 6 of 1900, S. 47, am. 18 of 1919, Act 11 of 1923; Act 32 of 1925; and 25 of 1926, S. 2.

Declared in force—

in the Santhal Parganas, Reg. 3 of 1872, S. 3, as amended by Reg. 3 of 1899, S. 3.

in the Angul District, Reg. 3 of 1913, S. 3;

in the Upper Burma (except the Shan States), Act 13 of 1898, S. 4;

in the British Baluchistan, Reg. 2 of 1913, S. 3.

THE DIVORCE ACT (IV OF 1869).

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2. Reference to High Court.
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SECTIONS.

17. Confirmation of decree for dissolution by District Judge.

IV.—NULLITY OF MARRIAGE.

18. Petition for decree of nullity.
19. Grounds of decree.
20. Confirmation of District Judge's decree.
21. Children of annulled marriage.

V.—JUDICIAL SEPARATION.

22. Bar to decree for divorce *a mensa et toro*; but judicial separation obtainable by husband or wife.

23. Application for separation made by petition.

24. Separated wife deemed spinster with respect to after-acquired property.

25. Separated wife deemed spinster for purposes of contract and suing

REVERSAL OF DECREE OF SEPARATION.

26. Decrees of separation obtained during absence of husband or wife may be reversed.

VI.—PROTECTION-ORDERS.

27. Deserted wife may apply to Court for protection.

28. Court may grant protection-order.

29. Discharge or variation of orders.

30. Liability of husband seizing wife's property after notice of order.

31. Wife's legal position during continuance of order.

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33. Answer to petition.

VIII.—DAMAGES AND COSTS.

34. Husband may claim damages from adulterer.

35. Power to order adulterer to pay costs.

Power to order litigious intervenor to pay costs.

IX.—ALIMONY.

36. Alimony *pendente lite*.

37. Power to order permanent alimony.

Power to order monthly or weekly payments.

38. Court may direct payment of alimony to wife or to her trustee.

X.—SETTLEMENTS.

39. Power to order settlement of wife's property for benefit of husband and children.

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40. Inquiry into existence of ante nuptial or post-nuptial settlements.

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42. Power to make such orders after decree.

43. Power to make orders as to custody of children in suits for dissolution or nullity.

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confirmation.

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47. Stamp on petition.

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Statements to be verified.

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49. Suits by minors.

50. Service of petition.

51. Mode of taking evidence.

52. Competence of husband and wife to give evidence as to cruelty or desertion.

53. Power to close doors.

54. Power to adjourn.

55. Enforcement of, and appeals from, orders and decrees

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56. Appeal to Queen in Council.

XIII.—REMARriage.

57. Liberty to parties to marry again.

58. English clergyman not compelled to solemnize marriages of persons divorced for adultery.

59. English minister refusing to perform ceremony to permit use of his church.

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60. Decree for separation or protection-order valid as to persons dealing with wife before reversal.

Indemnity of persons making payment to wife without notice of reversal of decree or protection-order.

61. Bar of suit for criminal conversation.

62. Power to make rules.

SCHEDULE OF FORMS.

NOS.

1. Petition by husband for a dissolution of marriage with damages against co-respondent by reason of adultery.

2. Respondent's statement in answer to No. 1.

3. Co-respondent's statement in answer to No. 1.

4. Petition for decree of nullity of marriage.

5. Petition by wife for judicial separation on the ground of her husband's adultery.

6. Statement in answer to No. 5.

7. Statement in reply to No. 6.

8. Petition for a judicial separation by reason of cruelty.

9. Statement in answer to No. 8.

10. Petition for reversal of decree of separation

11. Petition for protection-order.

12. Petition for alimony pending the suit.

13. Statement in answer to No. 12.

14. Undertaken by minor's next friend to be answerable for respondent's costs.

THE DIVORCE ACT (IV OF 1869)¹

[26th February, 1869.]

An Act to amend the law relating to Divorce and Matrimonial Causes in India.

WHEREAS it is expedient to amend the law relating to the divorce of persons professing the Christian religion, and to confer upon certain Courts jurisdiction in matters matrimonial; it is

Preamble.

hereby enacted as follows :—

¹ For Statement of Objects and Reasons, see Select Committee, see Gazette of India, 1869, Calcutta Gazette, 1863, p. 173; for Report of p. 192; for Proceedings in Council, see Calcutta

I.—PRELIMINARY.

Short title. Commencement of Act.

1. This Act may be called THE INDIAN DIVORCE ACT and shall come into operation on the first day of April, 1869.

Extent of Act.

2. This Act shall extend to the whole of British India, and (so far only as regards British subjects within the dominions hereinafter mentioned) to the dominions of Princes and States in India in alliance with her Majesty.

Extent of power to grant relief generally,

¹[Nothing hereinafter contained shall authorize any Court to grant any relief under this Act, except where the petitioner (or respondent)² professes the Christian religion.]

Gazette, 1862, Supplement, p. 463, *ibid.*, 1863, Supplement, p. 43. and Gazette of India, 1869, Supplement, p. 291.

It has been declared in force in Upper Burma generally (except the Shan States) by the Burma Laws Act (XIII of 1898), S. 4 (1) and Sched. I; in the Arakan Hill District, *see* Schedule to the Arakan Hill District Laws Regulation (IX of 1874); in Angul and the Khondmals, Schedule to the Angul District Regulation (I of 1894); in the Sonthal Parganas by S. 3 of the Sonthal Parganas Settlement Regulation (III of 1872) as amended by the Sonthal Parganas Justice and Laws Regulation (III of 1899), *ibid.*, in British Baluchistan by the Baluchistan Laws Regulation (I of 1890).

It has been declared, by notification under S. 3 (a) of the Scheduled Districts Act (XIV of 1874), to be in force in the following Scheduled Districts, namely:—

The Districts of Hazaribagh, Lohardaga and Manbhum, and Pargana Dhalbhum and the Kohlan in the District of Singhbhum, *see* *Gazette of India*, 1881, Pt. I, p. 504.

(The District of Lohardaga included at that time the present district of Palamau which was separated in 1894. The District of Lohardaga is now called the Ranchi District—*see* *Calcutta Gazette*, 1899, Pt. I, p. 44).

The Scheduled Districts in Ganjam and Vizagapatam, *see* *Fort St. George Gazette*, 1898, Pt. I, p. 666.

It has been extended by notification under S. 5 of the same Act to the North-Western Provinces Tarai, *see* *Gazette of India*, 1876, Pt. I, p. 505.

The Limitation Act does not apply to suits under this Act, *see* the Indian Limitation Act (IX of 1908), S. 29 (2).

Sec. 1.—Jurisdiction in matrimonial causes was not based on a so-called matrimonial domicile when the Indian Councils Act was passed in 1861. 47 Bom. 843 = 25 Bom. L. R. 945 = 1923 Bom. 321. Act does not confer jurisdiction on the Courts to dissolve the marriages of non-domiciled parties. (*Ibid.*) Relief not involving the status of the parties may be granted under the Act if the conditions of residence are satisfied. (*Ibid.*) Municipal Law of a country may lay down its own tests for creating jurisdiction within its own boundaries even in cases where the status of the parties is involved. (*Ibid.*) History of Courts for divorce and matrimonial causes in England traced. *See* (*Ibid.*) Whether Act applies to British subjects in Native States, *see* 10 Bom. 422. On this section, *see also* 38 Bom. 125;

8 Bom. L. R. 856; 17 Mad. 235.

POWERS OF LEGISLATURE.—Divorce Act, is, and always has been, within the legislative powers conferred upon the Indian legislature by the Indian Councils Act, 1861. 47 Bom. 843.

Sec. 2.—¹ This and the succeeding three paras. were substituted for the 2nd, 3rd and 4th paras. by Act XX of 1926, S. 2.

[*See also* under S. 7.]

² Inserted by Act XXX of 1927.

JURISDICTION.—To grant relief under the Act, it must be proved that the conditions of S. 2 are strictly complied with. *See* 29 C. W. N. 350 = 52 Cal. 379 = 89 I. C. 1018 = 1925 Cal. 585 (F.B.). *See also* 52 Cal. 566 = 89 I. C. 611 = 1925 Cal. 874. Courts in India are not empowered to decree dissolution of the marriage between persons not domiciled within their jurisdiction. 2 Bur. L. J. 106 = 1923 Rang. 223. The provisions of S. 2 as to the residence, apply to cases when the parties are domiciled in India but where the parties are domiciled in England they cannot override the express provisions in S. 7. (*Ibid.*) Court should enquire and set out in the judgment facts relied on as conferring jurisdiction. 32 All. 293 = 5 I. C. 871 = 7 A. L. J. 193.

RESIDENCE.—Residence in India is sufficient to give the Court jurisdiction under the Act, though the party retains a foreign domicile. 40 Cal. 215 = 17 C. W. N. 491; 53 Cal. 282 = A.I.R. 1926 Cal. 871. There will be a valid divorce in India though the marriage may be valid in the country of the domicile of origin. 40 Cal. 215 = 17 C. W. N. 491. Residence of the petitioner must be *bona fide* and not casual or as a traveller. 38 Bom. 125 = 15 Bom. L. R. 593. *See also* 32 All. 293. The High Court has no jurisdiction to grant a decree for restitution either against a Parsi respondent or a respondent not within Presidency. 38 Bom. 125 = 15 Bom. L. R. 593. In a divorce case before a final decree is passed the Court must definitely come to a finding on the question whether the marriage was solemnized in India and on what date. 57 I. C. 43 = 31 C. L. J. 340.

PROFESSION OF CHRISTIANITY.—A person does not cease to profess Christianity within the meaning of S. 2 merely because she has been excommunicated by the sect or the Church to which she belongs. 46 Mad. 839 = 45 M. I. J. 208 = 1924 M. 18. The question of profession of Christianity is a question of the party's own action and not of the action of the Church. (*Ibid.*) The conversion to Christianity of one of two

[or to make decrees of dissolution of marriage except where the parties to the marriage are domiciled in India at the time when the petition is presented,]

[or to make decrees of nullity of marriage except where the marriage has been solemnized in India, and the petitioner is resident in India at the time of presenting the petition,]

[or to grant any relief under this Act other than a decree of dissolution of marriage or of nullity of marriage, except where the petitioner resides in India at the time of presenting the petition.]

3. In this Act, unless there be something repugnant in the subject or context,—

Interpretation-clause.

(1) "High Court" means,—

in any Regulation province—the Court there established under the Act of the twenty-fourth and twenty-fifth of Victoria, chapter one hundred and four;¹

in the territories for the time being subject to the Government of the Lieutenant-Governor of the Punjab—[the High Court of Judicature at Lahore];²

in Burma—[the High Court of Judicature at Rangoon];³

[in Oudh—the Chief Court of Oudh];⁴

[in Sind—the Chief Court of Sind];⁵

and in any other non-Regulation province and in any place in the dominions of the Princes and States of India in alliance with her Majesty—the High Court or Chief Court to whose original criminal jurisdiction the petitioner is for the time being subject, or would be subject if he or she were a European British subject of her Majesty:

In the case of any petition under this Act, "High Court"⁶ is that one of the aforesaid Courts within the local limits of whose ordinary appellate jurisdiction, or of whose jurisdiction under this Act, the husband and wife reside or last resided together;

"District Judge."

(2)⁷ "District Judge" means,—

married Hindus does not dissolve the marriage. (*Ibid.*)

Sec. 3.—¹The Indian High Courts Act, 1861, Coll. Stat. Vol. I.

² The words "the High Court—Lahore" were substituted for the words "Chief Court of the Punjab" by Act XVIII of 1910.

³ The words "the High—Rangoon" were substituted for the words "the Chief Court of Lower Burma" by Act XI of 1923, Sch. I.

⁴ The words "in Oudh the Chief Court of Oudh" were inserted by Act XXXII of 1925, Sch. I.

⁵ Inserted by Act XXXIV of 1926

⁶ In the N. W. Frontier Province, the Chief Court of the Punjab is the High Court as regards proceedings under this Act, *see* the N. W. F. P. Law and Justice Regulation, 1901 (Regulation VII of 1901), S. 6 (1) (c), P. and N. W. Code

⁷ Repealed in the Punjab and in the Central Provinces in so far as it defines "District Judge" in the Punjab and in the Central Provinces respectively to mean the "Commissioner of a Division" *see* S. 2 of the Punjab Courts Act (XVIII of 1884), P. and N. W. Code, and S. 8 of the Central Provinces Civil Courts Amendment Act, 1901 (IV of 1901), repealed by the Central Provinces Courts Act, 1904 (II of 1904), C. P. Code. In these two provinces the Divisional Court is for the purposes of this Act to be deemed to be the District Court for the District comprised in the Division, *see* Act XVIII of 1884, S. 23, cl. (a) and Act II of 1904, S. 13 (1), cl. (d).

Under the powers conferred by S. 6 of the Scheduled Districts Act (XIV of 1874), the powers of a "District Judge" were conferred on

the Deputy Commissioner, Khasi and Jaintia Hills, the Garo Hill District and the Naga Hills, *see* p. 12 of the Assam Manual of Local Rules and Orders, Ed. 1893, and Assam Gazette, 1897, Pt. II, p. 591, and 1898, Pt. I, p. 741, respectively.

Sec. 3, Cl. (1). JURISDICTION—RESIDENCE. —As to jurisdiction of Chief Court (now High Court), Punjab, *see* 10 I. C. 487 = 47 P. R. 1911. As to residence conferring jurisdiction, *see* 36 Cal. 964 = 4 I. C. 419. *See also* 53 Cal. 282. To constitute residence it is not essential that the persons should have a house of their own. It is sufficient to find the place where both parties lived together. 29 Bom. L. R. 308 = 100 I. C. 388 = A. I. R. 1927 Bom. 230. *Per Marten, C. J.* —The word 'reside' in S. 3 does not mean sexual intercourse; the word 'together' in that section does not govern the word 'reside' but only the words 'last resided'. (*Ibid.*)

ILLUSTRATIVE CASES.—Where a husband and wife had no permanent residence but they last lived together in a Hotel in Bombay for the greater portion of the month, the husband then being on leave from Active Service in Mesopotamia, it was held the Bombay Court has jurisdiction. 45 Bom. 547 = 22 Bom. L. R. 1077. Though both parties to a petition for divorce are residing separately from each other, the Court has jurisdiction if they lived within the jurisdiction of the Court at the time of the presentation of the petition. 44 Bom. 924 = 59 I. C. 931 = 22 Bom. L. R. 361. But not otherwise. *See* 76 P. R. 1916 = 122 P. W. R. 1916 = 36 I. C. 367 = 139 P. I. R. 1916. The word 'together' in S. 3 (1) must be read with "last resided" only. 171 P. L. R. 1911 = 47 P. R.

in the Regulation provinces [and in Oudh]¹—a Judge of a principal Civil Court of original jurisdiction ;

² in the Non-Regulation³ provinces, other than [Oudh]⁴ Sind and Burma—a Commissioner of a Division;

[* * * * *]

in Burma [and Sind]⁶—a Judge of a [District]⁷ Court ;

and in any place in the dominions of the Princes and States aforesaid—such officer⁸ as the Governor-General of India in Council shall from time to time appoint in this behalf by notification in the Gazette of India, and, in the absence of such officer, the High Court in the exercise of its original jurisdiction under this Act :

(3) ⁹ “District Court” means, in the case of any petition under this Act, the Court of the District Judge within the local limits of whose ordinary jurisdiction, or of whose jurisdiction under this Act, the husband and wife reside or last resided together :

“Court.” (4) “Court” means the High Court or the District Court, as the case may be :

(5) “minor children” means, in the case of sons of Native fathers, boys who have not completed the age of sixteen years, and, in the case of daughters of Native fathers, girls who have not completed the age of thirteen years : in other cases it means unmarried children who have not completed the age of eighteen years :

(6) “incestuous adultery” means adultery committed by a husband with a woman with whom, if his wife were dead, he could not lawfully contract marriage by reason of her being within the prohibited degrees of consanguinity (whether natural or legal) or affinity :

“Incestuous adultery.” (7) “bigamy with adultery” means adultery with the same woman with whom the bigamy was committed :

(8) “marriage with another woman” means marriage of any person, being married to any other person, during the life of the former wife, whether the second marriage shall have taken place within the dominions of her Majesty or elsewhere :

1911=10 I. C. 487=122 P. W. R. 1911. See also 3 O. W. N. 306=A. I. R. 1926 Oudh 319. The Resident at Aden is not a District Judge. 37 Bom. 57=17 I. C. 215=14 Bom. L. R. 872 As to the necessity for residence of husband and wife in order to confer jurisdiction on District Court or Divisional Court, see 7 L. B. R. 5=20 I. C. 399=6 Bur. L. T. 176. Judges of Divisional Courts throughout Burma are District Judges under the Act. No appeal however lies to the Chief Court from their decision. 6 Bur. L. T. 10=19 I. C. 53=7 L. B. R. 8 (F. B.).

¹ After the words “Regulation Provinces” the words “and in Oudh”, were inserted by Act XXXII of 1925, Sch. I.

² This clause as originally enacted was as follows :—

“in the Non Regulation provinces, other than British Burma and Sindh—a Commissioner of a Division;”

“in Pegu—the Recorder of Rangoon ;”

“in Arakan—the Recorder at Rangoon until a Recorder’s Court is established at Akyab, and thenceforward the Recorder at Akyab ;”

“in the Tenasserim Provinces—the Recorder at Moulmein ;”

“in Sind—the Judicial Commissioner in that Province,” for the subsequent amendments, see S. 97 and

the second schedule to the Lower Burma Courts Act (XI of 1889), and S. 47 and the first schedule of the Lower Burma Courts Act (VI of 1900) ; as to the operation of the repeal of the former Act by the latter, see S. 1 (2), Act VI of 1900.

³ In the Sonthal Parganas, the Commissioner has been declared to be the District Judge, and the High Court at Calcutta to be the High Court, for the purposes of the Act, see S. 15 (3) of the Sonthal Parganas Justice Regulation (V of 1893), Ben. Code.

⁴ After the words “other than” the word “Oudh” was inserted by Act XXXII of 1925, Sch. I.

⁵ Omitted by Act XXXIV of 1926.

⁶ Inserted by Act XXXIV of 1926.

⁷ The word “District” was substituted for the word “Divisional” by Act XI of 1923, Sch. I.

⁸ For Notifications issued under the power conferred by this clause, see p. 43 of Brit. Enact. N. S. (W. I), Ed. 1895, and *Gazette of India*, 1893, Pt. I, p. 510, in respect of Kathiawar and the Nizam’s Dominions respectively.

⁹ In the Punjab and the N. W. F. Province the Divisional Court shall, for the purposes of this Act, be deemed to be the District Court for all districts comprised in the division. Punjab Courts Act (XVIII of 1894), S. 23, proviso (a); N.W.F. Province Law and Justice Regulation (Regulation VII of 1901), S. 53, proviso (a), see P. and N. W. Code,

"Desertion."

(9) "desertion" implies an abandonment against the wish of the person charging it : and

(10) "property" includes, in the case of a wife, any property to which she is entitled for an estate in remainder or reversion, or as a trustee, executrix or administratrix ; and the date of the

"Property."
death of the testator or intestate shall be deemed to be the time at which any such wife becomes entitled as executrix or administratrix.

II.—JURISDICTION.

4. The jurisdiction now exercised by the High Courts in respect of divorce *a mensa et toro*, and in all other causes, suits and matters matrimonial, shall be exercised by such Courts and by the District Courts subject to the provisions in this Act contained, and not otherwise : except so far as relates to the granting of marriage-licenses, which may be granted as if this Act had not been passed.

Matrimonial jurisdiction of High Courts to be exercised subject to Act Exception.

5. Any decree or order of the late Supreme Court of Judicature at Calcutta, Madras or Bombay sitting on the ecclesiastical side, or of any of the said High Courts sitting in the exercise of their matrimonial jurisdiction, respectively, in any cause or matter matrimonial, may be enforced and dealt with by the said High Courts, respectively, as hereinafter mentioned, in like manner as if such decree or order had been originally made under this Act by the Court so enforcing or dealing with the same.

Enforcement of decrees or orders made heretofore by Supreme or High Court.

6. All suits and proceedings in causes and matters matrimonial, which when this Act comes into operation are pending in any High Court, shall be dealt with and decided by such Court, so far as may be, as if they had been originally instituted therein under this Act.

Pending suits.

7. Subject to the provisions contained in this Act, the High Courts and District Courts shall, in all suits and proceedings hereunder, act and give relief on principles and rules which, in the opinion of the said Courts, are as nearly as may be conformable to

Court to act on principles of English Divorce Court.

Sec. 4.—[See also under S. 7.] The jurisdiction of the Patna High Court in matters matrimonial is only such jurisdiction as is comprised within the provisions of the Divorce Act. (1923) Pat. 127 = 1 P. L. R. 129 = A. I. R. 1923 P. 301. A suit for a mere declaration that the plaintiff's marriage with her deceased husband's brother is valid and legal is not sustainable on the matrimonial side of the Patna High Court. (*Ibid.*) As to jurisdiction of High Court, prior to passing of this Act, see 38 Bom. 125 = 20 I. C. 492 = 15 Bom. L. R. 593. As to jurisdiction of Oudh Chief Court, see 3 O. W. N. 406 = 13 O. L. J. 236 = 94 I. C. 952 = A. I. R. 1926 Oudh. 319. S. 4 does not preclude the Court from considering whether a marriage was duly solemnized and from declaring a marriage null and void on grounds other than those contained in S. 18. 47 I. C. 544 = 11 Bur. L. T. 69.

Sec. 7.—[See also notes under Ss. 4, 17, 18 and 19].

SCOPE OF SECTION.—S. 7 is a residuary section intended to provide for any matters which by inadvertence or otherwise are not expressly dealt with in the Act. It is not unusual in statutory drafting to insert provisions of this nature *ex maiore cautela* more especially where an attempt is being made to codify in this country an unfamiliar branch of English Law. 47 Bom. 843 = 25 Bom. L. R. 945. The expression 'rules and principles' points rather to the rules and princi-

ples on which the Courts deal with matrimonial cases in requiring a certain degree of evidence and other cognate matters. (*Ibid.*) The words "rules and principles" in S. 7 have reference to rules that are quasi substantive rather than mere adjective law. 7 Bur. L. T. 129 = 23 I. C. 242 = 7 L. B. R. 347.

APPLICABILITY.—S. 7 applies not only to the grant of relief but also to questions of procedure. 55 I. C. 269 = 12 Bur. L. T. 199. See also 52 Cal. 566 = 1925 Cal. 874 ; 53 Cal. 282.

ENGLISH LAW.—There is the possibility of reading into S. 7 an intention on the part of Legislature to adopt whatever test the Court of Divorce in England might from time to time lay down upon the matter of divorce but that is a forced and unnatural construction. 47 Bom. 843 = 25 Bom. L. R. 945 = 1923 Bom. 321. See also 48 Cal. 636 under S. 57 ; 42 M. L. J. 562 = 1922 Mad. 350 (F. B.) ; 38 Bom. 125 = 20 I. C. 492 ; 32 C. W. N. 179.

PRACTICE AND PROCEDURE—EVIDENCE.—In all divorce cases the petitioner must come into the witness-box, must be sworn, and he must prove his case because among other things, the judge has to satisfy himself whether there is any collusion between the parties and as to the complete truth and honesty of the petition. Where this procedure had not been followed, the High Court would set aside the decree *nisi*. 20 A. L. J. 853 = 44 A. 728 = 1923 All. 43 (F. B.). As to

the principles and rules on which the Court for Divorce and Matrimonial Causes in England for the time being acts and gives relief :

[Provided that nothing in this section shall deprive the said courts of jurisdiction in a case where the parties to a marriage professed the Christian religion at the time of the occurrence of the facts on which the claim to relief is founded.]¹

8. The High Court may, whenever it thinks fit, remove and try and determine as a Court of original jurisdiction any suit or proceeding instituted under this Act in the Court of any District Judge within the limits of its jurisdiction under this Act.

Extraordinary jurisdiction of High Court.

The High Court may also withdraw any such suit or proceeding, and transfer it for trial or disposal to the Court of any other such District Judge.

Power to transfer suits.

9. When any question of law or usage having the force of law arises at any point in the proceedings previous to the hearing of any suit under this Act by a District Court or at any subsequent stage of such suit, or in the execution of the decree therein or order thereon,

Reference to High Court.

the Court may, either of its own motion or on the application of any of the parties, draw up a statement of the case and refer it, with the Court's own opinion thereon, to the decision of the High Court.

If the question has arisen previous to or in the hearing, the District Court may either stay such proceedings, or proceed in the case pending such reference and pass a decree contingent upon the opinion of the High Court upon it.

If a decree or order has been made, its execution shall be stayed until the receipt of the order of the High Court upon such reference.

III.—DISSOLUTION OF MARRIAGE.

10. Any husband may present a petition to the District Court or to the High Court, praying that his marriage may be dissolved on the ground that his wife has, since the solemnization thereof, been guilty of adultery.

When husband may petition for dissolution.

admission of additional evidence after decision, where advocate omits to call evidence, *see* 11 I. C. 779=4 Bur. L. T. 161. Admissions as to cruelty and adultery are not conclusive proofs. 38 Cal. 907=13 I. C. 491. In proceedings for divorce the evidence of the husband or wife alone ought never to be accepted without corroboration either by witness or at least by strong surrounding circumstances. 16 L. W. 689=43 M. L. J. 441=1923 Mad. 9 (F. B.). *See also* 16 L. W. 16=42 M. L. J. 562=1922 Mad. 350. Procedure as to service of petition. *See* 55 I. C. 269=12 Bur. L. T. 199. Attachment before judgment not to be made in a divorce suit. 7 I. C. 792=37 Cal. 693.

CO-RESPONDENT.—Where charges of adultery are made against a person, he ought to be made a co-respondent unless the judge should otherwise direct. 16 L. W. 689=43 M. L. J. 441=1923 Mad. 9 (F. B.). Claim for damages against co-respondent—Points to be considered in assessing damages. 3 O. W. N. 296. *See also* 38 Mad. 466=21 I. C. 645=25 M. L. J. 594; 47 I. C. 510=45 Cal. 525.

COSTS.—Even although a wife's defence fails or her counter-charges break down or she has been proved guilty of adultery the husband has to pay her costs. 1922 All. 243.

Proviso was added to this section by Act X of 1912.

Sec. 10. JURISDICTION.—Under S. 16, Bombay Civil Courts Act, the District Judge cannot transfer to the Assistant Judge a suit under the

Divorce Act and the Assistant Judge cannot try the suit. 39 Bom. 136=26 I. C. 599=16 Bom. L. R. 754. Irish woman and English man married in Ireland living in India—Husband temporarily serving in British regiment—Court has got power to grant divorce. 106 I. C. 481=5 O. W. N. 163. Scope of the Indian and Colonial Divorce Act pointed out. (*Ibid.*) As to jurisdiction of Oudh Chief Court, *see* A. I. R. 1926 Oudh 319.

CHANGE OF RELIGION.—Under this section change of religion by the husband and his subsequent re-marriage entitles his first wife to dissolution of the marriage. 14 I. C. 192.

ADULTERY.—In a suit for dissolution of marriage the Court may presume adultery if it is satisfied that guilty attachment subsisted between the parties and that they had opportunities to have guilty intercourse. 62 I. C. 782. The direct fact of adultery need not be proved. In a divorce case, the correspondence between the respondent and the co-respondent is very important evidence. 62 I. C. 782. Admission in a letter from the husband of adultery is not a sufficient proof of adultery. 31 I. C. 264=8 L. B. R. 106 (F. B.). *See also* 49 Bom. 368=27 Bom. L. R. 251=1925 Bom. 231 (Wife's admission of adultery caution to be exercised).

CRUELTY.—Repeated acts of cruelty by a husband taken together, entitles the wife to a decree for divorce, though each act by itself may not be sufficient ground, and no formal complaint or threat of divorce proceedings was made as regards each of them. 36 I. C. 982=10 Bur. L. T.

Any wife may present a petition to the District Court or to the High Court, praying that her marriage may be dissolved on the ground

When wife may petition for dissolution.

that, since the solemnization thereof, her husband has exchanged his profession of Christianity for the profession

of some other religion, and gone through a form of marriage with another woman ;

or has been guilty of incestuous adultery,

or of bigamy with adultery,

or of marriage with another woman with adultery,

or of rape, sodomy or bestiality,

or of adultery coupled with such cruelty as without adultery would have entitled her to a divorce *a mensa et toro*,

or of adultery coupled with desertion, without reasonable excuse, for two years or upwards.

Every such petition shall state, as distinctly as the nature of the case permits,

the facts on which the claim to have such marriage dissolved is founded.

Contents of petition.

11. Upon any such petition presented by a husband, the petitioner shall make the alleged adulterer a co-respondent to the said petition,

Adulterer to be co-respondent.

unless he is excused from so doing on one of the following grounds, to be allowed by the Court :—

- (1) that the respondent is leading the life of a prostitute, and that the petitioner knows of no person with whom the adultery has been committed ;
- (2) that the name of the alleged adulterer is unknown to the petitioner although he has made due efforts to discover it ;
- (3) that the alleged adulterer is dead.

228. Cruelty is conduct of such a character as to have caused danger to life, limb, or health (bodily or mental) or as to give rise to a reasonable apprehension of such danger. In order to establish a case of cruelty against her husband, a wife must prove more than isolated acts of violence. No doubt the degree of violence varies in accordance with the status of the parties. 1 Luck. C. 685. The cruelty must be dangerous to life, limb or health, bodily or mentally or a reasonable apprehension of it. 36 I. C. 381=10 Bur. L. T. 182. Isolated assaults that arise on the spur of the moment on some real or fancied provocation do not constitute cruelty. 1 Luck. C. 685. A single severe assault resulting from a dispute as to jewellery would not amount to such cruelty, but adultery of the husband, affords ground for judicial separation (*Ibid.*) Threat of physical force to a pregnant wife amounts to legal cruelty. 47 All. 50=83 I. C. 167=L. R. 6 All. 16=1925 All. 237 ; 53 Cal. 436. Subsequent cruelty may operate to revive condoned adultery. See 39 Cal. 395=15 I. C. 886; 47 All. 50=83 I. C. 167=(1925) All. 237 ; 53 Cal. 436. As to the amount of cruelty to be proved, see 4 Bur. L. T. 168=11 I. C. 784=10 Bur. L. T. 182 *supra*.

DESERTION.—Desertion implies an abandonment against the wish of the person charging it. 5 Bur. L. T. 85=15 I. C. 353. There is no abandonment against the wish of the wife where she herself left owing to intemperate habits of her husband. 31 I. C. 264=8 L. B. R. 106 (F. B.). A wife who seeks to prove desertion must give evidence of conduct on the part of the husband showing unmistakably that such desertion was against her wish actively expressed. The husband must be proved to have

wilfully absented himself from her in spite of her wish. Subsequent conduct cannot transform what was a voluntary separation into desertion by the husband. (*Ibid.*) No decree can be passed on a petition for divorce made before the two years' period of desertion is over, as it is premature and without a cause of action. 6 Bur. L. T. 177=21 I. C. 230=7 L. B. R. 37.

ADULTERY AND CRUELTY.—A wife who has obtained a judicial separation on the ground of her husband's adultery is entitled to a dissolution of the marriage on proof that her husband has been guilty of adultery after the separation and that he has been guilty of cruelty to her after separation. 45 I. C. 914=11 Bur. L. T. 227. See also A. I. R. 1927 Oudh 34.

ADULTERY AND DESERTION.—For a decree for divorce, adultery of the husband together with desertion without reasonable cause for two years or upwards or with such cruelty as without adultery would entitle the wife to a divorce, must be proved. 8 L. B. R. 385=36 I. C. 381=10 Bur. L. T. 182. As to condonation of adultery, see 1 Luck. C. 685.

Sec. 11.—Court should not lightly excuse a party from making any enquiry which he can reasonably be expected to make as to the adulterer. See 49 Bom. 368=27 Bom. L. R. 251=1925 Bom. 231. The Indian Courts do not have the same discretion to dispense with the name of a co-respondent as the English Courts have. The three grounds stated in S. 11 of the Act are the only ones on which leave can be so granted to proceed with the petition for dissolution of marriage. The fact that the petitioner had well-grounded suspicions against two men is no sufficient reason. 11 N. L. J. 4=107 I. C. 667=A. I. R. 1928 Nag. 117.

12. Upon any such petition for the dissolution of a marriage, the Court shall satisfy itself, so far as it reasonably can, not only as to the

Court to be satisfied of
absence of collusion.

facts alleged, but also whether or not the petitioner has been in any manner accessory to, or conniving at, the going through of the said form of marriage, or the adultery, or has condoned the same, and shall also inquire into any counter-charge which may be made against the petitioner.

13. In case the Court, on the evidence in relation to any such petition, is satisfied that the petitioner's case has not been proved, or is not satisfied that the alleged adultery has been committed,

Dismissal of petition.

or finds that the petitioner has, during the marriage, been accessory to, or conniving at, the going through of the said form of marriage, or the adultery of the other party to the marriage, or has condoned the adultery complained of,

or that the petition is presented or prosecuted in collusion with either of the respondents,

then and in any of the said cases the Court shall dismiss the petition.

When a petition is dismissed by a District Court under this section, the petitioner may, nevertheless, present a similar petition to the High Court.

14. In case the Court is satisfied on the evidence that the case of the petitioner has been proved,

Power to Court to pronounce decree for dissolving marriage.

SECS. 12 TO 14. CONNIVANCE.—A mere refusal by the husband without reasonable cause, of the matrimonial bed, does not constitute desertion or such wilful neglect or misconduct as conduces to the wife's adultery, and is not a sufficient ground for dissolution of marriage. 44 Cal. 1091 = 41 I. C. 447 = 21 C. W. N. 717. A decree for dissolution of marriage cannot be legally granted merely on the ground that the respondent does not oppose the petition. The Court must satisfy itself that there was good reason for the delay in suing, and that connivance or condonation is absent. 25 P. R. 1919 = 51 I. C. 235 = 71 P. L. R. 1919 (F. B.). Husband's conduct partly the cause of wife's adultery, can be considered against husband. 54 Cal. 80. See also 30 C. W. N. 820 = 44 C. I. J. 25 = A. I. R. 1926 Cal. 1014.

COLLUSION.—A collusion under S. 13 exists where the initiation of the proceedings for dissolution is procured or its conduct provided for by agreement between the spouses or their agents. 44 Cal. 1091 = 41 I. C. 447 = 21 C. W. N. 717. If a Court is satisfied that there is no collusion between the parties, it may act on an uncorroborated confession of adultery by a party to the proceedings. 49 I. C. 305 = 11 Bur. L. T. 197 (38 Cal. 907, Foll.). See also 9 Lah. 116.

CONDONATION.—Resumption or continuance of co-habitation with complete knowledge of the wife's adultery amounts to condonation. 57 I. C. 216 = 31 C. L. J. 435. Condonation is a question of fact and not of law. See 41 Bom. 36 = 36 I. C. 800 = 18 Bom. L. R. 818. Condonation is forgiveness of a conjugal offence with full knowledge of all the circumstances and is purely a question of fact. It is a blotting out of the offence imputed so as to restore the offending party to the position which he or she occupied before the commission of the offence. 44 Cal. 1091 = 41 I. C. 447 = 21 C. W. N. 717. Mere forgiveness is not condonation; condonation means completely restoring the offending party and must be followed by co-habitation. (*Ibid.*) 57 I. C. 216 = 31 C. L. J. 435. Condonation of past matrimonial offences is however

impliedly conditioned upon the future good behaviour of the offending spouse, and it follows that if after condonation the offences are repeated, the right to make the condoned offences a ground for divorce revives. 57 I. C. 216 = 31 C. L. J. 435. If an adultery is condoned but subsequently the wife commits an offence less than adultery with another person, it does not revive the offence of adultery which has already been condoned; but if the subsequent offence committed is adultery itself, the forgiveness is cancelled and the old cause of complaint is revived even if the offence be *ejusdem generis* with the original offence. 1 Luck C. 685 = 51 Bom. 1026 = 29 Bom. L. R. 1336 = 105 I. C. 871 = A. I. R. 1927 Bom. 594.

DELAY.—Unreasonable delay in instituting proceedings will generally be excused if it is really due to poverty. 57 I. C. 216 = 31 C. L. J. 435. But delay may also be a ground for dismissal of petition for dissolution. 107 I. C. 273. Disinclination from religious motives cannot be regarded as sufficient excuse for not taking action for obtaining the remedy which the law provides for an injured wife and for delaying the presenting of a petition. 31 I. C. 264 = 8 L. B. R. 106 (F. B.).

PRACTICE AND PROCEDURE.—High Court should not make a decree nisi absolute without a motion made to that effect. 31 All. 511 = 3 I. C. 969 = 6 A. I. J. 793 = 6 M. L. T. 96 following 10 All. 559. A decree for divorce may be obtained even if the petitioner be guilty of adultery under peculiar circumstances, discretionary with the Court. But the Court is bound by the rules binding the English courts under the English Divorce Act. 70 P. R. 1911 = 12 I. C. 960 = 239 P. W. R. 1911. Misconduct of wife before confirmation of decree nisi on her application—Court's discretion. See 88 I. C. 1009 = 4 Bur. L. J. 47 = 1925 Rang. 257. Wife's adultery—Husband's adultery proved—Application may be dismissed. 41 Bom. 36 = 36 I. C. 800 = 18 Bom. L. R. 818. Points to be considered on assessing damages against co-respondent. See A. I. R. 1927 Oudh 34.

and does not find that the petitioner has been in any manner accessory to, or conniving at, the going through of the said form of marriage, or the adultery of the other party to the marriage, or has condoned the adultery complained of,

or that the petition is presented or prosecuted in collusion with either of the respondents,

the Court shall pronounce a decree declaring such marriage to be dissolved in the manner and subject to all the provisions and limitations in sections 16 and 17 made and declared :

Provided that the Court shall not be bound to pronounce such decree if it finds that the petitioner has, during the marriage, been guilty of adultery,

or if the petitioner has, in the opinion of the Court, been guilty of unreasonable delay in presenting or prosecuting such petition,

or of cruelty towards the other party to the marriage,

or of having deserted or wilfully separated himself or herself from the other party before the adultery complained of, and without reasonable excuse,

or of such wilful neglect or misconduct of or towards the other party as has conduced to the adultery.

No adultery shall be deemed to have been condoned within the meaning of this Act unless where conjugal cohabitation has been resumed or continued.

Condonation.

15. In any suit instituted for dissolution of marriage, if the respondent opposes

Relief in case of opposition on certain grounds.

the relief sought on the ground, in case of such a suit instituted by a husband, of his adultery, cruelty or desertion without reasonable excuse, or, in case of such a suit

instituted by a wife, on the ground of her adultery and cruelty, the Court may in such suit give to the respondent, on his or her application, the same relief to which he or she would have been entitled in case he or she had presented a petition seeking such relief, and the respondent shall be competent to give evidence of or relating to such cruelty or desertion.

16. Every decree for a dissolution of marriage made by a High Court, not being

Decree for dissolution to be nisi.

a confirmation of a decree of a District Court, shall, in the first instance, be a decree *nisi*, not to be made absolute till after the expiration of such time, not less than six

Sec. 15.—Speaking generally, a guilty party cannot obtain relief by way of judicial separation any more than she can obtain relief by way of divorce. 47 Bom. 657 = 25 Bom. L. R. 289 = 1923 Bom. 284. Desertion to justify judicial separation must be a wilful abscention by the husband against the wish of the wife. (*Ibid.*) (17 B. 624, Ref.) Where a wife sues her husband for divorce on the ground of his adultery it is open to the husband in his written statement to counter-petition for a divorce on the ground of his wife's adultery. It is not necessary that the husband should take an independent proceeding. 47 Bom. 657 = 25 Bom. L. R. 289 = 1923 Bom. 284. Where a husband alleges adultery on the part of the wife with a foreigner the court has jurisdiction to add such foreigner as a co-respondent to the proceeding. (*Ibid.*) (1913 P. 75 ; 1913 P. 271, Ref.) See also 46 Mad. 133 under S. 37.

Sec. 16.—A High Court alone is competent to pronounce a decree *nisi* under S. 16. 43 I. C. 519. In *ex-parte* cases the proper course, if there is no cross-examining pleader, is for the judge to ask sufficient questions to make it reasonably clear what the precise facts are on which the petitioner seeks relief. 29 Bom. L. R. 308 = 101 I. C. 388 = A. I. R. 1927 Bom. 230. If in a matrimonial suit the husband being ordered to give security for the wife's costs and having failed to give it then,

where the husband is the petitioner, his petition should be stayed and not dismissed. 47 Bom. 664 = 25 Bom. L. R. 339. Where the wife is the petitioner, the husband's defence should not be struck out, but he should be proceeded against for contempt if he is proved to be able to pay, but contumaciously refuses to do so. (*Ibid.*) Where, in a divorce case, the decree is referred to the High Court for confirmation the said Court has jurisdiction for the purpose, and it is not necessary for the said purpose that the petitioner himself should be present personally before the High Court. 29 M. L. J. 269 = 29 I. C. 178 = 17 M. L. T. 357 (F. B.). A witness in a divorce case is not precluded from showing cause why the decree *nisi* should not be made absolute. 1 Luck. C. 203 = 103 I. C. 512 = A. I. R. 1927 Oudh 310. Effect of resumption of marital relations after decree *nisi* and before decree absolute, see 34 Mad. 339 = 8 I. C. 864 = (1911) 1 M. W. N. 107 = 9 M. L. T. 125 = 21 M. L. J. 528. On this section, see also 84 I. C. 71 = 1924 Bom. 132.

"DURING THAT PERIOD,"—Means period from the date of decree *nisi* to the date of decree absolute. 1 Luck. 203 = 103 I. C. 512 = A. I. R. 1927 Oudh 310.

INTERVENOR.—Merely because the intervenor is a near relation of respondent is no ground for disentitling him to interfere. 1 Luck. 203 = 103

months from the pronouncing thereof, as the High Court by general or special order from time to time directs.

During that period any person shall be at liberty, in such manner as the High Court by general or special order from time to time directs, to show cause why the said decree should not be made absolute by reason of the same having been obtained by collusion or by reason of material facts not being brought before the Court.

On cause being so shown, the Court shall deal with the case by making the decree absolute, or by reversing the decree *nisi*, or by requiring further inquiry, or otherwise as justice may demand.

The High Court may order the costs of counsel and witnesses, and otherwise arising from such cause being shown, to be paid by the parties or such one or more of them as it thinks fit, including a wife if she have separate property.

Whenever a decree *nisi* has been made, and the petitioner fails, within a reasonable time, to move to have such decree made absolute, the High Court may dismiss the suit.

17. Every decree for a dissolution of marriage made by a District Judge shall be subject to confirmation by the High Court.

Cases for confirmation of a decree for dissolution of marriage shall be heard (where the number of the Judges of the High Court is three or upwards) by a Court composed of three such Judges, and in case of difference the opinion of the majority shall prevail, or (where the number of the Judges of the High Court is two) by a Court composed of such two Judges, and in case of difference the opinion of the senior Judge shall prevail.

The High Court, if it think further enquiry or additional evidence to be necessary, may direct such enquiry to be made or such evidence to be taken.

The result of such enquiry and the additional evidence shall be certified to the High Court by the District Judge, and the High Court shall thereupon make an order confirming the decree for dissolution of marriage, or such other order as to the Court seems fit :

Provided that no decree shall be confirmed under this section till after the expiration of such time, not less than six months from the pronouncing thereof, as the High Court by general or special order from time to time directs.

During the progress of the suit in the Court of the District Judge, any person, suspecting that any parties to the suit are or have been acting in collusion for the

I. C. 512 = A. I. R. 1927 Oudh 310. The words "not being brought before the Court" in S. 16 mean, "not being brought before the Court at any time up to the date of intervention". 1 Luck. C. 203 = 103 I. C. 512 = A. I. R. 1927 Oudh 310.

Sec. 17. GENERAL.—The obvious intention of the legislature as expressed in S. 17 is that the High Court upon a reference for confirmation, should review the entire evidence and come to its own conclusion whether facts sufficient to justify a decree for dissolution of the marriage are or are not established by that evidence. A. I. R. 1922 All. 504. See also 40 Bom. 109 = 31 I. C. 331 = 17 Bom. L. R. 948 under S. 37 ; 91 I. C. 99 = A. I. R. 1926 Sind 58 (F. B.).

NOTICE.—No notice to the respondent is necessary in proceedings for confirmation of a decree for dissolution of marriage. 10 P. L. R. 1921 = 59 I. C. 89 = 19 P. W. R. 1921. The High Court will not confirm a decree for the dissolution of a marriage if it is not satisfied that the respondent was in fact served with a petition for divorce. 16 L. W. 16 = 42 M. L. J. 562 = 1922 Mad. 350 (F. B.). Whether relationship of husband and wife subsists after decree *nisi*, and before it is confirm-

ed, see 41 Cal. 714.

PRACTICE AND PROCEDURE.—Where in divorce proceedings the petitioner charged his wife with adultery but did not mention the adulterer's name and the Judge added his name as correspondent on his initiative, the Judge was in error in adding his name without amending the petition accordingly. 38 Mad. 466 = 14 M. L. T. 447 = 21 I. C. 645 = (1913) M. W. N. 983 = 25 M. L. J. 594. See also 17 M. L. T. 357 = 29 I. C. 178 = 29 M. L. J. 269.

EVIDENCE.—It is contrary to the principles and rules on which the Divorce Court acts and gives relief, to act on the uncorroborated testimony of a petitioner either to establish adultery or cruelty. 16 L. W. 16 = 42 M. L. J. 562 = 1922 Mad. 350 (F. B.). Under S. 7 the courts in this country should follow the same rule. (*Ibid.*) Admission of a adultery by a husband may form the ground for granting a divorce even though it is not corroborated by other evidence. 9 Lah. L. J. 315 = A. I. R. 1927 Lah. 491. Condoned adultery may be revived by a subsequent matrimonial offence. 53 Cal. 436 = 96 I. C. 932 = A. I. R. 1926 Cal. 864.

purpose of obtaining a divorce, shall be at liberty, in such manner as the High Court by general or special order from time to time directs, to apply to the High Court to remove the suit under section 8, and the High Court shall thereupon, if it think fit, remove such suit and try and determine the same as a Court of original jurisdiction, and the provisions contained in section 16 shall apply to every suit so removed; or it may direct the District Judge to take such steps in respect of the alleged collusion as may be necessary to enable him to make a decree in accordance with the justice of the case.

[“ 17-A. The Governor-General in Council may appoint for each High Court of Judicature established by Letters Patent an officer who shall, within the jurisdiction of the High Court for which he is appointed, have the like right of showing cause why a decree for the dissolution of marriage should not be made absolute or should not be confirmed, as the case may be, as is exercisable in England by the King's Proctor, and the Governor-General in Council may make rules regulating the manner in which the right shall be exercised and all matters incidental to, or consequential on, such exercise.”]¹

IV.—NULLITY OF MARRIAGE.

18. Any husband or wife may present a petition to the District Court or to the High Court, praying that his or her marriage may be declared null and void.

19. Such decree may be made on any of the following grounds :—

- (1) that the respondent was impotent at the time of the marriage and at the time of the institution of the suit ;
- (2) that the parties are within the prohibited degrees of consanguinity (whether natural or legal) or affinity ;
- (3) that either party was a lunatic or idiot at the time of the marriage ;
- (4) that the former husband or wife of either party was living at the time of the marriage, and the marriage with such former husband or wife was then in force.

Nothing in this section shall affect the jurisdiction of the High Court to make decrees of nullity of marriage on the ground that the consent of either party was obtained by force or fraud.

20. Every decree of nullity of marriage made by a District Judge shall be subject to confirmation by the High Court, and the provisions of section 17, clauses 1, 2, 3 and 4 shall, *mutatis mutandis*, apply to such decrees.

21. Where a marriage is annulled on the ground that a former husband or wife was living, and it is adjudged that the subsequent marriage was contracted in good faith and with the full belief of the parties that the former husband or wife was dead, or when a marriage is annulled on the ground of insanity, children begotten before the decree is made shall be specified in the decree and shall be entitled to succeed, in the

Sec. 17-A.—¹ Sec. 17-A is inserted by Act XV of 1927.

Secs. 18 and 19.—The word ‘solemnized’ in S. 5 of the Christian Marriage Act means “Celebrated” and deals with the ceremony only; and the words “rules, rites, ceremonies, and customs of the church” mean only the rules, etc., as to the capacity of the parties, 47 I. C. 544=11 Bur. L. T. 69. Suit for declaration of nullity of marriage—Questions to be considered by court. See (*Ibid.*) ‘Fraud’ means fraud practised upon the other party to the marriage and does not include fraud upon a third party. (*Ibid.*) No degree of deception can avail to set aside a marriage knowingly made unless the party imposed upon has been deceived as to the person, and thus has given no consent at all. (*Ibid.*) A decree of nullity must

be passed when the marriage is effected within six months of the confirmation of a decree of dissolution of a former marriage of either party where the former husband or wife is living at the time of the latter. 29 P. R. 1913=19 I. C. 778=222 P. L. R. 1913. See also 38 I. C. 413=38 Mad. 452. Hereditary syphilis—Impotency—Consent obtained by fraud—Held marriage should be annulled. 67 I. C. 949=25 C. W. N. 706. In the absence of an express allegation and strict proof that the party was impotent. *i.e.*, physically unfit for consummation both at the date of marriage and at the date of the institution of the suit, a suit for declaration of nullity of a marriage on the ground of impotency is not maintainable, 30 I. C. 565=29 M. L. J. 183.

same manner as legitimate children, to the estate of the parent who at the time of the marriage was competent to contract.

V.—JUDICIAL SEPARATION.

- 22.** No decree shall hereafter be made for a divorce *a mensa et toro*, but the husband or wife may obtain a decree of judicial separation, on the ground of adultery, or cruelty, or desertion without reasonable excuse for two years or upwards, and such decree shall have the effect of a divorce *a mensa et toro* under the existing law, and such other legal effect as

Bar to decree for divorce *a mensa et toro*; but judicial separation obtainable by husband or wife.

hereinafter mentioned.

- 23.** Application for judicial separation on any one of the grounds aforesaid may be made by either husband or wife by petition to the District Court or the High Court; and the Court, on being satisfied of the truth of the statements made in such petition, and that there is no legal ground why the application should not be granted, may decree judicial separation accordingly.

Application for separation made by petition.

- 24.** In every case of a judicial separation under this Act, the wife shall, from the date of the sentence, and whilst the separation continues, be considered as unmarried with respect to property of every description which she may acquire, or which may come to or devolve upon her.

Separated wife deemed spinster with respect to after-acquired property.

Such property may be disposed of by her in all respects as an unmarried woman, and on her decease the same shall, in case she dies intestate, go as the same would have gone if her husband had been then dead:

Provided that, if any such wife again cohabits with her husband, all such property as she may be entitled to when such cohabitation takes place shall be held to her separate use, subject, however, to any agreement in writing made between herself and her husband whilst separate.

- 25.** In every case of a judicial separation under this Act, the wife shall whilst so separated, be considered as an unmarried woman for the purposes of contract, and wrongs and injuries, and suing and being sued in any civil proceeding; and her husband shall not be liable in respect of any contract, act or costs entered into, done, omitted or incurred by her during the separation:

Separated wife deemed spinster for purposes of contract and suing.

Provided that where, upon any such judicial separation, alimony has been decreed or ordered to be paid to the wife, and the same is not duly paid by the husband, he shall be liable for necessaries supplied for her use:

Provided also that nothing shall prevent the wife from joining, at any time during such separation, in the exercise of any joint power given to herself and her husband.

REVERSAL OF DECREE OF SEPARATION.

- 26.** Any husband or wife, upon the application of whose wife or husband, as the case may be, a decree of judicial separation has been pronounced, may, at any time thereafter, present a petition to the Court by which the decree was pronounced, praying for a reversal of such decree, on the ground that it was obtained in his or her absence, and that there was reasonable excuse for the alleged desertion, where desertion was the ground of such decree.

Decree of separation obtained during absence of husband or wife may be reversed.

Sec. 22.—Desertion under the Divorce Act implies an abandonment against the wish of the person charging it, but it is not a universal rule that the abandonment must be against expressed wish of that person. 8 Bar. L. T. 32=8 L. R. 256=27 I. C. 604=9 Bur. L. T. 207.

Sec. 23.—Adultery on the part of the applicant

is sufficient legal ground for rejecting an application for judicial separation, though otherwise it is a fit case. 33 All. 500=9 I. C. 796=8 A. L. J. 318.

Sec. 24.—On this section, see 4 Cal. 140 and 1 Cal. 412.

The Court may, on being satisfied of the truth of the allegations of such petition, reverse the decree accordingly ; but such reversal shall not prejudice or affect the rights or remedies which any other person would have had, in case it had not been decreed, in respect of any debts, contracts or acts of the wife incurred, entered into or done between the times of the sentence of separation and of the reversal thereof.

VI.—PROTECTION-ORDERS.

27. Any wife to whom section 4 of the Indian Succession Act, 1865, does not apply, may, when deserted by her husband, present a petition to the District Court or the High Court, at any time after such desertion, for an order to protect any property which she may have acquired or may acquire, and any property of which she may have become possessed or may become possessed after such desertion, against her husband or his creditors, or any person claiming under him.

28. The Court, if satisfied of the fact of such desertion, and that the same was without reasonable excuse, and that the wife is maintaining herself by her own industry or property, may make and give to the wife an order protecting her earnings and other property from her husband and all creditors and persons claiming under him. Every such order shall state the time at which the desertion commenced, and shall, as regards all persons dealing with the wife in reliance thereon, be conclusive as to such time.

29. The husband or any creditor of, or person claiming under him, may apply to Court by which such order was made for the discharge or variation thereof, and the Court, if the desertion has ceased, or if for any other reason it think fit so to do, may discharge or vary the order accordingly.

30. If the husband, or any creditor of, or person claiming under, the husband seizes or continues to hold any property of the wife after notice of any such order, he shall be liable, at the suit of the wife (which she is hereby empowered to bring), to return or deliver to her the specific property, and also to pay her a sum equal to double its value.

31. So long as any such order of protection remains in force, the wife shall be and be deemed to have been, during such desertion of her, in the like position in all respects with regard to property and contracts and suing and being sued, as she would be under this Act if she obtained a decree of judicial separation.

VII.—RESTITUTION OF CONJUGAL RIGHTS.

32. When either the husband or the wife has, without reasonable excuse, withdrawn from the society of the other, either wife or husband may apply, by petition to the District Court or the High Court, for restitution of conjugal rights, and the Court, on being satisfied of the truth of the statements made in such petition, and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly.

33. Nothing shall be pleaded in answer to a petition for restitution of conjugal rights which would not be ground for a suit for judicial separation or for a decree of nullity of marriage.

Sec. 31.—Delay to be culpable delay must be somewhat in the nature of connivance or acquiescence. 8 Bur. L. T. 32=8 L. B. R. 256=27 I. C. 604=9 Bur. L. T. 207. *See also* 107 I. C. 273. "Delay" must be the sort of delay that would show the petitioner to have been insensible to the

loss of the husband or wife as the case may be. 8 Bur. L. T. 32=8 L. B. R. 256=27 I. C. 604=9 Bur. L. T. 207.

Sec. 33.—*See* 38 Bom. 125=20 I. C. 492=15 Bom. L. R. 593.

VIII.—DAMAGES AND COSTS.

34. Any husband may, either in a petition for dissolution of marriage or for judicial separation, or in a petition to the District Court or the High Court limited to such object only, claim damages from any person on the ground of his having committed adultery with the wife of such petitioner.

Such petition shall be served on the alleged adulterer and the wife unless the Court dispenses with such service, or directs some other service to be substituted.

The damages to be recovered on any such petition shall be ascertained by the said Court, although the respondents or either of them may not appear.

After the decision has been given, the Court may direct in what manner such damages shall be paid or applied.

35. Whenever in any petition presented by a husband, the alleged adulterer has been made a co-respondent, and the adultery has been established, the Court may order the co-respondent to pay the whole or any part of the cost of the proceedings :

Provided that the co-respondent shall not be ordered to pay the petitioner's costs—

(1) if the respondent was, at the time of the adultery, living apart from her husband and leading the life of a prostitute, or

(2) if the co-respondent had not, at the time of the adultery, reason to believe the respondent to be a married woman.

Whenever any application is made under section 17, the Court, if it thinks that the applicant had no grounds or no sufficient grounds for intervening, may order him to pay the whole or any part of the costs occasioned by the application.

IX.—ALIMONY.

36. In any suit under this Act, whether it be instituted by a husband or a wife, and whether or not she has obtained an order of protection, the wife may present a petition for alimony pending the suit.

Such petition shall be served on the husband; and the Court, on being satisfied of the truth of the statements therein contained, may make such order on the husband for payment to the wife of alimony pending the suit as it may deem just :

Provided that alimony pending the suit shall in no case exceed one-fifth of the husband's average nett income for the three years next preceding the date of the order, and shall continue, in case of a decree for dissolution of marriage or of nullity of marriage, until the decree is made absolute or is confirmed, as the case may be.

Sec. 34.—The principle in awarding damages against a co-respondent in divorce proceedings is to ascertain what loss the husband has suffered ; the object is not to punish. The means of the co-respondent are not a relevant factor. 52 Cal. 379 = 29 C. W. N. 350 = 86 I. C. 1018 = 1925 Cal. 585 (F. B.) ; A. I. R. 1927 Oudh 34. Per *Marten, C. J.*—"In every divorce case one principal element is that the marriage should be proved strictly and in general a certificate of marriage should be produced....Indian Courts have no jurisdiction to dissolve the marriage of persons who are not domiciled in India or persons who are not Christians....In such cases it is desirable that independent corroborative evidence should be obtained to show that the respondent was living in adultery with the co-respondent. 51 Bom. 1026 = 29 Bom. L. R. 1336 = 105 I. C. 871 = A. I. R. 1927 Bom. 594.

Sec. 36.—A Court has discretion to give alimony *pendente lite* if it thinks reasonable and

just, especially where the wife avers that she had been forced to prostitution by her husband. 49 I. C. 203 = 12 S.L.R. 89. On this Section, see also 36 Cal. 1018 = 4 I. C. 699. Where a petition for the dissolution of marriage on the ground of adultery is made and is filed by the husband and the wife enters an appearance and denies the allegations against her, she has an absolute right to require her husband to furnish her with funds sufficient to enable her to make a full and satisfactory defence and to obtain such assistance from counsel, as is reasonable under the circumstances. 1922 All. 504. A husband, may, in a proper case on the wife's application, be ordered by the appellate Court to provide for the costs of the wife's appeal against a decree *nisi* for divorce, but such a procedure should be adopted only after careful scrutiny and should be refused when facts do not justify it. 44 Cal. 35 = 24 C. L. J. 226 = 37 I. C. 216 = 21 C. W. N. 711.

Power to order permanent alimony.

37. The High Court may, if it think fit, on any decree absolute declaring a marriage to be dissolved, or on any decree of judicial separation obtained by the wife,

and the District Judge may, if he thinks fit, on the confirmation of any decree of his, declaring a marriage to be dissolved, or on any decree of judicial separation obtained by the wife,

order that the husband shall, to the satisfaction of the Court, secure to the wife such gross sum of money, or such annual sum of money for any term not exceeding her own life, as having regard to her fortune (if any), to the ability of the husband, and to the conduct of the parties, it thinks reasonable, and for that purpose may cause a proper instrument to be executed by all necessary parties.

Power to order monthly or weekly payments. In every such case the Court may make an order on the husband for payment to the wife of such monthly or weekly sums for her maintenance and support as the Court may think reasonable :

Provided that if the husband afterwards from any cause becomes unable to make such payments, it shall be lawful for the Court to discharge or modify the order, or temporarily to suspend the same as to the whole or any part of the money so ordered to be paid, and again to revive the same order wholly or in part, as to the Court seems fit.

38. In all cases in which the Court makes any decree or order for alimony it may direct the same to be paid either to the wife herself, or to any trustee on her behalf to be approved by the Court, and may impose any terms or restrictions which to the Court seem expedient, and may from time to time appoint a new trustee, if it appears to the Court expedient so to do.

X.—SETTLEMENTS.

39. Whenever the Court pronounces a decree of dissolution of marriage or judicial separation for adultery of the wife, if it is made to appear to the Court that the wife is entitled to any property, the Court may, if it think fit, order such settlement as it thinks reasonable to be made of such property or any part thereof, for the benefit of the husband, or of the children of the marriage or of both.

Any instrument executed pursuant to any order of the Court at the time of or after the pronouncing of a decree of dissolution of marriage or judicial separation shall be deemed valid notwithstanding the existence of the disability of coverture at the time of the execution thereof.

Sec. 37.—It is the District Court whose order for dissolution of marriage was confirmed by the High Court, that has got jurisdiction in a petition for alimony. 40 Bom. 100=31 I. C. 331=17 Bom. L. R. 948. A decree *nisi* for divorce for adultery having been obtained against a wife, it is left to the discretion of the Court to grant alimony to her under the particular circumstances of the case. 38 All. 688=37 I. C. 143=14 A. L. J. 786. Under S. 37 the Court has power to make an order for payment of a lump sum for maintenance. 39 Bom. 182=27 I. C. 494=17 Bom. L. R. 56. The words "for any time not exceeding her own life" qualify "annual sum" and not "gross sum". The word "secure" would ordinarily include "pay". (*Ibid.*) Decree absolute dissolving marriage—Petition for alimony, 15 years after decree—Power of Court to grant after such delay. 44 Mad. 987=41 M. L. J. 269=14 L. W. 196=(1921) M. W. N. 591. The words "on any

decree" in S. 37 should be construed as meaning "at the same time as or after a reasonable time after the passing of the decree". Circumstances of each case will determine what is reasonable time. (*Ibid.*) If a husband's suit for dissolution of marriage on the ground of his wife's adultery is dismissed on the ground that the adultery alleged was not proved, the Court cannot as part of the decree in the suit grant permanent alimony to the wife. 46 M. 133=17 L. W. 19=(1923) M. W. N. 184=43 M. L. J. 763=1023 Mad. 211.

Sec. 38.—Alimony should usually be allowed from the date of service of summons upon the respondent; but where no summons has been served it should be from the time the latter entered appearance. Income-tax and insurance premia can be deducted, but not the expenses of a son's education, in calculating the net income of a person for granting alimony to his wife. 11 J. C. 813=4 Bur. L. T. 176. See also 14 Mad. 89.

The Court may direct that the whole or any part of the damages recovered under section 34 shall be settled for the benefit of the children of the marriage, or as a provision for the maintenance of the wife.

Settlement of damages.

Inquiry into existence of ante-nuptial or post-nuptial settlements.

40. The High Court, after a decree absolute for dissolution of marriage, or a decree of nullity of marriage,

and the District Court, after its decree for dissolution of marriage or of nullity of marriage has been confirmed,

may inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders, with reference to the application of the whole or a portion of the property settled, whether for the benefit of the husband or the wife, or of the children (if any) of the marriage, or of both children and parents, as to the Court seems fit :

Provided that the Court shall not make any order for the benefit of the parents or either of them at the expense of the children.

XI.—CUSTODY OF CHILDREN.

41. In any suit for obtaining a judicial separation the Court may from time to

Power to make orders as to custody of children in suit for separation.

time, before making its decree, make such interim orders, and may make such provision in the decree, as it deems proper with respect to the custody, maintenance and education of the minor children, the marriage of whose parents is the subject of such suit, and may, if it think fit, direct proceedings to be taken for placing such children under the protection of the said Court.

42. The Court, after a decree of judicial separation, may upon application (by petition) for this purpose make, from time to time, all such

Power to make such orders after decree.

orders and provision, with respect to the custody, maintenance and education of the minor children, the marriage of whose parents is the subject of the decree, or for placing such children under the protection of the said Court, as might have been made by such decree or by interim orders in case the proceedings for obtaining such decree were still pending.

43. In any suit for obtaining a dissolution of marriage or a decree of nullity of

Power to make orders as to custody of children in suits for dissolution or nullity

marriage instituted in, or removed to, a High Court, the Court may from time to time, before making its decree absolute or its decree (as the case may be), make such interim orders, and may make such provision in the

decree absolute or decree,

and in any such suit instituted in a District Court, the Court may from time to time, before its decree is confirmed, make such interim orders, and may make such provision on such confirmation,

as the High Court or District Court (as the case may be) deems proper with respect to the custody, maintenance and education of the minor children, the marriage of whose parents is the subject of the suit ;

and may, if it think fit, direct proceedings to be taken for placing such children under the protection of the Court.

Power to make such orders after decree or confirmation.

44. The High Court, after a decree absolute for dissolution of marriage or a decree of nullity of marriage,

Sec. 43.—An order under S. 43 regarding the custody and maintenance of children, is an *ad interim* order liable to terminate upon the confirmation of decree by the High Court, and hence such an order should not form part of the decree nisi by District Judge, for dissolution of marriage. 54 I. C. 943 = 142 P. R. 191 (F. B.).

Secs. 43 and 44.—Where a person had obtain-

ed a decree nisi for dissolution of marriage and custody of the children and dies before its confirmation by the High Court the Court has no jurisdiction to confirm the decree for dissolution of the marriage or to make any order as regards the custody of the children. 50 C. 153 = 1923 Cal. 425.

and the District Court, after a decree for dissolution of marriage or of nullity of marriage has been confirmed,

may, upon application by petition for the purpose, make from time to time all such orders and provision, with respect to the custody, maintenance and education of the minor children, the marriage of whose parents was the subject of the decree, or for placing such children under the protection of the said Court, as might have been made by such decree absolute or decree (as the case may be), or by such interim orders as aforesaid.

XII.—PROCEDURE.

Code of Civil Procedure to apply.

45. Subject to the provisions herein contained, all proceedings under this Act between party and party shall be regulated by the Code of Civil Procedure.¹

Forms of petitions and statements.

ed in such schedule.

46. The forms set forth in the schedule to this Act, with such variation as the circumstances of each case require, may be used for the respective purposes mentioned

47. Every petition² under this Act for a decree of dissolution of marriage or of nullity of marriage, or of judicial separation [* * * *]³ [* * * *]³ state that there is not any collusion or connivance between the petitioner and the other party to the marriage ;

the statements contained in every petition under this Act shall be verified by the petitioner or some other competent person in manner required by law for the verification of plaints, and may at the hearing be referred to as evidence.

48. When the husband or wife is a lunatic or idiot, any suit under this Act (other than a suit for restitution of conjugal rights) may be brought on his or her behalf by the committee or other person entitled to his or her custody.

49. Where the petitioner is a minor, he or she shall sue by his or her next friend to be approved by the Court : and no petition presented by a minor under this Act shall be filed until the next friend has undertaken in writing to be answerable for costs.

Such undertaking [* * *]⁴ shall be filed in Court, and the next friend shall thereupon be liable in the same manner and to the same extent as if he were a plaintiff in an ordinary suit.

50. Every petition under this Act shall be served on the party to be affected thereby, either within or without British India, in such manner as the High Court by general or special order from time to time directs :

Provided that the Court may dispense with such service altogether in case it seems necessary or expedient so to do.

Sec. 45.—¹ See now the Code of Civil Procedure (Act V of 1908).

See 38 Bom. 125=20 I. C. 492=15 Bom. L. R. 593. A party should not be lightly excused from effecting personal service of the petition. See 49 Bom. 368=27 Bom. L. R. 251=1925 Bom. 231. See same case as to when service by registered post is proper.

Sec. 47.—² For court-fee see Court-Fees Act (VII of 1870), Sch. II, No. 20.

³ The words " or of reversal of judicial separation, or for restitution of conjugal rights, or for damages, shall bear a stamp of five rupees, and," and the words " in the first, second, and third cases mentioned in this section," were repealed

by the Court Fees Act (VII of 1870).

Sec. 49.—⁴ The words " shall bear a stamp of eight annas and" were repealed by the Court-Fees Act (VII of 1870). For court-fee, see Art. 7 of Sch. II of that Act.

Secs. 50 and 51.—Under S. 50 the manner in which service of petition is to be effected is to be regulated not by the C. P. C., but by general or special orders of the High Court. 55 I. C. 269=12 Bur. L. T. 199. In the absence of general orders on the subject the proper course when service cannot be effected on the respondent is to apply to the Court for a special order as to how it is to be effected. The Court will act on the principles laid down by the English decisions. (*Ibid.*).

51. The witnesses in all proceedings before the Court, where their attendance can be had, shall be examined orally, and any party may offer himself or herself as a witness, and shall be examined, and may be cross-examined and re-examined, like any other witness:

Mode of taking evidence.

Provided that the parties shall be at liberty to verify their respective cases whole or in part by affidavit, but so that the deponent in every such affidavit shall, the application of the opposite party, or by direction of the Court, be subject to cross-examination by or on behalf of the opposite party orally, and after such cross-examination may be re-examined orally as aforesaid by or on behalf of the party by whom such affidavit was filed.

52. On any petition presented by a wife, praying that her marriage may be dissolved by reason of her husband having been guilty

Competence of husband and wife to give evidence as to cruelty or desertion.

adultery coupled with cruelty, or of adultery coupled with desertion without reasonable excuse, the husband and wife respectively shall be competent and compellable to give evidence of or relating to such cruelty or desertion.

Power to close doors.
doors.

53. The whole or any part of any proceeding under this Act may be heard, if the Court thinks fit, with closed doors.

54. The Court may from time to time adjourn the hearing of any petition under this Act, and may require further evidence thereon if it sees fit so to do.

Power to adjourn.

55. All decrees and orders made by the Court in any suit or proceeding under this Act shall be enforced and may be appealed¹ from in the like manner as the decrees and orders of the Court made in the exercise of its original civil jurisdiction are enforced and may be appealed from under the laws, rules and orders for the time being in force:

Provided that there shall be no appeal from a decree of a District Judge in dissolution of marriage or of nullity of marriage: nor from the order of the High Court confirming or refusing to confirm such decree.

No appeals as to costs.

Provided also that there shall be no appeal on the subject of costs only.

56. Any person may appeal to Her Majesty in Council from any decree (other than a decree *nisi*) or order under this Act of a High Court made on appeal or otherwise.

Appeal to Queen in Council.

and from any decree (other than a decree *nisi*) or order made in the exercise of original jurisdiction by Judges of a High Court or of any Division Court from which appeal shall not lie to the High Court,

when the High Court declares that the case is a fit one for appeal to Her Majesty in Council.

XIII. RE-MARRIAGE.

57. When six months after the date of an order of a High Court confirming the decree for a dissolution of marriage made by a District Judge have expired,

or when six months after the date of any decree of a High Court dissolving marriage have expired, and no appeal has been presented against such decree to the High Court in its appellate jurisdiction,

¹ See 55.—¹ For court-fee on memorandum of appeal, see the Court-Fees Act (VII of 1870), Sch. II, No. 20. Order for payment of alimony is to be executed as a decree, and contempt proceedings are not the proper remedy. 32 C. W. N. 179. See 19 I. C. 53=6 Bur. L. T. 10.

See 57.—This section prohibits a remarriage within six months after the decree absolute, 30 I. C. 413=38 M. 452. See also 29 P. R. 1913=

19 I. C. 778=22 P. L. R. 1913. A second marriage by the successful petitioner in a suit for dissolution of marriage within six months of the date of the decree for dissolution is null and void. 48 Cal. 636=64 I. C. 924=25 C. W. N. 710 (F. R.). See also 34 All. 203=13 I. C. 9=9 A. L. J. 108; Held, also that the reputed wife was not entitled to any permanent alimony. Cal. 636.

or when any such appeal has been dismissed,
or when in the result of any such appeal any marriage is declared to be dissolved,

but not sooner, it shall be lawful for the respective parties to the marriage to marry again, as if the prior marriage had been dissolved by death :

Provided that no appeal to Her Majesty in Council has been presented against any such order or decree.

When such appeal has been dismissed, or when in the result thereof the marriage is declared to be dissolved, but not sooner, it shall be lawful for the respective parties to the marriage to marry again as if the prior marriage had been dissolved by death.

58. No clergyman in Holy Orders of the [* *]¹ Church of England [* *]² shall be compelled to solemnize the marriage of any person whose former marriage has been dissolved on the ground of his or her adultery, or shall be liable to any suit, penalty or censure for solemnizing or refusing to solemnize the marriage of any such person.

English clergyman not compelled to solemnize marriages of persons divorced for adultery.

59. When any minister of any church or chapel of the said [* *]¹ Church refuses to perform such marriage service between any persons who, but for such refusal would be entitled to have the same service performed in such church or chapel, such minister shall permit any other minister in Holy Orders of the said Church entitled to officiate within the diocese in which such church or chapel is situate, to perform such marriage service in such church or chapel.

English minister refusing to perform ceremony to permit use of his church.

XIV. MISCELLANEOUS.

60. Every decree for judicial separation or order to protect property obtained by a wife under this Act shall, until reversed or discharged, be deemed valid, so far as necessary, for the protection of any person dealing with the wife.

Decree for separation or protection order valid as to persons dealing with wife before reversal.

No reversal, discharge or variation of such decree or order shall affect any rights or remedies which any person would otherwise have had in respect of any contracts or acts of the wife entered into or done between the dates of such decree or order and of the reversal, discharge or variation thereof.

All persons who in reliance on any such decree or order make any payment to, or permit any transfer or act to be made or done by, the wife who has obtained the same shall, notwithstanding such decree or order may then have been reversed, discharged or varied, or the separation of the wife from her husband may have ceased, or at some time since the making of the decree or order been discontinued, be protected and indemnified as if, at the time of such payment, transfer or other act, such decree or order were valid and still subsisting without variation, and the separation had not ceased or been discontinued ;

Indemnity of persons making payment to wife without notice of reversal of decree or protection order.

unless, at the time of the payment, transfer or other act, such persons had notice of the reversal, discharge or variation of the decree or order or of the cessation or discontinuance of the separation.

Bar of suit for criminal conversation.

61. After this Act comes into operation, no person competent to present a petition under sections 2 and 10 shall maintain a suit for criminal conversation with his wife.

Secs. 58 and 59.—¹The word "United" was repealed by the Repealing Act (XII of 1873).

Sec. 58.—²The words "and Ireland" were repealed by Act XII of 1873.

Sec. 61.—Section does not forbid the Crown to prosecute and punish an alleged adulterer under S. 497, I. P. C. when moved to do so by an injured husband, A. I. R. 1928 Lab. 50.

62. The High Court shall make such rules under this Act as it may from time to time consider expedient, and may from time to time alter and add to the same : ¹

Power to make rules.

Provided that such rules, alterations and additions are consistent with the provisions of this Act and the Code of Civil Procedure,²

All such rules, alterations and additions shall be published in the local official Gazette.

SCHEDULE OF FORMS.

NO. 1.—PETITION BY HUSBAND FOR A DISSOLUTION OF MARRIAGE WITH DAMAGES AGAINST CO-RESPONDENT, BY REASON OF ADULTERY.

(See sections 10 and 34.)

In the (High) Court of
To the Hon'ble Mr. Justice

[or To the Judge of]

The day of 186 .
The petition of A. B., of

SHEWETH,

1. That your petitioner was on the day of , one thousand eight hundred and , lawfully married to C. B., then C. D., spinster, at

2. That from his said marriage, your petitioner lived and cohabited with his said wife at and at , in , and lastly at in , and that your petitioner and his said wife have had issue of their said marriage, five children, of whom two sons only survive, aged respectively twelve and fourteen years.

3. That during the three years immediately preceding the day of one thousand eight hundred and , X. Y. was constantly, with few exceptions, residing in the house of your petitioner at aforesaid, and that on divers occasions during the said period, the dates of which are unknown to your petitioner, the said C. B. in your petitioner's, said house committed adultery with the said X. Y.

4. That no collusion or connivance exists between me and my said wife for the purpose of obtaining a dissolution of our said marriage or for any other purpose.

Your petitioner, therefore, prays that this (Hon'ble) Court will decree a dissolution of the said marriage and that the said X. Y. do pay the sum of rupees 5,000 as damages by reason of his having committed adultery with your petitioner's said wife, such damages to be paid to your petitioner, or otherwise paid or applied as to this (Hon'ble) Court seems fit.

(Signed) A. B.⁴

Form of Verification.

I, A. B., the petitioner named in the above petition, do declare that what is stated therein is true to the best of my information and belief.

NO. 2.—RESPONDENT'S STATEMENT IN ANSWER TO NO. 1.

In the Court of the day of
Between A. B., petitioner,
C. B., respondent, and
X. Y., co-respondent.

C. B., the respondent, by D. E., her attorney [or vakil], in answer to the petition of A. B. says that she denies that she has on divers or any occasions committed adultery with X. Y., as alleged in the third paragraph of the said petition.

Wherefore the respondent prays that this (Hon'ble) Court will reject the said petition.

(Signed) C. B.

NO. 3.—CO-RESPONDENT'S STATEMENT IN ANSWER TO NO. 1.

In the (High) Court of
The day of
Between A. B., petitioner,
C. B., respondent and
X. Y., co-respondent.

X. Y., the co-respondent in answer to the petition filed in this cause, saith that he denies that he committed adultery with the said C. B., as alleged in the said petition.

Wherefore the said X. Y. prays that this (Hon'ble) Court will reject the prayer of the said petitioner and order him to pay the costs of and incident to the said petition.

(Signed X. Y.)

Sec. 62.—See 17 M. L. T. 357 = 29 I. C. 178 = 29 M. L. J. 269.

¹ For rule in force in Bombay as to confirmation of decrees for dissolution of marriage, see Bom. R & O.

² See now the Code of Civil Procedure, (Act

V of 1908).

³ If the marriage was solemnized out of India, the adultery must be shown to have been committed in India.

⁴ The petition must be signed by the petitioner.

NO. 4.—PETITION FOR DECREE OF NULLITY OF MARRIAGE.

(See section 18.)

In the (High) Court of
To the Hon'ble Mr. Justice [or To the Judge of].

The day of , 186 .
The petition of A. B., falsely called A. D.,

SHEWETH,

1. That on the day of , one thousand eight hundred and , your petitioner then a spinster, eighteen years of age, was married in fact though not in law, to C. D., then a bachelor of about thirty years of age, at [some place in India].

2. That from the said day of , one thousand eight hundred and , until the month of , one thousand eight hundred and , your petitioner lived and cohabited with the said C. D., at divers places, and particularly at aforesaid.

3. That the said C. D. has never consummated the said pretended marriage by carnal copulation.

4. That at the time of the celebration of your petitioner's said pretended marriage, the said C. D. was, by reason of his impotency or malformation, legally incompetent to enter into the contract of marriage.

5. That there is no collusion or connivance between her and the said C. D. with respect to the subject of this suit.

Your petitioner therefore prays that this (Hon'ble) Court will declare that the said marriage is null and void.

(Signed) A. B.

Form of Verification—see No. 1.

NO. 5.—PETITION BY WIFE FOR JUDICIAL SEPARATION ON THE GROUND OF HER HUSBAND'S ADULTERY.

(See section 22.)

In the (High) Court of
To the Hon'ble Mr. Justice [or To the Judge of].

The day of 186 .
The petition of C. B., of the wife of A. B.,

SHEWETH,

1. That on the day of , one thousand eight hundred and sixty your petitioner, then C. D., was lawfully married to A. B. at the Church of , in the .

2. That after her said marriage, your petitioner cohabited with the said A. B. at and at , and that your petitioner and her said husband have issue living of their said marriage, three children, to wit, etc., etc.¹

3. That on divers occasions in or about the months of August, September and October, one thousand eight hundred and sixty , the said A. B., at aforesaid, committed adultery with E. F., who was then living in the service of the said A. B. and your petitioner at their said residence aforesaid.

4. That on divers occasions in the months of October, November, and December, one thousand eight hundred and sixty , the said A. B., at aforesaid, committed adultery with G. H., who was then living in the service of the said A. B. and your petitioner at their said residence aforesaid.

5. That no collusion or connivance exists between your petitioner and the said A. B. with respect to the subject of the present suit.

Your petitioner therefore prays that this (Hon'ble) Court will decree a judicial separation to your petitioner from her said husband by reason of his aforesaid adultery.

(Signed) C. B.²

Form of Verification—see No. 1.

NO. 6.—STATEMENT IN ANSWER TO NO. 5

In the (High) Court of
B against B.

The day of

The respondent, A. B., by W. Y., his attorney [or vakil], saith,—

1. That he denies that he committed adultery with E. F., as in the third paragraph of the petition alleged.

2. That the petitioner condoned the said adultery with E. F., if any.

3. That he denies that he committed adultery with G. H., as in the fourth paragraph of the petition alleged.

4. That the petitioner condoned the said adultery with G. H., if any.

Wherefore this respondent prays that this (Hon'ble) Court will reject the prayer of the said petition.

(Signed) A. B.

¹ State the respective ages of the children.

² The petition must be signed by the petitioner.

NO. 7.—STATEMENT IN REPLY TO NO. 6.

In the (High) Court of

B against *B*.

The day of

The petitioner, *C. B.*, by her attorney [*or vakil*], says,—

1. That she denies that she condoned the said adultery of the respondent with *E. F.*, as in the second paragraph of the statement in answer alleged.

2. That even if she had condoned the said adultery, the same has been revived by the subsequent adultery of the respondent with *G. H.*, as set forth in the paragraph of the petition.

(Signed) *C. B.*

NO. 8.—PETITION FOR A JUDICIAL SEPARATION BY REASON OF CRUELTY.

(See section 22.)

In the (High) Court of
To the Hon'ble Mr Justice

[*or To the Judge of*
The day of
The petition of *A. B.* (wife of *C. B.*) of , 186]

SHEWETH,

1. That on the day of one thousand eight hundred and your petitioner, then *A. D.*, spinster, was lawfully married to *C. B.*, at

2. That from her said marriage, your petitioner lived and cohabited with her said husband at until the day of , one thousand eight hundred and when your petitioner separated from her said husband as hereinafter more particularly mentioned, and that your petitioner and her said husband have had no issue of their said marriage.

3. That from and shortly after your petitioner's said marriage, the said *C. B.* habitually conducted himself towards your petitioner with great harshness and cruelty, frequently abusing her in the coarsest and most insulting language, and beating her with his fists, with a cane, or with some other weapon.

4. That on an evening in or about the month of one thousand eight hundred and , the said *C. B.* in the highway and opposite to the house in which your petitioner and the said *C. B.* were then residing at aforesaid, endeavoured to knock your petitioner down, and was only prevented from so doing by the interference of *F. D.*, your petitioner's brother.

5. That subsequently on the same evening, the said *C. B.*, in his said house at aforesaid, struck your petitioner with his clenched fists a violent blow on her face.

6. That on one Friday night in the month of , one thousand eight hundred and , the said *C. B.* in , without provocation, threw a knife at your petitioner, thereby inflicting a severe wound on her right hand.

7. That on the afternoon of the day of , one thousand eight hundred and , your petitioner, by reason of the great and continued cruelty practised towards her by her said husband, with assistance withdraw from the house of her said husband to the house of her father at , that from and after the said day of , one thousand eight hundred and , your petitioner hath lived separate and apart from her said husband and hath never returned to his house or to cohabitation with him.

8. That there is no collusion or connivance between your petitioner and her said husband with respect to the subject of the present suit.

Your petitioner, therefore, prays that this (Hon'ble) Court will decree a judicial separation between your petitioner and the said *C. B.*, and also order that the said *C. B.* do pay the costs of and incident to these proceedings,

(Signed) *A. B.**Form of Verification—see No. 1.*

NO. 9.—STATEMENT IN ANSWER TO NO. 8.

In the (High) Court of

The day of
Between *A. B.*, petitioner, and
C. B., respondent.

C. B., the respondent, in answer to the petition filed in this cause, by *W. J.*, his attorney [*or vakil*], saith that he denies that he has been guilty of cruelty towards the said *A. B.*, as alleged in the said petition.

(Signed) *C. B.*

NO. 10.—PETITION FOR REVERSAL OF DECREE OF SEPARATION.

(See section 24.)

In the (High) Court of
To the Hon'ble Mr Justice

[*or To the Judge of*
The day of , 186
The petition of *A. B.*, of]

SHEWETH,

1. That your petitioner was on the day of , lawfully married to

2. That on the day of , this (Hon'ble) Court, at the petition of , pronounced a decree affecting the petitioner to the effect following to wit,—

Here set out the decree.

3. That such decree was obtained in the absence of your petitioner who, was then residing at [State facts tending to shew that the petitioner did not know of the proceedings; and, further, that had he known he might have offered a sufficient defence,]

or

That there was reasonable ground for your petitioner leaving his said wife for that his said wife.

(Here state any legal grounds justifying the petitioner's separation from his wife).

Your petitioner, therefore, prays that this (Hon'ble) Court will reverse the said decree.

(Signed) A. B.

Form of Verification—see No. 1.

NO. 11.—PETITION FOR PROTECTION-ORDER.

(See section 27.)

In the (High) Court of
To the Hon'ble Mr. Justice

[or To the Judge of
The day of
The petition of C. B., of
the wife of A. B. , 186

SH EWETH,

That on the day of she was lawfully married to A. B.

at That she lived and cohabited with the said A. B. for years at
and also at , and had had children. issue of her said marriage, of whom
are now living with the applicant, and wholly dependent upon her earnings.

That on or about , the said A. B., without any reasonable cause, deserted the applicant, and hath ever since remained separate and apart from her.

That since the desertion of her said husband, the applicant hath maintained herself by her own industry [or on her own property, as the case may be] and hath thereby and otherwise acquired certain property consisting of [here state generally the nature of the property]

Wherefore she prays an order for the protection of her earnings and property acquired since the said day of , from the said A. B., and from all creditors and persons claiming under him.

(Signed) C. B.

NO. 12.—PETITION FOR ALIMONY PENDING THE SUIT.

(See section 36.)

In the (High) Court of

To the Hon'ble Mr. Justice

B. against B.

[or To the Judge of
The day of , 186
The petition of C. B., the lawful wife of
A. B.

SH EWETH,

1. That the said A. B. has for some years carried on the business of , at , and from such business derives the net annual income of from Rs. 4,000 to 5,000.

2. That the said A. B. is possessed of plate, furniture, linen and other effects at his said house afore said, all of which he acquired, in right of your petitioner as his wife, or purchased with money he acquired through her, of the value of Rs. 10,000.

3. That the said A. B. is entitled, under the will of his father, subject to the life-interest of his mother therein, to property of the value of Rs. 5,000 or some other considerable amount.¹

Your petitioner, therefore, prays that this (Hon'ble) Court will decree such sum or sums of money by way of alimony, pending the suit, as to this (Hon'ble) Court may seem meet.

(Signed) C. B.

Form of Verification—see No. 1.

NO. 13.—STATEMENT IN ANSWER TO NO. 12.

In the (High) Court of

B. against B.

A. B. of , the above-named respondent, in answer to the petition for alimony, pending the suit of C. B., says—

1. In answer to the first paragraph of the said petition, I say that I have for the last three years carried on the business of , at , and that, from such business, I have derived a nett annual income of Rs. 900, but less than Rs. 1,000.

¹ The petitioner should state her husband's income as accurately as possible.

2. In answer to the second paragraph of the said petition, I say that I am possessed of place, furniture, linen and other chattels and effects at my said house aforesaid, of the value of Rs. 7,000 but as I verily believe of no larger value. And I say that a portion of the said plate, furniture and other chattels and effects of the value of Rs. 1,500, belonged to my said wife before our marriage, but the remaining portions thereof I have since purchased with my own moneys. And I say that, save as hereinbefore set forth, I am not possessed of the plate and other effects as alleged in the said paragraph in the said petition, and that I did not acquire the same as in the said petition also mentioned.

3. I admit that I am entitled under the will of my father, subject to the life-interest of my mother therein, to property of the value of Rs. 5,000. that is to say, I shall be entitled under my said father's will, upon the death of my mother, to a legacy of Rs. 7,000, out of which I shall have to pay to my father's executors the sum of Rs. 2,000, the amount of a debt owing by me to his estate, and upon which debt I am now paying interest at the rate of five per cent. per annum.

4. And, in further answer to the said petition, I say that I have no income whatever except that derived from my aforesaid business, that such income, since my said wife left me, which she did on the day of last, has been considerably diminished and that such diminution is likely to continue. And I say that out of my said income, I have to pay the annual sum of Rs. 100 for such interest as aforesaid to my late father's executors, and also to support myself and my two eldest children.

5. And, in further answer to the said petition I say that, when my wife left my dwelling house on the day of last, she took with her, and has ever since withheld and still withholds from me, plate, watches and other effects in the second paragraph of this my answer mentioned, of the value of, as I verily believe, Rs. 800 at the least; and I also say that, within five days of her departure from my house as aforesaid, my said wife received bills due to me from certain lodgers of mine, amounting in the aggregate to Rs. , and, that she has ever since withheld and still withholds from me the same sum.

(Signed) A. B.

NO. 14.—UNDERTAKING BY MINOR'S NEXT FRIEND TO BE ANSWERABLE FOR RESPONDENT'S COSTS.

(See section 49.)

In the (High) Court of
I, the undersigned, A. B., of , being the next friend of C. D., who is a minor, and who is desirous of filing a petition in this Court, under the Indian Divorce Act, against D. D. of , hereby undertake to be responsible for the costs of the said D. D. in such suit, and that, if the said C. D. fail to pay to the said D. D. when and in such manner as the Court shall order all such cost of such suit as the Court shall direct him (or her) to pay to the said D. D., I will forthwith pay the same to the proper officer of this Court.

Dated this day of , 186 .

(Signed) A. B.

THE DOWER ACT (XXIX OF 1839.)

PREFATORY NOTE :—Dower is one of the rights which the wife under the English law, has in her husband's property. Under the English law, at the present day, a life interest in a portion of the real estate of which the husband dies possessed and intestate and provided he had not excluded the wife therefrom is all that remains of the ancient Dower, a right which the common law gave to the widow for the sustenance of herself and her children (Co. Litt. 31 a).

"Where a woman taketh a husband seised of such an estate in tenements, etc., so as by possibility it may happen that the wife may have issue by her husband, and that the same issue may by possibility inherit the same tenements of such an estate as the husband hath, as heir to the husband, of such tenements she shall have her dower, and otherwise not" (Litt. S. 53). Three conditions were therefore necessary to entitle the wife to dower—(i) marriage; (ii) sole seisin of an estate of inheritance; (iii) death of the husband (Co. Litt. 31 a). It was not necessary that there should be issue in fact of the marriage (Litt. S. 36) but it was necessary that there should be a possibility of issue who could inherit; and therefore if lands were limited to a man and his heirs by a certain marriage in tail, and his wife died, and he married again, his second wife would have no dower out of those lands (Litt. S. 53.) Assuming these three conditions fulfilled, the widow was entitled to an estate for life in one-third of the lands of which her husband was solely seised for an estate of inheritance in possession at any time during the coverture. The husband must have been "Seised," therefore the widow was not dowable out of his equitable estates (Co. Litt. 29 a), including a mere equity of redemption. (*Dawson v. Bank of Whitehaven*, 1877, 6 Ch. D 218).

All women married after the 1st January 1834 come under the provisions of the Dower Act, 3 & 4 Will. IV c. 105. Under this Act a widow is dowable out of lands in which her husband's interest was equitable, or partly legal and partly equitable (S. 2), provided it was an estate of inheritance in possession, or equal to an estate of inheritance in possession (*In re Mitchell*, (1892) 2 Ch. 87), other than a joint-tenancy. If the husband's interest is a right of entry, that is sufficient (S. 3), provided the claim to dower is enforced before the right of entry is barred. But she is not dowable out of any lands of which her husband actually disposed in his lifetime or by will (S. 4). A widow is not entitled to dower out of any land of her husband where, in the deed by which such land is conveyed, or by any deed executed, by him, it shall be declared that his widow shall not be entitled to dower out of

such land (S. 6). Nor is she entitled to dower out of any land of which her husband dies wholly or partially intestate, when by his will he declares his intention that she shall not be entitled to a dower out of such land or out of any of his land (S. 7). Her right is subject to any conditions, restrictions, or directions declared by her husband's will (S. 8). Where a husband devises land out of which his widow would have been dowerable if the same were not so devised, or any estate or interest therein, to or for the benefit of his widow, she is not dowerable out of any of his land unless a contrary intention appears in his will (S. 9). A devise of real estate to trustees on trust to sell and to pay an annuity out of the proceeds is a devise of an interest in land (*Lacy v. Hill*, 1875 L. R. 19 Eq. 346; *In re Thomas*, (1886) 34 Ch. D 166). But no gift or bequest out of personal estate, or out of land not liable to dower, will defeat her right to dower unless a contrary intention is expressed in the husband's will (S. 10). The Court may enforce an agreement by the husband not to bar his wife's right to dower (S. 11). Formerly, if a legacy were given in satisfaction of dower, it was entitled to priority over simple legacies, for it was considered the price of the dower. By S. 12 nothing in the Act is to interfere with any rule of equity by which legacies, bequeathed in satisfaction of dower are entitled to priority over other legacies. But this rule only applies where, if she had not accepted the gift in satisfaction the widow would have been entitled to dower (*In re Greenwood*, (1892) 2 Ch. 295). By S. 5 dower is made subject to all partial estates and interests, and all charges which the husband may have created, and also to all debts, incumbrances, and contracts to which the land may be liable. The proportionate part of the widow's charge for £500 to be borne by the real estate of an intestate under the Intestates' Estates Act, 1890, has priority over her right to dower (*In re Charriere*, (1896) 1 Ch. 912). Encyclopædia of the Laws of England, 2nd Ed., Vol. VI. Title "Husband and Wife."

THE DOWER ACT (XXIX OF 1839).¹

Short title given, Act 14 of 1897.

Rep. (except as to marriages contracted before 1st January, 1866), Act 8 of 1868.

Rep. in pt., Act 12 of 1891.

S. 1 rep. in pt., Act 10 of 1914.

Declared in force throughout B. I., except as regards, the Scheduled Districts, Act 15 of 1874, S. 3.

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[16th December, 1839.]

An Act for the Amendment of the Law relating to Dower.

1. WHEREAS it is expedient to extend the Amendments in the English law of dower contained in the ²Statute 3rd and 4th William IV,

Preamble.

Chapter CV, to the territories of the East India Company in cases which, but for the passing of this Act, would be governed by the English law of dower as it existed previously to the passing of the aforesaid Statute;

It is hereby enacted that the words and expressions hereinafter mentioned which in their ordinary signification have a more confined

Interpretation.

or a different meaning, shall in this Act, except where the nature of the provision or the context of the Act shall exclude such construction, be interpreted as follows; that is to say, the word "land" shall extend to messuages, and

¹Short title, "The Dower Act, 1839." See the Indian Short Titles Act (14 of 1897).

The whole Act, except as to marriages contracted before 1st January, 1866, was repealed by the Repealing Act (8 of 1868).

As to dower when the marriage was contracted before the 1st January, 1866, the Act has been

declared, by the Laws Local Extent Act '15 of 1874). S. 3, to be in force in the whole of British India, except as regards the Scheduled Districts.

²Sec. 1—²Short title. "The Dower Act, 1833" See the Short Titles Act, 1896 (59 & 60 Vict., c. 14).

all other hereditaments, whether corporeal or incorporeal (except such as are not liable to dower), and to any share thereof [* * * * *]¹

2. [* * *]² When a husband shall die, beneficially entitled to

Widows to be entitled to dower out of equitable estates.

any land for an interest which shall not entitle his widow to dower out of the same at law, and such interest, whether wholly equitable, or partly legal and partly equitable, shall be an estate of inheritance in possession, or equal to an estate of inheritance in possession (other than an estate in joint-tenancy), then his widow shall be entitled in equity to dower out of the same land.

3. [* * *]²

Seisin shall not be necessary to give title to dower.

When a husband shall have been entitled to a right of entry or action in any land, and his widow would be entitled to dower out of the same if he had recovered possession thereof, she shall be entitled to dower out of the same although her husband shall not have recovered possession thereof : Provided that such dower be sued for or obtained within the period during which such right of entry or action might be enforced.

4. [* * *]²

No dower out of estates disposed of.

No widow shall be entitled to dower out of any land which shall have been absolutely disposed of by her husband in his lifetime, or by his will.

5. [* * *]²

Priority to partial estates, charges and specialty debts.

All partial estates and interests, and all charges created by any disposition or will of a husband, and all debts, incumbrances, contracts and engagements to which his land shall be subject or liable, shall be valid and effectual as against the right of his widow to dower.

6. [* * *]²

Dower may be barred by a declaration in a deed.

A widow shall not be entitled to dower out of any land of her husband, when in the deed by which such land was conveyed to him, or by any deed executed by him, it shall be declared that his widow shall not be entitled to dower

out of such land.

1. [* * *]²

or by a declaration in the husband's will.

A widow shall not be entitled to dower out of any land of which her husband shall die wholly or partially intestate when by the will of her husband, duly executed for the devise of free-hold estate, he shall declare his intention that she shall not be entitled to dower out of such land or out of any of his land.

8. [* * *]²

Dower shall be subject to restrictions.

The right of a widow to dower shall be subject to any conditions, restrictions or directions which shall be declared by the will of her husband duly executed as aforesaid.

9. [* * *]²

Devise of real estate to the widow shall bar her dower.

Where a husband shall devise any land out of which his widow would be entitled to dower if the same were not so devised, or any estate or interest therein, to or for the benefit of his widow, such widow shall not be entitled to dower out of or in any land of her said husband, unless a contrary intention shall be declared by his will.

10. [* * *]²

Bequest of personal estate to the widow shall not bar her dower.

No gift or bequest made by any husband to or for the benefit of his widow of or out of his personal estate, or of or out of any of his land not liable to dower, shall defeat or prejudice her right to dower unless a contrary intention shall be declared by his will :

¹The words "and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing" were repealed by Act X of 1914.

The words "And it is hereby further enacted, that" in Ss. 2 to 10, 12 and 14 were repealed by the Repealing and Amending Act (12 of 1891).

11. Provided always, [* * *]¹ that nothing in this Act contained

Agreement not to bar dower
may be enforced.

shall prevent any Court of Equity from enforcing any covenant or agreement entered into by or on the part of any husband not to bar the right of his widow to dower out

of his lands or any of them.

12. [* * *]² Nothing in this Act contained shall interfere with any rule

Legacies in bar of dower
still entitled to preference.

of equity or of any Ecclesiastical Court by which legacies bequeathed to widows in satisfaction of dower are entitled to priority over other legacies.

13. [Certain dowers abolished.] *Rep. by the Repealing and Amending Act, 1891 (XII of 1891).*

14. [* * *]² This Act shall not extend to the dower of any widow who

Act not to take effect before the 1st July, 1840.

shall have been or shall be married on or before the first day of July one thousand eight hundred and forty, and shall not give to any will, deed, contract, engagement or charge executed, entered into or created before the said first day of July one thousand eight hundred and forty the effect of defeating or prejudicing any right to dower.

15. [* * *]³ This Act shall not be construed to affect any right of property in land otherwise than by modifying the law of dower in cases governed by the English law of dower, or to extend or alter the jurisdiction of any of Her Majesty's

Saving of certain rights and jurisdiction.

Courts of Justice.

THE EASEMENTS ACT (V OF 1882.)

S. 3, Sub., Act 10 of 1914.

S. 14 am., Act 12 of 1891.

Ext. to Bombay and the U. P. Act 8 of 1891.

Continued in force (with modifications) in territory transferred to Delhi Province, Act 7 of 1915, S. 3, Sch. III.

PREFATORY NOTE.—Easements, in some form or other was known to all the ancient nations, who had developed some form of legal rules, and legal institutions.

Thus "Easements were familiar to Hindus and Mussalmans, and their law books are full of rules in regard to what are termed by Muhammadan lawyers as "neighbour's rights." (See Abstract Proceedings of the Council of the Governor-General of India, dated 16th February, 1882, See also 13 B. L. R. O. C. 18.)

It had sometimes been said that easements in an agricultural country like India are not matters of sufficient importance or deserve the attention of the legislature; that, to frame an Act in regard to them, is to encumber the Indian Statute book unnecessarily. Such views are not countenanced by the Native community. In cities and towns, easements are regarded as rights of great pecuniary value and litigation often arises in regard to them. In the rural parts of the country the right to take fish or water from lakes and tanks often becomes the subject of litigation, and the final decision materially affects the value of the property in regard to which the easements are claimed. Nor are disputes in regard to easements confined to the most advanced parts in India. Probably they are more frequent in those parts of India which have come under British dominion comparatively lately. (See Abstract Proceedings of the Council of the Governor-General of India, dated 10th February, 1882. See also 3 B. L. R. O. C. 18.)

"The origin of servitudes," says an eminent French writer, "is as ancient as that of property, of which they are a modification. By their natural disposition the inferior lands were placed in a species of dependence on those more elevated, and the first possessors of the soil recognized the indispensable necessity of such subjections. When the extension of cultivation brought men nearer together, and the want of a common defence formed the first society, public utility and safety led to the conviction, that it was necessary to restrict in certain cases rights legitimate in themselves, but the absolute exercise of which by individuals could not take place without rendering some properties almost valueless. In a short time, similar rights were stipulated for by private persons as matter of utility, or even pleasure. Thus, from the disposition of nature, the wants of society and the agreements of individuals, have originated praedial servitudes." (*Pardessus, Traite des Servitudes*, Sec. 1, cited in Gale on Easements, 8th Ed., 1908, p. 27.)

"Probably the origin of praedial servitudes is to be found in the gradual introduction of the stricter notions of exclusive ownership. Without some modifications of these notions, neighbours could not have lived comfortably together. Hence in praedial servitudes, it is always assumed that

¹ The words "and it is hereby further enacted" in S. 11 were repealed by Act 12 of 1891.

² See foot note ² to p. 962 *sup.a*.

³ The words "And it is hereby provided that" in S. 15 were repealed by the Repealing and Amending Act (XII of 1891).

the two *praedia* are not far apart. Hence also it was a rule that the right of a landowner over the land of his neighbour must not only be advantageous to him, but advantageous to him *qua* landowner, or as it is sometimes put, advantageous to his land. So again it followed that, if the land owner who had the right sold the land for the benefit of which the right existed, he could not himself retain the right. It passed with the land to each successive owner of the land. Exactly in the same way, if the land over which the right was exercised were sold, the land remained burdened with servitude, following out the idea that the servitude was attached to both lands, to one as a benefit, and to the other as a burden. The land or house to which the servitude was attached has a benefit was called *locus superior*; that to which it was attached as a burden was called the *locus inferior*. (Markby's Elements of Law, 5th Ed., 1896, pp. 207 & 208.)

It has been said that "The right of easement is a right as old as the day when the human race, first emerging from barbarism, adopted the custom of living together in towns, or living as each other's neighbours, or respecting each other's rights. The right of easement is the necessary consequence of the right of ownership of immovable property; and, as soon as mankind arrived at the determination that individuals were to be allowed exclusive ownership of property, the very next step was concurrence in the equitable principle, that the good of the public lay in enjoying one's property so as not to disturb the enjoyment by the neighbour of his own property. And this salutary principle appears to be the original foundation on which easements are based." (See Abstract Proceedings of the Council of the Governor-General of India, dated 16th February, 1882.)

The Indian Easements Act was intended to systematically formulate those rules of law which previously governed the decision of disputes relating to easements. Those rules were such as our Courts were, even before the passing of this Act in the habit of administering.

The object of this Act was to state, clearly and compactly, the rules relating to Easements, that is to say, the rights which a man sometimes has over one piece of immovable property by reason of his ownership of another. As to these rights then existing statutory law was silent, except so far as regards the acquisition of easements by long and continued possession, the limitation of suits for disturbing them, and the granting of injunctions to prevent such disturbance; and three of the then most experienced Judges in India—Sir Michael Westropp, Mr. Justice Jackson and Mr. Justice Innes expressed their opinion that it was desirable to codify the law on the subject, which was then (to quote the Chief Justice of Bombay) 'for the most part to be found only in treatises and reports practically inaccessible to a large proportion of the legal profession in the Mufassal and to the Subordinate Judges.' There was much litigation in the case of urban easements, and a Judge of the Punjab Chief Court asserted that was largely due to the fact that neither the people themselves, nor the majority of the Courts understood the principles upon which such disputes had to be determined. (See Statement of Objects and Reasons; See also Whitely Stokes' Anglo-Indian Codes, Vol. I, p. 879.)

The Act was mainly based on the law of England, which, being just, equitable and almost free from local peculiarities, has, in many cases, been held to regulate the subject in this country; but a few deviations had been made from that law, and rules as to some matters which had not till then come under the cognizance of the English and Indian Courts had been adapted from the writings of well-known jurists. (See Whitely Stokes' Anglo-Indian Codes, Vol. I, p. 879.)

Whenever any disputes regarding easements arose previous to the passing of the Act, the Courts had to decide these disputes on principles derived from reported English cases. Of course, there were customary rights in this country which were not usual in England, but that was not the difficulty. The difficulty was to know what gave a man a right to an easement so as to enable him to enforce it against a neighbour, and how he might acquire that right, and how he could enforce it. All these points were decided by the High Courts according to the English law, and therefore it was held that, in any attempt at codifying the existing law, the reproduction of the rules of English law was found to be inevitable. (See Abstract Proceedings of the Council of the Governor-General of India, dated 16th February, 1882.)

In the early days of the British administration of this country, there was a wholesale and indiscriminate borrowing from the English law—the most copious system of express rules known to the world. "The Judge reads English Law-books; the young native lawyers read them; for law is the study into which the educated youth of the country are throwing themselves, and for which they may even be said to display something like genius. You may ask, what authority have these borrowed rules in India? Technically, they have none whatever. Yet, though they are taken (and not always correctly taken) from a law of entirely of foreign origin, they are adopted as if they naturally commended themselves to the reason of mankind; and all that can be said of the process, is that it is another example of the influence often felt in European legal history which express written law invariably exercises on unwritten customary law when they are found side by side." (See Abstract Proceedings of the Council of the Governor-General of India, dated 16th February, 1882; Maine's Ancient Law.)

On this subject the following remarks of Justice Field may also be noted:—"Doubts had been expressed as to whether a measure like this Bill is at present demanded by the requirements of this country. I have on many previous occasions expressed my own opinion that legislation in India ought not to anticipate future requirements, the nature and measure of which must in the present be uncertain, and that the real test of the advisability or utility of any proposed legislative measure is whether it is demanded by the actual present requirement of the country. If there is a considerable amount of actual present litigation to which any proposed measure will be immediately applicable, and for dealing with which it will supply a ready and useful body of rules, it appears to me that this is a strong fact to show that such legislation is demanded by the requirement of 'the

progress of the country. Applying this test to the Easements Bill, I think that it is a measure which may well be passed into law. As the result of my own personal experience, I have had before me within the last six months cases which directly involved the following easements:—“(1) Right of way for foot passengers. (2) Right of way for boats. (3) Right of way for carts. (4) An easement of necessity. (5) *Destination du père de famille*. (6) Flumen, or the right of discharging water in a continuous stream upon adjoining premises. (7) Right of allowing water to drop from the eaves of the dominant tenement upon the servient tenement (*stillicidium*). (8) *Jus-projiciendi*, or right to project a roof over the boundary line of a neighbour's land. Turning to the published reports of twenty years (previous to the passing of this Act) we find cases connected with easements in every presidency, and in every Court, from the Munsiff's Court in India up to Judicial Committee of the Privy Council. For the assistance of any who may desire to test the value of this argument, I give a few instances which may be verified by referring to the reports. The reference will be found most interesting.” Mr. Field referred to the reports of over seventy Indian Cases relating to easements, which might be tabulated as follows:—Right of way, 34 cases. Right of water, 8 cases. Right to stop or obstruct the natural flow of water, 7 cases. Fall of water from roof of house, 2 cases. Light and air, 9 cases. Profits *a prendre*, 2 cases. Other cases connected with easements, 11 cases. In this connection it must also be remembered that the number of reported cases on a given subject was only a small fraction of the number of unreported cases on that subject. (*See Abstract Proceedings of the Council of the Governor-General of India, dated 16th February, 1882.*)

“This Act is a measure of which the country had long stood in need.”

This Act, it was believed, would do material service in the Central Provinces in enabling the raiyats to maintain themselves in the enjoyment of those grazing and forest rights, which the Government had endeavoured to preserve to them, but of which a few of the more grasping land-owners were seeking to deprive them. (*See Abstract Proceedings of the Council of the Governor-General of India, dated 16th February, 1882.*)

THE EASEMENTS ACT (V OF 1882).

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THE EASEMENTS ACT (V OF 1882).¹

[17th February, 1882.]

An Act to define and amend the law relating to Easements and Licenses.

Preamble.

WHEREAS it is expedient to define and amend the law relating to Easements and Licenses ; It is hereby

enacted as follows :—

PRELIMINARY.

Short title.

1. This Act may be called THE INDIAN EASEMENTS ACT, 1882.

Local extent

It extends to the territories respectively administered by the Governor of Madras in Council and the Chief Commissioners of the Central Provinces and Coorg,

Commencement.

and it shall come into force on the first day of July, 1882.

Savings.

2. Nothing herein contained shall be deemed to affect any law not hereby expressly repealed ; or to derogate from—

(a) any right of the Government to regulate the collection, retention and distribution of the water of rivers and streams flowing in natural channels, and of natural lakes and ponds, or of the water flowing, collected, retained or distributed in or by any channel or other work constructed at the public expense for irrigation ;

(b) any customary or other right (not being a license) in or over immoveable property which the Government, the public or any person may possess irrespective of other immoveable property ; or

¹ For Statement of Objects and Reasons see *Gazette of India*, 1880, Pt. V, p. 494 ; for Report of the Select Committee see *ibid.*, 1881, Pt. V, p. 1021 ; and for Proceedings in Council, see *ibid.*, 1881, Supplement, pp. 687 and 766, and *ibid.*, 1882, Supplement, p. 172.

Sec. 1.—Act is not retrospective. 14 All. 785. Act is a complete Code and only in places where it is not in force, the Courts rely upon English sources for the law of easements and upon justice, equity and good conscience. 34 I. C. 450=20 C. W. N. 1158. See also 8 C. W. N. 425 (P. C.) ; 7 Bom. L. R. 825. The Limitation Act is remedial and gives a right where there is no other right at all, but it does not exclude or interfere with other titles and modes of enjoyment, (as) Easement. 29 M. L. J. 685=31 I. C. 528. (5 M. 253 ; 5 M. 226 ; 6 C. 812 ; 35 C. 851 ;

14 B. 222 ; 10 C. 214 ; 8 G. 956 ; 7 C. 432. Fol.) Act not in force in Punjab 85 P. R. 1902 ; 102 I. C. 447=A. I. R. 1927 Lah. 492 ; also not in force in Bengal. 29 Cal. 366. But its principles may be applied even in Provinces where Act is not in force as such. (*Ibid.*) But see 102 I. C. 447=1927 Lah. 492 ; 91 I. C. 881=A. I. R. 1926 Cal. 307 (Bengal) Principles of the Act applied to Berar—See 94 I. C. 923=A. I. R. 1926 Nag. 376.

Sec. 2.—Where a part of the sources of irrigation for a ryotwari village is a Govt. tank, Mirasdars who have from time immemorial cultivated their wet lands with the tank water have a preferential right to irrigate from the tank over assignees of waste land from the Govt. 51 I. C. 714. A ryotwari proprietor can claim a supply of water for irrigation of his lands from a Govt.

(c) any right acquired, or arising out of a relation created, before this Act comes into force.

Construction of certain references to Act XV of 1877 and Act IX of 1871.

1 3. [All references in any Act or Regulation to sections 26 and 27 of the Indian Limitation Act, 1871, or to sections 27 and 28 of Act No IX of 1871, shall, in the territories to which this Act extends, be read as made to sections 15 and 16 of this Act.]

CHAPTER I.

OF EASEMENTS GENERALLY.

4. An easement is a right which the owner or occupier of certain land possesses, as such, for the beneficial enjoyment of that land, to do and continue to do something, or to prevent and continue to prevent something being done, in or upon, or in respect of, certain other land not his own.

The land for the beneficial enjoyment of which the right exists is called the dominant heritage, and the owner or occupier thereof the dominant owner; the land on which the liability is imposed is called the servient heritage, and the owner or occupier thereof the servient owner.

Explanation.—In the first and second clauses of this section, the expression “land” includes also things permanently attached to the earth: the expression “beneficial enjoyment” includes also possible convenience, remote advantage and even a mere amenity; and the expression “to do something” includes removal and appropriation by the dominant owner for the beneficial enjoyment of the dominant heritage, of any part of the soil of the servient heritage or anything growing or subsisting thereon.

Illustrations.

(a) *A*, as the owner of a certain house, has a right of way thither over his neighbour *B*'s land for purposes connected with the beneficial enjoyment of the house. This is an easement.

(b) *A*, as the owner of a certain house, has the right to go on his neighbour *B*'s land and to take water for the purposes of his household out of a spring therein. This is an easement.

(c) *A*, as the owner of a certain house, has the right to conduct water from *B*'s stream to supply the fountains in the garden attached to the house. This is an easement.

(d) *A*, as the owner of a certain house and farm, has the right to graze a certain number of his own cattle on *B*'s field, or to take, for the purposes of being used in the house, by himself, his family, guests, lodgers and servants, water or fish out of *C*'s tank, or timber out of *D*'s wood, or to use, for the purpose of manuring his land, the leaves which have fallen from the trees on *E*'s land. These are easements.

(e) *A* dedicates to the public the rights to occupy the surface of certain land for the purpose of passing and re-passing. This right is not an easement.

(f) *A* is bound to cleanse a watercourse running through his land and keep it free from obstruction for the benefit of *B*, a lower riparian owner. This is not an easement.

channel. But it is for the Govt. to distribute water in any way it thinks fit. 34 M. L. J. 425 = 45 I. C. 80. No one has any right to interfere with the Govt.'s exercise of its general power of distributing and limiting the supply of water for irrigation in ryotwari villages. But if the Govt. dams up water and prevents it from going to plff.'s land there is a right of suit 26 I. C. 18 = (1914) M. W. N. 788. The construction and control of works and sources of irrigation is the special function and duty of the Govt. in India. 24 M. L. J. 36 = 14 I. C. 261. See also 28 Mad. 72 = 15 M. L. J. 32; 1 M. L. J. 47; 16 Mad. 333; 7 Bom. 209; 28 Bom. 105. Customary right, proof of See 90 I. C. 976; A. I. R 1926 All. 130.

Sec. 3.—This section was substituted for the original section 3 by the Repealing and Amending Act (X of 1914), S. 2 and Sch. I.

This section repeals, so far as the Central Provinces are concerned, Ss. 26 and 27 of the Limitation Act and the definition of easement

contained in that Act. 43 I. C. 962 = 14 N. L. R. 35.

Sec. 4 —OVER WHAT PROPERTY CAN EASEMENTS BE ACQUIRED.—Easements can be acquire^d over artificial structures such as flat masonry, or roofs of shops. 45 I. C. 585 = 21 O. C. 78. It is not inconsistent to claim a property, or in the alternative an easement over the same. 41 C. L. J. 379 = 1925 Cal. 788. Neither writing nor registration is necessary for the creation of easement. 96 I. C. 276 following 31 All. 612.

ILLUSTRATIVE CASES—(1) WHAT ARE EASEMENTS.—The definition of easement applies to a projection of eaves in a dry country as well to a country having abundant rainfall, the purposes of the eaves being only to discharge rain water. 38 Bom. 1 = 21 I. C. 352 = 15 Pom. L. R. 876.

EASEMENT OR LICENCE — Difference. See 29 Bcm. L. R. 312. The possession of a *punkh* or

Continuous and discontinuous, apparent and non-apparent, easements.

5. Easements are either continuous or discontinuous, apparent or non-apparent.

A continuous easement is one whose enjoyment is or may be continual without the act of man.

A discontinuous easement is one that needs the act of man for its enjoyment.

An apparent easement is one the existence of which is shown by some permanent sign which upon careful inspection by a competent person, would be visible to him.

A non-apparent easement is one that has no such sign.

Illustrations.

(a) A right annexed to B's house to receive light by the windows without obstruction by his neighbour A. This is a continuous easement.

(b) A right of way annexed to A's house over B's land. This is a discontinuous easement.

(c) Rights annexed to A's land to lead water thither across B's land by an aqueduct and to draw off water thence by a drain. The drain would be discovered upon careful inspection by a person conversant with such matters. These are apparent easements.

(d) A right annexed to A's house to prevent B from building on his own land. This is a non-apparent easement.

6. An easement may be permanent or for a term of years or other limited period, or subject to periodical interruption, or exercisable only at a certain place, or at certain times, or between certain hours, or for a particular purpose, or on condition

Easement for limited time or on condition.

that it shall commence or become void or voidable on the happening of a specified event or the performance or non-performance of a specified act.

Easement restrictive of certain rights.

7. Easements are restrictions of one or other of the following rights (namely).

eaves overhanging another's land is an easement and is not occupation of property. 37 Bom. 491 = 15 Bom. L. R. 551. Right of way for the use of the sweeper, who is also a Municipal servant can be acquired as an easement. 28 Bom. L. R. 601 = 95 I. C. 170 = A. I. R. 1926 Bom. 282.

WHAT ARE NOT EASEMENTS.—Right to bury in another's land does not fall within the general definition of "easement." It cannot be deemed a right. 66 I. C. 640 = 34 C. L. J. 319. Private right of way if not appurtenant to a dominant tenement, like public rights of way, are not easements. They are rights in gross and can be enforced as such. 59 I. C. 319. A right of passage over a public road is not an easement. 48 All. 560 = 95 I. C. 1030 = 24 A. L. J. 682 = A. I. R. 1926 All. 538. A right to go on to a neighbour's land to gather the fruits there from a portion of a tree alleged to belong to the plaintiff is not an easement. Such a right cannot be acquired by prescription. 43 M. L. J. 152 = 16 L. W. 98 = 1922 Mad 338; (1895) A. C. 1 (Foll.) A general right of easement to use a roof as a place of setting or drying clothes or for other purposes can be acquired under the Act. User may be either by the dominant owner or by his tenants beyond the statutory period. User without permission is user as of right. 45 I. C. 585 = 21 O. C. 78. A person has no right to cut off the overhanging branches and the penetrating roots of a tree belonging to his neighbour when the tree is growing partly on his land and partly on his neighbour's land for many years past. 22 Bom. L. R. 790 = 44 B. 795.

NO RECIPROCAL EASEMENTS.—It is not possible to acquire a reciprocal easement for the benefit of the servient tenement by the exercise of an easement by the dominant owner. 22 I. C. 514 = 19 C. L. J. 45.

PROFIT "A PRENDRE".—The right to hunt in a jungle and to appropriate the game is a right known in English law as a right to profit *a prendre* in gross. 2 P. L. J. 323 = 39 I. C. 868.

PERMISSIVE USER.—No question of easement could arise where the user of the defendant's land was permissive. 21 A. L. J. 436 = L. R. 4 A. 274 = 1924 All. 50.

Sec. 7.—GENERAL—NATURAL RIGHTS AND EASEMENTS.—The right incident to the ownership of land, in the nature of easement but not a right of easement as such is called a natural right and is distinct from the right of easement. Where one is claimed, the other does not arise. 57 I. C. 504. As to water course, the water of which is largely increased in volume by percolation, See 64 I. C. 158 = 3 Lah. I. J. 555. The ownership of free natural elements, such as air and water and of all wild animals living therein is obtained by occupancy or appropriation. 3 P. L. T. 53 = 64 I. C. 346. An occupier of abutting lands cannot be restrained in the exercise of his natural rights simply because he becomes a lessee of other lands not abutting. 24 I. C. 685 = (1914) M. W. N. 481. Where the water of a stream has been used for irrigating only abutting lands, the owner of abutting lands cannot be restrained from using more than a reasonable quantity by another to whom no material diminution in supply is caused. (*Ibid.*) The actual and not a mere threatened use of the water flowing through a natural stream to irrigate lands other than those abutting on the stream gives a right to sue (*Ibid.*)

ILLUSTRATIVE CASES.—No one has power, for the safety of his own property, to direct or interfere with a natural stream running a natural outlet, and if he does so, he will be liable in damages to any one who is injured by his Act.

(a) The exclusive right of every owner of immoveable property (subject to any law for the time being in force) to enjoy and dispose of the same and all products thereof and accessions thereto.

Exclusive right to enjoy.

(b) The right of every owner of immoveable property (subject to any law for the time being in force) to enjoy without disturbance by another the natural advantages arising from its situation.

Rights to advantages arising from situation.

19 A. L. J. 736=63 I. C. 980=43 A. 688. Where the rain water falling on plff.'s land which is on a higher level, flows across deft.'s land which is on a lower level, the plff.'s right is a natural right not acquired by prescription, and it cannot be interfered with by the deft. 24 I. C. 91=12 A. L. J. 685. (1 Mad. 335; 29 Mad. 539 Ref.). There is no easement of prospect or of privacy. 36 C. L. J. 406=1923 Cal. 256 (But see also cases under S. 18 *infra*.) Every one may build upon or otherwise utilise his own land regardless of the fact that his doing so involves an interference with the light which would otherwise reach the land and building of another person. (*Ibid.*) If windows are opened, the neighbour may, by building on his own land obstruct the light which would otherwise reach them. (*Ibid.*) Same principle has been applied to partition of joint properties. 36 C. L. J. 406=1923 Cal. 256. On a severance of tenements by a partition of joint property, and in the absence of a contrary intention, expressed or necessarily implied all such easements as are apparent, continuous and necessary for enjoying any of the undivided shares when the partition was effected pass to the coparceners to whom such shares are respectively allotted in severalty. *Ibid.* Every person has a right to do anything on his own land with regard to the diversion, storage or the uses of water in any way he chooses provided that he does not allow or cause that water to go upon his neighbour's land so as to affect it in some other way than the way in which it had been affected before. 41 I. C. 47. The fact that the water discharged from a dominant tenement flows over the servient tenement without a definite channel, cannot prevent the acquisition of an easement. 40 Cal. 458=17 C. W. N. 306 (F. B.) (8 C. W. N. 214, Overruled). Even the rights of the riparian owners may be acquired by easement, 1923 Lah. 594. A person has no right to obstruct the water of a stream except to the extent to which he has had prescriptive use. 41 I. C. 47.

MEANING OF WORDS.—"Owner does not necessarily mean absolute owner. 42 Mad. 567=37 M. L. J. 28=50 I. C. 291. It includes limited owner such as lessees or persons having derivative interest in the property. *Ibid.* An occupier of zamindari lands is an "owner" within the meaning of illustration(j) to the section. 21 I. C. 685=(1914) M. W. N. 481. The term, "natural right" to drain covers only the right to allow rain water falling on land of a naturally higher level to drain off by surface flow along whatever lines the water could find its way on the neighbouring land. The right to drain off water brought according to the custom and usages of the country along irrigation channels upon the land may also be said to be a natural right. 23 M. L. T. 210=44 I. C. 500 (1918) M. W. N. 167. Each upper owner in a system of connected

tanks in different villages supplied with water by or through a permanent or artificial channel, is entitled in the flood season, to fill his tank, which is of sufficient storage capacity for the Ayakut and the must, subject to this, allow the water to flow freely on the lower tank till the last of them is supplied. (1917) M. W. N. 571=41 I. C. 24=6 L. W. 572. Whatever may be the means adopted to let out the surplus, the owner of the tank, in such cases, cannot increase the storage capacity of his tank beyond the capacity at the beginning which, in many cases can only be proved by the customary flow of water. (*Ibid.*) An easement right to keep a latrine on another man's land is unknown to law and cannot be acquired by prescription. 29 I. C. 865=19 C. W. N. 864.

RIPARIAN RIGHTS.—The lower proprietor owes a natural servitude without claim to compensation to the higher, in respect of water naturally flowing upon it; but the higher land owner cannot exceed his natural right by sending water not going there naturally. Short of this the upper owner may interfere with the flow of water. 36 Mad. 149=21 I. C. 62=25 M. L. J. 276. A riparian proprietor is entitled to use the water of the stream for irrigation of his lands without causing injury to the riparian proprietors. 18 I. C. 284=37 Mad. 369 (note). Riparian right is a natural right and is not lost by non-user until some other person acquires a right of easement substantially diminish the water available to the owner; the riparian right cannot be affected or lost. 104 I. C. 781. It is right incidental to the ownership of the land upon which the air or the water lies, just as much as is the right to make the silt deposited by rivers or the lava thrown up by a volcano or the rain or snow falling from the sky. 3 P. L. T. 53=64 I. C. 316. Erecting a dam across the bed of the river is a common method of using the water of a stream by a riparian proprietor. (*Ibid.*) A riparian proprietor should not take more water than he was taking before, but can use the water to raise wet crop in lands in which it was customary to raise only dry crops. 18 I. C. 294=37 Mad. 369 (N.) An easement exists for the benefit of the dominant tenement alone and the servient owner cannot insist on its continuance by the dominant owner or claim damages for abandonment. 65 I. C. 84. If however water running through an artificial channel on a neighbour's land has all along been flowing to the plaintiff's land it is open to the plaintiff to insist on its continuance on the footing of a lost grant or old arrangement. 66 I. C. 84.

Sec. 7 (b).—The owner of higher land is entitled to discharge surface water over adjacent lower land. 41 I. C. 863=22 C. W. N. 666. Where owing to the silting up of a stream into which the water thus discharged ultimately flowed, the level of the bed of the stream became higher

Illustrations of the rights above referred to.

(a) The exclusive right of every owner of land in a town to build on such land, subject to any municipal law for the time being in force.

(b) The right of every owner of land that the air passing thereto shall not be unreasonably polluted by other persons.

(c) The right of every owner of a house that his physical comfort shall not be interfered with materially and unreasonably by noise or vibration caused by any other person.

(d) The right of every owner of land to so much light and air as pass vertically thereto.

(e) The right of every owner of land that such land, in its natural condition, shall have the support naturally rendered by the subjacent soil of another person.

Explanation.—Land is in its natural condition when it is not excavated and not subjected to artificial pressure; and the "subjacent and the adjacent soil" mentioned in this illustration means such soil only as in its natural condition would support the dominant heritage in its natural condition.

(f) The right of every owner of land that, within his own limits, the water which naturally passes or percolates by, over or through his land shall not, before so passing or percolating, be unreasonably polluted by other persons.

(g) The right of every owner of land to collect and dispose within his own limits of all water under the land which does not pass in a defined channel and all water on its surface which does not pass in a defined channel.

(h) The right of every owner of land that the water of every natural stream which passes by, through or over his land in a defined natural channel shall be allowed by other persons to flow within such owner's limits without interruption and without material alteration in quantity, direction, force or temperature; the right of every owner of land abutting on a natural lake or pond into or out of which a natural stream flows, that the water of such lake or pond shall be allowed by other persons to remain within such owner's limits without material alteration in quantity or temperature.

(i) The right of every owner of upper land that water naturally rising in, or falling on, such land, and not passing in defined channels, shall be allowed by the owner of adjacent lower land, to run naturally thereto.

than the adjacent lower land to the inconvenience thereof. *Held*, that dominant owners were still entitled to exercise their rights. *Ibid.*

Sec. 7 (h).—A plaintiff cannot claim damages for injury caused to the crops on his land by the shade caused by trees standing on his neighbour's land. 19 N. L. R. 191 = 1924 Nag. 69. It cannot be said that every owner of a field has the right to have the sun's rays fall on it from every possible direction (*Ibid.*). There cannot be such a right, for if it were allowed, the use and enjoyment of the adjoining fields by their owners would be very largely restricted. (*Ibid.*)

Illus. (e).—Where plaintiff's land is on a level higher than the defendant's adjoining land it is not open to the defendant to build a bund so as to obstruct the flow of the water naturally flowing thereto. The defendants must allow the water to pass on through their land and then dispose of it in the way they think best. The question is not one of easement but of a right ancillary to property. 27 I. C. 268 = 19 C. W. N. 54. Every one is entitled, in the absence of controlling rights of easement or servitude, regarding his premises to protect his premises against the flow of water from adjacent lands or houses. 248 P. L. R. 1912 = 16 I. C. 797. (29 M. 539 Rel.).

Illus. (g).—Indian Courts should be liberal in recognising irrigation rights as natural rights of as strong a character as any other, provided the lower riparian owners are not injured and the quality and the wide participation of the benefits of the natural stream are not interfered with. 34 M. L. J. 223 = 43 I. C. 113. In India a riparian owner must be confined to the land which is on the bank of the stream or which extends from that bank to a reasonable depth in land. (*Ibid.*) A depth of more than half a furlong would usually be unreasonable. (*Ibid.*)

The right of a riparian owner is not restricted to lifting up of water from a natural stream and carrying it at once to the land but extends to the temporary storage of water in wells before carrying it on to the irrigated lands. (*Ibid.*) Every land owner has a natural right to collect and retain upon his own land the surface water not flowing in a defined channel and put it to such use as he may desire. 4 Pat. L. T. 81 = 2 P. 110. He may also allow it to flow away in the usual course of nature upon the lower lands of his neighbour and cannot be bound to prevent it from so doing. (*Ibid.*) He cannot do this, however, by an artificial discharge upon his neighbour's land unless he has acquired an easement which his neighbour is bound to submit to. (*Ibid.*) If he should acquire such an easement the owner of the servient tenement acquires no reciprocal rights as against the owner of the dominant tenement with regard to the surface water, that is water not passing through a defined channel (*Ibid.*) But see also 66 I. C. 84.

Illus. (h), (i) and (j).—No riparian owner is entitled to obstruct a public river. 21 Cr. L. J. 55 = 54 I. C. 407. Riparian owner has a right to the usufruct of the river or stream which passed through his land. This is not an absolute or exclusive right to the flow of the water but to the reasonable enjoyment of the same. 10 I. C. 181. The right of a riparian owner to use the water of a stream either for irrigation or manufacture is an extraordinary use of water and is subject to the condition that the use of the water by other proprietors should not be affected. 51 I. C. 949. It is not rightful to a higher riparian owner to use the water for irrigation in such a way as to interfere with an easement acquired by prescription by a lower riparian owner. 44 I. C. 19. Where through his own

(j) The right of every owner of land abutting on a natural stream, lake or pond to use and consume its water for drinking, household purposes and watering his cattle and sheep; and the right of every such owner to use and consume the water for irrigating such land, and for the purposes of any manufactory situate thereon, provided that he does not thereby cause material injury to other like owners.

Explanation—A natural stream is a stream, whether permanent or intermittent, tidal or tideless, on the surface of land or underground, which flows by the operation of nature only and in a natural and known course.

CHAPTER II.

THE IMPOSITION, ACQUISITION AND TRANSFER OF EASEMENTS.

8. An easement may be imposed by any one in the circumstances, and to the extent, in and to which he may transfer his interest in the heritage on which the liability is to be imposed.

Who may impose easements.

Illustrations.

(a) A is tenant of B's land under a lease for an unexpired term of twenty years, and has power to transfer his interest under the lease. A may impose an easement on the land to continue during the time that the lease exists or for any shorter period.

fault flood water accumulates on a man's land, his neighbour is entitled to put up bunds to protect his land. The former cannot claim a right of natural drainage and restrain the latter from putting up the bund. 1 Rang. 427=1924 Rang. 86. Natural right of drainage extent of right. 107 I. C. 203. Where a stream, having a continuous flow at the beginning subsequently diverts itself, it is a natural stream and the owners of the land below cannot put a dam across it to the damage and injury of upper owners. 28 M. L. J. 98=2 L. W. 45=26 I. C. 800. Where there is a competition between the rights of the owner of land on a higher level to allow water to pass in its natural flow without obstruction and the rights of the owner of the lower land to use it as he pleases the latter's right must give way to the former. In such a case the owner of the lower land cannot erect a bund to obstruct the flow of water. 52 I. C. 128. An owner of land through which a river or other natural channel flows is not bound to clean it though he is bound within certain limits as between himself and other riparian owners not to do anything which will obstruct the flow of water or materially interfere with their rights. 33 All. 619=8 A. L. J. 640.

Illus. (j).—A riparian proprietor, can only take for the purpose of irrigation so much water as is necessary without materially diminishing what is allowed to descend 52 I. C. 276=20 Cr. L. J. 612. The quantity of water that can be abstracted and used without infringing that essential condition must in all cases be a question of circumstances, depending mainly upon the size of the stream and the proportion which the water bears to entire value. (*Ibid.*) Riparian proprietors can permanently divert water for agricultural purposes and irrigation. The question is whether the use was reasonable having regard to the custom of the adjoining country. 43 I. C. 235=3 Pat. L. J. 51. Where a riparian owner has made a diversion for the irrigation of his own tenement, the surplus water which would otherwise be vested may be taken in a channel by another riparian owner to irrigate his land. (*Ibid.*) The policy of law should be to encourage and protect all beneficial use of the water. (*Ibid.*) As to limitation for suit see *Ibid.*

Sec. 8.—An easement right can be conferred by the owner of the servient tenement for cash consi-

deration and whether it takes the shape of a sum paid in cash once for all or paid from time to time cannot make any difference in the legal nature of the right conferred on the owner of the dominant tenement. 27 I. C. 920=2 L. W. 27. Uninterrupted enjoyment to raise a presumption of right, must have been acquiesced in, by the owner of the servient tenement wherefrom continued user the Court is asked to presume a grant of a right of way. 54 I. C. 936. Knowledge of such user on the part of the servient owner is an essential condition to the acquisition of an easement. (*Ibid.*) (10 Cal. 214, Ref). The presumption of lost grant is allowed only when the enjoyment of easement cannot be otherwise accounted for. 50 I. C. 933; 1924 Cal. 363. A right of way can be created by a verbal agreement. 9 Bur. L. T. 222=34 I. C. 95. Whether a grant of an easement arises by implication on a conveyance of land depends on the intent of the parties, which must clearly appear; in order to determine the intent the Court will take into consideration the circumstances attending the transaction, the particular situation of the parties and the state of the thing granted. This principle holds only where there is no express contract relating to the matter. 36 C. L. J. 406=1923 Cal. 256. Where a zemindar has been using the water of a channel for irrigating his lands from the time of the permanent settlement, the Court may presume from the long possession and enjoyment a right to use the water free of charge. Though an actual grant of an easement is not discovered or proved, it will be presumed. 45 I. A. 302=37 M. L. J. 724=54 I. C. 154=24 C. W. N. 446 (P. C.). The public as such, cannot acquire the ownership of immoveable property or an easement on such property by prescription. But the user by the public may be evidence of a dedication. 44 M. L. J. 638=47 Mad. 116=1923 Mad. 624. A dedication to be valid must be to the public at large and not to any section of it. (*Ibid.*) As to construction of deeds granting easements, see 19 Bom. 799; 60 P. R. 1888. The mere finding that a *parnala* is old is no finding in law that easement has been established with respect thereto. 66 I. C. 922=3 Lah. L. J. 58.

PARTIES.—In a suit relating to easements, all servient owners are necessary parties. 14 C. W. N. 15.

(b) *A* is tenant for his life of certain land with remainder to *B* absolutely. *A* cannot, unless with *B*'s consent, impose an easement thereon which will continue after the determination of his life interest.

(c) *A*, *B* and *C* are co-owners of certain land. *A* cannot, without the consent of *B* and *C*, impose an easement on the land or on any part thereof.

(d) *A* and *B* are lessees of the same lessor, *A* of a field *X* for a term of five years, and *B* of a field *Y* for a term of ten years. *A*'s interest under his lease is transferable; *B*'s is not. *A* may impose on *X*, in favour of *B*, a right of way terminable with *A*'s lease.

9. Subject to the provisions of section 8, a servient owner may impose on the servient heritage any easement that does not lessen the utility of the existing easement. But he cannot, without the consent of the dominant owner, impose an easement on the servient heritage which would lessen such utility.

Servient owners.

Illustrations.

(a) *A* has, in respect of his mill a right to the uninterrupted flow thereto, from sunrise to noon, of the water of *B*'s stream. *B* may grant to *C* the right to divert the water of the stream from noon to sunset: Provided that *A*'s supply is not thereby diminished.

(b) *A* has, in respect of his house, a right of way over *B*'s land. *B* may grant to *C*, as the owner of a neighbouring farm, the right to feed his cattle on the grass growing on the way: provided that *A*'s right of way is not thereby obstructed.

10. Subject to the provisions of section 8, a lessor may impose, on the property leased, any easement that does not derogate from the rights of the lessee as such, and a mortgagor may impose, on the property mortgaged, any easement that does not render the security insufficient. But a lessor or mortgagor cannot, without the consent of the lessee or mortgagee, impose any other easement on such property, unless it be to take effect on the termination of the lease or the redemption of the mortgage.

Lessor and mortgagor.

Explanation.—A security is insufficient within the meaning of this section unless the value of the mortgaged property exceeds by one-third, or, if consisting of buildings, exceeds by one-half, the amount for the time being due on the mortgage.

11. No lessee or other person having a derivative interest may impose on the property held by him as such an easement to take effect after the expiration of his own interest, or in derogation of the right of the lessor or the superior proprietor.

Lessee.

12. An easement may be acquired by the owner of the immoveable property for the beneficial enjoyment of which the right is created, or on his behalf, by any person in possession of the same.

Who may acquire easements.

One of two or more co-owners of immoveable property may, as such, with or without the consent of the other or others, acquire an easement for the beneficial enjoyment of such property.

No lessee of immoveable property can acquire, for the beneficial enjoyment of other immoveable property of his own, an easement in or over the property comprised in his lease.

Sec. 9.—Application of section to customary rights. *See* 6 All. 497.

Sec. 11.—Although a tenant cannot acquire a prescriptive right of easement in land belonging to his lessor, he may claim a right of easement based on immemorial user. 36 C. L. J. 161 = 50 C. 356 = 1923 C. 8. Where the enjoyment of a right to take water from the landlord's tank was continued uninterrupted for a long series of years such enjoyment should be attributed to a legal origin and the Court should presume a grant or an agreement. (*Ibid.*). A tenant can establish his right to irrigate his field from his landlord's tank by proof of open and continuous user from time immemorial. (*Ibid.*) (29 C. 363; 38 M. L. J. 28; 6 C. 394; 4 C. 633; 30 C. 281, Ref.) If the user of the easement had actually commenced before the property over which it was claimed passed into the possession of the lessee, the mere fact of the

intervention of such tenancy should not be sufficient to defeat the right acquired by the lapse of time unless, indeed it is further shown that the landlord, up to the time he granted the lease was in ignorance that any such right was claimed. 36 C. L. J. 161 = 50 C. 356.

Sec. 12—Tenants in the dominant tenement enjoying an easement as of right, acquire it for the landlord. 31 I. C. 549 = 19 C. W. N. 1211. He cannot acquire it as against the landlord. 29 C. 363 = 9 C. W. N. 856; 14 All. 185 (F. B.) *See also* 1 C. W. N. 151. A tenant can acquire by prescription the right to irrigate his field from the landlord's tank by open and continuous user. 18 I. C. 597; (4 C. 633; 30 C. 781, Rel.). A tenant of land having even a permanent tenancy cannot acquire an easement by prescription in other lands of his lessor. 38 M. L. J. 28 = 54 I. C. 948;

Easements of necessity and quasi-easements.

13. Where one person transfers or bequeaths immoveable property to another,—

(a) if an easement in other immoveable property of the transferor or testator is necessary for enjoying the subject of the transfer or bequest, the transferee or legatee shall be entitled to such easement ; or,

(b) if such an easement is apparent and continuous and necessary for enjoying the said subject as it was enjoyed when the transfer or bequest took effect, the transferee or legatee shall, unless a different intention is expressed or necessarily implied, be entitled to such easement ;

(c) if an easement in the subject of the transfer or bequest is necessary for enjoying other immoveable property of the transferor or testator, the transferor or the legal representative of the testator shall be entitled to such easement ; or,

(d) if such an easement is apparent and continuous and necessary for enjoying the said property as it was enjoyed when the transfer or bequest took effect, the transferor, or the legal representative of the testator, shall, unless a different intention is expressed or necessarily implied, be entitled to such easement.

Sec. 13. WHAT ARE EASEMENTS OF NECESSITY.—Easement of necessity means an easement absolutely necessary for the use of the dominant tenement and not merely one necessary for the more convenient enjoyment 38 All. 467=9 I. C. 628 ; 17 A. L. J. 672=50 I. C. 646 ; 48 I. C. 670 ; 50 I. C. 756 ; See also (1925) M. W. N. 282=90 I. C. 900=1925 Mad. 680. An easement of necessity is one which the law creates according to the doctrine of implied grant in a particular case. 60 I. C. 504. It is one without which the dominant tenement cannot be used at all. (*Ibid.*) (1923) Oudh 250. (15 A. 270 ; 33 A. 467 ; 19 B. 79 ; 28 M. 495, referred to). It is a question of fact from the circumstances of each case as to whether an easement of a claim is an easement of necessity or not. There can be an easement of necessity to take water from other's land. 103 I. C. 862=A. I. R. 1927 Mad. 963 ; 17 I. C. 966=16 C. L. J. 417. A right of way of necessity ceases if the dominant owner can approach the place through his own land. 60 I. C. 504. An easement of necessity cannot arise in any other way than by severance of tenements. 46 I. C. 327=4 L. B. R. 246 ; see also 14 Bom. 452 ; 26 Cal. 510=3 C. W. N. 409=24 M. L. J. 552. There is ordinarily no reservation by implication of easement in favour of the grantor except in the case of an easement of necessity. 17 I. C. 966=16 C. L. J. 417. As a right of easement of necessity arising out of a severance by partition arises from a presumed grant, no grant can be presumed where the rights of parties have been definitely settled in a partition suit. 59 I. C. 89. As to Quasi-easements see 27 Punj. L. R. 375=96 I. C. 913=A. I. R. 1926 Lah. 473.

ILLUSTRATIVE CASES.—Where the owner of one of two tenements originally held by a common owner, claims a right of way over the other tenement, it was held, that having regard to the enjoyment of the right of way for twenty years, there was a grant of the right to the plaintiff at the time of the severance of the tenements. 49 I. C. 798=29 C. L. J. 51. There is a presumption of easement of necessity both in respect of the portion granted as well as the portion retained by the grantor. 65 I. C. 22=34 C. L. J. 518 ; 31 I. C. 541=19 C. W. N. 1217. The mere fact that it is absolutely necessary for a person to use a way does not constitute an easement of necessity. 26 I. C. 485. Plaintiff and defendant owned

a common courtyard. Before partition of the courtyard, plaintiff had the right to pass his water through the drainage which existed in the yard. The onus lay on the defendant to show that the right which plaintiff possessed prior to the partition had been extinguished by some agreement or rule of law. 53 I. C. 584=101 P. R. 1919. The mere fact that plaintiff had acquired another tenement through which he could pass his water did not deprive the easement in question of the character of an easement of necessity. *Ibid.*

An easement which ceases to be beneficial to the dominant owner might become extinguished. 50 I. C. 756. (33 All. 461 Ref.) Where two houses situated on opposite sides of a land were connected by a bridge which had been destroyed and which plaintiff wanted to rebuild but the defendant objected and the Municipality also refused permission, the re-building of the bridge could not be allowed as the houses had passed to different persons. 9 P. L. R. 1911=9 I. C. 402. A person cannot claim a right of way on the ground of convenience if he has other means of access available. An easement of necessity is an easement without which the property sold could not be used at all, and not one merely necessary for the more convenient enjoyment of the property. 1923 Oudh 250.

Sec. 13, Cl. (a).—A house owner in order to repair his wall on his neighbour's side of the premises can go to the other side of the wall on the land of his neighbour. 16 I. C. 893. See also 28 Bom. L. R. 403=94 I. C. 673=A. I. R. 1926 Bom. 328. But the easement does not extend to going over the neighbour's roof for that purpose. 16 I. C. 893. A person is also entitled to enter his neighbour's house or land to protect his eaves which project over the neighbour's house. 16 I. C. 893. (15 M. 286, Ref.)

Sec. 13, Cl. (b).—The existence of vents through which adjoining lands were being irrigated is evidence of an apparent, continuous and necessary easement which passes to the transferee under S. 13 (b). 45 M. L. J. 724=1924 M. 108. An act done for the proper enjoyment of an easement such as closing the vents after irrigation or in the course of the enjoyment of an easement which is continuous would not render the easement a non-continuous easement. (*Ibid.*)

Sec. 13, Cl. (d).—See 29 I. C. 695.

Where a partition is made of the joint property of several persons—

(e) if an easement over the share of one of them is necessary for enjoying the share of another of them, the latter shall be entitled to such easement, or,

(f) if such an easement is apparent and continuous and necessary for enjoying the share of the latter as it was enjoyed when the partition took effect, he shall, unless a different intention is expressed or necessarily implied, be entitled to such easement.

14. The easements mentioned in this section, clauses (a), (c) and (e) are called easements of necessity.

Where immoveable property passes by operation of law, the persons from and to whom it so passes are, for the purpose of this section, to be deemed, respectively, the transferor and transferee.

Illustrations.

(a) *A* sells *B* a field then used for agricultural purposes only. It is inaccessible except by passing over *A*'s adjoining land or by trespassing on the land of a stranger. *B* is entitled to a right of way, for agricultural purposes only, over *A*'s adjoining land to the field sold.

(b) *A*, the owner of two fields, sells one to *B* and retains the other. The field retained was at the date of the sale used for agricultural purposes only and is inaccessible except by passing over the field sold to *B*. *A* is entitled to a right of way, for agricultural purposes only, over *B*'s field to the field retained.

(c) *A* sells *B* a house with windows overlooking *A*'s land, which *A* retains. The light which passes over *A*'s land to the windows is necessary for enjoying the house as it was enjoyed when the sale took effect. *B* is entitled to the light, and *A* cannot afterwards obstruct it by building on his land.

(d) *A* sells *B* a house with windows overlooking *A*'s land. The light passing over *A*'s land to the windows is necessary for enjoying the house as it was enjoyed when the sale took effect. Afterwards *A* sells the land to *C*. Here *C* cannot obstruct the light by building on the land, for he takes it subject to the burdens to which it was subject in *A*'s hands.

(e) *A* is the owner of a house and adjoining land. The house has windows overlooking the land. *A* simultaneously sells the house to *B* and the land to *C*. The light passing over the land is necessary for enjoying the house as it was enjoyed when the sale took effect. Here *A* impliedly grants *B* a right to the light, and *C* takes the land subject to the restriction that he may not build so as to obstruct such light.

(f) *A* is the owner of a house and adjoining land. The house has windows overlooking the land. *A* retaining the house sells the land to *B*, without expressly reserving any easement. The light passing over the land is necessary for enjoying the house as it was enjoyed when the sale took effect. *A* is entitled to the light, and *B* cannot build on the land so as to obstruct such light.

(g) *A*, the owner of a house, sells *B* a factory built on adjoining land. *B* is entitled, as against *A*, to pollute the air, when necessary, with smoke and vapours from the factory.

(h) *A*, the owner of two adjoining houses, *Y* and *Z* sells *Y* to *B* and retains *Z*. *B* is entitled to the benefit of all the gutters and drains common to the two houses and necessary for enjoying *Y* as it was enjoyed when the sale took effect and *A* is entitled to the benefit of all the gutters and drains common to the two houses and necessary for enjoying *Z* as it was enjoyed when the sale took effect.

(i) *A*, the owner of two adjoining buildings, sells one to *B* retaining the other. *B* is entitled to a right to lateral support from *A*'s buildings and *A* is entitled to a right to lateral support from *B*'s building.

(j) *A*, the owner of two adjoining buildings, sells one to *B* and the other to *C*. *C* is entitled to lateral support from *B*'s building, and *B* is entitled to lateral support from *C*'s building.

(k) *A* grants lands to *B* for the purpose of building a house thereon. *B* is entitled to such amount of lateral and subjacent support from *A*'s land as is necessary for the safety of the house.

(l) Under the Land Acquisition Act, 1870, a Railway company compulsorily acquires a portion of *B*'s land for the purpose of making a siding. The Company is entitled to such amount of lateral support from *B*'s adjoining land as is essential for the safety of the siding.

Clas. (e) and (f).—Clauses (e) and (f) must not be confused. Under cl. (e) plaintiff has to prove that the easement claimed was necessary for the enjoyment of the property allotted to him by partition. Under cl. (f) he has to prove that the easement was apparent, continuous, and necessary for enjoying his share as it was enjoyed when the partition took effect and that no different intention was expressed or necessarily implied in the partition. 25 O. C. 251=1923 Oudh 57. No right of way by easement can be acquired by a person who builds an osara on another man's land even though with his acquiescence. 9 I. C. 813. Right to use of water from well. See 22 Bom. L. R. 415=57 I. C. 143=45

Bom. 80; 25 Panj. L. R. 334=9 Lah. L. J. 169=100 I. C. 939=A. I. R. 1927 Lah. 383. There cannot be such an easement of necessity in respect of a right of way, if there is an alternative route or way. But where the alternative route is extremely inconvenient there may exist an easement of necessity in respect of a more convenient pathway. 1924 Cal. 363. Right to light when easement of necessity. Bom. P. J. (1897), 471; decree for room implies right of access thereto. Bom. P. J. (1887), 113; as to use of well and privy, see Bom. P. J. (1886), 128. Right to bury dead can be acquired by prescription. 95 I. C. 458 (78 P. L. R. 1908; 27 P. R. 1923 P. C.; 26 Boin. 898 Fol.).

(m) Owing to the partition of joint property, *A* becomes the owner of an upper room in a building, and *B* becomes the owner of the portion of the building immediately beneath it. *A* is entitled to such amount of vertical support from *B*'s portion as is essential for the safety of the upper room.

(n) *A* lets a house and grounds to *B* for a particular business, *B* has no access to them other than by crossing *A*'s land. *B* is entitled to a right of way over that land suitable to the business to be carried on by *B* in the house and grounds.

14. When [a right] ¹ to a way of necessity is created under S. 13, the transferor Direction of way of neces- the legal representative of the testator, or the owner of the sity. share over which the right is exercised, as the case may be; is entitled to set out the way; but it must be reasonably convenient for the dominant owner.

When the person so entitled to set out the way refuses or neglects to do so the dominant owner may set it out.

15. Where the access and use of light or air to and for any building have been peaceably enjoyed therewith, as an easement, without Acquisition by prescription. interruption, and for twenty years, and

Sec. 14.—¹The words "a right" were substituted for the word "right" by Amending Act (XII of 1891).

Sec. 15. NATURE OF PRESCRIPTIVE RIGHTS.—The law relating to the acquisition of easements under this Act appears to be the same as under the English Prescription Act. 35 I. C. 749 = 4 L. W. 128. Section not exhaustive and does not preclude other titles or modes of acquisition. (1926) M. W. N. 404 = 96 I. C. 317 = A. I. R. 1926 Mad. 788. The Easement Act does not exclude or interfere with other titles or modes of acquiring easements. 43 I. C. 962 = 14 N. L. R. 35. Easements are not capable, in an exact sense of being possessed. The enjoyment which may in time ripen into an easement is not possession and gives no possessory right before the expiry of twenty years, 29 I. C. 255 = 38 Mad. 280. When user is proved, the presumption is that it is of right. [69 I. C. 11 ; 15 L. W. 266 = (1922) M. W. N. 143 Fol.] 86 I. C. 595 (2) = 1925 Lah. 344. An easement is a restriction in favour of one owner or occupier of immovable property of the rights of ownership of the immovable property of another owner. The restriction cannot be built up or asserted without consciousness of the rights which are restricted. 23 N. I. R. 117 = 104 I. C. 431 = A. I. R. 1927 Nag. 334.

The user over a land purported to be exercised as owner cannot be made the basis of an easement. 104 I. C. 503. A customary right differs from a prescriptive right in the sense that no fixed period for its enjoyment is necessary. 20 I. C. 467. (20 M. 389 and 2 B. L. R. 454 and 459, rel.) A prescriptive right or easement is a right existing in a particular individual while a customary right belongs to no particular individuals but attaches to a locality and is capable of being enjoyed by all who, for the time being, own land in the locality. (*Ibid.*) (18 M. 320, rel.) A prescriptive right to light and air cannot be acquired as an easement for limited period, *i. g.*, when the servient heritage is in the occupancy of a tenant. 42 Mad. 567 = 37 M. L. J. 28 = 50 I. C. 291. The word "imposition" of an easement does not necessarily mean imposition by some act, such as grant, but includes imposition by omission to prevent acquisition by prescription. (*Ibid.*) Government land in the management of Municipal Board—Proof of user for 60 years

essential—Land leased out to tenant whether makes any difference. 4 O. W. N. 1035.

WHAT RIGHTS CAN BE ACQUIRED.—A prescriptive right is acquired, if plaintiff's privies are cleaned by scavengers passing over the land of the defendant for twenty years to the knowledge of and without obstruction by defendant. 50 I. C. 34. All that a defendant whose eaves project over plaintiff's land can acquire after 20 years is an easement imposing the burden on the servient tenement of having that projection over it. 46 Bom. 827 = 24 Bom. L. R. 305. Removal of support of a wall before accrual of right of easement by prescription to neighbour is not actionable: *See* A. I. R. 1928 Nag. 91. Private rights of fishing in public water may be acquired either by a grant from the Crown or by the prescription from which a grant may be presumed. 39 Cal. 53 = 11 I. C. 180 = 15 C. W. N. 972. Whether exclusive rights can be acquired in a tank or navigable river by proof of mere enjoyment. *See Ibid.* Right to ferry though not an easement is in the nature of an easement and may be acquired by user. 9 I. C. 846. (16 C. 608 foll.) A prescriptive right to dam up a stream is acquired by the continued exercise of the right for twenty-five or thirty years. 15 M. L. T. 247 = 26 M. L. J. 385 = 24 I. C. 547. In the case of *Shrotriem* grant the right of Government over the minerals is not lost by limitation. 23 I. C. 144 = 15 M. L. T. 277. Mere non-user for not less than two years before suit independent of any adverse act on the part of the owner of the servient heritage does not amount to cessation or abandonment of the right of easement within the meaning of Sec. 15. Expl. II clearly relates not to the period after which the easement has ceased to be enjoyed but to any interval of non-user within the 20 years of enjoyment. 98 I. C. 886 = A. I. R. 1927 Mad. 238.

WHAT RIGHT CANNOT BE ACQUIRED.—The right to drive cattle to the grazing ground through the jungle of another village is not a right which can be acquired as an easement though enjoyed for any length of time. 43 All. 345 = 60 I. C. 990 = 19 A. L. J. 126. As to right of way for agricultural purposes *see* 50 Bom. 635 = 28 Bom. L. R. 1158 = A. I. R. 1926 Bom. 537. Right to stored manure by non-agriculturist, *see* 5 O. W. N. 296.

SECT. 15 AND 17.—Where the plaintiff had been enjoying the water by means of channels

where support from one person's land, or things affixed thereto, has been peaceably received by another person's land subjected to artificial pressure, or by

through which water passed to a tank, for a certain number of years no prescriptive right was acquired to receive the water through the channels unobstructed so as to entitle the plaintiff to seek the removal of these obstructions caused by the defendants. 23 Bom. L. R. 1004=46 Bom. 115. A prescriptive right of easement to discharge surplus water on the deft.'s land through a channel across the public road cannot be acquired. 19 C. L. J. 42=21 I. C. 857=18 C. W. N. 378. No easement or prescriptive right can be acquired by a ryotwari landholder in water in a Government channel irrigating the lands. 45 I. C. 80=34 M. L. J. 425. There can be no possessory rights in connection with incorporeal rights. (*Ibid.*) Under S. 15 a right of fishing cannot be acquired by prescription, but from uninterrupted user such a grant may be presumed. 43 I. C. 962=14 N. L. R. 35. Right of way, acquisition of. See 24 Bom. L. R. 298=1922 Bom. 79; 1924 Cal. 359; 9 I. C. 965=13 C. L. J. 316; 45 Mad. 633=1922 Mat. 5=42 M. L. J. 417; 39 M. L. J. 74=60 I. C. 171.

WHO CAN ACQUIRE.—A claim of higher right of ownership does not prevent another person from acquiring a right of easement, if he can show that he converts certain rights of enjoyment over the land in question for the benefit of another land of his own. 62 I. C. 633. A right once established by immemorial user, is not extinguished by non-user or interruption for more than two years. 62 I. C. 633. A right of way cannot be acquired by a tenant over the lands of the landlord within his tenancy except by grant. 34 I. C. 450=20 C. W. N. 1158 (31 I. C. 549, ref to). The mere grant of leave and license of a right of way by the landlord to his tenant, will not invest the latter with a right of way enforceable in suit.

(*Ibid.*) A prescriptive right cannot be acquired by one tenant against another tenant of the same landlord. 31 I. C. 549=19 C. W. N. 1211. Whether one permanent tenure-holder can acquire an easement against another permanent tenure-holder under the same landlord. (*Ibid.*) A tenant in a zamindari cannot acquire the right to irrigate his land held by him as a tenant, with water from the tank belonging to the Zamindar. 56 I. C. 598=11 L. W. 600. The joint user of the water from a tank for the joint cultivation of a plot does not affect the nature of the right of easement which is a right over the servient heritage acquired by virtue of the joint ownership of the plot. The right prescribed for, is not a right to irrigate jointly but a right as part owners of a dominant heritage. 20 M. L. T. 544=35 I. C. 749=4 L. W. 128. (8 C. W. N. 359, dist). The essential requisite of prescription is that it should be acquired against specific individuals; prescription against one person cannot be tacked on to that acquired against others. 24 I. C. 519=28 M. L. J. 669. (24 M. 219; dist. 10 I. C. 110; 14 A. 156; 23 A. 448, foll.). A caste is a corporation with civil rights and can acquire by user, title to a right of way, even if the user be only of a few members of the caste provided it is exercised on behalf of and for the caste. 24 I. C. 467=28 M. L. J. 110. See also 24 I. C. 519=28 M. L. J. 669 (Suit by *Stanom-holder*).

EASEMENTS, HOW ACQUIRED.—A person to

acquire the right of fishery, by prescription must show that he had an *uninterrupted enjoyment of it openly, publicly and peaceably* for over the statutory period; but where such an enjoyment was in exercise of a common right which he shared with others, he should show that his user was in assertion of a higher right than the general right, in himself, and for his exclusive benefit. 39 Cal. 53=11 I. C. 180. The right to establish and maintain a ferry over the property of another is a right of easement for which twenty years' user is necessary. 5 P. L. J. 500=1 P. L. T. 395. To establish a right under this section, twenty years of uninterrupted user must be shown. 25 I. C. 405=12 A. L. J. 693. As to presumption from long user, see 91 I. C. 987=A. I. R. 1926 Oudh 237. As to the effect of unreasonable user see 92 I. C. 465=A. I. R. 1926 Mad. 625. The period of user must be twenty years or more ending within two years before the institution of the suit wherein the claims to which such period relates is contested. 24 I. C. 126=12 A. L. J. 415. No minimum limit of time can be laid down to justify an inference of immemorial user. The question whether such an user is established depends on the circumstances of each case. 45 Bom. 1027=62 I. C. 65. Peaceable enjoyment means one without interruption or opposition by the servient owner sufficient to defeat the enjoyment. 49 I. C. 963=21 Bom. L. R. 709. The obstruction must find expression in something done on the servient tenement itself. 45 B. 1027=23 Bom. L. R. 422. Mere protest does not amount to such obstruction. (*Ibid.*) The mere fact that the land is waste does not necessarily show that no right can be acquired over such land. If that were so, the right of user over almost every pathway in the mofussil would be lost, inasmuch as almost every pathway lies over waste land. 65 I. C. 509. (18 C. W. N. 735, ref.). In determining the question whether an user of way over waste land was as of right or not, the Court would have to consider the character of the land, the relation between the parties and the circumstances under which the user took place. 65 I. C. 509. (8 C. W. N. 359, Ref.). If an easement has been enjoyed for the statutory period peaceably and openly as of right without interruption the right becomes absolute. 26 I. C. 781. A long and uninterrupted user for a long series of years leads to the inference that the user had been as of right and that the right had a lawful origin. 20 M. L. T. 544=35 I. C. 749=4 L. W. 128. A prescriptive right can be acquired only if the enjoyment of the easement ended "before the beginning of the two years next" before the suit was instituted. 33 I. C. 503. See also 29 M. L. J. 685; 1923 Oudh 29. Enjoyment may be peaceable notwithstanding oral disputes regarding it. 29 M. L. J. 685=31 I. C. 528. The adverb 'peaceably' indicates the manner in which the dominant owner must conduct himself in his use of the servient tenement, i.e., the person claiming a right of easement must not have deprived the servient owner of that right by use of force or secretly. (*Ibid.*) A statutory prescriptive title to an easement is impossible to be acquired under S. 15 unless and until the claim thereto has been

things affixed thereto, as an easement, without interruption, and for twenty years, and where a right of way or any other easement has been peaceably and openly enjoyed by any person claiming title thereto, as an easement, and as of right, without interruption, and for twenty years,

the right to such access and use of light or air, support or other easement shall be absolute.

Each of the said periods of twenty years shall be taken to be a period ending within two years next before the institution of the suit wherein the claim to which such period relates is contested.

Explanation I.—Nothing is an enjoyment within the meaning of this section when it has been had in pursuance of an agreement with the owner or occupier of the

contested in a regular suit. 29 M. L. J. 685. [10 A. L. J. 227; 6 C. 894 (P. C.) Foll]. See also 1923 Oudh 29; 17 I. C. 22=10 A. L. J. 227. Enjoyment for less than the prescriptive period if entitles the persons enjoying, to an injunction against trespasser. 30 I. C. 989=18 M. L. T. 515. The words 'as an easement' do not mean that the enjoyment should be in the assertion of claim of an easement. Illus. (b) shows that the words were used in order to show that unity of title or possession makes the possession unless to create a right of easement. 38 Mad. 1=17 I. C. 112. Assertion of full ownership, which however negated by the evidence may suffice to establish an easement, provided that the user was for the beneficial enjoyment of another land. (*Ibid*). See also 49 Mad. 820=96 I. C. 968=(1926) M. W. N. 923=23 L. W. 609=A. I. R. 1926 Mad. 728 (F. B.). Mere acquiescence does not create an easement. 16 I. C. 893. When two houses originally owned by one and the same person have backyards opening into a lane which separates them, in the absence of evidence as to when the gates were opened the presumption is that they were so opened before severance, and that the enjoyment of a right of way for over twenty years peaceably and as of right ending within two years before suit created a prescriptive right. 9 M. L. T. 274=9 I. C. 764.

S. 15, Expl. (1).—Where in the absence of a license or agreement the defendants were found to have been using a way over plaintiff's land openly peaceably and as of right for over the statutory period, held the defendants had acquired an easement in respect of that right. 9 I. C. 640=9 M. L. T. 350. Continuous and peaceable user of easement of light and air for more than twenty years may give rise to a presumption that it existed with the consent of the owner of the servient heritance. 6 N. L. J. 59=1923 Nag. 192. As easement of light and air need not be proved to have been enjoyed as of right, it is enough, if there is enjoyment. 61 I. C. 569. An open user of road or path, without interruption, for a long time, not under permission or sufferance, is *prima facie* evidence of enjoyment as of right. (*Ibid*). Under S. 15 (5) plaintiff has to show a period of 20 years continuing up to some point within two years before the institution of the suit. 1923 Oudh 29. The fifth paragraph of S. 15 of the Easements Act seems to render it impossible to acquire statutory prescriptive title of an easement, unless and until the claim thereto has been contested in a suit. 1923 Oudh 29. The right to the lateral support to a wall from a neighbour's land, is acquired only by prescription. 68 I. C. 831=14 L. W. 728. A right of way over one part may be acquired by

grant, and over another, by prescription. 57 I. C. 852.

MODE OF ENJOYMENT.—No presumption of a lost grant can be made in the case of the right of fishery where the use of the fishery was in harmony with the right of the public to fish by stakes which is acknowledged method of public fishing on the West Coast of India. 23 Bom. L. R. 939. Possession of the dar (space between two fishing stakes) for over sixty years does not perfect into an easement by way of prescriptive right. 23 Bom. L. R. 939. As to presumption of lost grant, See also (1926) M. W. N. 404=96 I. C. 317=A. I. R. 1926 Mad. 788. A plaintiff is entitled to have his right of way declared if he establishes the terminus to and from which the way runs. And the right would be enjoyed in the way the servient owners point out as the tract. If no tract is pointed out, the plaintiff can enjoy the nearest route. 46 I. C. 374=22 C. W. N. 922. No use of property which would be legal if due to a proper motive, would become illegal, if prompted by an improper or even a malicious motive. 42 Cal. 164=20 C. L. J. 97=18 C. W. N. 1296. The extent of a right acquired by prescription is measured by the extent of the use and enjoyment thereof during the prescriptive period. (*Ibid*). It is not necessary to prove annual or continuous user, but only substantial enjoyment whenever the occasion required. The mere fact that the openings made were different in different years does not make the user indefinite when the channels through which the water was taken were the same. 15 C. W. N. 259=13 C. L. J. 670. The fact that the servient owner paid a certain sum for the repair of the embankment for his own benefit does not make the user permissive. 15 C. W. N. 259=13 C. L. J. 670.

EASEMENT AGAINST GOVERNMENT.—A plaintiff claiming a right of easement against Government must prove sixty years' peaceful and uninterrupted user and the rule of law that the burden of proof is shifted on to Government if the plaintiff proves possession for a sufficient number of years is not applicable if the plaintiff fails to prove the completion of even the prescriptive period necessary against a private individual. 26 I. C. 723=39 Mad. 304. (19 M. 165; 33 M. 1=33 M. 173; 33 M. 362 Dist.). See also 4 O. W. N. 1035; 45 I. C. 80=34 M. L. J. 425. (Acquisition of right in water in Government channel). If the plaintiff proves 30 years' possession, the Government must prove that he had no possession within 60 years. 16 I. C. 626=12 M. L. T. 159. The words 'belongs to the Government' in S. 15 refer not to the time of the suit but to the duration of enjoyment. 41 M. 622=34 M. L. J. 395. When after 40 years'

property over which the right is claimed, and it is apparent from the agreement that such right has not been granted as an easement, or, if granted as an easement, that it has been granted for a limited period, or subject to a condition on the fulfilment of which it is to cease.

Explanation II.—Nothing is an interruption within the meaning of this section unless where there is an actual cessation of the enjoyment by reason of an obstruction by the act of some person other than the claimant, and unless such obstruction is submitted to or acquiesced in for one year after the claimant has notice thereof and of the person making or authorizing the same to be made.

Explanation III.—Suspension of enjoyment in pursuance of a contract between the dominant and servient owners is not an interruption within the meaning of this section.

Explanation IV.—In the case of an easement to pollute water, the said period of twenty years begins when the pollution first prejudices perceptibly the servient heritage.

When the property over which a right is claimed under this section belongs to Government, this section shall be read as if for the words "twenty years" the words "sixty years" were substituted.

Illustrations.

(a) A suit is brought in 1883 for obstructing a right of way. The defendant admits the obstruction, but denies the right of way. The plaintiff proves that the right was peaceably and

enjoyment against the Government, the latter transfers the land to a private person, the easement in order to become absolute must be enjoyed as against the transfer for a further period of 20 years. 41 Mad. 622 = 34 M. L. J. 396. The period of 20 years must be computed from the time when the transfer was made to a private person. (*Ibid*)

BURDEN OF PROOF.—The onus of proving that a right of way has been peaceably and openly enjoyed by any person claiming title thereto as an easement and as of right without interruption and for 20 years, lies upon the person asserting the right. 25 I. C. 499. See also (1923) M. W. N. 454 = 18 L. W. 404 = 1923 Mad 674. The question in each case must be, what is the exact nature of the right which is shown by the evidence: to have been acquired by the party? See 1923 Mad. 674 *Supra*. S. 15 (1) applies both to continuous and discontinuous easements. 17 I. C. 22 = 10 A. L. J. 227. Where it is a question of acquisition of an easement by prescription, the burden lies entirely on the plaintiff to prove 20 years' enjoyment, and not mere possession for 12 years and then say the onus is shifted on to the defendant 33 I. C. 503.

DEFENCES.—When a right has begun to run under s. 15 and the servient holder sues to put an end to it, the defendant cannot plead in bar of it, Art. 32 of Lim Act 33 I. C. 90. When the defendant has a right of support from the plaintiff's wall abutting on the defendant's property, for a roof of his adjoining house, it is an encroachment of that right if the defendant raises his wall and erects upon it another that resting on the plaintiff's wall. 33 I. C. 90. The limit of a party's right of support must be determined by his actual enjoyment up to the date of the encroachment complained of by the opposite party. (*Ibid*.) If a man's ancient lights be interrupted, it is no answer to say that he can provide other sources of light for himself by making changes in his own tenement; nor that defendant is willing to provide fresh light for him in another way. 36 Mad 11 = 21 M. L. J. 742 = 11 I. C. 642.

Where a party causes injury to another he cannot object to appropriate relief being granted to his opponent on the ground that he would suffer serious injury by being compelled to undo the mischief. (*Ibid*.) There is no difference in the application of the law as regards the interference with ancient lights to buildings in cities and elsewhere. (*Ibid*).

NATURE OF OBSTRUCTION.—To constitute an actionable obstruction there must be substantial privation of light enough to render the occupation uncomfortable according to the ordinary notions of mankind. 9 I. C. 417 = 21 M. L. J. 313. Where the owner of building, who is in the course of acquiring a right of easement by prescription, has his house burnt down, but begins immediately to rebuild his house and place the windows exactly in the same position as the old ones, he can be regarded as enjoying the access and use of light and air continuously, and he will be entitled to protection after twenty years from the first building, 46 Bom. 448 = 24 Bom. L. R. 83 = 1922 Bom. 3. If, however, there is any delay in rebuilding, then that might be evidence of an intention not to resume the user. (*Ibid*), Knowledge of the fact of enjoyment on the part of servient owner is essential to the acquisition of an easement where the Court is asked to presume a grant. 54 I. C. 936 = 16 N. L. R. 76. Active obstruction on the part of such owner would negative any such presumption. (*Ibid*), To negative submission to an interruption the party interrupted need not have brought a suit (*Ibid*), The question whether there has been submission to, or acquiescence in, an obstruction, is a question of fact, the burden of negating submission being on the party alleging that he did not submit. (*Ibid*.) It is not enough, for supporting an action for obstruction of right that there has been a diminution of light from what it was before. 49 I. C. 458 = 18 Bur. L. T. 109. The decrease in light should constitute a nuisance and make the house uncomfortable according to the ordinary standards of humanity or unfit for business. (*Ibid*).

openly enjoyed by him, claiming title thereto as an easement and as of right, without interruption, from 1st January, 1862, to 1st January, 1882. The plaintiff is entitled to judgment.

(b) In a like suit the plaintiff shows that the right was peaceably and openly enjoyed by him for twenty years. The defendant proves that for a year of that time the plaintiff was entitled to possession of the servient heritage as lessee thereof and enjoyed the right as such lessee. The suit shall be dismissed, for the right of way has not been enjoyed "as an easement" for twenty years.

(c) In a like suit the plaintiff shows that the right was peaceably and openly enjoyed by him for twenty years. The defendant proves that the plaintiff on one occasion during the twenty years had admitted that the user was not of right and asked his leave to enjoy the right. The suit shall be dismissed, for the right of way has not been enjoyed "as of right" for twenty years.

16. Provided that, when any land upon, over or from which any easement has been enjoyed or derived has been held under or by virtue

Exclusion in favour of reversioner of servient heritage.

of any interest for life or any term of years exceeding three years from the granting thereof, the time of the enjoyment of such easement during the continuance of such interest or term, shall be excluded in the computation of the said last mentioned period of twenty years, in case the claim is, within three years next after the determination of such interest or term, resisted by the person entitled, on such determination, to the said land.

Illustration.

A sues for a declaration that he is entitled to a right of way over B's land. A proves that he has enjoyed the right for twenty five years; but B shows that during ten of these years C had a life-interest in the land; that on C's death B became entitled to the land; and that within two years after C's death he counter-claimed A's claim to the right. The suit must be dismissed, as A, with reference to the provisions of this section, has only proved enjoyment for fifteen years.

17. Easements acquired under section 15 are said to be acquired by prescription, and are called prescriptive rights.

Rights which cannot be acquired by prescription.

None of the following rights can be so acquired :—

- (a) a right which would tend to the total destruction of the subject of the right, or the property on which, if the acquisition were made, liability would be imposed;
- (b) a right to the free passage of light or air to an open space of ground;
- (c) a right to surface-water not flowing in a stream and not permanently collected in a pool, tank or otherwise;
- (d) a right to underground water not passing in a defined channel.

18. An easement may be acquired in virtue of a local custom. Such easements are called customary easements.

Customary easements.

S. 16.—The mere finding that a *purnala* is old is not sufficient to prove that an easement has been established with respect thereto. 66 I. C. 922 = 3 Lah. L. J. 58. User against Kanomdar—Effect as against *jenmi* or *melcharathdar*. 24 L. W. 691 = A. I. R. 1927 Mad. 73.

Sec. 17. Cl. (a).—Sec. 17 is intended to apply not to rights of irrigation in natural streams, but to rights in the nature of *profits à prendre* which do not include a right to water. 7 Pat. L. T. 547 = 94 I. C. 929 = A. I. R. 1926 Pat. 187. Mere possibility of destruction at some future date is not what is contemplated by Cl. (a). 23 Bom. 666. Right of way, land or water cannot be acquired in every direction. 7 Cal. 145; 8 B. L. R. (A. C.) 118. So also an unlimited right of fishery. 9 Cal. 698 = 12 C. L. R. 382. Private right of way and a highway may exist over same land. 18 C. W. N. 378 = 19 C. L. J. 42.

Sec. 17. Cl. (b).—Extent of right to light by prescription. See 3 B. L. R. (O. C.) 41; 14 Cal. 839.

Sec. 17. Cl. (c).—A person may acquire a right to easement of water over artificial channels or water derived from artificial tank or pools. 33 M. L. J. 674 = 44 I. C. 625. (7 M. 530, Foll.) Also in respect of tanks fed by rain water as well

as surface water from neighbouring lands. (*Ibid*). Considering the position of the lands and the conditions of agriculture in Bombay, it must be held that where the plaintiff had been enjoying the water by means of channels through which water passed to a tank, for a certain number of years no prescriptive right was acquired to receive the water through the channels unobstructed so as to entitle the plaintiff to seek the removal of these obstructions caused by the defendants. 46 Bom. 115 = 1922 Bom. 378. The right to take water from a river running through an undefined channel over the neighbouring lands is not one coming under S. 17 (c), but is a right which, though perhaps could not be acquired by prescription as an easement, could be inferred from long user. 42 Bom. 288 = 45 I. C. 448 = 20 Bom. L. R. 398. See also 7 M. H. C. 37 (46). A presumption of lost grant can be made if the usage is long and uninterrupted if it could form the subject of grant. (*Ibid*.) A right to the user of water flowing in undefined channels cannot be acquired by prescription. 64 I. C. 153 = 3 Lah. L. J. 555.

Sec. 18.—A customary easement is not limited to easements of a kind which could not be recognized at all apart from official customs. 1924 All. 159. As to proof of customary rights. See

Illustrations.

(a) By the custom of a certain village every cultivator of village-land is entitled, as such, to graze his cattle on the common pasture. *A*, having become the tenant of a plot of uncultivated land in the village, breaks up and cultivates that plot. He thereby acquires an easement to graze his cattle in accordance with the custom.

(b) By the custom of a certain town no owner or occupier of a house can open a new window therein so as substantially to invade his neighbour's privacy. *A* builds a house in the town near *B*'s house. *A* thereupon acquires an easement that *B* shall not open new windows in his house so as to command a view of the portion of *A*'s house which are ordinarily excluded from observation, and *B* acquires a like easement with respect to *A*'s house.

19. Where the dominant heritage is transferred or devolves, by act of parties or by operation of law, the transfer or devolution shall, unless

Transfer of dominant heri-
tage passes easement.

a contrary intention appears, be deemed to pass the ease-
ment to the person in whose favour the transfer or devolu-

tion takes place.

90 I. C. 976. A customary right is not an easement in the legal sense of that term. Customary rights have their origin in grant or prescription but it is not necessary that in every case there should be evidence from which a lost grant may be presumed. Nor is it necessary that the custom should be traced back for the whole time necessary to make it immemorial. 36 C. L. J. 280 = 1923 Cal. 200. What may suffice to establish a customary easement may be wholly insufficient to establish an easement by prescription and *vice versa*. The two rights are different although the result may be the same. Consequently where a claim of easement is based on a prescriptive title it is not open to the appellate Court to treat the cases as one based on custom. 1924 Lah. 275. Nature of customary easement—See 18 Mad. 320. The distinction between a customary right and customary easement is seen in 46 Mad. 866 = 45 M. L. J. 333 = 18 L. W. 366 = 1924 Mad. 197. Customary easements and prescriptive easements, distinguished. 2 P. L. R. 454; 29 Mad. 389. No fixed period is laid down by law as necessary to establish a customary right—See 46 M. 866 = 45 M. L. J. 333. Customary right of pasture on landlord's lands—Proof of—See 106 I. C. 195.

ILLUSTRATIVE CASES.—Zemindars in U. P. cannot arbitrarily close a right of way used by occupancy tenants for more than 30 years, 1924 All. 159. A customary right of burial can exist, apart from provisions of this Act; hence where it is found that a certain family used a grave as a burial ground customarily it was held not an easement but a customary right in the nature of an easement, 31 I. C. 805 = 13 A. L. J. 1094. (23 B. 666; 17 A. 87, Foll.). Right to privacy is customary right. 10 All. 358; 5 B. H. C. 42; 9 B. H. C. 266; 8 B. H. C. 87; 2 Bom. L. R. 454. If a right of privacy is established the intervention of a space between two houses cannot affect the right of privacy. 28 I. C. 674 = 13 A. L. J. 361. (6 Bom. H. C. R. 143, Appr.) The purdah system is generally observed by both Hindus and Mahomedans in the United Provinces except by the lowest classes. 28 I. C. 674 = 13 A. L. J. 361. Whether the houses in question are on the same side of a street or on the opposite side, a right of privacy exists and this right needs more protection when the person who invades it, is opposite to the person whose right of privacy is invaded and there is invasion of the right of privacy if a person constructs a room in the upper storey of

his house overlooking another person's house. 24 I. C. 683. In the province of Gujarat there is a customary usage which makes an invasions of the privacy as an actionable wrong. 55 I. C. 949 = 22 Bom. L. R. 226. A plff. is entitled to an injunction restraining his neighbour from opening such windows and ventilators as would infringe the plff.'s right of privacy which he is entitled to by custom. 74 P. L. R. 1915 = 29 I. C. 154 = 251 P. W. R. 1915. A plaintiff cannot ask the defendant to close his windows on the ground of the invasion of his right of privacy when it is proved that the said windows do not look out upon the plff.'s house but upon certain plots of land acquired by him less than twenty years. 15 I. C. 270. Held on the evidence that there was a custom of privacy with respect to the roofs of houses in the city of Larkhana in Sindh. 66 I. C. 333. By custom, a Mahomedan cannot acquire any right to say prayers on the land of another, except with the other's permission, express or implied. 9 I. C. 45. The right to cut sugarcane, to extract, boil and concentrate the juice on a piece of land in the *abadi* is in the nature of a customary easement and can be acquired by a tenant against the landlord. 26 I. C. 122 = 12 A. L. J. 963. A custom to allow the neighbour's trees to overhang one's house and premises, is neither definite nor reasonable. Whether the right to retain trees overhanging another's land is customary easement. See 43 Bom. 164 = 47 I. C. 629 = 20 Bom. L. R. 826. See also 27 Bom. L. R. 653 = 89 I. C. 191 = 1925 Bom. 446. Right to use bathing ghat. See 20 All. 200. From use of tank for a long period dedication to the public can be inferred. See 91 I. C. 712 = A. I. R. 1926 Cal. 507. A person who is entitled to put up a dam of turf and loose stones, is not necessarily entitled to substitute a tighter and stronger dam. 9 I. C. 636 = 9 M. L. T. 375. As to right to take water from another well—See 2 M. L. J. 290. A right to graze cattle in a jungle area of the village can be the subject of a customary right. 20 I. C. 467—See also 19 All. 172. A custom by which earth is taken from a piece of waste land to repair houses in a village after inundations is not unreasonable. A. I. R. 1924 P. 303. On the contrary, it seems to be an eminently reasonable custom that the people of the village should take earth from a ditch which serves no other purpose, in order to repair their houses, (*ibid.*)

Illustration.

A has certain land to which a right of way is annexed. *A* lets the land to *B* for twenty years. The right of way vests in *B* and his legal representative so long as the lease continues.

CHAPTER III.

THE INCIDENTS OF EASEMENTS.

20. The rules contained in this Chapter are controlled by any contract between

Rules controlled by contract
or title.

imposed.

the dominant and servient owners relating to the servient heritage, and by the provisions of the instrument of decree, if any, by which the easement referred to was

Incidents of customary ease-
ments.

And, when any incident of any customary easement is inconsistent with such rules, nothing in this Chapter shall affect such incident.

Bar to use unconnected with
enjoyment.

21. An easement must not be used for any purpose not connected with the enjoyment of the dominant heritage.

Illustrations.

(a) *A*, as owner of a farm *Y*, has a right of way over *B*'s land to *Y*. Lying beyond *Y*, *A* has another farm *Z*, the beneficial enjoyment of which is not necessary for the beneficial enjoyment of *Y*. He must not use the easement for the purpose of passing to and from *Z*.

(b) *A*, as owner of a certain house, has a right of way to and from it. For the purpose of passing to and from the house the right may be used, not only by *A* but by the members of his family, his guests, lodgers, servants, workmen, visitors and customers; for this is a purpose connected with the enjoyment of the dominant heritage. So, if *A* lets the house, he may use the right of way for the purpose of collecting the rent and seeing that the house is kept in repair.

22. The dominant owner must exercise his right in the mode which is least

Exercise of easement. Con-
finement of exercise of ease-
ment.

onerous to the servient owner; and, when the exercise of an easement can without detriment to the dominant owner be confined to a determinate part of the servient heritage, such exercise shall, at the request of the servient owner,

be so confined.

Sec. 19.—See 14 S.L.R. 132; 18 Bom. 382.

Sec. 20.—See 25 Cal. 576; 76 P. R. 1900. There can be no question of easement as regards light and air in the case of joint property. See 28 Bom. L. R. 1000=97 I. C. 691=A. I. R. 1926 Bom. 545.

Sec. 21.—Legal user cannot be restrained because it is prompted by improper motive. 18 C. W. N. 1296=20 C. L. J. 97.

Secs. 22 and 23.—Easement confined to a particular purpose ought not to be extended to any other. 19 I. C. 984. As to extent of right of way, see 7 Cal. 145; Bom. P. J. (1891) 244; 15 W. R. 496; Bom. P. J. (1893) 53; 87 I. C. 899=1925 Nag. 389; 41 C. L. J. 379=87 I. C. 19=1925 Cal. 788. The general rule is that a right of way once defined cannot be altered and the dominant owner is entitled to exercise his strict rights unless he can be induced to consent to a deviation. 46 B. 910=24 Bom. L. R. 437=1922 Bom. 407. S. 22 does not deal with the question whether the servient owner, when once the right of way has been defined, can substitute a new way and reconquer must therefore be had to the common law. (*Ibid.*) The owner of a private right of way is entitled to enter the way at one and the same place only, and not at any other. 42 Cal. 164=20 C. L. J. 97=26 I. C. 213=18 C. W. N. 1296. A back-door of a house which was occasionally used by the sweepers or the ladies of the house cannot be converted into a main

entrance to be used by males. 19 I. C. 984. Under S. 22 the dominant owner must exercise his right in the mode which is least onerous to the servient tenement and cannot impose any additional burden on it. Where the easement right is only to use a roof as an open space, the holder cannot build over that portion. 1924 Lah. 387. See also 23 M. L. T. 210=44 I. C. 500=(1918) M. W. N. 167.

SCOPE OF SECTION. -No man can impose a new or increased restriction or burden on his neighbour by his own act, and an owner of an easement cannot, by altering his dominant tenement, increase his right. 24 C. W. N. 896=58 I. C. 854=32 C. L. J. 27; 97 I. C. 169=24 A. L. J. 810.

ILLUSTRATIVE CASES.—Defts. who had a right to discharge water from his thatched roof to the plaintiff's roof pulled down his house and built a three storied house with spouts, to discharge water on the plaintiff's land. Held, that the burden on the plaintiff's land was increased within the section. 30 I. C. 941=13 A. L. J. 791. A person is not entitled to enlarge his right of easement by increasing the volume of water flowing through a drain through which he was entitled to discharge only the rain water and the ordinary waste water. 102 P. L. R. 1917=42 I. C. 284=18 P. W. R. 1917. Where the defendant blocked a waste channel of the plaintiff by building a wall, the Court directed the opening of another channel through the defendant's land without

Illustrations.

(a) *A* has a right of way over *B*'s field. *A* must enter the way at either end, and not at any intermediate point.

(b) *A* has a right annexed to his house to cut thatching grass in *B*'s swamp. *A*, when exercising his easement, must cut the grass so that the plants may not be destroyed.

- 23.** Subject to the provisions of section 22, the dominant owner may, from time to time, alter the mode and place of enjoying the easement, provided that he does not thereby impose any additional burden on the servient heritage.

Right to alter mode of enjoyment.

Exception.—The dominant owner of a right of way cannot vary his line of passage at pleasure, even though he does not thereby impose any additional burden on the servient heritage.

Illustrations.

(a) *A*, the owner of a saw-mill, has a right to a flow of water sufficient to work the mill. He may convert the saw-mill into a corn-mill, provided that it can be worked by the same amount of water.

(b) *A* has a right to discharge on *B*'s land the rain-water from the eaves of *A*'s house. This does not entitle *A* to advance his eaves if, by so doing, he imposes a greater burden on *B*'s land.

(c) *A*, as the owner of a paper-mill, acquires a right to pollute a stream by pouring in the refuse-liquor produced by making in the mill paper from rags. He may pollute the stream by pouring in similar liquor produced by making in the mill paper by a new process from bamboos, provided that he does not substantially increase the amount, or injuriously change the nature, of the pollution.

(d) *A*, a riparian owner, acquires, as against the lower riparian owners, a prescriptive right to pollute a stream by throwing sawdust into it. This does not entitle *A* to pollute the stream by discharging into it poisonous liquor.

- 24.** The dominant owner is entitled, as against the servient owner, to do all acts necessary to secure the full enjoyment of the easement;

Right to do acts to secure enjoyment.

but such acts must be done at such time and in such manner as, without detriment to the dominant owner, to cause the servient owner as little inconvenience as possible; and the dominant owner must repair, as far as practicable, the damage (if any) caused by the act to the servient heritage.

Accessory rights.

Rights to do acts necessary to secure the full enjoyment of an easement are called accessory rights.

demolishing the wall. 29 I. C. 1002 = 13 A. L. J. 637. The extension of the projection of a cornice beyond its original breadth and the consequent increase in the flow of rain water on the land of the servient owner are both an addition to the burden of the servient owner. 24 C. W. N. 896 = 58 I. C. 854 = 32 C. L. J. 27. The owner of the dominant tenement may raise the height of the eaves so long as he does not throw an increased burden on the servient tenement, but the projection of the new roof should not exceed that of the old though at an increased height. 28 I. C. 169. Re-construction of a house by the dominant owner involving a change in the situation of the roshandans does not mean a fresh easement requiring a fresh period of twenty years for its acquisition. 45 I. C. 985 = 98 P. W. R. 1918. Where the plaintiff's right of way is proved over a defined track, occasional deviation therefrom does not affect his right. 18 I. C. 85; A. I. R. 1926 Nag. 221. The prohibition of the user of the track, during a particular season does not negative the claim of a general right of way, but is presumptive proof of a restricted right. (*Ibid.*)

See also 15 Bom. L. R. 876 (Projecting eaves), 24 Bom. 188 (Right to draw water); Bom. P. J. (1893) 143 (Discharging water); 23 Bom. 595 (Right of way).

PROCEDURE.—If the dominant owner exceeds the right, injunction and not damages is the proper remedy. 28 I. C. 169.

Sec. 24. PRINCIPLE OF SECTION AND ILLUSTRATIVE CASES.—The dominant owner has a right to do everything requisite to secure to himself the fullest advantage of his servitude but thereby he should not impose any additional burden on the servient tenement. 39 I. C. 592 = 18 P. W. R. 1917. Repairing pipes on another's land. 23 Cal. 525; Repairing roof. See 15 Mad. 286. On this Sec. see also 20 Bom. L. R. 403. By the Civil Law the owner of a dominant tenement has a right to do whatever is requisite to secure to himself the fullest enjoyment of his servitude so long as he does not impose any additional burden upon the servient heritage. 39 I. C. 590 (2). The accessory rights mentioned in S. 24 are not intended to deprive the servient owner of his rights of property unless such a result is absolutely essential. 42 Bom. 529 = 45 I. C. 422 = 20 Bom. L. R. 403. (Right to repair wall and eaves through which rain water was discharged). A person can also enter the neighbour's house or land to protect his eaves which project over the neighbour's house. 16 I. C. 893. Where the repair of the wall is reasonably necessary for its enjoyment the right to go to the neighbour's side of the premises to repair the wall if a necessary easement. 16 I. C. 893; See also 42 Bom. 529. The right does not allow going over the defendant's roof. 16 I. C. 893.

Illustrations.

(a) *A* has an easement to lay pipes in *B*'s land to convey water to *A*'s cistern. *A* may enter the land in order to mend the pipes, but he must restore the surface to its original state.

(b) *A* has an easement of a drain through *B*'s land. The sewer with which the drain communicates is altered. *A* may enter upon *B*'s land and alter the drain, to adapt it to the new sewer provided that he does not thereby impose any additional burden on *B*'s land.

(c) *A*, as owner of a certain house, has a right of way over *B*'s land. The way is out of air, or a tree is blown down and falls across it. *A* may enter on *B*'s land and repair the way or remove the tree from it.

(d) *A*, as owner of a certain field, has a right of way over *B*'s land. *B* renders the way impassable. *A* may deviate from the way and pass over the adjoining land of *B*, provided that the deviation is reasonable.

(e) *A*, as owner of a certain house, has a right of way over *B*'s field. *A* may remove rocks to clear the way.

(f) *A* has an easement of support from *B*'s wall. The wall gives way. *A* may enter upon *B*'s land and repair the wall.

(g) *A* has an easement to have his land flooded by means of a dam in *B*'s stream. The dam is swept away by an inundation. *A* may enter upon *B*'s land and repair the dam.

liability for expenses necessary for preservation of easement.

25. The expenses incurred in constructing works, or making repairs, or doing any other act necessary for the use or preservation of an easement, must be defrayed by the dominant owner.

26. Where an easement is enjoyed by means of an artificial work, the dominant owner is liable to make compensation for any damage to the servient heritage arising from the want of repair of such work.

liability for damage from want of repair.

27. The servient owner is not bound to do anything for the benefit of the dominant heritage and he is entitled, as against the dominant owner, to use the servient heritage in any way consistent with the enjoyment of the easement; but he must not do any act tending to restrict the easement or to render its exercise less convenient.

servient owner not bound to do anything.

Illustrations.

(a) *A*, as owner of a house, has a right to lead water and send sewage through *B*'s land. *B* is bound as servient owner to clear the watercourse or scour the sewer.

(b) *A* grants a right of way through his land to *B* as owner of a field. *A* may feed his cattle on the grass growing on the way, provided that *B*'s right of way is not thereby obstructed, but he must not build a wall at the end of his land so as to prevent *B* from going beyond it, nor must he narrow the way so as to render the exercise of the right less easy than it was at the date of the grant.

(c) *A*, in respect of his house, is entitled to an easement of support from *B*'s wall. *B* is not bound as servient owner to keep the wall standing and in repair. But he must not pull down or weaken the wall so as to make it incapable of rendering the necessary support.

(d) *A* in respect of his mill, is entitled to a watercourse through *B*'s land. *B* must not drive trees so as to obstruct the watercourse.

(e) *A*, in respect of his house, is entitled to a certain quantity of light passing over *B*'s land. *B* must not plant trees so as to obstruct the passage to *A*'s windows of that quantity of light.

extent of easements.

28 With respect to the extent of easements and the mode of their enjoyment, the following provisions shall have effect:—

effect:—

An easement of necessity is co-extensive with the necessity as it existed when the easement was imposed.

easement of necessity.

Sec. 24, Ill. (d).—Public rights of way are not easements but arise from a dedication to the public evidenced by a deed or implied from custom and user. There can be no right of easement in favour of an indeterminate body of persons. *I. C. 368=14 N. L. R. 78.* Where the owner of lands renders a way impassable, a person having a right to use the way may deviate from the way, pass over adjoining land of the owner provided the deviation is reasonable. (*Ibid.*)

Sec. 27. PRINCIPLE OF SECTION.—See 85 C. 608=1925 All. 348; 87 I. C. 899=

1925 Nag. 389. Where water flowing underground in a defined subterranean channel which forms the source of supply for the plaintiff's springs is abstracted by the defendants by cutting off a channel on their own land very near the springs. *Held*, that plaintiff could restrain by injunction any attempt to divert the underground channel or diminish his water supply. 25 Bom. L. R. 789=47 B. 809=1923 Bom. 305. On this Sec. see also 20 Bom. 788; 13 A. L. J. 637.

The extent of any other easement and the mode of its enjoyment must be fixed with reference to the probable intention of the parties, and the purpose for which the right was imposed or

Other easements.
acquired.

In the absence of evidence as to such intention and purpose—

(a) a right of way of any one kind does not include a right of way of any other kind ;

(b) the extent of a right to the passage of light or air to a certain window, door or other opening, imposed by a testamentary or non-testamentary instrument, is the quantity of light or air that entered the opening at the time the testator died or the non-testamentary instrument was made ;

(c) the extent of a prescriptive right to the passage of light or air to a certain window, door or other opening is that quantity of light or air which has been accustomed to enter that opening during the whole of the prescriptive period irrespectively of the purposes for which it has been used ;

(d) the extent of a prescriptive right to pollute air or water is the extent of the pollution at the commencement of the period of user on completion of which the right arose ; and

(e) the extent of every other prescriptive right and the mode of its enjoyment must be determined by the accustomed user of the right.

29. The dominant owner cannot, by merely altering or adding to the dominant heritage, substantially increase an easement.

Where an easement has been granted or bequeathed so that its extent shall be proportionate to the extent of the dominant heritage, if the dominant heritage is in-

Sec. 28. (a).—A right of way of one kind, *e.g.*, for persons, cattle and carts, etc., does not include a right of way of another kind, *e.g.*, for sweepers removing nightsoil, in the absence of evidence as to the probable intention of parties, and the purpose for which the right was imposed or acquired, 59 I. C. 426 = 22 Bom. L. R. 1131. See also 90 I. C. 149 = 26 Cr. L. J. 1493. Where an easement is claimed over another's property the servient tenement should not be saddled with a heavier burden than what the plaintiff has succeeded in proving. But when a particular mode of user is not heavier than the mode of user proved, the plaintiff may be allowed to use it in that particular way, *e.g.*, the user of a way for horses may include the right to lead smaller animals as well, but not larger animals or loads, 65 I. C. 579. The user of a path for the passage of men, carts and palanquins, may also entitle the dominant owner to take cattle, processions and corpses along the path. (*Ibid.*)

Sec. 28 (b), (c) and (d).—As regards an easement of light, there is no rule defining the measure of the dominant owner's right or requiring an angle of 45 degrees through which the rays of the sun are to be received, 1923 All. 542. To sustain an action, there must be a substantial privation of light enough to render the occupation of the house uncomfortable according to ordinary notions, 1923 All. 542. See also 20 M. L. J. 29 = 7 M. L. T. 245; 7 Bom. L. R. 352; 7 Bom. L. R. 73; 29 Bom. 157; 35 Cal. 661; 18 C. W.

N. 933 = 27 M. L. J. 117. 42 C. 46 (P. C.). The dominant owner is not entitled to the full amount of light enjoyed during the prescriptive period, but only to so much as is necessary for habitation or business according to the ordinary notions of mankind. There is no infringement of the right unless the obstruction amounts to a nuisance, 42 Cal. 46 = 18 C. W. N. 933 = 27 M. L. J. 117 = 24 I. C. 300 = 41 I. A. 180 (P. C.).

Cl. (e).—If a grazing area is larger than that required by the persons, a proprietor may use the excess for his own purposes. The persons having grazing rights cannot prevent him from developing any excess area and using it to its best purposes, 67 I. C. 306 = 2 Lah. L. J. 44. (31 C. 503 = 31 I. A. 75 = 14 M. L. J. 152 (P. C.); 86 P. K. 1911. Ref.) Exclusive fishery rights do not give occupancy right, but lease of a holding, part of which is under water will give a right to acquisition of occupancy in the whole, 3 P. L. T. 53 = 1922 P. 9.

Sec. 29.—The height of the roof in the dominant tenement which had an easement of letting down rain water on another's roof, was raised from 7 feet to 21 feet and instead of allowing the dripping of water along the eaves, it was poured down through pipes, *held*, that burden on the servient tenement is increased thereby and therefore the easement is extinguished, 58 I. C. 967. On this section see also 6 M. H. C. 112; 13 Cal. 136 = 13 I. A. 77 (P. C.) as to what amounts to increase of easements.

sed by alluvion, the easement is proportionately increased, and, if the dominant age is diminished by diluvion, the easement is proportionately diminished.

Save as aforesaid, no easement is affected by any change in the extent of the nant or the servient heritage.

Illustrations.

(a) *A*, the owner of a mill, has acquired a prescriptive right to divert to his mill part of the of a stream. *A* alters the machinery of his mill. He cannot thereby increase his right to water.

(b) *A* has acquired an easement to pollute a stream by carrying on a manufacture on its by which a certain quantity of foul matter is discharged into it. *A* extends his works and by increases the quantity discharged. He is responsible to the lower riparian owners for injury by such increase.

(c) *A*, as the owner of a farm, has a right to take, for the purpose of manuring his farm, which have fallen from the trees on *B*'s land. *A* buys a field and unites it to his farm. *A* is hereby entitled to take leaves to manure this field.

30. Where a dominant heritage is divided between two or more persons, the easement becomes annexed to each of the shares, but not so as to increase substantially the burden of the servient heritage: provided that such annexation is consistent the terms of the instrument, decree or revenue-proceeding (if any) under which division was made, and, in the case of prescriptive rights, with the user during the prescriptive period.

Illustrations.

(a) A house to which a right of way by a particular path is annexed is divided into two parts, of which is granted to *A*, the other to *B*. Each is entitled, in respect of his part, to a right of way by the same path.

(b) A house to which is annexed the right of drawing water from a well to the extent of fifty buckets a day is divided into two distinct heritages, one of which is granted to *A*, the other to *B*. *A* and *B* are each entitled, in respect of his heritage, to draw from the well fifty buckets a day; but amount drawn by both must not exceed fifty buckets a day.

(c) *A*, having in respect of his house an easement of light, divides the house into three distinct heritages. Each of these continues to have the right to have its windows unobstructed.

31. In the case of excessive user of an easement the servient owner may, without prejudice to any other remedies to which he may be entitled, obstruct the user, but only on the servient heritage: provided that such user cannot be obstructed when the excessive user would interfere with the lawful enjoyment of the easement.

Illustration.

A, having a right to the free passage over *B*'s land of light to four windows six feet by four, increases their size and number. It is impossible to obstruct the passage of light to the new windows without also obstructing the passage of light to the ancient windows. *B* cannot obstruct the excessive

CHAPTER IV.

THE DISTURBANCE OF EASEMENTS.

32. The owner or occupier of the dominant heritage is entitled to enjoy the easement without disturbance by any other person.

30.—If two houses were common and a right of way belonged to the parties, the right being common, it must be presumed, in the absence of any express agreement between the parties, that at partition, the passage was made for common enjoyment. 36 Bom. 379 = C. 818 = 14 Bom. L. R. 418. When a dominant heritage is divided between two or more persons the easement becomes annexed to each of the shares, provided that such annexation is consistent with the terms of the instrument under which the division was made. (1923) 17 N. 454 = 18 L. W. 404 = 1923 Mad. 674. Where the same grantor conveys in the course of

one transaction portions of his property, to several grantees, each grantee is presumed in law to take his portion subject to such rights, as a right of way as are created in favour of the other grantees. 38 Mad. 141 = 19 I. C. 80 = 24 M. L. J. 552. "Appurtenances" when used in conveyance include a right of way. (*Ibid.*)

Sec. 31.—If a person cannot obstruct the new user without obstructing the old, he must submit to the new burden. See 11 M. L. J. 290; 7 Cal. 453; Bom. P. J. (1889) 310.

Sec. 32.—Right of co-owner to put up eaves and insert beams in party wall. See 6 Bom. L. R. 682.

Illustration.

A, as owner of a house, has a right of way over *B*'s land, *C* unlawfully enters on *B*'s land and obstructs *A* in his right of way. *A* may sue *C* for compensation, not for the entry, but for the obstruction.

33. The owner of any interest in the dominant heritage, or the occupier of such heritage, may institute a suit for compensation for the disturbance of the easement or of any right accessory thereto : provided that the disturbance has actually caused substantial damage to the plaintiff.

Explanation I.—The doing of any act likely to injure the plaintiff by affecting the evidence of the easement, or by materially diminishing the value of the dominant heritage, is substantial damage within the meaning of this section and section 34.

Explanation II.—Where the easement disturbed is a right to the free passage of light passing to the openings in a house, no damage is substantial within the meaning of this section, unless it falls within the first explanation, or interferes materially with the physical comfort of the plaintiff, or prevents him from carrying on his accustomed business in the dominant heritage as beneficially as he had done previous to instituting the suit.

Explanation III.—Where the easement disturbed is a right to the free passage of air to the openings in a house, damage is substantial within the meaning of this section if it interferes materially with the physical comfort of the plaintiff, though it is not injurious to his health.

Illustrations.

(a) *A* places a permanent obstruction in a path over which *B*, as tenant of *C*'s house has, a right of way. This is substantial damage to *C*, for it may affect the evidence of his reversionary right to the easement.

(b) *A*, as owner of a house, has a right to walk along one side of *B*'s house. *B* builds a verandah overhanging the way about ten feet from the ground, and so as not to occasion any inconvenience to foot-passengers using the way. This is not substantial damage to *A*.

34. The removal of the means of support to which a dominant owner is entitled does not give rise to a right to recover compensation, unless and until substantial damage is actually sustained.

35. Subject to the provisions of the Specific Relief Act, 1877, sections 52 to 57 (both inclusive) an injunction may be granted to restrain the disturbance of an easement—

Sec. 33.—PRINCIPLES AND ILLUSTRATIONS.

—The law does not concern itself with a disturbance which is trivial or immaterial. Where the plaintiff comes into Court at once, when the disturbance is threatened and the defendant completes his structures pending the suit, he does so at his own peril. 28 I. C. 962 = 13 A. L. J. 385. As to what amounts to disturbance, see also 7 Bom. L. R. 825 ; *Ibid.* 73 ; 5 All. 369 = 3 A. W. N. 58 ; 8 Bom. 95 ; 39 Cal. 59 ; Bom. P. J. (1895) 272 ; 3 N. L. R. 114. Extent of damage depends on mode of life and place of living. 97 I. C. 500 = A. I. R. 1926 All. 764 (A. I. R. 1924 All. 392, Rel. on). The test of interference with the right to light and air is whether the obstruction amounts to a nuisance. 23 I. C. 959. See also 97 I. C. 500 = A. I. R. 1926 All. 764. There is no actionable wrong unless there is a material interference with the physical comfort of the plaintiff or other substantial damage. 33 I. C. 615 = 9 S. L. R. 101 (33 M. 327, and Coll's case (1904) A. C. 179, Foll.) If in spite of an obstruction being created by the servient owner the same quantity of light still penetrates the ancient windows of a dominant owner the latter has no remedy in equity. 33 I. C. 615 = 9 S. L. R. 101. Where the plaintiff has a right to pass

his rain and sewage water across the defendant's land to the public drain, the diversion of the old route taken by the water in former days and passing it by another route does not constitute an obstruction to the exercise of plaintiff's right. 30 I. C. 508 = 13 A. L. J. 821. Grazing rights include right to have sufficient pasturage left. A. I. R. 1925 Lah. 216 = 92 I. C. 403.

PARTIES.—As a general rule, where a person claims a right of easement on a servient tenement all the owners of the servient tenement ought to be made parties, as any decree in the absence of a necessary party declaring a right of easement would be infructuous. 1924 Cal. 369. But there are cases which may well be taken as exceptions to the general rule, such as where any of the co sharers took no part in obstructing the plaintiff's right. (*Ibid.*)

REMEDY.—Where an easement has been disturbed, plaintiff is entitled to an injunction rather than damages. 28 I. C. 962 = 13 A. L. J. 385. S. 33 allows compensation to be recovered provided that the disturbance has actually caused a substantial damage to the plaintiff. (*Ibid.*)

Sec. 31.—As to the principles on which courts will grant injunction in respect of easements, see Specific Relief Act, Ss. 52-57 and notes there-

(a) if the easement is actually disturbed,—when compensation for such disturbance might be recovered under this Chapter :

(b) if the disturbance is only threatened or intended,—when the act threatened or intended must necessarily, if performed, disturb the easement.

Abatement of obstruction of easement.

36. Notwithstanding the provisions of section 24, the dominant owner cannot himself abate a wrongful obstruction of an easement.

CHAPTER V.

THE EXTINCTION, SUSPENSION AND REVIVAL OF EASEMENT.

37. When, from a cause which preceded the imposition of an easement, the person by whom it was imposed ceases to have any right in the servient heritage, the easement is extinguished.

Exception.—Nothing in this section applies to an easement lawfully imposed by a mortgagor in accordance with section 10.

Illustrations.

(a) *A* transfers Sultanpur to *B* on condition that he does not marry *C*. *B* imposes an easement on Sultanpur. Then *B* marries *C*. *B*'s interest in Sultanpur ends, and with it the easement is extinguished.

(b) *A*, in 1860, let Sultanpur to *B* for thirty years from the date of the lease. *B*, in 1861, imposes an easement on the land in favour of *C*, who enjoys the easement peaceably and openly as an easement without interruption for twenty-nine years. *B*'s interest in Sultanpur then ends, and with it *C*'s easement.

(c) *A* and *B*, tenants of *C*, have permanent transferable interests in their respective holdings. *A* imposes on his holding an easement to draw water from a tank for the purpose of irrigating *B*'s

under and Civil Procedure Code, O. XXXIX and notes thereunder. Court has got discretion to grant injunction or not—Different considerations govern Indian Courts and English Courts—Courts must have consideration for both parties. See 3 Rang. 230=87 I. C. 800=1925 Rang. 327.

ILLUSTRATIVE CASES.—LIGHT AND AIR.—The decree issuing injunction about obstruction to light and air should be given in general terms. 25 Bom. L. R. 239=1923 Bom. 196. The dominant owner acquires by prescription so much light as is sufficient for the ordinary purposes of inhabitancy or business according to the ordinary notions of mankind with reference to the locality and surroundings concerned; and the amount received during the period of prescription is immaterial. 57 I. C. 706. It is only substantial privation of light enough to make the occupation of the house uncomfortable, or unfit for business according to the ordinary notions of mankind which gives rise to an actionable claim. The mere fact that light received has become less, gives no right. 57 I. C. 706; 42 Cal. 45=18 C. W. N. 933=41 I. A. 180=27 M. L. J. 117 (P. C.). See also 97 I. C. 500=A. I. R. 1926 All. 764 (As to test of nuisance, see 96 I. C. 546=9 N. L. J. 136=A. I. R. 1926 Nag. 474). In India the right to air is more important than the right to light; damages will be awarded even when the injury is not detrimental to the existence and use of the property. 57 I. C. 706; 19 I. C. 843=6 S. L. R. 255.

WINDOWS AND SHUTTERS.—The right to open and shut windows and shutters into adjoining land can be acquired as an easement. The owner of such an easement is entitled to restrain the servient owner by an injunction from interfering with his rights by erecting a wall or building close to the boundaries. 45 I. C. 435=7 L.

W. 332. The Court should issue a mandatory injunction directing defendant to lower the roof of his house so as to enable plaintiff to shut and open the window freely. *Ibid.*

VENTILATORS.—When by the closing of certain ventilators in a house a thorough draft for the house and effective ventilators are not allowed, the injury is so serious that the house will be substantially useless. 19 I. C. 843=6 S. L. R. 255.

COMPOUND WALL.—Where the raising of a compound wall makes the habitation of a neighbour's room uncomfortable so much of the wall as produced this effect will be removed. 57 I. C. 706. See also (1926) M. W. N. 195=51 M. L. J. 304.

RIGHT OF WAY.—It is only the inconvenience to the public that justifies restriction of right of way. 2 Lah. L. J. 499.

WATER RIGHTS.—An occupier of abutting lands cannot be restrained in his exercise of his natural rights, simply because he becomes a lessee of other lands not abutting. 24 I. C. 685=(1914) M. W. N. 481. Where the water of a stream has been used for irrigating only abutting lands, the owner of abutting lands cannot be restrained from using more than a reasonable quantity by another to whom no material diminution in supply is caused. (*Ibid.*). The actual and not a mere threatened use of the water flowing through a natural stream to irrigate lands other than those abutting on the stream gives a right to sue. (*Ibid.*).

Sec. 36.—Dominant owner himself abating nuisance.—If offence under Penal Code, S. 426. See 29 Bom. L. R. 484.

Sec. 37.—Land acquired under Land Acquisition Act is taken free of easement rights over the same. See 14 Cal. 423; 6 B. L. R. (App.) 74.

land. *B* enjoys the easement for twenty years. Then *A*'s rent falls into arrear and his interest is sold. *B*'s easement is extinguished.

(*d*) *A* mortgages Sultanpur to *B*, and lawfully imposes an easement on the land in favour of *C* in accordance with the provisions of section 10. The land is sold to *D* in satisfaction of the mortgage-debt. The easement is not thereby extinguished.

38. An easement is extinguished when the dominant owner releases it, expressly or impliedly, to the servient owner.

Extinction by release.

Such release can be made only in the circumstances and to the extent in and to which the dominant owner can alienate the dominant heritage.

An easement may be released as to part only of the servient heritage.

Explanation I.—An easement is impliedly released—

(*a*) where the dominant owner expressly authorises an act of a permanent nature to be done on the servient heritage, the necessary consequence of which is to prevent his future enjoyment of the easement, and such act is done in pursuance of such authority :

(*b*) where any permanent alteration is made in the dominant heritage of such a nature as to show that the dominant owner intended to cease to enjoy the easement in future.

Explanation II.—Mere non-user of an easement is not an implied release within the meaning of this section.

Illustrations.

(*a*) *A*, *B* and *C* are co-owners of a house to which an easement is annexed. *A*, without the consent of *B* and *C*, releases the easement. This release is effectual only as against *A* and his legal representative.

(*b*) *A* grants *B* an easement over *A*'s land for the beneficial enjoyment of his house. *B* assigns the house to *C*. *B* then purports to release the easement. The release is ineffectual.

(*c*) *A*, having the right to discharge his eavesdroppings into *B*'s yard, expressly authorizes *B* to build over this yard to a height which will interfere with the discharge. *B* builds accordingly. *A*'s easement is extinguished to the extent of the interference.

(*d*) *A*, having an easement of right to a window, builds up that window with bricks and mortar so as to manifest an intention to abandon the easement permanently. The easement is impliedly released.

(*e*) *A*, having a projecting roof by means of which he enjoys an easement to discharge eavesdroppings on *B*'s land permanently alters the roof, so as to direct the rain-water into a different channel and discharge it on *C*'s land. The easement is impliedly released.

39. An easement is extinguished when the servient owner, in exercise of a power reserved in this behalf, revokes the easement.

Extinction by revocation.

Extinction on expiration of limited period or happening of dissolving condition.

Extinction on termination of necessity.

40. An easement is extinguished where it has been imposed for a limited period, or acquired on condition that it shall become void on the performance or non-performance of a specified act, and the period expires or the condition is fulfilled.

41. An easement of necessity is extinguished when the necessity comes to an end.

Illustration.

A grants *B* a field inaccessible except by passing over *A*'s adjoining land. *B* afterwards purchases a part of that land over which he can pass to his field. The right of way over *A*'s land which *B* had acquired is extinguished.

Sec. 38.—An agreement to build a common wall with holes indicating permission to end the rafters of the next storey which may be constructed does not imply consent to close ventilators by building such next storey. 1923 Lah. 249. Permanent alteration in the dominant heritage must be such "as to show that the dominant owner intended to cease to enjoy the easement in future, and unless such an intention is establish-

ed the dominant owner cannot be disentitled to the easement on the ground of non-user. 25 I. C. 383. An agreement by one of several co-owners of a dominant tenement to effect a release of an easement is not effectual against the other co-owners. 19 I. C. 908=6 S. L. R. 265. On this section, see also 35 Cal. 889; 26 Bom. 374; 7 I. C. 813; 8 M. L. T. 292.

Extinction of useless easement.

42. An easement is extinguished when it becomes incapable of being at any time and under any circumstances beneficial to the dominant owner.

43. Where, by any permanent change in the dominant heritage, the burden on the servient heritage is materially increased and cannot be reduced by the servient owner without interfering with the lawful enjoyment of the easement, the easement is

Extinction by permanent change in dominant heritage.

extinguished, unless—

(a) it was intended for the beneficial enjoyment of the dominant heritage, to whatever extent the easement should be used; or

(b) the injury caused to the servient owner by the change is so slight that no reasonable person would complain of it; or

(c) the easement is an easement of necessity.

Nothing in this section shall be deemed to apply to an easement entitling the dominant owner to support of the dominant heritage.

Extinction on permanent alteration of servient heritage by superior force.

44. An easement is extinguished where the servient heritage is by superior force so permanently altered that the dominant owner can no longer enjoy such easement:

Provided that, where a way of necessity is destroyed by superior force, the dominant owner has a right to another way over the servient heritage, and the provisions of section 14 apply to such way.

Illustrations.

(a) A grants to B, as the owner of a certain house, a right to fish in a river running through A's land. The river changes its course permanently and runs through C's land. B's easement is extinguished.

(b) Access to a path over which A has a right of way is permanently cut off by an earthquake. A's right is extinguished.

Extinction by destruction of either heritage.

45. An easement is extinguished when either the dominant or the servient heritage is completely destroyed.

Illustration.

A has a right of way over a road running along the foot of a sea-cliff. The road is washed away by a permanent encroachment of the sea. A's easement is extinguished.

46. An easement is extinguished when the same person becomes entitled to the absolute ownership of the whole of the dominant and servient heritages.

Sec. 42.—See also notes under S. 13 *supra*.

Easement of necessity is one without which the tenement cannot be used at all and not merely one which is necessary for its more convenient enjoyment. 50 I. C. 756. An easement which ceases to be beneficial to the dominant owner might become extinguished. 50 I. C. 756 (33 All. 461, Ref.).

Sec. 43.—Whether an additional burden alleged to have been imposed on the servient tenement could be reduced without difficulty to its original limit by the construction or alteration of a structure, the easement is not extinguished. 44 A. 343 = 20 A. L. J. 202 = 1922 All. 28. An easement of light and air for windows is not extinguished on demolition of a wall which is re-built without delay. 24 Bom. L. R. 83 = 46 B. 448 = 1922 Bom. 3. The owner of an easement is precluded from increasing his right on the alteration of his dominant tenement. In a case, where by change of height, eaves discharge water with increased force, it is held that an additional burden is put upon the plaintiff's land. 32 C. L. J. 27 = 58 I. C. 854 = 24 C. W. N. 896 (Burden of proof that no additional burden is imposed lies on dominant owner). An owner of the dominant tenement

had a right to drop water from his eaves at a distance of seven feet height. He increased the height three times and allowed water to drop through pipes. *Held*, that his easement was extinguished by the increase of burden. 58 I. C. 967. Dominant owner increasing height of water spout dropping water on servient tenement by 4 feet—Easement is not destroyed. 102 I. C. 447 = A. I. R. 1927 Lah. 492. On this section, see also 7 Cal. 453.

Sec. 45.—See 7 Bom. L. R. 352.

Sec. 46.—As to extinction of easements by merger, see A. I. R. 1926 Cal. 92. The unity of the dominant and servient estates in the same person extinguished the easement appurtenant to the dominant estate for no person can have an easement in land which he himself owns. But unity of title will not extinguish an easement, unless the ownership of the two estates be co-extensive, equal in validity, quality and other circumstances. If there has been unity of possession merely and not unity of seisin for estates in fee simple an estate which has been thereby suspended will revive on severance of the union, but if there has been unity of seisin for estates in fee simple and not unity of possession merely, all easements are absolutely extinguished and will

Illustrations.

(a) *A*, as the owner of a house, has a right of way over *B*'s field. *A* mortgages his house, and *B* mortgages his field to *C*. Then *C* forecloses both mortgages and becomes thereby absolute owner of both house and field. The right of way is extinguished.

(b) The dominant owner acquires only part of the servient heritage : the easement is not extinguished, except in the case illustrated in section 41.

(c) The servient owner acquires the dominant heritage in connection with a third person ; the easement is not extinguished.

(d) The separate owners of two separate dominant heritages jointly acquire the heritage which is servient to the two separate heritages : the easements are not extinguished.

(e) The joint owners of the dominant heritage jointly acquire the servient heritage : the easement is extinguished.

(f) A single right of way exists over two servient heritages for beneficial enjoyment of a single dominant heritage. The dominant owner acquires only one of the servient heritages. The easement is not extinguished.

(g) *A* has a right of way over *B*'s road. *B* dedicates the road to the public. *A*'s right of way is not extinguished.

47. A continuous easement is extinguished when it totally ceases to be enjoyed as such for an unbroken period of twenty years.

A discontinuous easement is extinguished when for a like period, it has not been enjoyed as such.

Such period shall be reckoned, in the case of a continuous easement, from the day on which its enjoyment was obstructed by the servient owner, or rendered impossible by the dominant owner ; and, in the case of a discontinuous easement, from the day on which it was last enjoyed by any person as dominant owner :

Provided that if, in the case of a discontinuous easement, the dominant owner, within such period, registers, under the Indian Registration Act, 1877,¹ a declaration of his intention to retain such easement, it shall not be extinguished until a period of twenty years has elapsed from the date of the registration.

Where an easement can be legally enjoyed only at a certain place, or at certain times, or between certain hours, or for a particular purpose, its enjoyment during the said period at another place, or at other times, or between other hours, or for another purpose, does not prevent its extinction under this section.

The circumstance that, during the said period, no one was in possession of the servient heritage, or that the easement could not be enjoyed, or that a right accessory thereto was enjoyed, or that the dominant owner was not aware of its existence, or that he enjoyed it in ignorance of his right to do so, does not prevent its extinction under this section.

An easement is not extinguished under this section—

(a) where the cessation is in pursuance of a contract between the dominant and servient owners ;

(b) where the dominant heritage is held in co-ownership, and one of the co-owners enjoys the easement within the said period ; or

not revive, unless they are recreated on severance of the former dominant and servient estates. 50 Cal. 356 = 36 C. L. J. 161 = 1923 Cal. 8. See also *A. W. N.* (1887) 260. Right of ownership and easement are incompatible. *A. W. N.* (1883) 68.

Sec. 47. PRINCIPLE OF SECTION.—See 45 Bom. 80 = 57 I. C. 143 = 22 Bom. L. R. 415. An easement is not extinguished where its user is suspended in pursuance of a contract between the dominant and the servient owners. A person who purchases the servient tenement in an execution sale with knowledge of the easement is bound thereby. 56 P. W. R. 1918 = 45 I. C. 618 = 34 P. L. R. 1918.

WATER.—Flowing of water continuously through a rill, Cuttai and another water-course may form a natural stream in which easement rights may be acquired as against Government. 31 I. C. 82. If the Government wished to claim right to water flowing through

pattah land they can do it only when classifying the bed separately as poramboke ; otherwise the ryot can retain it as his property. 31 I. C. 982. Whether a prescriptive right to light and air is lost through abandonment, depends on the intention of the parties to be gathered from the circumstances and the interval of non-user. 49 I. C. 752. It is not necessary for the building to enjoy the light, that it should be identical with that which acquired the right, either in structure or the purposes for which it is to be used. 49 I. C. 752 (30 Cal. 503 ; 3 C. W. N. 28, Ref.). On this section, see also 8 M. L. T. 292 ; 5 M. L. T. 216 ; 18 I. C. 85. An easement of light, and air for windows is not extinguished on demolition of a wall which is re-built without delay. 24 Bom. L. R. 83 = 46 B. 448 = 1922 Bom. 3.

¹ Act III of 1877 was repealed and re-enacted by the Indian Registration Act, 1908 (XVI of 1908).

(c) where the easement is a necessary easement.

Where several heritages are respectively subject to rights of way for the benefit of a single heritage, and the ways are continuous, such rights shall, for the purposes of this section, be deemed to be a single easement.

Illustration.

A has, as annexed to his house, rights of way from the high road thither over the heritages X and Z and the intervening heritage Y. Before the twenty years expire A exercises his right of way over X. His rights of way over Y and Z are not extinguished.

Extinction of accessory rights. **48.** When an easement is extinguished, the rights (if any) accessory thereto are also extinguished.

Illustration.

A has, an easement to draw water from B's well. As accessory thereto he has a right of way over B's land to and from the well. The easement to draw water is extinguished under section 47. The right of way is also extinguished.

49. An easement is suspended when the dominant owner becomes entitled to possession of the servient heritage for a limited interest therein, or when the servient owner becomes entitled to possession of the dominant heritage for a limited interest therein.

50. The servient owner has no right to require that an easement be continued ; and, notwithstanding the provisions of section 26, he is not entitled to compensation for damage caused to the servient heritage in consequence of the extinguishment or suspension of the easement, if the dominant owner has given to the servient owner such notice as will enable him, without unreasonable expense, to protect the servient heritage from such damage.

Compensation for damage caused by extinguishment. Where such notice has not been given, the servient owner is entitled to compensation for damage caused to the servient heritage in consequence of such extinguishment or suspension.

Illustration.

A, in exercise of an easement, diverts to his canal the water of B's stream. The diversion continued for many years, and during that time the bed of the stream partly fills up. A then abandons his easement, and restores the stream to its ancient course. B's land is consequently flooded. B sues A for compensation for the damage caused by the flooding. It is proved that A gave B a month's notice of his intention to abandon the easement, and that such notice was sufficient to enable B, without unreasonable expense, to have prevented the damage. The suit must be dismissed.

51. An easement extinguished under section 45 revives (a) when the destroyed heritage is, before twenty years have expired, restored by the deposit of alluvion ; (b) when the destroyed heritage is a servient building and before twenty years have expired such building is rebuilt

Sec. 49.—See 16 I. C. 365=(1913) M.W.N. 95.

Sec. 50.—The owner of a servient tenement over which the dominant owner had acquired a right to discharge his water, cannot insist that the water should be continued to be so discharged. 46 I. C. 24. See also 2 C. L. R. 141. An easement exists only for the benefit of the dominant tenement and a servient owner gets no right to insist on its continuance or to sue for damages on its abandonment. 17 C. W. N. 1066=20 I. C. 815=18 C. L. J. 131. As to the natural right to collect and retain surface water, or to allow it to flow on naturally to the lower lands, see 4 P. I. T. 81=2 P. 110=1922 (Pat.) 305=1923 P. 65. The owner of the servient tenement acquires no reciprocal rights as against the owner of the dominant tenement with regard to the flow of surface water, that is, water not passing through a defined channel. 4 P. L. T. 81=2 P. 110=(1922) Pat. 305=1923 P. 65. The owner of the servient tenement cannot compel

the owner of the dominant tenement to continue the exercise of his right even where that right has been exercised uninterruptedly for over 20 years and even if its exercise should be beneficial to the servient tenement. (*Ibid.*) On this section, see also 1 Luck C. 238.

Sec. 51.—[See also notes under S. 49.] When a dominant tenement is rebuilt, the dominant owner has no right to impose a greater burden on the servient tenement than the prescriptive quantity of the right enjoyed 33 I. C. 615=9 S. L. R. 101. Blocking up an old window and building another of the same dimensions in another place is an imposition of a burden on the servient tenement which was not existing till then. (*Ibid.*) But the right of the dominant owner under the common law to free access of light and air through an ancient window is not lost by shifting the window backwards or forwards. (*Ibid.*)

upon the same site; and (c) when the destroyed heritage is a dominant building and before twenty years have expired, such building is rebuilt upon the same site and in such a manner as not to impose a greater burden on the servient heritage.

An easement extinguished under section 46 revives when the grant or bequest by which unity of ownership was produced is set aside by the decree of a competent Court. A necessary easement extinguished under the same section revives when the unity of ownership ceases from any other cause.

A suspended easement revives if the cause of suspension is removed before the right is extinguished under section 47.

Illustration.

A, as the absolute owner of field Y, has a right of way thither over B's field Z. A obtains from B a lease of Z for twenty years. The easement is suspended so long as A remains lessee of Z. But when A assigns the lease to C, or surrenders it to B, the right of way revives.

CHAPTER VI.

LICENSES.

52. Where one person grants to another, or to a definite number of other persons

“License” defined.

a right to do, or continue to do, in or upon the immoveable property of the grantor, something which would, in

the absence of such right, be unlawful, and such right does not amount to an easement or an interest in the property, the right is called a license.

53. A license may be granted by any one in the circumstances and to the extent

Who may grant license.

in and to which he may transfer his interests in the property affected by the license.

Grant may be expressed or implied.

54. The grant of a license may be express or implied from the conduct of the grantor, and an agreement which purports to create an easement, but is ineffectual

for that purpose, may operate to create a license.

55. All licenses necessary for the enjoyment of any

Accessory licenses annexed by law.

interest, or the exercise of any right, are implied in the constitution of such interest or right. Such licenses are

called accessory licenses.

Illustration.

A sells the trees growing on his land to B. B is entitled to go on the land and take away the trees.

56. Unless a different intention is expressed or necessarily implied, a license

License when transferable.

to attend a place of public entertainment may be transferred by the licensee; but, save as aforesaid, a license

cannot be transferred by the licensee or exercised by his servants or agents.

Illustrations.

(a) A grants B a right to walk over A's field whenever he pleases. The right is not annexed to any immoveable property of B. The right cannot be transferred.

(b) The Government grant B a license to erect and use temporary grain-sheds on Government land. In the absence of express provision to the contrary, B's servants may enter on the land for the purpose of erecting sheds, erect the same, deposit grain therein and remove grain therefrom.

Sec. 52.—A licensee is a person without any title and has no interest in the land. 38 All. 178 = 32 I. C. 346 = 14 A. L. J. 137. License and easement distinguished. 7 Bom. L. R. 352; 23 Bom. 397; 4 M. H. C. 98; 16 Mad. 304; 8 Bom. L. R. 310 (Permission to use land as burial ground); 16 M. 280 (Right to put up trap for elephants). License, if transferable. See 84 I. C. 284 = 1924 All. 825. License may be implied from circumstances. See 1925 All. 203. A weighman in an old market allowed by Government to continue the same calling in the new market, does not acquire any exclusive privilege and is only a licensee. 23 I. C. 922 = 12 A. L. J. 447. Validity of a transfer by a holder of a licence to build 1 Luck C. 238 =

103 I. C. 681 = A. I. R. 1927 Oudh 314. A licensee having no interest in property cannot maintain a suit for possession. 103 I. C. 43 = A. I. R. 1927 All. 633. License to use privy as dwelling house—If revocable 51 Bom. 274 = 101 I. C. 210 = 29 Bom. L. R. 78 = A. I. R. 1927 Bom. 115. As to whether a licence is revocable, see also 29 Bom. L. R. 312 = 100 I. C. 393 = A. I. R. 1927 Bom. 240.

Sec. 53.—See 7 Bom. 336.

Sec. 56.—Validity of a transfer by a holder of a licence to build. 1 Luck. C. 238 = 103 I. C. 681 = A. I. R. 1927 Oudh 314. As to transfer by one licensor to his co-licensor, See A. I. R. 1927 All. 197.

Grantor's duty to disclose defects.

of the licensee, of which the

57. The grantor of a license is bound to disclose to the licensee any defect in the property affected by the license, likely to be dangerous to the person or property of the grantor is, and the licensee is not, aware.

Grantor's duty not to render property unsafe.

58. The grantor of a license is bound not to do anything likely to render the property affected by the license dangerous to the person or property of the licensee.

Grantor's transferee not bound by license.

59. When the grantor of the license transfers the property affected thereby, the transferee is not as such bound by the license.

License when revocable.

60. A license may be revoked by the grantor, unless—

Secs. 57 and 58. Per Curiam.—It is necessary that the legislature in India especially in view of conditions prevalent in Bombay should undertake legislation on the lines of the Housing of Working Classes Act of 1890 in England. 51 Bom 274 = 101 I. C. 210 = 29 Bom. L. R. 78 = A. I. R. 1927 Bom. 115.

Sec. 59.—Enjoyment under a license for a long time does not constitute adverse possession. 44 A. 726 = 20 A. L. J. 608 = 1023 All. 140 (1). S. 59 has no application to a case in which one of two joint licensors transfers his interest in the property with respect to which the license has been granted in favour of his co-licensor. The transferee contemplated by the section must be a person who was not the licensor himself. 98 I. C. 814 = A. I. R. 1927 All. 197. S. 59 cannot be interpreted so as to give the transferee a right of revocation of a license which would not be exercisable by the transferor himself. (37 All. 91, fol.) 1 Luck. C. 44 = 102 I. C. 26 = A. I. R. 1927 Oudh 206. The transferee of a licensor cannot revoke a license, when the licensee has effected a work of permanent character and incurred expenses, 37 All. 91 = 26 I. C. 445 = 13 A. L. J. 1. See also 91 I. C. 1031 = 13 O. L. J. 170; 97 I. C. 337 = A. I. R. 1926 All. 714; 84 I. C. 264 = 1924 All. 750.

Sec. 60.—The grantor of a license is under an obligation to place the licensee in a position to enjoy the license. 36 C. L. J. 271 = 1923 Cal. 49. Where a license coupled with a transfer of property is granted, the transferee of the licensor is not entitled to revoke such license. 30 I. C. 581 = 13 A. L. J. 886. (16 C. 649, Ref.). See also 4 M. H. C. 98. An appropriation of the land licensed to any use inconsistent with the enjoyment of the license works a revocation and the licensee may maintain an action for damages against the licensor for breach of contract in unlawfully revoking it. (*Ibid.*) A license to catch elephants for consideration is not revocable, for it is a license coupled with an interest. (*Ibid.*) Where there is a grant of an exclusive right to catch elephants within a specified area for a specified period it does not follow as a matter of course that the grantee would be entitled to exclusive occupation of the entire territory during that time. 36 C. L. J. 271 = 1923 Cal. 49. Building license.—Effect of revocation. 19 I. C. 853 = 19 C. L. J. 321; See also 3 A. L. J. 760 = 29 All. 133; 34 I. C. 471 = 12 N. L. R. 75 (34 I. C. 471 ref.; 16 Cal. 640) A licensee permitted to build a house and reside therein is entitled to

be indemnified if evicted by the licensor's successor. A bare license may be revoked at the grantor's will and on reasonable notice, but a license coupled with grant is irrevocable. 19 I. C. 853 = 19 C. L. J. 321; 22 N. L. R. 162. Where a license is granted to building houses on a site and the licensee erects a work of a permanent nature, the license cannot be revoked. 106 I. C. 479 = A. I. R. 1927 All. 342; The principle of this section is also applicable to Berar. See 94 I. C. 923 = A. I. R. 1926 Nag. 376. Section also applies to transferee of property. 97 I. C. 337 = A. I. R. 1926 All. 714 (39 All. 91, fol. A. I. R. 1923 All. 140 dist.) A licensor cannot be allowed to revoke the license on condition of his making compensation to the licensee for loss incurred by the revocation of the license. 98 I. C. 814 = A. I. R. 1927 All. 197. Buildings of mud walls and thatched roof built for the purpose of school and which were in existence and kept under regular repair for about 30 years were held to be a work of a permanent character. (28 All. 741, fol.) 1 Luck. C. 44 = 102 I. C. 26 = A. I. R. 1927 Oudh 206; see also 97 I. C. 337 = A. I. R. 1926 All. 714. A licensee is entitled to damages for breach of any contract or for an improper revocation of his license in a proper case; the Court will allow revocation only on payment. 49 I. C. 811 = (1918) M. W. N. 772. Under the Act a license is of a personal character not merely as regards the grantee, but also as regards the grantor. It ceases the moment the property passes to another from the grantor whether by inheritance or otherwise. 18 N. L. R. 76 = 1922 Nag. 162. The heirs of the licensor may treat the licensee as a trespasser and eject him without notice of revocation. *Ibid.* A license coupled with a void grant is revocable save (1) when the licensee entered into occupation and paid rent and (2) when the licensee acting on the license has executed a work of permanent character, and incurred expense in so doing. 34 I. C. 471 = 12 N. L. R. 75 (21 Ch. D. 9; (1901) 2 Ch. 598; and 8 A. 60, ref. to.) Thatched house may be a work of permanent character. See 1925 All. 203. A license cannot be revoked during licensee's lifetime when the license had made permanent improvements. 48 I. C. 723. When plff. allowed deft. to execute on plff.'s land an irrigation scheme of considerable expense and permanent benefit to a very large number of villages, held, that the agreement created a license which could not be revoked at the instance of the plff. 47 I. C. 166. A licensee in possession does not, like the tenant, by denying title of the

(a) it is coupled with a transfer of property and such transfer is in force :

(b) the licensee, acting upon the license, has executed a work of a permanent character and incurred expenses in the execution.

Revocation express or implied.

61. The revocation of a license may be express or implied.

Illustrations.

(a) *A*, the owner of a field, grants a license to *B*, to use a path across it. *A*, with intent to revoke the license, locks a gate across the path. The license is revoked.

(b) *A*, the owner of a field, grants a license to *B* to stack hay on the field. *A* lets or sells the field to *C*. The license is revoked.

License when deemed revoked.

62. A license is deemed to be revoked—

(a) when, from a cause preceding the grant of it, the grantor ceases to have any interest in the property affected by the license :

(b) when the licensee releases it, expressly or impliedly, to the grantor or his representative :

(c) where it has been granted for a limited period, or acquired on condition that it shall become void on the performance or non-performance of a specified act, and the period expires, or the condition is fulfilled ;

(d) where the property affected by the license is destroyed or by superior force so permanently altered that the licensee can no longer exercise his right :

(e) where the licensee becomes entitled to the absolute ownership of the property affected by the license :

(f) where the license is granted for a specified purpose and the purpose is attained, or abandoned, or becomes impracticable :

(g) where the license is granted to the licensee as holding a particular office, employment or character, and such office, employment or character ceases to exist :

(h) where the license totally ceases to be used as such for an unbroken period of twenty years, and such cessation is not in pursuance of a contract between the grantor and the licensee :

(i) in the case of an accessory license, when the interest or right to which it is accessory ceases to exist.

63. Where a license is revoked, the licensee is entitled to a reasonable time to leave the property affected thereby and to remove any goods which he has been allowed to place on such property.

Licensee's rights on revocation.

64. Where a license has been granted for a consideration, and the licensee, without any fault of his own, is evicted by the grantor before he has fully enjoyed, under the license, the right for which he contracted, he is entitled to recover compensation from the grantor.

Licensee's rights on eviction.

THE INDIAN EVIDENCE ACT, (1 OF 1872).

PREFATORY NOTE.—EFFECT OF SUBSEQUENT LEGISLATION.—Rep.in part, 44 and 45 Vic. C, 58 S. 127 : Acts 10 of 1837 ; 18 of 1872 ; 3 of 1887, 3 of 1891, ss. 1 to 8 ; 5 of 1899 ; S. 33 overridden by Act 14 of 1908, S. 13 ; S. 37, rep. in part and amended by Act 10 of 1914 ; S. 1 amended by Act 18 of 1918, 1st Schedule. Act 18 of 1919, Act 10 of 1927. Declared in force—in the Sonthal Parganas Reg. 3 of 1872, s. 3 as amended by Reg. 3 of 1899, s. 3 ; in the Angul District Reg. 3 of 1913, S. 3 ; in the Chittagong Hill tracts, Reg. 1 of 1900, S. 4 ; in the Arakan Hill Districts, Reg. 1 of 1916, S. 2 ; in Kachin Hill tracts, as regards Hill tribes Reg. 1 of 1895, S. 3 ; in certain tracts in the Chin Hills, Reg. 5 of 1896, S. 3 ; in Upper Burmah except the Shan States (with an addition) Act 13 of 1898, S. 4 ; in British Baluchistan (with a modification) Reg. 2 of 1913, S. 3.

grantor of the license forfeit the license and become liable to ejectment. 1923 All. 403. (15 A.L.J. 592, ref.) See also A. I. R. 1925 All. 203.

Sec. 62.—See 21 A. W. N. 175.

Secs. 63 and 64.—In the absence of anything showing the restriction as to the method of building by a licensee, of a land set for building

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*For Statement of Objects and Reasons, see Gazette of India, 1868, P. 1574 ; for the draft or preliminary Report of the Select Committee, dated 31st March, 1871, see *ibid.* 1871, Pt. V, p. 273, and for the second Report of the Select Committee, dated 30th January, 1872, see *ibid.* 1872, Pt. V, p. 34 : for discussions in Council, see *ibid.* 1868, Supplement, pp. 1060 and 1209, *ibid.* 1871, Extra Supplement, p. 42, and Supplement, p. 1641 and *ibid.* 1872, pp. 136 and 230.*

THE INDIAN EVIDENCE ACT (1 OF 1872).

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THE INDIAN EVIDENCE ACT, (1 OF 1872).

[15th March, 1872.

Preamble.

WHEREAS it is expedient to consolidate, define and amend the law of evidence ; It is hereby enacted as follows :—

PART I.

RELEVANCY OF FACTS.

CHAPTER I.

PRELIMINARY.

1. This Act may be called THE INDIAN EVIDENCE ACT, 1872.

Short title.

Extent.

It extends to the whole of British India, and applies to all judicial proceedings in or before any Court, including Courts-martial [other than Courts-martial convened under the Army Act]¹ [or the Air Force Act]² but not to affidavits presented to any Court or officer, nor to proceedings before an arbitrator and it shall come into force on the first day of September, 1872.

Commencement of Act.

Sec. 1.—¹ The words in brackets were inserted by Act XVIII of 1919.

² Inserted by Act X of 1927.

But see the Army Act. (44 & 45 Vict. C. 58), S. 127, which is as follows :—

“A Court-martial under this Act shall not, as respects the conduct of its proceedings, or the reception or rejection of evidence, or as respects any other matter or thing whatsoever, be subject to the provisions of the Indian Evidence Act, 1872, or to any Act, law or ordinance of any legislature whatsoever, other than the Parliament of the United Kingdom.”

Act I of 1872 is (subject to such modifications as the Governor General in Council may direct) applicable to all proceedings before Indian Marine Courts—see Act XIV of 1887, S. 68.

Rules in this Act are rules of logic, (1914) M. W.N. 931. Act is not exhaustive. 39 C. 164 = 15 C.W.N. 1053 = 12 I.C. 273 = 12 Cr. L. J. 505 = 14 C. L. J. 375. See also 39 M. 449; 14 I. C. 721. The provisions of the Evidence Act are not exhaustive of the rules of evidence and the Courts can invoke the aid of the principles of jurisprudence of English law as supplementing and explaining the rules of evidence given in the Act. 39 Mad. 449 = 28 M. L. J. 329 = 28 I. C. 518 = 16 Cr. L. J. 294. The provisions of the Act are independent of the Rules of procedure contained in Crim. Pro. Code, and must have full scope, unless clearly repealed or altered by another statute. 7 Iah. 84 = 94 I. C. 901 = 27 Punj. L. R. 583 = A.I.R. 1926 Lah. 88. The records of the German Court authenticated in the manner prescribed by Ss. 14 and 15 of the English Extradition Act are admissible in evidence. 39 Cal. 164 = 15 C. W. N. 1753 = 12 I. C. 273. Evidence properly admitted for one purpose must be admissible for all purposes in the cause. 37 Bom. 122 = 40 I. A. 1 = 24 M. L. J. 176 = 17 C. W. N. 358. (P. C.) (O. A. from 12 Bom. L. R. 316 = 5 I. C. 457). See also 11 Bom. L. R. 926 = 4 I. C. 652. No court has a right to look at any document or any papers other than those on the record unless the Judge gives to the parties to the suit an opportunity of being heard and making their submission with regard to what is contained in documents outside the record to which the Judge desires to refer. 1923 Cal. 194. Conjecture should not be the basis of a judgment. 1924 Nag. 363. Statements which are not admissible in evidence cannot be rendered admissible by consent of parties. 1923 Lah. 630. See also 1924 P. 284; 36 I. C. 906. Omission to object to the reception of evidence does not make irrelevant evidence relevant and the objection can be taken on second appeal. 44 Bom. 192 = 55 I. C. 316 = 22 Bom. L. R. 57. See also 47 M. L. J. 640; (1924) Nag. 358; 79 I. C. 1029 = 1924 All. 918. See also 40 I. C. 553. Where a piece of evidence not proved in the proper manner has been admitted without objections the opposite party cannot challenge it at a later stage. But the principle on

which unobjected evidence, is admitted, does not apply where evidence has been received without objection in direct contravention of an imperative provision of law. 35 C. L. J. 473 = 27 C. W. N. 134 = 1922 Cal. 160. An objection as to the mode of proof not taken in the courts below cannot be taken for the first time in second appeal. 64 I. C. 266 = 36 C. L. J. 186. An erroneous omission to object to evidence which is irrelevant and consequently inadmissible under any circumstances, does not make it admissible. But the Court will not entertain for the first time in appeal an objection that a document which *per se* is not admissible in evidence has been improperly admitted in evidence. 45 Cal. 159 = 21 C.W.N. 996. Documentary evidence relevant to the case and admitted without objection in the first Court cannot be objected to in appeal on the ground that it is not admissible for the purposes for which it has been used. 40 I.C. 553. Evidence which is relevant under any circumstances whatsoever must be distinguished from evidence which is inadmissible if certain conditions were fulfilled 9 I.C. 211 = 13 C.L.J. 18; (1 C. W. N. 830 = 19 A. 76, Ref.) In the latter case objection should be taken at the earliest possible stage before the court of first instance and if such objection is not taken the appellate court will not entertain it. 9 I. C. 211 = 13 C. L. J. 18. It is too late in appeal to object to the admissibility in evidence of a document which had been admitted without objection in the First Court. 3 L. 59 = 5 L.L.J. 558 = 1922 L. 281. When at a trial, admissibility of evidence is objected to, it is the duty of the trial judge to decide at once whether it is admissible. If he holds it inadmissible the document should not find a place on the record and assessors or jurors should be warned not to rely on it. 20 Cr. L. J. 305 = 50 I. C. 481 = 98 P. L. R. 1918. A party who did not object to the admissibility of secondary evidence of a registered will even in his appeal memo. cannot be allowed to urge it. 31 I. C. 600 = 184 P. W. R., 1915. Parties, if so minded may ordinarily agree that evidence shall be taken in a particular way. That is not a matter which can be said to affect the jurisdiction of the Court. It is merely that parties allow certain materials to be used as evidence which apart from their consent cannot be so used; 43 M. L. J. 448 = 1922 M. 394. (43 M 609; 38 M. 160 foll.). If a party to suit consents to the recitals in prior judgment being taken as proof of a will, he cannot object to their admissibility on appeal. *Ibid.* The omission by a party to prevent irrelevant evidence from being admitted will not in the absence of a deliberate consent to waive objections, cure the defect. (19 A. 76 foll.) 36 I.C. 906. When the lower Court has given a finding that the document is legally proved, the appellate Court should sparingly interfere with the finding when no objection was taken at the hearing. 32 I. C. 760. It does not

follow that a document is invalid, merely because it may not be admissible in evidence. 1923 Nag. 109. Where a document is admitted without proof but without objection in the trial Court, no objection to its admissibility on the ground of want of formal proof can be taken in appeal. 44 I. C. 422=3 P. L. J. 306. If a document is once admitted in the lower Court without objection no party can take objection to its being referred to by the Court. 36 I. C. 96=10 S.L.R. 4. (11 B. 320: 34 Cal. 1059 ref.) It is not safe to assume that a case must be false if some of the evidence in support of it appears to be ambiguous or is clearly untrue. There is on some occasions a tendency amongst litigants to back up a good case by false or exaggerated evidence. 24 C. W. N. 626 (P.C.). An appellate tribunal may bring their knowledge of life and business to bear even in cases where in the lower Court contemporary communications and course of business are used, and it can say that evidence given about them at the trial cannot be true. 34 I.C. 273 (P. C.). In a matter of appreciation of evidence and the credibility of witness the opinion of the trial judge should not be lightly disturbed on appeal. 39 B. 386=42 I. A. 119=19 C. W. N. 617=28 M. L. J. 593 (P. C.) (Also 43 Cal. 707=33 I. C. 583; 43 I. A. 73; 28 C. L. J. 305=48 I. C. 561; 39 All. 426=39 I. C. 666; 27 I. C. 276=20 C. L. J. 501. Discrepancies in the statements of witnesses on material points should not be lightly passed over, as the value of their testimony is seriously affected by them. 36 All. 187=26 M. L. J. 442=8 C. W. N. 649=23 I. C. 715 (P. C.). As to appreciation of evidence, see also 45 M. L. J. 438=23 C. W. N. 589=77 I. C. 141 (P. C.) Trial judge's opinion of witness when open to criticism on appeal. 76 I. C. 63=46 M. L. J. 334. Low status of witness is not sufficient to discredit him. (1924) M. W. N. 445=80 I. C. 641=1924 P. C. 106. Where the parties to a suit are at issue on a vital question, such as the genuineness of debt's signature to the document sued on, the safe principle is to consider which story fits in with the admitted circumstances and resulting probabilities. The Privy Council upheld the finding of the Chief Court as to the genuineness of the signature, in reversal of the decision of the first Court. 38 Cal. 805=15 C. W. N. 934=13 Bom. L. R. 704=21 M. L. J. 1127=11 I. C. 801=38 I. A. 155 (P. C.). In a dispute as to facts, great weight, naturally attaches to the finding of the trial judge. 15 C. W. N. 717=10 I. C. 963=10 M. L. T. 216 (P. C.). The fact that a witness makes mistakes in identification is no reason for discrediting his evidence in other matters. 45 A. 300=21 A. L. J. 143=24 Cr. L. J. 526=1923 A. 352. In India where references to time are generally mere approximations there is a large margin of honest error. 15 Bom. L. R. 297=19 I. C. 326=14 Cr. L. J. 232. A theory of improbability in order to prevail against positive evidence must be clear and cogent; it must be such as to justify the rejection of the positive evidence as concocted and unreliable. 24 C. W. N. 860=59 I. C. 814=47 C. 1043 (39 Bom. 388; 22 Cal. 519 Ref.) Presumption against misconduct is among the probabilities to be taken into account in estimating the value of evidence and where the charac-

ter and position of the person is above reproach this probability becomes stronger. The mere fact that this or that thing in a complete transaction is improbable does not count for much as against clear and distinct evidence or reliable witness. 39 Cal. 244=13 I. C. 577=16 C. W. N. 266. The mere fact that the promissory note is stamped with a King Edward stamp does not prove that the note was executed in 1911 and not in 1915, in the absence of any evidence that there were no King Edward stamps in existence in 1915. 1923 Lah. 601. Where a witness keeps quiet for many days after the occurrence and comes forward after the police had made a discovery he is not reliable. 5 Lah. L. J. 325=1923 Lah. 438 (2). Without deliberately intending to tell a lie human beings are prone to believe what they wish, to confound what they believe with what they heard and to ascribe to memory what is merely the result of imagination. 8 O. L. J. 433=1022 Oudh 178. The evidence of respectable persons with special means of knowledge owing to relationship to the parties of the matters they depose to, should not be viewed with suspicion especially in cases where only oral evidence will ordinarily be available. 25 I. C. 660=7 O. L. J. 383. It is a good working rule not to act upon the evidence of persons who are vitally interested in the result of the case, unless, that evidence receives corroboration from surrounding circumstances. A.I.R. 1922 P. 111. Where a party comes into a Court with a story, which cannot be believed in its essential details, it is impossible to rely on a part of the story for the purpose of convicting the accused. 19 Cr. L. J. 877=47 I. C. 73=1918 Pat 288. The maxim *falsus in uno falsus in omnibus* is a maxim of ancient origin which is not now implicitly followed by Courts in the appreciation of evidence. It is the duty of the Court to sift the evidence and separate the truth from the falsehood, if it can, 1 Bur. L. J. 212=1923 Rang. 30. Circumstantial evidence in order to justify a conviction must be exhaustive and must exclude the possibility of guilt of any other person or must point conclusively to the complicity of the accused. But "exhaustive" does not mean that every incident short of the criminal act must be proved by positive evidence, and the "possibility" must not be treated as signifying "physical possibility" but so high a degree of probability that a prudent man considering all the facts and realising that the life or liberty of the accused person depends upon the decision, feels that the accused committed the crime. 18 Cr. L. J. 375=38 I. C. 759=32 P. R. (Cr.) 1916. Circumstantial evidence must like any other evidence be tested and weighed and must prevail or not by its own inherent proving force. 16 M. L. T. 535=1 L. W. 1007; 26 I. C. 332=16 Cr. L. J. 38. To justify an inference of guilt from circumstantial evidence the inculpatory facts must be incompatible, with the innocence of the accused and must be incapable of explanation upon any reasonable hypothesis other than that of his guilt, 59 I. C. 358=22 Cr. L. J. 154=1 P. L. T. 684. See also 65 P. L. R. 1917=40 P. W. R. (Cr.) 1917=42 I. C. 129; 8 C. W. N. 278; 39 I. C. 322. Circumstantial evidence is evidence of circumstances, as opposed to what is called direct evidence. 10 I. C. 929=12 Cr. L. J. 329=

2. On and from that day the following laws shall be repealed :—

Repeal of enactments.

(1) all rules of evidence not contained in any Statute, Act or Regulation in force in any part of British India ;

(2) all such rules, laws and regulations as have acquired the force of law under the 25th section of the Indian Councils Act, 1861, in so far as they relate to any matter herein provided for ; and

(3) the enactments mentioned in the schedule hereto to the extent specified in the third column of the said schedule.

But nothing herein contained shall be deemed to affect any provision of any Statute, Act, or Regulation in force in any part of British India and not hereby expressly repealed.

Interpretation-clause.

3. In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context :—

“Court”. “Court” includes all Judges¹ and Magistrates,² and all persons, except arbitrators, legally authorized to take evidence.

“Fact” “Fact” means and includes—

(1) any thing, state of things, or relation of things capable of being perceived by the senses ;

(2) any mental condition of which any person is conscious.

Illustrations.

(a) That there are certain objects arranged in a certain order in a certain place, is a fact.

(b) That a man heard or saw something, is a fact.

(c) That a man said certain words, is a fact.

(d) That a man holds a certain opinion, has a certain intention, acts in good faith, or fraudulently, or uses a particular word in a particular sense, or is or was at a specified time conscious of a particular sensation, is a fact.

(e) That a man has a certain reputation, is a fact.

4 Bur. L. T. 97. It is unsafe to rely completely on the evidence of trackers as to the correspondence of tracks. 42 I. C. 129=18 Cr. L. J. 897. Sometimes the identification of the particular accused by witnesses to whom they are strangers is useful. 17 Cr. L. J. 156=33 I. C. 636. Where a witness was examined before the committing Magistrate and was simply tendered for cross-examination in the Sessions Court and the evidence before the Committing Magistrate was marked as exhibit in the Sessions Court, such procedure is illegal. 30 I. C. 439=16 Cr. L. J. 615=1915 M. W. N. 544. Statement of accused in police custody are notoriously untrustworthy. 18 Cr. L. J. 465=20 I. C. 721=(1912) M. W. N. 825. In criminal cases, it is the weight of the evidence and not the number of the witnesses, which the Court has, and ought to consider. 22 Cr. L. J. 647=63 I. C. 407=24 O. C. 225. Conviction should be resorted to only after the reasonable exclusion of every conceivable hypothesis of innocence. 7 P. L. R. 1911=9 I. C. 400=12 Cr. L. J. 690.

Sec. 2. ENGLISH LAW.—Cl. (1) Precludes the courts from following English Rules of Evidence in future. 7 I. A. 70 (P. C.)

There are however several Acts of Parliament relating to evidence that are in force in India. See Whitley Stoke's Anglo Indian Codes Vol. II pp. 822-827; Field. p. 53, (6th Ed.) see also 14 C. 721.

Sec. 3.—¹Cf. the Code of Civil Procedure, 1908 (Act V of 1908), S. 2, the Indian Penal Code

(Act XLV of 1860), S. 19, General Acts, Vol. I, and, for a definition of “District Judge,” the General Clauses Act, 1897 (X of 1897), S. 3 (15), General Acts, Vol. IV.

² Cf. the General Clauses Act, 1897 (X of 1897) S. 3 (31), and Code of Criminal Procedure, 1898 (V of 1898).

COURT.—The definition of “court” in this Act is framed only for purposes of this Act and should not be extended beyond its legitimate scope. 12 B. 36. “Court” includes both Judge and Jury. 4 C. 483. Registrar or Sub-Registrar, not court under Crim. Pro Code. [Cr. P. C., S. 105(2)]; so also a magistrate holding preliminary enquiry in police investigation. 11 B. 702. The term, “Matters before it” include matters which do not fall within the definition of “Evidence.” 1924 Nag. 385. “Court” includes all magistrates. 36 I. C. 171=34 P. R. (Cr.) 1916.

FACT.—Fact in issue cannot be proved by one not called as a witness. 13 I. C. 220=13 Cr. L. J. 28. Misrepresentation of fact—Fact, meaning of. 36 I. C. 850=18 Cr. L. J. 18=17 P. R. (Cr.) 1916. State of a man's mind is a fact. 29 Ch. D. 483. Possession is a fact. 25 I. C. 510.

“EVIDENCE.”—This is only a definition of the word as used in the Act. 4 C. 492.

“PROVED.”—meaning of. See 107 I. C. 564.

“NOT PROVED.”—Proof in Civil and Criminal cases.—The evidence in criminal cases must be such as to exclude any reasonable doubt of guilt ; if there be any such doubt the accused is entitled to be acquitted. 22 C. 323.

One fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in the provisions of this Act relating to the relevancy of facts.

"Relevant."

"Facts in issue." The expression "facts in issue" means and includes—

any fact from which, either by itself or in connection with other facts, the existence, non-existence, nature or extent of any right, liability, or disability, asserted or denied in any suit or proceeding, necessarily follows.

Explanation.—Whenever, under the provisions of the law for the time being in force relating to Civil Procedure, any Court records an issue of fact, the fact to be asserted or denied in the answer to such issue is a fact in issue.

Illustrations.

A is accused of the murder of *B*.

At his trial the following facts may be in issue :—

that *A* caused *B*'s death ;

that *A* intended to cause *B*'s death ;

that *A* had received grave and sudden provocation from *B* ;

that *A*, at the time of doing the act which caused *B*'s death was, by reason of unsoundness of mind, incapable of knowing its nature.

"Document" means any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter.

"Document."

Illustrations.

A writing is a document ;

Words printed, lithographed or photographed are documents :

A map or plan is a document ;

An inscription on a metal plate or stone is a document ;

A caricature is a document.

"Evidence."

"Evidence" means and includes—

(1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry :

such statements are called oral evidence :

(2) all documents produced for the inspection of the Court ;

such documents are called documentary evidence.

A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

"Proved."

A fact is said to be disproved when, after considering the matters before it, the Court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist.

"Disproved."

"Not proved."

A fact is said not to be proved when it is neither proved nor disproved.

4. Whenever it is provided by this Act that the Court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it.

"May presume."

"Shall presume."

Whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved,

When one fact is declared by this Act to be conclusive proof of another, the Court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it.

"Conclusive proof."

CHAPTER II. OF THE RELEVANCY OF FACTS.

Evidence may be given of facts in issue and relevant facts.

5. Evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant, and of no others.

Explanation.—This section shall not enable any person to give evidence of a fact which he is disentitled to prove by any provision of the law for the time being in force relating to Civil Procedure.

Illustrations.

(a) *A* is tried for the murder of *B* by beating him with a club with the intention of causing his death.

At *A*'s trial the following facts are in issue :—

A's beating *B* with the club ;

A's causing *B*'s death by such beating ;

A's intention to cause *B*'s death.

(b) *A* suitor does not bring with him, and have in readiness for production at the first hearing of the case, a bond on which he relies. This section does not enable him to produce the bond or prove its contest at a subsequent stage of the proceedings, otherwise than in accordance with the conditions prescribed by the Code of Civil Procedure.

6. Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant whether they occurred at the same time and place or at different times and places.

Illustrations.

(a) *A* is accused of the murder of *B* by beating him. Whatever was said or done by *A* or *B* or the bystanders at the beating, or so shortly before or after it as to form part of the transaction, is a relevant fact.

(b) *A* is accused of waging war against the Queen by taking part in an armed insurrection in which property is destroyed, troops are attacked, and gaols are broken open. The occurrence of these facts is relevant, as forming part of the general transaction, though *A* may not have been present at all of them.

(c) *A* sues *B* for a libel contained in a letter forming part of a correspondence. Letters between the parties relating to the subject out of which the libel arose, and forming part of the correspondence in which it is contained, are relevant facts, though they do not contain the libel itself.

(d) The question is, whether certain goods ordered from *B* were delivered to *A*. The goods were delivered to several intermediate persons successively. Each delivery is a relevant fact.

7. Facts which are the occasion, cause or effect, immediate or otherwise, of relevant facts, or facts in issue, or which constitute the state of things under which they happened, or which afforded an opportunity for their occurrence or transaction, are relevant.

Illustrations.

(a) The question is, whether *A* robbed *B*.

The facts that, shortly before the robbery, *B* went to a fair with money in his possession, and that he showed it or mentioned the fact that he had it, to third persons, are relevant.

Sec. 5.—SCOPE OF SECTION.—Act does not lay down rules as to the weight of evidence ; it only deals with admissibility (Field, 6th Ed., 64.) In determining the relevancy or otherwise of any evidence the Court cannot consider matters beyond the purview of the Evidence Act. 24 I. C. 165=15 Cr. L. J. 429=12 A. L. J. 285. In a trial for murder the case against the accused should be determined on evidence which is relevant and admissible under the Act. 62 I. C. 545=22 Cr. L. J. 529=22 Bom. L. R. 1274.

Sec. 6.—Principles of the sections relating to relevancy of facts are mere rules of logic (1914) M. W. N. 931. Statement made to Police—Admissibility of. See 50 I. C. 487=20 Cr. L. J. 311=17 A. L. J. 760. Evidence of woman raped—Res gestae. See 4 Lah. L. J. 491, note under S. 8. In a case of rape, a statement made by the com-

plainant immediately after the occurrence another woman is admissible, not as evidence of the truth of the charge alleged, but as corroborating the credibility of the complainant and of the evidence of the consistency of her conduct. 43 I. C. 443=19 Cr. L. J. 155 (F. B.) Hearsay evidence—Statement of by-stander admissibility—In order to make the statement of a by-stander admissible it must have been made as contemplated by S. 6 and illustration (a) to S. 6 at the time the transaction took place or so shortly before or after as to form part of the transaction. The statement would be irrelevant if made after the transaction is complete. The admissibility depends on the continuity of the transaction. 34 P. R. (Cr.) 1914=27 I. C. 664=16 Cr. L. J. 184.

(b) The question is, whether *A* murdered *B*.

Marks on the ground, produced by a struggle at or near the place where the murder was committed, are relevant facts.

(c) The question is, whether *A* poisoned *B*.

The state of *B*'s health before the symptoms ascribed to poison, and habits of *B*, known to *A*, which afforded an opportunity for the administration of poison, are relevant facts.

Motive, preparation and previous or subsequent conduct.

8. Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact.

The conduct of any party, or of any agent to any party, to any suit or proceeding, in reference to such suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.

Explanation 1.—The word "conduct" in this section does not include statements, unless those statements accompany and explain acts other than statements; but this explanation is not to affect the relevancy of statements under any other section of this Act.

Explanation 2.—When the conduct of any person is relevant, any statement made to him or in his presence and hearing, which affects such conduct, is relevant.

Illustrations.

(a) *A* is tried for the murder of *B*.

The facts that *A* murdered *C*, that *B* knew that *A* had murdered *C*, and that *B* had tried to extort money from *A* by threatening to make his knowledge public are relevant.

(b) *A* sues *B* upon a bond for the payment of money. *B* denies the making of the bond.

The fact that, at the time when the bond was alleged to be made, *B* required money for a particular purpose, is relevant.

(c) *A* is tried for the murder of *B* by poison.

The fact that, before the death of *B*, *A* procured poison similar to that which was administered to *B*, is relevant.

(d) The question is, whether a certain document is the will of *A*.

Sec 8.—**MOTIVE.**—Per *Crumph, J.*—A motive is that which moves a man to do a particular act. Whether the belief which produces the state of mind is true or false, the motive remains the same and the truth or falsity of the belief is not really in question. 62 I.C. 545=22 Cr. L. J. 529=22 Bom. L. R. 1274. Motive can never supply want of reliable evidence of the offence. 7 Lah. 84=27 Punj. L. R. 583=94 I. C. 901=A. I. R. 1926 Lah. 88.

EVIDENCE OF CONDUCT.—As to evidence of conduct and surrounding circumstances, see 22 C. 406; 24 W. R. 176; 7 A. 385. 25 S. L. R. 55=A. I. R. 1927 Sind 28. *Res gestae*—Report by woman raped—Statements to neighbours. The statements were inadmissible under S. 6 but admissible as a complaint under S. 8. 4 Lah. L. J. 491. As to statements of a raped girl, to persons immediately after occurrence see 25 Cr. L. J. 124=82 I.C. 142=1925 Nag. 74; A.I.R. 1926 Pat. 58. Statement to Police-officer and complaint in his presence admissibility. The evidence of Police-officer and the complainant as to the pointing out of the various places by the accused was a confession of his guilt made while he was in the custody of the Police-officer and inadmissible under Ss. 25 and 26. The evidence could not be treated as evidence of conduct, apart from the accompanying statements under S. 8 of the Act, 52 I. C. 601=23 Cr. L. J. 681=21 Bom. L. R. 724. Accused pointing out spot to Police officer—Conduct. If an accused accompanies a Police officer and points out the spot. Where the stolen property is concealed it amounts to conduct proof of which is admissible under S. 8. 35 I.C. 962=

17 Cr. L. J. 402.

CONDUCT OF ACCUSED.—Where the evidence against a person charged with an offence under S. 147, I. P. C., is open to doubt, his conduct, some time after the occurrence, cannot be taken to be evidence under S. 8 and cannot be used against him in the case. 54 I. C. 775=21 Cr. L. J. 167. As to evidence of conduct or character see 97 I. C. 1041=A. I. R. 1927 Sind 28. As to evidence of subsequent conduct see also 5 W. R. (Cr.) 28; 9 A. 568. Admissibility of statements accompanying acts, see 3 B. 17; 14 B. 260; 10 B. L. R. App 2; 4 Bom. L. R. 284.

Expl. (2)—An informer's statement to the police that he purchased opium from the accused is not admissible unless it was made in the presence of the accused. 12 I. C. 87=12 Cr. L. J. 479=4 Bur. L. T. 222. But the finding of marked coins on the accused and opium on the informer are circumstances from which it may be inferred that the accused sold the opium. (*Ibid.*) The statement made by the Police-officer to the complainant in the presence of the accused that he (the accused) was going to show the various places connected with the theft was not admissible under S. 8, Expln. 2, because such a statement could not be said to affect the conduct of the accused. 52 I. C. 601=20 Cr. L. J. 681=21 Bom. L. R. 724. Absence of entries in account book is relevant fact. See 1924 Nag. 22 (10 C. 1024 Diss.; 4 C. W. N. 207 Foll.) Agent acting nefariously, presumption from 1924 S. 105; 80 I. C. 969. First Information Report as evidence of conduct—See 54 Cal. 237=99 I. C. 227=A. I. R. 1927 Cal. 17=44 C. L. J. 253.

The facts that, not long before the date of the alleged will, *A* made inquiry into matters to which the provisions of the alleged will relate, that he consulted vakils in reference to making the will, and that he caused drafts of other wills to be prepared, of which he did not approve, are relevant.

(e) *A* is accused of a crime.

The facts that, either before, or at the time of, or after the alleged crime, *A* provided evidence which would tend to give to the facts of the case an appearance favourable to himself, or that he destroyed or concealed evidence, or prevented the presence or procured the absence of persons who might have been witnesses, or suborned persons to give false evidence respecting it, are relevant.

(f) The question is, whether *A* robbed *B*.

The facts that after *B* was robbed, *C* said in *A*'s presence—"the police are coming to look for the man who robbed *B*," and that immediately afterwards *A* ran away, are relevant.

(g) The question is, whether *A* owes *B* rupees 10,000.

The facts that *A* asked *C* to lend him money and that *D* said to *C* in *A*'s presence and hearing—"I advise you not to trust *A*, for he owes *B* 10,000 rupees," and that *A* went away without making any answer, are relevant facts.

(h) The question is, whether *A* committed a crime.

The fact that *A* absconded after receiving a letter warning him that enquiry was being made for the criminal, and the contents of the letter, are relevant.

(i) *A* is accused of a crime.

The facts that, after the commission of the alleged crime, he absconded, or was in possession of property or the proceeds of property acquired by the crime, or attempted to conceal things which were or might have been used in committing it, are relevant.

(j) The question is, whether *A* was ravished.

The facts that, shortly after the alleged rape, she made a complaint relating to the crime, the circumstances under which and the terms in which, the complaint was made are relevant.

The fact that, without making a complaint, she said that she had been ravished is not relevant as conduct under this section, though it may be relevant—as a dying declaration, under section 32, clause (1), or as corroborative evidence under section 157.

(k) The question is, whether *A* was robbed.

The fact that, soon after the alleged robbery, he made complaint relating to the offence, the circumstances under which, and the terms in which, the complaint was made, are relevant.

The fact that he said he had been robbed without making any complaint, is not relevant as conduct under this section, though it may be relevant as a dying declaration under section 32, clause (1), or as corroborative evidence under section 157.

9. Facts necessary to explain or introduce a fact in issue or relevant fact, or

Facts necessary to explain or introduce relevant facts.

which support or rebut an inference suggested by a fact in issue or relevant fact, or which establish the identity of any thing or person whose identity is relevant, or fix the time or place at which any fact in issue or relevant fact happened, or which show the relation of parties by whom any such fact was transacted, are relevant in so far as they are necessary for that purpose.

Illustrations.

(a) The question is, whether a given document is the will of *A*.

The state of *A*'s property and of his family at the date of the alleged will may be relevant facts.

(b) *A* sues *B* for a libel imputing disgraceful conduct to *A*; *B* affirms that the matter alleged to be libellous is true.

The position and relations of the parties at the time when the libel was published may be relevant fact as introductory to the facts in issue.

The particulars of a dispute between *A* and *B* about a matter unconnected with the alleged libel are irrelevant, though the fact that there was a dispute may be relevant if it affected the relations between *A* and *B*.

Sec 9.—SCOPE OF SS. 9 AND 11.—See also notes under Ss. 14 and 15 *infra*. Ss. 9 and 11 read along with S. 21 of the Evidence Act amply justify a court in admitting into evidence all previous statements made by the accused which have a bearing on the question of his guilt and whether the previous statement is made to a police-officer or to an officer or to a third party is immaterial if the statement is relevant to the fact in the issue. These sections are not controlled by the Criminal Procedure Code. 73 I. C. 963 = 4 Pat. L. T. 381.

If after the commission of a crime a person whose name is mentioned as a participator in the

crime abscond his conduct implies that he is concerned in the crime. Anything therefore which tends to explain his conduct and furnishes motive other than a guilty conscience is relevant under S. 9. 62 I. C. 545 = 22 Bom. L. R. 1274. Admissibility of judgment to prove identity, see 18 A. 78. As to comparison of thumb marks to prove identity, see 1 C. W. N. 33; 9 C. W. N. 530. As to recitals of boundaries in documents between strangers to suit See 45 C. L. J. 55; 8 Lah. 657 = A. I. R. 1927 Lah. 448. See also 30 C. W. N. 761 and notes under S. 13 *infra*. Evidence of identification of accused. A. I. R. 1926 Oudh 36.

(c) *A* is accused of a crime.

The fact that, soon after the commission of the crime, *A* absconded from his house, is relevant under section 8, as conduct subsequent to and affected by facts in issue.

The fact that at the time when he left home he had sudden and urgent business at the place to which he went, is relevant, as tending to explain the fact that he left home suddenly.

The details of the business on which he left are not relevant, except in so far as they are necessary to show that the business was sudden and urgent.

(d) *A* sues *B* for inducing *C* to break a contract of service made by him with *A.C.*, on leaving *A*'s service, says to *A*—"I am leaving you because *B* has made me a better offer." This statement is a relevant fact as explanatory of *C*'s conduct, which is relevant as a fact in issue.

(e) *A*, accused of theft, is seen to give the stolen property to *B*, who is seen to give it to *A*'s wife. *B* says as he delivers it—"A says you are to hide this." *B*'s statement is relevant as explanatory of a fact which is part of the transaction.

(f) *A* is tried for a riot and is proved to have marched at the head of a mob. The cries of the mob are relevant as explanatory of the nature of the transaction.

10. Where there is reasonable ground to believe that two or more persons

Things said or done by conspirator in reference to common design. have conspired together to commit an offence or an actionable wrong, anything said, done or written by any one of such persons in reference to their common intention, after the time when such intention

was first entertained, by any one of them, is a relevant fact as against each of the persons believed to be so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it.

Illustration.

Reasonable ground exists for believing that *A* has joined in a conspiracy to wage war against the Queen.

The facts that *B* procured arms in Europe for the purpose of the conspiracy, *C* collected money in Calcutta for a like object, *D* persuaded persons to join the conspiracy in Bombay *E* published writings advocating the object in view at Agra, and *F* transmitted from Delhi to *G* at Kabul the money which *C* had collected at Calcutta and the contents of a letter written by *H* giving an account of the conspiracy, are each relevant, both to prove the existence of the conspiracy, and to prove *A*'s complicity in it, although he may have been ignorant of all of them, and although the persons by whom they were done were strangers to him, and although they may have taken place before he joined the conspiracy or after he left it.

When facts not otherwise relevant become relevant.

11. Facts not otherwise relevant are relevant—

Sec. 10.—SCOPE OF ENGLISH AND INDIAN LAW.—S. 10 is wider than the English Law. As soon as it is shown with regard to an individual conspirator or that he was in privy with the combination and its objects and adopted the acts already performed, he as a conspirator becomes bound by the antecedent and the consequent acts of his fellow-conspirators. 17 P. R. (Cr.) 1915=16 Cr.L.J. 354=28 I. C. 738. See also 37 C. 467=14 C. W. N. 1114=7 I. C. 359. There is a considerable inconsistency between S. 10 and the illustration thereto. (*Ibid.*) It is not necessary to establish by direct evidence that the accused persons did enter into an agreement to commit an offence to attract the operation of S. 10 against the accused. (*Ibid.*)

EVIDENCE OF CONSPIRACY.—Possession of sedition literature by one member is evidence against the others for finding out the object of the association, even where such possession was obtained or such essays written before the association was formed or before other members joined the association. 46 C. 215=23 C. W. N. 193=46 I. C. 152. As to evidence of conspiracy see also 30 C. 983; 4 C. W. N. 523; 25 B. 230; 28 C. 797; 7 Beng. L. R. 63 and 9 Beng. I. R. 36 App. 2. The finding of closed covers relating to the conspiracy in possession of one of the conspirators is relevant against the other under S. 10. 17 P. R. (Cr.) 1915=28 I. C. 738.

Whenever evidence is sought to be let in under S. 10 the accused is entitled to insist on strict compliance with its provisions, namely, proof of reasonable ground for belief that the persons named have conspired together. 42 C. 957=19 C. W. N. 676=21 C. L. J. 331. On a charge of conspiracy particular facts are proved to show, that one or more of the accused took part in it after general evidence of the existence of conspiracy is first given. 42 Cal. 957.

ILLUSTRATIVE CASES.—In a case of forgery, letter written by a third party to a stranger is not admissible against accused. 25 Bom. L. R. 248, See also 40 C. 783. In a charge of conspiracy evidence of gambling and cocaine cases prior to conspiracy charged are admissible in evidence. 46 C. 710=54 I. C. 53. The evidence of an Excise Inspector of raids on the dens was admissible as leading up to the admissions made to him. (*Ibid.*) Confession of co-accused by itself not sufficient to have a conviction upon. 48 All. 409=95 I. C. 74=24 A. L. J. 410=A. I. R. 1926 AH. 377.

Sec. 11.—[See also Notes under S. 13 *infra*.]

SCOPE OF SECTION.—See also notes under S. 9. "Highly probable," meaning of, 13 M. L. T. 282=18 I. C. 997. Proof of custom opposed to personal law. See 8 I. C. 897. Section to be liberally construed. The illustrations do not go beyond cases familiar in English law. 11 B. H.

- (1) if they are inconsistent with any fact in issue or relevant fact ;
- (2) if by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable.

Illustrations.

- (a) The question is, whether *A* committed a crime at Calcutta on a certain day. The fact that, on that day, *A* was at Lahore is relevant.
The fact that, near the time when the crime was committed, *A* was at a distance from the place where it was committed, which would render it highly improbable, though not impossible, that he committed it, is relevant.
- (b) The question is, whether *A* committed a crime.
The circumstances are such that the crime must have been committed, either by *A, B, C.* or *D.* Every fact which shows that the crime could have been committed by no one else, and that it was not committed by either *B, C* or *D,* is relevant.

In suits for damages, facts tending to enable Court to determine amount are relevant.

12. In suits in which damages are claimed, any fact which will enable the Court to determine the amount of damages which ought to be awarded, is relevant.

Facts relevant when right or custom is in question.

13. Where the question is as to the existence of any right or custom, the following facts are relevant :—

- (a) any transaction by which the right or custom in question was created, claimed, modified, recognized, asserted or denied, or which was inconsistent with its existence ;
- (b) particular instances in which the right or custom was claimed, recognized or exercised, or in which its exercise was disputed, asserted or departed from.

C. 90-91. On this section *see also* 1925 Pat. 68 ; 1924 Cal. 1067 ; 28 C. W. N. 1092 ; 1924 Mad. 537=34 M. L. T. 355. A judgment in civil suit is relevant under S. 11. 37 Mad. 238=23 M. L. J. 447=17 I. C. 544=(1912) M.W.N. 1029. Entry in Butwara papers—*see* A. I. R. 1926 Cal. 115. Entry in Hospital Register.—An entry made in a Register of in-door patients in a hospital is admissible in evidence to prove that the person mentioned in the entry was in the hospital on a certain date. 56 P. L. R. 1918=43 I. C. 429. Statement of wounded person on the day of occurrence. Accused was charged with having caused grievous hurt to one of his wives and having killed another. The wounded woman on the day of the occurrence on her arrival in hospital made a statement to a Magistrate to the effect that it was the accused who had attacked herself and her co wife. *Held* S. 11 does not justify the admission of the contents of the statements. 54 I. C. 887=23 C. W. N. 933. Letter written by accused.—A letter written by the accused where it is self-condemnatory is *prima facie* evidence against him and is admissible in evidence ; it is enough if it can be traced to the writer. It is admissible though it was intercepted or surreptitiously detained and opened. 41 Cal. 545=22 I. C. 179=18 C. W. N. 386. Facts disclosing similar fraudulent transactions are admissible to prove intent. 39 A. 273=39 I. C. 673=15 A. L. J. 241. Horoscope. *See* 21 O. C. 298=48 I. C. 400. Police Report. *See* 2 O. L. J. 299=30 I. C. 292.

Sec. 12.—*See* 47 C. 671=24 C. W. N. 501=58 I. C. 929.

Sec. 13—SCOPE OF SECTION.—“Transaction” meaning of, *see* 31 C. W. N. 32=99 I. C. 189=A. I. R. 1927 Cal. 1. Section not confined to public rights, but also applies to private rights. 6 C. 171. *See also* 39 C. L. J. 526. It also covers rights of ownership and also incorporeal

rights. 10 B. 439 ; 15 M. 12 ; 12 A. 1.

DOCUMENTS ADMITTED UNDER THIS SECTION.—Under this section, maps (5 C. 287) ; rent receipts (16 M. 194) ; entries in taluq maps (22 I. C. 645) ; old maps (16 C. W. N. 116=13 I. C. 332) ; sale deeds (23 W. R. 293). Zamin-dari papers (101 I. C. 792=A. I. R. 1927 Cal. 576) ; Documents under which title to land is devised, when title is in question, have been admitted. (*Ibid*) As to chittas by Government. *See* 98 I. C. 85. Judgments not *inter partes* in previous cases in which the right involved in the present litigation was asserted are admissible. 60 I. C. 142. *See also* A. I. R. 1927 Nag. 19 ; 13 O. L. J. 684=1 Luck. 50 ; 13 O. L. J. 696=1 Luck. 489 ; 6 C. 171 ; 28 C. W. N. 942 ; 82 I. C. 99=1926 Cal. 194 ; 40 C. L. J. 30=82 I. C. 392=1924 Cal. 1046 (Proceedings under S. 145, Cr. P. C.) ; 1924 Oudh 19 ; 11 C. 745 ; 15 C. 233 ; 13 C. 352 ; 12 M. 9 ; 15 M. 12 ; 22 I. A. 60 ; 24 I. A. 10 ; 29 I. A. 24 ; 25 C. 522 ; 24 B. 598, 599 ; 40 I. C. 159. Judgments not *inter partes* are admissible to show existence of custom of a public nature. *see* 7 W. R. 210 ; 7 M. H. C. 307 ; 12 M. 9, *also* as authoritative statement of facts as found by the court. 94 I. C. 694=9 N. L. J. 215 (22 W. R. 365 ; 24 Bom. 591 ; A. I. R. 1926 Nag. 109 R.) 22 N. L. R. 49 ; A. I. R. 1926 Nag. 129 ; A. I. R. 1926 Oudh 578. Assertion of right under cl. (b) need not be successful assertion. 92 I. C. 104. As to family custom, *see* 82 I. C. 886=40 C. L. J. 331.

RECITAL OF BOUNDARIES IN DOCUMENTS BETWEEN STRANGERS, not admissible. 8 Lah. 651=103 I. C. 889=A. I. R. 1927 Lah. 448 ; *See also* 45 C. L. J. 55 ; 44 C. L. J. 582=99 I. C. 907=A. I. R. 1927 Cal. 230 (following 23 Bom. 63 ; 11 Bom. L. R. 409 ; 14 C. L. J. 467) ; 101 I. C. 542=45 C. L. J. 138 ; 30 C. W. N. 826=1926 C. 822=30 C. W. N. 761 ; A. I. R. 1926 Cal. 479.

Illustration.

The question is whether *A* has a right to a fishery. A deed conferring the fishery on *A*'s ancestors, a mortgage of the fishery by *A*'s father, a subsequent grant of the fishery by *A*'s father irreconcilable with the mortgage, particular instances in which *A*'s father exercised the right, or in which the exercise of the right was stopped by *A*'s neighbours, are relevant facts.

14. Facts showing the existence of any state of mind, such as intention, know-

Facts showing existence of state of mind, or of body, or bodily feeling.

ledge, good faith, negligence, rashness, ill-will or good-will towards any particular person, or showing the existence of any state of body or bodily feeling, are relevant, when the existence of any such state of mind or body or bodily

feeling is in issue or relevant.

[*Explanation 1.*—A fact relevant as showing the existence of a relevant state of mind must show that the state of mind exists, not generally, but in reference to the particular matter in question.

[*Explanation 2.*—But where, upon the trial of a person accused of an offence the previous commission by the accused of an offence is relevant within the meaning of this section, the previous conviction of such person shall also be a relevant fact.]

Illustrations.

(a) *A* is accused of receiving stolen goods knowing them to be stolen. It is proved that he was in possession of a particular stolen article.

The fact that, at the same time, he was in possession of many other stolen articles is relevant, as tending to show that he knew each and all of the articles of which he was in possession to be stolen.

¹[(b) *A* is accused of fraudulently delivering to another person a counterfeit coin which, at the time when he delivered it, he knew to be counterfeit.

The fact that, at the time of its delivery, *A* was possessed of a number of other pieces of counterfeit coin is relevant.

The fact that *A* had been previously convicted of delivering to another person as genuine a counterfeit coin knowing it to be counterfeit is relevant.]

(c) *A* sues *B* for damage done by a dog of *B*'s, which *B* knew to be ferocious.

Sec. 14.—Expls. 1 and 2 were substituted by Act III of 1891, S. 1 (1). Acts of court are presumed to be regular. 96 I. C. 591 = A. I. R. 1926 All. 691.

¹ Ill. (b) was substituted by Act III of 1891, S. 1 (2).

See 75 Ind. Cases 67 and 70.

ILLUS. (b).—See 8 B. 223; 11 B. H. C. 90; 93; 61 I. C. 647.

ILLUS. (c).—See 13 B. 532.

Secs. 14 and 15.—RELATION OF SS. 14 AND 15.—Opinions of Judges.—Evidence of the opinions of the other Judges on other documents written or attested by the accused in proceedings to which he is not a party is not admissible to prove his intention or knowledge in his trial for giving false evidence in respect of an alleged forged document. 38 I. C. 723 = 13 N. L. R. 35. S. 15 must be read subject to S. 14 so far as evidence of knowledge and intention is concerned. (*Ibid.*)

PREVIOUS CONVICTION—EVIDENCE OF NOT ADMISSIBLE TO SHOW STATE OF MIND. 60 I. C. 331 = 5 Pat. L. J. 706. (27 C. 139; 1 C. W. N. 146 Foll.).

EVIDENCE OF PREVIOUS CRIME—ADMISSIBILITY.—When a person is charged with an offence, evidence of his participation in an independent crime cannot be received as substantive evidence of the offence on trial but evidence may be given to prove the elements mentioned in S. 14, such as intention, etc. 22 I. C. 187 = 18 C. L. J. 578. In a prosecution under S. 209, Penal Code, evidence relating to other suits by the accused against other persons may be admis-

sible under Ss. 14 and 15 to show the *animus* of the accused, and a systematic course of fraud and to rebut the plea of good faith or mistake. 46 I. C. 896 = 22 C. W. N. 494. But the evidence relating to similar suits by other persons is not admissible, unless those suit form part of the same transaction or the result of a conspiracy between them. 46 I. C. 696 = 22 C. W. N. 494. See also 6 B. H. C. 90. Series of similar acts involving forgery is evidence of intention but not forgery itself. 40 Cal. 783 = 33 I. C. 306 = 20 C. W. N. 262.

PREVIOUS DACOITIES.—In a charge of dacoity, evidence of other dacoities committed by the accused is inadmissible either under S. 14 or 15 (1912) M. W. N. 49 = 13 I. C. 781. In a case where the offence for which the accused are being tried is the particular one of belonging to a gang of dacoits, simple theft or bad livelihood, in which the order for giving security is based on evidence merely that the accused habitually commits thefts (as opposed to dacoity and possibly robbery) is not evidence indicating an intention to commit the particular crime of which the accused is charged. 45 Bom. 958 = 25 Bom. L. R. 214 = 1923 Bom. 71.

PREVIOUS CHEATING.—Where a licensed clerk was charged with cheating by collecting 2 annas more than what was due, from each licensee, evidence of action with others is not admissible under S. 14 or 15, 34 All. 93 = 12 I. C. 987 = 8 A. L. J. 1269.

COUNTERFEIT COINS AND INSTRUMENTS.—In a trial of a person for being in possession of

The facts that the dog had previously bitten X, Y and Z, and that they had made complaints to B, are relevant.

(d) The question is, whether A, the acceptor of a bill of exchange, knew that the name of the payee was fictitious.

The fact that A had accepted other bills drawn in the same manner before they could have been transmitted to him by the payee if the payee had been a real person, is relevant as showing that A knew that the payee was a fictitious person.

(e) A is accused of defaming B by publishing an imputation intended to harm the reputation of B.

The fact of previous publications by A respecting B, showing ill-will on the part of A towards B is relevant, as proving A's intention to harm B's reputation by the particular publication in question.

The facts that there was no previous quarrel between A and B, and that A repeated the matter complained of as he heard it, are relevant, as showing that A did not intend to harm the reputation of B.

(f) A is sued by B for fraudulently representing to B that C was solvent, whereby B, being induced to trust C, who was insolvent, suffered loss.

The fact that at the time when A represented C to be solvent, C was supposed to be solvent by his neighbours and by persons dealing with him, is relevant, as showing that A made the representation in good faith.

(g) A is sued by B for the price of work done by B, upon a house of which A is owner, by the order of C, a contractor.

A's defence is that B's contract was with C.

The fact that A paid C for the work in question is relevant, as proving that A did, in good faith, make over to C the management of the work in question, so that C was in a position to contract with B on C's own account, and not as agent for A.

(h) A is accused of the dishonest misappropriation of property which he had found, and the question is whether, when he appropriated it, he believed in good faith that the real owner could not be found.

The fact that public notice of the loss of the property had been given in the place where A was, is relevant, as showing that A did not in good faith believe that the real owner of the property could not be found.

The fact that A knew, or had reason to believe, that the notice was given fraudulently by C, who had heard of the loss of the property and wished to set up a false claim to it, is relevant, as showing that the fact that A knew of the notice did not disprove A's good faith.

(i) A is charged with shooting at B with intent to kill him. In order to show A's intent the fact of A's having previously shot at B may be proved.

(j) A is charged with sending threatening letters to B. Threatening letters previously sent by A to B may be proved, as showing the intention of the letters.

(k) The question is, whether A has been guilty of cruelty towards B, his wife. Expressions of their feeling towards each other shortly before or after the alleged cruelty are relevant facts.

(l) The question is, whether A's death was caused by poison.

Statements made by A during his illness as to his symptoms are relevant facts.

(m) The question is, what was the state of A's health at the time an assurance on his life was effected.

Statements made by A as to the state of his health at or near the time in question are relevant facts.

(n) A sues B for negligence in providing him with a carriage for hire not reasonably fit for use, whereby A was injured.

The fact that B's attention was drawn on other occasions to the defect of that particular carriage is relevant.

The fact that B was habitually negligent about the carriages which he let to hire is irrelevant.

(o) A is tried for the murder of B by intentionally shooting him dead.

The fact that A on other occasions shot at B is relevant as showing his intention to shoot B.

counterfeit coins and instruments and materials for counterfeiting in his house in the district where he is tried evidence of such possession in his house in another district is admissible. 61 I. C. 647 = 22 Cr. L. J. 407.

POSSESSION OF STOLEN CATTLE.—In Sind possession of stolen cattle three or four months after theft is sufficient to raise presumption of guilt under section; but the accused may set

up title by lawful origin to rebut the presumption 38 I. C. 971 = 10 S. L. R. 167. The accused was charged under S. 420, I. P. C., for having borrowed money on mortgage, representing himself to be major, though he was minor, *held*, that the evidence of transactions which took place on the occasion of the loan was relevant to show the intention or knowledge or otherwise of the accused. L. R. 1 A. (Cr.) 103.

The fact that *A* was in the habit of shooting at people with intent to murder them is irrelevant.

(*p*) *A* is tried for a crime.

The fact that he said something indicating an intention to commit that particular crime is relevant.

The fact that he said something indicating a general disposition to commit crimes of that class is irrelevant.

Facts bearing on question whether act was accidental or intentional.

15. When there is a question whether an act was accidental or intentional, [or done with a particular knowledge or intention,]¹ the fact that such act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is relevant.

Illustration.

(*a*) *A* is accused of burning down his house in order to obtain money for which it is insured.

The facts that *A* lived in several houses successively, each of which he insured, in each of which a fire occurred, and after each of which fires *A* received payment from a different insurance office, are relevant, as tending to show that the fires were not accidental.

(*b*) *A* is employed to receive money from the debtors of *B*. It is *A*'s duty to make entries in a book showing the amounts received by him. He makes an entry showing that on a particular occasion he received less than he really did receive.

The question is, whether this false entry was accidental or intentional.

The facts that other entries made by *A* in the same book are false, and that the false entry is in each case in favour of *A*, are relevant.

(*c*) *A* is accused of fraudulently delivering to *B* a counterfeit rupee.

The question is, whether the delivery of the rupee was accidental.

The facts that, soon before or soon after the delivery to *B*, *A* delivered counterfeit rupees to *C*, *D* and *E* are relevant, as showing that the delivery to *B* was not accidental.

16. When there is a question, whether a particular act was done, the existence of any course of business, according to which it naturally would have been done, is a relevant fact.

Existence of course of business when relevant.

Sec. 15.—¹ The words within brackets were inserted by Act III of 1891, S. 2.

SCOPE OF SECTION.—Per *Walsh, J.*—S. 15 is applicable to all cases where the question is whether an untruthful statement is "accidental or intentional or made with particular knowledge or intention." 39 I. C. 673=39 All. 273=15 A. L. J. 241. There is a presumption of user as of right from open user for a long time. 95 I. C. 269=A. I. R. 1926 Lah. 522.

SUBSEQUENT OCCURRENCES.—S. 15 covers both previous and subsequent similar occurrences 46 I. C. 696=22 C. W. N. 494.

INCIDENTS IN A SERIES OF SIMILAR TRANSACTIONS.—Where the accused administered *Dhatara* poison to *A* and *B*, both of whom died from the effects thereof, and on the following day administered the same poison to *D*, who also died, the acts against *A* and *B*, are relevant to a case of murder of *D*, as forming incidents in a series of similar transactions occurring about the same time and tending to show system and intention. 9 I. C. 931=32 P. L. R. 1911. See also 6 N. L. J. 144=73 I. C. 262=1923 Nag. 248. Evidence of similar acts may be received to prove a party's knowledge of the nature of the main fact or transaction of his intent with respect thereto. 19 C. W. N. 676=45 Cal. 957=29 I. C. 513. To admit evidence under this head the other acts must be of the same specific kind as the one in question and not of a different character. (*Ibid.*) The acts tendered must also have been proximate in point of time to that in question. (*Ibid.*).

EVIDENCE OF ASSOCIATION AND JOINT ACTION.—S. 15, is not applicable where there was no question of the act being accidental or intentional or forming part of a series of similar transactions. 47 C. 671=24 C. W. N. 501=58 I. C. 929 (F. B.) S. 14 would not also apply where the defence was a complete denial and no question of the character contemplated in S. 14 did or could possibly arise. (*Ibid.*) Where the accused who were charged with dacoity pleaded that their presence in company and armed, at a spot was accidental and innocent, it is open to the prosecution to rebut this theory, and to produce evidence that in the same locality raids have taken place in which one of the gang had been concerned. 71 I. C. 360=24 Cr. L. J. 136 (Pesh.) In the case of actual dacoity the prosecution is bound to prove the accused's commission of all the acts which constitute the offence. (*Ibid.*) S. 15 admits the production of any evidence which would determine the construction to be placed upon acts which in themselves might or might not be the preparation for decoity and evidence that one or more members of the gang had been concerned in previous and similar offences committed at the same place is admissible in evidence for this purpose. (*Ibid.*).

Sec. 16—Refusal of a registered letter sent by post precludes the person refusing from pleading ignorance of its contents, 16 W. R. 223; See also 15 C. 681; 9 A. 366. But there must be evidence of posting and of proper address, See S. 114 illus. (f.).

Illustrations.

(a) The question is whether a particular letter was despatched.

The facts that it was the ordinary course of business for all letters put in a certain place to be carried to the post, and that particular letter was put in that place, are relevant.

(b) The question is, whether a particular letter reached A. The facts that it was posted in due course, and was not returned through the dead Letter Office, are relevant.

ADMISSIONS.

17. An admission is a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons, and under the circumstances, hereinafter mentioned.

Admission defined.

18. Statements made by a party to the proceeding, or by an agent to any such party, whom the Court regards, under the circumstances of the case, as expressly or impliedly authorized by him to make them, are admissions.

Admission by party to proceeding or his agent :

by suitor in representative character :

Statements made by parties to suits suing or sued in a representative character, are not admissions, unless they were made while the party making them held that character.

Sec. 17.—Admission may be verbal or contained in documents (as) maps, bills, receipts, pleadings, letters, books, and other entries or even horoscopes. See Field, 6th Ed. p. 83; Amir Ali 3rd Ed. 201, 23 W. R. 325; 11 C. L. J. 22; 5 C. 864; 22 W. R. 220; 7 W. R. 249; 9 W. R. 162; 23 W. R. 27; (1924) Oudh 19; 28 M. L. J. 266; 28 M. L. J. 92=26 I. C. 899. The entire statement must be taken together, particular passages cannot be selected to the exclusion of the rest. Admission operates merely to shift the onus and raise only a rebuttable presumption. 1924 Nag. 387. Admission must be deemed to be exhaustive. It must be read as it stands and it is not permissible to take one part of an admission and reject another part. 49 A. 707=25 A. L. J. 572=100 I. C. 1037=A. I. R. 1927 All. 385. Admissions are of no evidential value once they are proved untrue. 49 A. 707=25 A. L. J. 572=100 I. C. 1037=A. I. R. 1927 All. 385. As to who can make binding admissions see 26 C. W. N. 273=15 L. W. 404=A. I. R. 1922 P. C. 102. As to admissions gathered from entries in account books see 23 L. W. 272=96 I. C. 429=A. I. R. 1926 Mad 955. As to admissibility of statement of accused to police as admission. 44 C. L. J. 253=A. I. R. 1927 Cal. 17. As to effect of erroneous admission, see 77 I. C. 875.

VAGUE ADMISSION IS NO ADMISSION.—21 A. L. J. 869=1924 All. 193.

ADMISSION IN FIRST INFORMATION REPORT is valuable corroborative evidence, it can not support a conviction, when the maker of the report himself is an accused person and cannot therefore be examined as a witness. 63 I. C. 822=22 Cr. L. J. 694 (Lah.). But where such a report contains an admission not amounting to a confession, the admission is admissible in evidence against the accused. (*Ibid*).

Sec. 18.—For an admission to be relevant, it should be shown that the person who made it had an interest at the time of making it within S. 18. 21 I. C. 714=19 C. L. J. 1. Admission not to be used against a co-defendant unless it is made in his character of a person jointly interested with the co-defendant. 30 C. W. N. 254=A. I. R. 1926 Cal. 705.

ADMISSION BY PARTIES TO SUIT.—Such admissions are generally contained in pleadings, written statements or depositions. See 7 W. R.

249; 9 W. R. 162; 5 B. L. R. 529; 14 W. R. (P. C.) 28; 13 M. I. A. 438; 15 W. R. 437; 17 W. R. 372; 22 W. R. 303; 23 W. R. 27. Such writings (to become admissible) must conform to legal requirements. 24 W. R. 114; 6 C. 762=8 C. L. R. 292. See also 21 W. R. 34; (*Ibid*) 414.

ADMISSION BY AGENT, BINDING ON PRINCIPAL.—See 2 Bom. L. R. 651. The fact of agency must be proved. 3 B. L. R. 273; 46 I. C. 709=19 Cr. L. J. 789.

ADMISSION BY COUNSEL ATTORNEYS AND PLEADERS.—As to circumstances when they are binding on the client and when not. see 18 M. 73. Admission by pleader in Lower Court cannot be set aside by engaging another pleader in appeal. See 102 I. C. 283 following 9 W. R. 465; 11 M. I. A. 253; 6 C. W. N. 52; 21 Mad. 279; 22 Mad. 538. (Adverse opinion expressed by vakil in argument not binding on client; 9 W. R. 375; 9 W. R. 485; 2 M. J. A. 253 (*Bona fide* admission of fact by a vakil is binding on client). But see also 17 W. R. (Cr.) 49, where the court held that such admissions are not binding in criminal cases; (*See also* 27 C. 428); nor when they relate to matters of law. See 18 W. R. 367; 16 W. R. 246.

ADMISSION BY PARTNERS.—See 11 C. 588. Admissions by one of several co-defendants. Such admission can only bind the persons making it. 22 W. R. 519; 6 A. 395; 7 A. 353; 22 I. A. 113; 22 W. R. 214; 9 C. L. R. 359; 2 C. W. N. 166; 11 C. 588; W. R. (F. B. Rul.) 23. Admissions by guardians do not generally bind the wards. See 10 C. L. R. 377; 20 W. R. 223. (Signature of guardian when not binding on minor, 13 C. 292). So also are admissions by guardian *ad litem* or next friend. (Tay, Evi. 8th Ed. S. 742. Field, 6th Ed., p. 89.) As to Admissions by Court of Wards, see 24 I. A. 107. Statements made by suitor in representative capacity are binding. See 1 W. R. 339 (executor); see also 8 W. R. 63; 14 W. R. 162. As to statements by interested persons when binding. see 5 W. R. 268; 10 W. R. 89; 14 W. R. 484; 18 W. R. 105; 22 I. C. 714=19 C. L. J. 1. Evidence as to admissions and promises made by alleged thieves before a *Punchayat* is admissible without proof of the actual words used. 13 P. R. 1914 (Cr.)=26 I. C. 625.

Statements made by—

(1) persons who have any proprietary or pecuniary interest in the subject-matter of the proceeding, and who make the statement in their character of persons so interested; or

(2) persons from whom the parties to the suit have derived their interest in the subject-matter of the suit, are admissions, if they are made during the continuance of the interest of the persons making the statements.

19. Statements made by persons whose position or liability it is necessary to prove as against any party to the suit, are admissions, if such statements would be relevant as against such persons in relation to such position or liability in a suit brought by or against them, and if they are made whilst the person making them occupies such position or is subject to such liability.

Illustrations.

A undertakes to collect rents for *B*.

B sues *A* for not collecting rent due from *C* to *B*.

A denies that rent was due from *C* to *B*.

A statement by *C* that he owed *B* rent is an admission, and is a relevant fact as against *A*, if *A* denies that *C* did owe rent to *B*.

Admissions by persons expressly referred to by party to suit.

20. Statements made by persons to whom a party to the suit has expressly referred for information in reference to a matter in dispute are admissions.

Illustration.

The question is whether a horse sold by *A* to *B* is sound.

A says to *B*—"Go and ask *C*; *C* knows all about it." *C*'s statement is an admission.

21. Admissions are relevant and may be proved as against the person who makes them, or his representative in interest; but they cannot be proved by or on behalf of the person who makes them or by his representative in interest, except in the following cases:—

Proof of admissions against persons making them, and by or on their behalf.

Sec. 19.—On the section. See 5 M. 239; 25 M. L. J. 51; 25 M. L. J. 329=20 I. C. 792; 62 I. C. 417. Ss. 19 & 20 are exceptions to the general rule in S. 18.

Sec. 20.—See also notes under S. 18 *supra*—A party to a litigation is not bound by the statements of the muktear of the opposite side who was cross-examined by the parties. 4 U. P. L. R. 9 (Rev.). Unless an express reference has been made to a witness on a certain question his statement will not constitute an admission as regards that question. L. R. 2. All. 204. Admission by person nominated by the parties. 80 I. C. 16=46 All. 710=1924 All. 570. See also 42 M. 625; 21 A. L. J. 209=71 I. C. 761. Agreement to be bound by the statement of a referee is an admission. See 103 I. C. 34=A. I. R. 1927 All. 659 (A. I. R. 1924 All. 570 Foll.). Effect of admission. See 37 I. C. 933. Effect of entry by creditor in debtor's books. See 14 Bom. L. R. 1020.

Sec. 21.—ADMISSIONS BY REPRESENTATIVE IN INTEREST are binding. See 22 C. 909=22 I. A. 129; A. I. R. 1926 Oudh 41; 24 C. 62 (purchaser at execution sale is representative of judgment-debtor and is bound by the latter's admissions. See also 1924 Nag. 208); 8 I. A. 65=10 C. L. R. 281; 17 M. 220; 31 C. 380; 100 I. C. 835=26 C. W. N. 273=15 L. W. 424=A. I. R. 1922 P. C. 102 (P. C.).

ADMISSION BY WITNESS. - Where in cross-examination a witness admits that a statement previously made by him is false he ought to be asked in re-examination why he made a statement which was false. The mere fact that the witness acknowledges the previous statement to be false is no justification for rejecting such previous statement, if on other grounds the Court is able to reach the conclusion that the statement is in substance true. 51 I. C. 449=20 Cr. I. J. 465 See also 13 C. W. N. 409=1 I. C. 320; 8 P. W. R. 1910=7 I. C. 505; 20 W. R. 69; 2 A. L. J. 21. Admissions by the accused made before the beginning of the proceedings alone can be proved under S. 21, as in a Civil suit. 36 Mad. 457=22 M. L. J. 73=12 I. C. 961=12 Cr. L. J. 585. The deposition of an insolvent reduced to writing is admissible as evidence against him in a criminal charge. 54 I. C. 478=46 Cal. 996 [(1896) 2 Q. B. 260=19 Ch. D. 580 Ref.] Oral and documentary evidence as to the statements of a postman in a departmental enquiry are inadmissible in evidence in his absence. 26 I. C. 307 (1)=16 Cr. L. J. 3. Statement on oath at a coroner's inquest is admissible at the trial. 50 Bom. 111=28 Bom. L. R. 111=A. I. R. 1926 Bom. 151.

A party cannot use in his favour an admission by his predecessor made in his own interest. 41 Cal. 57=17 C. W. N. 1013=20 I. C. 78. See

(1) An admission may be proved by or on behalf of the person making it, when it is of such nature that, if the person making it were dead, it would be relevant as between third persons under section 32.

(2) An admission may be proved by or on behalf of the person making it, when it consists of a statement of the existence of any state of mind or body, relevant or in issue, made at or about the time when such state of mind or body existed, and is accompanied by conduct rendering its falsehood improbable.

(3) An admission may be proved by or on behalf of the person making it, if it is relevant otherwise than an admission.

Illustrations.

(a) The question between *A* and *B* is, whether a certain deed is or is not forged. *A* affirms that it is genuine, *B* that it is forged.

A may prove a statement by *B* that the deed is genuine, and *B* may prove a statement by *A* that the deed is forged; but *A* cannot prove a statement by himself that the deed is genuine, nor can *B* prove a statement by himself that the deed is forged.

(b) *A*, the captain of a ship, is tried for casting her away.

Evidence is given to show that the ship was taken out of her proper course.

A produces a book kept in the ordinary course of his business showing observations alleged to have been taken by him from day to day and indicating that the ship was not taken out of her proper course. *A* may prove these statements, because they would be admissible between third parties, if he were dead, under section 32, clause (2).

(c) *A* is accused of a crime committed by him at Calcutta.

He produces a letter written by himself and dated at Lahore on that day, and bearing the Lahore post-mark of that day.

The statement in the date of the letter is admissible, because, if *A* were dead, it would be admissible under section 32, clause (2).

(d) *A* is accused of receiving stolen goods knowing them to be stolen.

He offers to prove that he refused to sell them below their value.

A may prove these statements, though they are admissions, because they are explanatory of conduct influenced by facts in issue.

(e) *A* is accused of fraudulently having in his possession counterfeit coin which he knew to be counterfeit.

He offers to prove that he asked a skilful person to examine the coin as he doubted whether it was counterfeit or not, and that that person did examine it and told him it was genuine.

A may prove these facts for the reasons stated in the last preceding illustration.

- 22.** Oral admissions as to the contents of a document or not relevant, unless and until the party proposing to prove them shows that he is entitled to give secondary evidence of the contents of such document under the rules hereinafter contained, or unless the genuineness of a document produced is in question.

When oral admissions as to contents of documents are relevant.

- 23.** In civil cases no admission is relevant, if it is made either upon an express condition that evidence of it is not to be given, or under circumstances from which the Court can infer that the parties agreed together that evidence of it should not be given.

Admissions in civil cases when relevant.

also 93 I. C. 996 = A. I. R. 1926 Lah. 381. As to admission in *Butuara* proceedings. *See* A. I. R. 1926 Cal. 290. A confession is evidence for the prisoner as well as against him and must be taken altogether. 52 I. C. 145 = 20 Cr. L. J. 737 (Nag). But it is only where no other evidence is forthcoming that this can be pressed to the extent of requiring that no part be accepted as true without accepting the whole. (*Ibid.*) (26 W. R. 15 (Cr.) and 25 W. R. 23 (Cr.) Foll.) If other evidence incompatible with a part of the confession is on record it may be relied on in preference to that part. 53 I. C. 145 = 20 Cr. L. J. 737 (Nag). Danger of resting judgment upon verbal admissions of sum due. *See* 10 I. C. 79 = 13 C. L. R. 271.

DENIALS OF PARTY.—Though Court is bound to receive admissions in evidence, no such rule applies to denials. 49 All. 482 = 25 A. L. J. 327 = 100 I. C. 707 = A. I. R. 1927 All. 383.

Sec. 23.—"When an attorney goes to an adverse party with a view to a compromise or to an action, you must always look with great care to his evidence of what then occurred." Lord St. Leonards in 5 H. L. Cases at p. 245. Admission before a person to whom the parties went for a compromise are admissible *see* 95 I. C. 363 = A. I. R. 1926 Lah. 548. But an offer of a certain compensation without prejudice in land acquisition proceedings is not admissible. 92 I. C. 319 = A. I. R. 1926 Lah. 509.

Explanation.—Nothing in this section shall be taken to exempt any barrister, pleader, attorney or vakil from giving evidence of any matter of which he may be compelled to give evidence under section 126.

24. A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise¹ having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the Court,

Sec. 24.—¹ For prohibition of such inducements, etc., see the Code of Criminal Procedure, 1898 (Act V of 1898), S. 343.

CONFESSION, WHAT IS—Any statement by a person which would suggest an inference as to his guilt may be a confession. 22 Cr. L. J. 68 = 59 I. C. 324 = 22 Bom. L. R. 1247. [As to 'confession to panchayatdars, see 25 Cr. L. J. 260 = 76 I. C. 829 = 1924 Mad. 230]. S. 24 will apply even if the person confessing was not accused person at the time of confession. A statement falling within S. 339 (2) of the Code excludes the operation of S. 24. 22 Cr. L. J. 68 = 59 I. C. 324 = 22 Bom. L. R. 1247. To constitute a 'confession' under the Evidence Act, it is not necessary that the person confessing should make a full and explicit admission of his guilt so clean as to leave no other hypothesis tenable. It is enough if they lead to an inference of guilt. 43 I. C. 605; 19 Cr. L. J. 189 (Mad.). The words "accused person" in Ss. 24 to 26 include any person who subsequently becomes accused, provided that at the time of making the statement criminal proceedings were in prospect, (*Ibid.*).

INADMISSIBLE CONFESSION.—Inadmissible confession would be inadmissible wholly 38 I. C. 767 = 18 Cr. L. J. 383 (Bur.).

ACCEPTANCE OR REJECTION OF CONFESSION.—The Court is at liberty to disregard any statement in the confession which it disbelieves. 46 I. C. 705 = 19 Cr. L. J. 785 (Nag.).

CONFESSION—EVIDENTIARY VALUE.—All parts of a confession are not entitled to equal weight. Some may be believed while others rejected. 3 O. W. N. 800 = 98 I. C. 178 = A. I. R. 1926 Oudh 618. The rule which excludes evidence of statements made by a prisoner, when they are induced by hope held out or fear inspired by a person in authority is a rule of policy. 18 C. W. N. 705 = 23 I. C. 678 = 1 L. W. 989 (P. C.). A confession to be admissible must be voluntary and made without any pressure. 35 All. 260 = 19 I. C. 307; 52 I. C. 881 (1) = 20 Cr. L. J. 721. Where the Magistrate in whose presence a confession was made is called as a witness and swears that the statement was made before him freely and willingly and not in the presence of a policeman, the confession is voluntary and can be acted upon. 2 Lah. L. J. 953.

CONFESSION IN POLICE CUSTODY, INADMISSIBILITY OF.—When a confession was made after police custody for several days and protracted consultation between the accused and the investigating officers and was subsequently retracted, the confession is inadmissible. 20 Cr. L. J. 833 = 53 I. C. 929 = 23 C. W. N. 886. See also 5 Lah. L. J. 128; 21 Cr. L. J. 177 = 54 I. C. 881 (P.); 18 Cr. L. J. 106 = 37 I. C. 314 = 10 Bur. L.

T. 270; 17 Cr. L. J. 402 = 35 I. C. 962. Moral exhortation is not objectionable. 5 W. R. 32. The mere fact of the accused being in Police custody is no basis to presume that his confession was induced by threat or promise. 3 O. W. N. 813 = 98 I. C. 250 = A. I. R. 1926 Oudh 622. Where the threats made do not influence the accused's confession it is admissible. 5 W. R. 175. A self exculpatory statement by an accessory after the fact is inadmissible in evidence. 21 Cr. L. J. 266 = 55 I. C. 282 = 30 C. L. J. 503. S. 24 does not admit as legal evidence an incriminating statement to headman at the latter's suggestion to speak the truth, lest witnesses for the other side may let it out when called. 18 Cr. L. J. 106 = 37 I. C. 314.

CONFESSION UNDER INDUCEMENT, THREAT, ETC.—WHAT CONSTITUTES INDUCEMENT.—

Where accused is told by a person in authority that if he makes a voluntary confession which is considered to be full and true, his prayer for being made an approver will receive due consideration, the confession made under such circumstances is inadmissible. 45 All. 633 = 21 A. L. J. 585 = 74 I. C. 529. S. 24 makes a confession inadmissible, if it appears to have been caused by any inducement or promise. 45 All. 300 = 73 I. C. 62 = 21 A. L. J. 143; 1923 All. 352. Where the accused whose confession is being recorded in forms the magistrate that he is making the confession under inducement, the confession is not admissible and cannot be allowed to go to the jury. Whether there was inducement or not is immaterial. 45 Bom. 1086 = 60 I. C. 1006. The statements made by the accused in the trial of the Police-officer concerned in the investigation of the case could be admitted in evidence against him on his own trial for murder. 59 I. C. 324 = 22 Bom. L. R. 1247. A confession made by an accused person under fear, encouraged by a police officer in a subtle way in the hours that elapsed before the accused reached the Magistrate is inadmissible in evidence. 60 I. C. 417 = 32 C. L. J. 204. A confession made by an accused person on an inducement by a Police officer that he would be offered a pardon is inadmissible in evidence. (*Ibid.*). The evidence of an accomplice, if suspicious, requires corroboration. (*Ibid.*). 9 P. R. 1911 (Cr.) = 10 I. C. 340 = 12 Cr. L. J. 267. The fact that a Police-officer got by means of threat an information from a prisoner as to a circumstance incriminating the latter does not render that information inadmissible in evidence. 17 Cr. L. J. 33 = 32 I. C. 321. It is not possible for a Court to say that the making of the confession "appears" to it to have been caused by any inducement, threat, or promise, except upon evidence which is before the Court. 4 Pat. L. T. 186 = 24 Cr. L. J. 497 = 72 I. C. 961.

to give the accused person grounds which would appear to him reasonable

WHO ARE PERSONS IN AUTHORITY FROM WHOM THREAT OR INDUCEMENT PROCEEDS.—S. 24 refers only to a person in actual authority, the test being the possession of some power or control over the accused with reference to his case. 37 I. C. 42=18 Cr. L. J. 58. The expression "person in authority" has a wider meaning than the actual prosecutor and the test is, has the person any authority to interfere in the matter and any concern or interest in it, sufficient to give him authority. 43 I. C. 605=19 Cr. L. J. 189 (Mad.) *see also* 40 B. 220=17 Bom. L. R. 1059 (8 B. H. C. R. 358; 8 Bom. L. R. 507; 26 I. C. 161 Ref.) Police Patel in a village is such a person. 40 Bom. 220=17 Cr. L. J. 113=33 I. C. 309=17 Bom. L. R. 1059. (9 B. H. C. 358 at p. 369 Foll.) So also a *Mukhia* of a village 97 I. C. 44=A. I. R. 1926 All. 737. A collecting panchayat and an assistant panchayat are both "persons in authority" within the meaning of the section. 50 Cal. 127=74 I. C. 264; 1923 Cal. 458. *See also* 76 I. C. 829=1924 M. 230. Panchayatdars are not persons in authority within the meaning of S. 24. Considering the nature of the functions of panchayatdars they are practically private detectives helping the police in finding out the criminals. They cannot be treated as men having any authority over the accused. 45 M. L. J. 845=76 I. C. 829=1924 Mad. 230. The president of a panchayat which was to consider a case is a person in authority within S. 24, and confession made to him is not therefore admissible in law. 20 C. W. N. 512=33 I. C. 828. The words "person in authority" in S. 24 include the prosecutor. 68 I. C. 413=26 C. W. N. 54. A confession made by an accused to the Superintendent of Excise in a trial for illicit possession of opium is admissible, provided no inducement, threat or promise was held out to the accused for making the confession. 22 C. W. N. 451=45 I. C. 284. A *Lambardar* being a person in authority, a confession induced by him by the use of threats is inadmissible. 4 Lah. L. J. 235=1922 Lah. 263; 26 P. R. 1916 (Cr.)=34 I. C. 642. A *Zaidar* or *Lambardar* is an officer who is to help the police in their investigation. 14 P. R. 1911 (Cr.)=12 I. C. 973. *See also* 221 P. L. R. 1911=12 I. C. 973. A confession made to a *Thugyi* by an accused who had been sent for by the former after being told that he would not be punished if he was not a party to the offence is irrelevant and inadmissible in evidence as the *Thugyi* is a person in authority within the meaning of S. 24. 15 Cr. L. J. 681=8 Bur. L. T. 39=26 I. C. 129. Other answers and questions based on the inadmissible statement are also inadmissible. (*Ibid.*) Neither a co-villager, nor a zamindar is a person in authority unless the zamindar is directed by the police to investigate. 37 I. C. 42=18 Cr. L. J. 58; 9 I. C. 718=12 Cr. L. J. 119. *Kotwar* in C. P. not a police-officer 25 Cr. L. J. 147=76 I. C. 291=(1924) Nag. 29. (*See also* notes under S. 25 *infra*)

RETRACTED CONFESSION, EVIDENTIARY VALUE OF.—A retracted confession uncorroborated in material points by other reliable evidence, is of no value. Conviction on it would be bad. 1 Pat. L. T. 241=58 I. C. 49=5 Pat. L. J. 430. *See also* 30 I. C. 436; 16 Cr. L. J. 612; 75 I. C. 152=

24 Cr. L. J. 304. A convicted prisoner undergoing a term of imprisonment made a statement before a Magistrate implicating the petitioner in the offence for which he had been convicted. But when he was examined as a witness he denied the implication of the petitioner. *Held*, the statement was not admissible in evidence. 54 I. C. 893=21 Cr. L. J. 189=18 A. L. J. 87. *See also* 22 Cr. L. J. 529=62 I. C. 545=22 Bom. L. R. 1274. It is unsafe for a Court to rely and act on a confession which has been retracted unless, after a consideration of the whole of the evidence in the case, the court is in a position to come to the unhesitating conclusion that the confession is true. 26 C. W. N. 1010=71 I. C. 497=1923 C. 217. A retracted confession should carry practically no weight as against a person other than its maker, (*Ibid.*) It is very unsafe to convict an accused person upon a retracted confession unless the confession is confirmed by other evidence. 36 I. C. 133=17 Cr. L. J. 453. The corroboration ought to be of the kind that not only confirms the general story of the crime, but also unmistakably connects the co-accused with the crime. 19 Cr. L. J. 275=44 I. C. 179. When a retracted confession is the sole evidence against an accused, it can be of but little value especially remembering the competition for pardon which sometimes occurs where a number of persons are suspected of an offence and some have already confessed or are believed to have confessed. 17 Cr. L. J. 226=34 I. C. 642=26 P. R. 1916 (Cr.). A Court should not convict a person upon a statement made by him but subsequently retracted owing to a promise of pardon, in the absence of corroboration in material particulars unless the peculiar circumstances of making the confession or the reasons of retraction show the genuineness of the confession in spite of its revocation. 31 I. C. 831=16 Cr. L. J. 815. It is, however, not safe in general to convict on an uncorroborated confession from the point of view of common experience and prudence, and when it is a question of a confession against a co-accused, the corroboration must not only confirm the general story of the crime but must clearly connect the co-accused with it. 264 P. L. R. 1914=30 P. R. 1914 (Cr.)=15 Cr. L. J. 626=25 I. C. 634. *See also* 30 I. C. 436=16 Cr. L. J. 612. There is no rule of law requiring a retracted confession to be supported by corroborative evidence in material particulars. The use to be made of such a confession is more a matter of prudence than of law. 46 I. C. 1005=19 Cr. L. J. 861 (Nag.). *See also* 26 C. W. N. 1010, (13 C. P. L. R. 107 Foll.) The fact that the confession was retracted before the committing Magistrate would not deprive it of its voluntary character 52 I. C. 50; *see also* 60 I. C. 789; 25 I. C. 634.

RETRACTED CONFESSION—PROOF OF.—Where a confession is retracted both before the committing magistrate and the Sessions trial, it cannot be used unless the Court is otherwise satisfied of its truth and voluntary character. 45 M. L. J. 613=18 L. W. 606=76 I. C. 642=25 Cr. L. J. 210=1924 Mad. 391. *See also* 93 I. C. 978=A. I. R. 1925 Lah. 605. Where an accused when retracting a confession alleged ill-treatment and inducement by the police to extract the confes-

for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.

25. No confession made to a police-officer¹ shall be proved as against a person accused of an offence.

26. No confession made by any person whilst he is in the custody of a police-officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person.

²*Explanation.*—In this section “Magistrate” does not include the head of a village discharging magisterial functions in the Presidency of Fort St. George or in Burma or elsewhere, unless such head-man is a Magistrate exercising the powers of a Magistrate under the Code of Criminal Procedure 1882.³

sion, the onus is on him to prove such ill-treatment and inducement. 19 Cr. L. J. 959 = 47 I. C. 811 = 22 C. W. N. 809. A first information report is not admissible in evidence at all, if in substance it is a confession to the police. 24 Cr. L. J. 570 = 73 I. C. 266 = 1923 Nag. 251. See also 63 I. C. 822 (Lah.).

Sec. 25—¹In Upper Burma after the expression “Police officer” the words “who is not a Magistrate” shall be inserted; *vide* S. 4 (3) (c) of the Burma Laws Act (XIII of 1898).

STATEMENT NOT AMOUNTING TO CONFESSION—A statement made by an accused to a police-officer if it does not amount to a confession may nevertheless be used against him and more particularly if the statement made turns out to be false in the light of the other evidence in the case. 23 Cr. L. J. 193 = 65 I. C. 849 = 2 A. L. J. 178. The word “confession” in S. 25 is not restricted to actual admission of guilt but includes inculpatory statement from which inferences of guilt can reasonably be drawn or which suggest the guilt of the person making the statement. 42 I. C. 1002 = 19 Cr. L. J. 42 (L. B.) Where the circumstances of the case compel a tribunal to act only upon a confession, and to reject all other evidence, the confession must be used *Literatim et Verbatim* and due effect must be given to every statement in it whether in favour of the accused or against him. 38 I. C. 740 = 18 Cr. L. J. 356 = 15 A. L. J. 15; 14 Cr. L. J. 252 = 19 I. C. 508. Confession made to police-officer is admissible to prove the ownership of property regarding which he is charged. 56 I. C. 62 = 21 Cr. L. J. 414 (Nag.). Section applies to every police-officer and is not restricted to Regular Police Force. 26 C. 569. An admission made by the accused to the police is inadmissible against him under S. 25 17 Cr. L. J. 512 = 36 I. C. 480. As to distinction between admission and confession before Police, see 10 B. L. R. App. 2; 6 C. 530 = 7 C. L. R. 541; 10 C. 1022. The test, which has to be applied in deciding whether S. 25 applies, is the position of the person at the time when it is proposed to prove the admission not his position at the time when he is alleged to have made it. 13 Cr. L. J. 465 = 15 I. C. 305 = 5 Bur. L. T. 392. A confession therefore made to a police officer by a person when he is not accused of any offence is inadmissible in evidence against him when he is accused of an offence. A confession made by an accused to a police officer might be

admissible in favour of a co-accused but not against him. (*Ibid.*) The expression “police-officer” in S. 25 is used in its usual and more comprehensive meaning, and includes Police-officers of the Native States as those of British India. 19 Cr. L. J. 79 = 43 I. C. 111 = 14 N. L. R. 192. The term “Police officer” in this respect must be construed not in any strict technical sense but according to its most comprehensive and popular meaning. 71 I. C. 360 = 24 Cr. L. J. 136 (Pesh.) The statements of approver to a Police Inspector being really confessions, are inadmissible. 35 Mad. 247 = 13 Cr. L. J. 305 = 22 M. L. J. 490 (S. B.) See also 15 Cr. L. J. 474 = 24 Ind. Cav. 562; 15 Ind. Cas 325. Confession made to a police-officer in Nizam’s Dominions is not admissible in evidence. 19 Cr. L. J. 79; 43 I. C. 111 = 14 N. L. R. 192 (22 Bom. 235 Fol.) Confession before Administrator in Portuguese territory not admissible. See 26 Bom. L. R. 706 = (1924) Bom. 480. A statement by an accused arrested on a charge of unlawful possession of opium to Excise-Officers, the police servants remaining in room in another part of the house, is still a statement made while in police custody and therefore inadmissible. 18 Cr. L. J. 609 = 39 I. C. 977 = 21 C. W. N. 694. Whether Excise Officers who have large powers of search, arrest and detention are to be regarded as police-officer within the meaning of S. 24. (*Ibid.*) See also 5 Cr. L. J. 1223 = 82 I. C. 151; 28 Bom. L. R. 674 = 97 I. C. 665 = A. L. R. 1926 Bom. 517 = 28 Bom. L. R. 1196 = A. I. R. 1927 Bom. 4 (F. B.). Village Chaukidars are police officers within the meaning of S. 25. 16 Cr. L. J. 62 = 26 I. C. 654. *Kotwar* in C. P. is not a police-officer. 25 Cr. L. J. 147 = 76 I. C. 291 = 1924 Nag. 29; 57 I. C. 88 = 21 Cr. L. J. 568 (Nag.) Village Munsif is not a Police-officer. 7 M. 287. A member of the Frontier constabulary is a police officer. 71 I. C. 360 = 24 Cr. L. J. 135 (Pesh.) As to village headman in Burma, see 2 R. 31 = 3 Bur. L. J. 11 = 81 I. C. 540.

Sec. 26.—²The Explanation was added by Act III of 1891, S. 3.

³ Now the Act V of 1898.

CONFESSION IN CUSTODY ON POLICE—EXTRA JUDICIAL CONFESSION.—The accused who was in the lock-up of the Magistrate under trial was sent up by the Magistrate to a hospital for treatment with two policemen in charge. The latter waited outside in the verandah. During his examination inside the dispensary by the

How much of information received from accused may be proved.

27. Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police-officer, so much of such information,

Doctor, the accused made a confession within the hearing of the Doctor *Held*, that it was excluded by S. 26. 12 B. 1=42 I. C. 597=19 Bom. L. R. 683. (20 B. 795 Dist.) *See also* 91 I. C. 806=A. I. R. 1925 Lah. 557. A confession while in police custody is of little value. 10 P. R. 1914 (Cr.)=15 Cr. L. J. 613=25 I. C. 525. *See also* 12 W. R. (Cl.) 82. As to meaning of "in custody." *See* 25 Cr. L. J. 381=77 I. C. 429=1921 Rang 173. Evidence to prove a confession made while an accused person is in police custody is inadmissible. 22 I. C. 150=15 Cr. L. J. 6=38 P. L. R. 1914. *See also* 22 B. 235. In 7 W. R. Cr. 56, evidence of policeman who overheard a prisoner's statement made in another room to another held admissible; but *see also* 20 B. 165; 18 Cr. L. J. 609=39 I. C. 977=21 C. W. N. 694. A police officer when giving evidence should not be allowed to state that an admission of guilt was made by the accused. 13 I. C. 783=13 Cr. L. J. 127=16 C. W. N. 238; 15 C. 607; *see also* 19 B. 363. An accused's confession to some person other than a police-officer is admissible in evidence. 16 Cr. L. J. 62=26 I. C. 654; (as) at Coroner's inquest, 28 Bom. L. R. 111=50 Bom. 111=A. I. R. 1926 Bom. 151. Admissions of facts which are not of an incriminating nature are admissible in evidence. 4 Bom. L. R. 312. Actual arrest and detention are not necessary. 1 R. 609=77 I. C. 429=1924 Rang 173.

POLICE-OFFICERS.—Referred to in S. 26 need not be investigating police officers. 42 Bom. 1=42 I. C. 97=19 Bom. L. R. 683. A confession to a Police Patel is inadmissible. 31 I. C. 340 (2)=16 Cr. L. J. 740=17 Bom. L. R. 898. Police-officers in Native States are police officers under this section. 22 B. 235. *See also* 20 B. 795 and other cases cited under S. 25. Jailor is not police-officer. 20 B. 794.

STATEMENT MADE IN POLICE CUSTODY AND BEFORE MAGISTRATE.—Is not admissible either against him or against a person jointly tried with him, unless it has led to discovery of any fact mentioned in S. 27. 28 I. C. 145=16 Cr. L. J. 257. A confession though made in the presence of a Magistrate is of very little value when the accused is not aware of his presence. 22 I. C. 150=15 Cr. L. J. 6. A confession made in the presence of a magistrate though on leave, is nevertheless relevant and admissible (*Ibid.*)

ORAL CONFESSION.—A confession to be admissible in evidence need not be recorded. It may be oral, and may be proved by the Magistrate to whom the oral confession was made. 45 I. C. 843=19 Cr. L. J. 651=11 P. R. 1918 (Cr.).

PLEA OF GUILTY BY UNDEFENDED ACCUSED ENFEEBLED BY ILLNESS.—A plea of guilty can be allowed to be withdrawn if the accused was at the time of making it, enfeebled by illness and was undefended. 28 I. C. 145=16 Cr. L. J. 257.

CONFESSION—ADMISSIBILITY OF AGAINST CO-ACCUSED.—A confession of an accused is not admissible against co-accused under S. 30 if the former is convicted on his plea of guilty. 28 I. C. 145=16 Cr. L. J. 257; 5 C. 954; 5 A. 253;

Ref. to.) A confession of an accused recorded outside British India by a Magistrate is not excluded by S. 26. 69 I. C. 257=23 Cr. L. J. 673=17 N. L. R. 113.

Sec. 27. (*N. B.*—*See also* Notes under Ss. 24—26).

SCOPE OF SECTION.—*See* 45 C. 557=22 C. W. N. 213=44 I. C. 321. S. 27 qualifies not only Ss. 25 and 26 but also S. 24 all three of which lay down general rules excluding confessions and the same broad grounds underlies all the three (*Ibid.*) *See also* 6 A. 509; 11 B. H. C. 242. The use that can be legitimately made of a confession to Police when direct evidence is given against the accused at the trial. 77 I. C. 860=1924 A. 207. It is open to the defence to check such evidence, *e. g.*, the consistency of an approver's story. (*Ibid.*) A statement made by an accused to a police-officer is inadmissible against a co-accused. 20 A. L. J. 178=23 Cr. L. J. 193=65 I. C. 840.

APPLICABILITY OF SECTION.—Sec. 27 is a proviso to Ss. 24, 25 and 26. Statement made to the Police is admissible though the accused himself makes the discovery about which the statement is made. 12 Cr. L. J. 119=9 I. C. 718. (31 A. 592 Fol.) Ss. 161 and 162 of Crim. Pro. Code, do not override the provisions of Ss. 27 and 28 of Evidence Act 5 Pat. 63=93 I. C. 884=7 Pat. L. T. 396=A. I. R. 1926 Pat. 232. *See also* 4 Rang. 72=96 I. C. 145=5 Bur. L. J. 30=A. I. R. 1926 Rang. 116. Confession to person in authority who holds out inducements to confess is not admissible even so far as it relates to the discovery of articles. (*Ibid.*) Where there is immediate connection between discovery and statement made to a police-officer, the latter is admissible in evidence. 20 Cr. L. J. 305=50 I. C. 481. If the recoveries were made in consequence of the information, supplied by the accused, the statements made by them are admissible. 1923 Lah. 434. A statement is admissible in evidence under S. 27, then as a consequence of it, there is a discovery incriminating the person making the statement. 72 P. L. R. 1916=17 Cr. L. J. 183=33 I. C. 823. *See also* 16 Cr. L. J. 545=29 I. C. 517=11 P. R. 1915 (Cr.).

INFORMATION NOT LEADING TO DISCOVERY.—Statements leading immediately to the discovery of property are properly admissible. Other statements connected with the one thus made and immediately, but not necessarily or directly connected with the fact discovered are not admissible. 17 Cr. L. J. 8=32 I. C. 136=13 A. L. J. 1077. (11 B. H. C. 242 Rel. on). The language of the section and its place in the Act make it clear that discovery therein referred to is discovery to or by police-officers. 49 Cal. 167=25 C. W. N. 788.

INFORMATION FROM TWO PERSONS—ONLY THAT LEADING TO DISCOVERY IS ADMISSIBLE.—Once property has been discovered in consequence of information received from a suspected person, it cannot be re-discovered in consequence of information received from another suspected person. 23 Cr. L. J. 22=9 P. L. R. 1922=64 I.

whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.

Confession made after removal of impression caused by inducement, threat or promise, relevant.

28. If such a confession as is referred to in section 24 is made after the impression caused by any such inducement, threat or promise has, in the opinion of the Court been fully removed, it is relevant.

C. 502 = 1922 Lah. 315. It is only the information that was given by the first person and which led to the actual discovery which may be proved under the terms of S. 27 (*Ibid.*). Where two or more persons are alleged to have given certain information to the police which led to the arrest of the accused, it is only the information given first which is admissible under Ss. 27 and 29. 17 Cr. L. J. 273 = 34 I. C. 993 = 52 P. L. R. 1916 (6 A. 509 Foll.) Information by two persons which leads to the discovery of a fact is relevant and so much of the statement of each which relates to the fact discovered is admissible against both, statements of co-accused after the discovery are irrelevant. 17 Cr. L. J. 506 = 36 I. C. 474 (24 W. R. (Cr.) 36 Ref.) After one accused has made a discovery the other should not be asked to do the same. *Ibid.* (2 Bom. L. R. 1059 Ref.).

JOINT DISCOVERY—TRACK EVIDENCE.—Track evidence is of no value if the comparison is made 8 or 9 days after the affairs. 63 P. L. R. 1914 = 15 Cr. L. J. 499 = 24 I. C. 587. Where more than one accused person in custody of the police point out this or produce that jointly, such an evidence of joint discovery is not sufficient for a conviction. *Ibid.* (3 I. C. 622 Foll.).

STATEMENT AFTER DISCOVERY—POINTING OUT PROPERTY—VALUE OF.—A statement by accused not leading to discovery of property but made after discovery and production of the property is irrelevant. The production or the pointing out may indicate that the accused was in possession or that he had innocent knowledge that the articles had been left there by someone else. 13 Cr. L. J. 529 = 15 I. C. 801. When a material fact has already been discovered, the accused's statement while in police custody relating thereto is not admissible under S. 27. 12 Cr. L. J. 35 = 9 I. C. 232.

INFORMATION LEADING TO DISCOVERY.—Though a person points out a place not his own where stolen property is concealed, the Court should not conclude that the person had received or retained it. 39 I. C. 330 = 18 Cr. L. J. 490 = 1 P. R. 1917 (Cr.) (17 A. 576; 20 P. R. 1905 Cr. Ref.) Accused's knowledge of place of concealment does not prove that he concealed it. 1923 Lah. 238 (2). The mere knowledge of the place of concealment does not show that the person having such knowledge actually received the stolen articles or participated in the act of concealment (*Ibid.*).

ILLUSTRATIVE CASES.—(a) **EVIDENCE HELD ADMISSIBLE.**—The discovery of ornaments at his house by accused is clearly a fact discovered. 45 All. 300; 21 A. L. J. 143 = 24 Cr. L. J. 526 = 73 I. C. 62 = 1923 All. 352. The statement of the accused that he could point out a spot and that bloodstains would be found there is admissible but not that it was at that spot that he committed the crime. 14 Cr. L. J. 190 = 19 I. C. 190 = 171 P. L. R. 1914. If the accused produced the article himself, the fact that he produced

it at a particular place may be proved, but the accompanying statement that he buried it there is inadmissible. (*Ibid.*)

(b) **EVIDENCE HELD NOT ADMISSIBLE.**—A person accused under S. 328, 1 P. C., pointed out during the police investigation a *Dhatura* tree and said that he had taken the fruit of it. The statement was inadmissible. 17 Cr. L. J. 8 = 32 I. C. 136 = 13 A. L. J. 1077. On a trial for murder a witness stated that the accused offered to point out the place where the dead body was and on being questioned as to who had buried the body he said that he (accused) had done so. *Held*, that the accused's statement that he buried the body was not admissible in evidence. 55 I. C. 685 = 21 Cr. L. J. 349 (1 Ah.) (14 B. 260; 24 P. W. R. 1916; 50 P. W. R. 1915 (Cr.) Dist.) The discovery of a person who is afterwards proved to be a dacoit is not the discovery of a fact with in S. 27. 19 Cr. L. J. 79 = 43 I. C. 111 = 14 N. L. R. 192.

MISCELLANEOUS.—A confession caused by some inducement from some person in authority is inadmissible in evidence. 14 Cr. L. J. 417 = 20 I. C. 401 = 6 Bur. L. T. 109.

STATEMENT OF ACCUSED WHILE IN CUSTODY OF POLICE.—It is legitimate to record evidence that an accused person said, "I will point out certain property," if such statements lead to a discovery; but it is not legitimate to record as an evidence that an accused said "I will point out certain property which I obtained as my share of the booty in the dacoity." 52 P. L. R. 1918 = 44 I. C. 967 = 19 Cr. L. J. 439. Where there is practically no evidence at all against an accused except an incriminating statement under S. 27, the latter should be viewed with great caution and suspicion. 14 Cr. L. J. 190 = 19 I. C. 190 = 171 P. L. R. 1913. The statement of an accused that he buried the weapon in a certain place is relevant but not the part of the statement that it was the weapon with which he had committed the crime. (*Ibid.*) A statement made by an accused may be proved under S. 27 so far as it relates to any material facts discovered in consequence, even though the police were present when the statement was made. 69 I. C. 377 = 23 Cr. L. J. 697 = 14 L. W. 418. To bring an information by accused under S. 27 the information must have had the direct effect of leading to the discovery of the stolen property. Unless a confession is corroborated in material particulars and by independent testimony it should not be the basis of a conviction. 21 Cr. L. J. 79 = 54 I. C. 479 = 11 L. W. 8. (See also notes under S. 30 *infra*.)

Sec. 28.—Confessions to the Magistrate made soon after inducements held out by certain Zamindars sent by the Police are inadmissible. 12 Cr. L. J. 110 = 9 I. C. 718. A confession by an accused in police detention as a suspect made in the immediate vicinity of the police to a Zaildar could not be proved unless made to a Magis-

29. If such a confession is otherwise relevant, it does not become irrelevant,

Confession otherwise relevant not to become irrelevant because of promise of secrecy, etc.

merely because it was made under a promise of secrecy, or in consequence of a deception practised on the accused person for the purpose of obtaining it, or when he was drunk, or because it was made in answer to questions which he need not have answered, whatever may have

been the form of those questions, or because he was not warned that he was not bound to make such confession, and that evidence of it might be given against him.

30. When more persons than one are being tried jointly for the same offence,

Consideration of proved confession affecting person making it and others jointly under trial for same offence.

and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession.

[*Explanation.*—"Offence," as used in this section, includes the abetment of, or attempt to commit, the offence.]¹

trate though the accused may not have been handicapped, as, to all intents and purposes he was in police custody. 153 P. L. R. 1916=26 P. R. 1916 (Cr.)=17 Cr. L. J. 226=34 I. C. 642.

Sec. 30.—The explanation was inserted by Act III of 1891, S. 4.

¹ Cf. *Explanation 4* to S. 108 of the Indian Penal Code (Act XLV of 1860).

CONFESSION—ADMISSIBILITY AGAINST CO-ACCUSED.—A statement of an accused must amount to a confession before it can be considered against his co-accused under S. 30. 35 Mad. 247=13 Cr. L. J. 305=22 M. L. J. 490=14 I. C. 849=11 M. L. T. 1 Supp. (S. B.); 40 C. L. J. 551. See also 9 P. R. 1911 (Cr.)=10 I. C. 340=12 Cr. L. J. 267; 1925 Sindh 116; 1924 Bom. 445=26 Bom. L. R. 614=25 Cr. L. J. 13=75 I. C. 701; 1924 Nag. 27; 1924 All. 511; 1924 Mad. 805; 1925 Cal. 406. The confession made by a person can be taken into consideration as against persons who are being tried along with him; such a statement however is always regarded as tainted and cannot be used to corroborate the testimony of the accomplice witnesses. 3 Lah. 144=23 Cr. L. J. 513=68 I. C. 113=1922 Lah. 1. See also 13 A. L. J. 337=28 I. C. 663=37 All. 247. Where an accused person after he is arrested makes a confession implicating the other accused and the confession is sought to be used against them, it is incumbent on the prosecution to disclose the name of the officer who made the arrest and produce him or any other person who could speak to the circumstances under which the confession was made so as to enable the defence to ascertain by cross-examination what inducements were offered to the accused to make it and what generally were the circumstances that attended the confession. 36 M. 501=17 C. W. N. 1110=25 M. L. J. 518=21 I. C. 369=40 I. A. 193 (P. C.). The confession of an accused in a dacoity case is not admissible in evidence against a co-accused in that case in a proceeding under S. 110 of the Cr. P. Code. 33 C. L. J. 70=61 I. C. 793=25 C. W. N. 239. The statement of an accused made after arrest and not amounting to a confession is not admissible in evidence against a co-accused either under S. 10 or S. 33 but only against himself. 46 Cal. 710=54 I. C. 53=30 C. L. J. 255.

TEST OF ADMISSIBILITY.—Whether the confession of an accused can be used against his co-

accused should be determined on seeing whether the accused can be convicted on that confession of the crime with which he and the co-accused were charged. 60 I. C. 660=22 Cr. L. J. 260 (Lah.). See also 15 C. W. N. 592=12 Cr. L. J. 286=38 Cal. 559; 50 Bom. 683; 9 N. I. J. 80= A. I. R. 1926 Nag. 229.

WEIGHT OF CONFESSION AGAINST CO-ACCUSED.—The confession of an accused should not carry the same weight as the evidence of the same person if he were examined as a witness. 21 I. C. 166=14 Cr. L. J. 566. The Court must, after the most careful consideration, decide whether the degree of proof prescribed by S. 3 has been reached or not. (*Ibid.*) A confession made by a co-accused must be regarded with suspicion. 23 Cr. L. J. 129=65 I. C. 561=1922 Nag. 146. See also 72 I. C. 497=24 Cr. L. J. 385. It is not the law that unless a confessing prisoner implicates himself as fully as his co-accused the statement will not be admissible, the principle being there is no guarantee that the maker of the confession is speaking the truth. All that is required is that the confession shall substantially implicate its maker in regard to the crime with which he and his co-accused are charged. 4 Pat. L. T. 505; 75 I. C. 705; 24 Cr. L. J. 17; 2 Pat. L. T. 125. A conviction founded solely on the confessions of co-accused cannot be sustained. S. 114 of the Evidence Act applies to the testimony of an accomplice on oath but not to a confession and a judge sitting with assessors ought never to convict solely on confession but where sitting with jury he could either ask the accused to withdraw the confession or direct them to acquit unless corroborated in material particulars by independent evidence. 21 I. C. 673=38 Bom. 156.

CONFESSION—NECESSITY FOR CORROBORATION.—Where however there is, apart from the confessions, a body of evidence and circumstances enough to support a conviction, if the evidence is accepted as free from untruth or exaggeration or serious mistake or distortion, the Court can take the confessions into consideration and consider together the evidence, the circumstances and the confessions. 43 B. 739=51 I. C. 657. See also 4 R. 45=95 I. C. 71=A. I. R. 1926 Rang. 127. Where the corroboration consisted of statements of witnesses which though giving rise

Illustrations.

(a) *A* and *B* are jointly tried for the murder of *C*. It is proved that *A* said—“*B* and I murdered *C*.” The Court may consider the effect of this confession as against *B*.

(b) *A* is on his trial for the murder of *C*. There is evidence to show that *C* was murdered by *A* and *B*, and that *B* said—“*A* and I murdered *C*.”

This statement may not be taken into consideration by the Court against *A*, as *B* is not being jointly tried.

to suspicion were consistent with the innocence of the accused, *Held*, that the corroboration fell far short of what is required to support a conviction. 42 Cal. 789 = 19 C. W. N. 584 = 28 I. C. 657. As to what amounts to corroboration, 95 I. C. 938 = *A. I. R.* 1926 All. 603. A conviction based entirely on statements contained in confessions of co-accused persons is not sustainable. 11 I. C. 1001 = 12 Cr. L. J. 465. *See also* 17 Cr. L. J. 156 = 33 I. C. 636 ; 73 I. C. 262 = 24 Cr. L. J. 566 = 1923 Nag. 248.

JOINT TRIAL.—A statement made by one accused can only be used against another if provisions of S. 30 of the Act are applicable. 20 A. L. J. 178 = 23 Cr. L. J. 193 = 65 I. C. 849 = 1922 A. 24. As to joint trial, *see also* 45 All. 323 = 21 A. L. J. 179 = 1923 All. 322. Persons against whom proceedings are being jointly taken under S. 117, Criminal Procedure Code, in one and the same enquiry cannot be said to be on their joint trial for the same offence within S. 30. 41 All. 231 = 17 A. L. J. 147 = 20 Cr. L. J. 206 = 49 I. C. 654. A confession by an accused implicating himself and two others in a charge of dacoity is inadmissible against the others in a proceeding under S. 110 of the Criminal Procedure Code. 22 C. W. N. 408 = 49 I. C. 649 = 20 Cr. L. J. 201. A confession of an accused not being declared relevant by the Evidence Act as against a co-accused cannot be treated as substantive evidence and a judgment cannot be based upon it so far as he is concerned. 23 Cr. L. J. 129 = 65 I. C. 561 = 1922 Nag. 146. Confessions recorded in the manner provided by the Criminal Procedure Code, even though made to magistrates outside British India if proved against the persons who made them may be taken into consideration against others who are being tried jointly for the same offence. 69 I. C. 257 = 23 Cr. L. J. 673 = 17 N. L. R. 113. Where one of the accused pleaded guilty and was examined at the end of the prosecution case, and declined to call any witnesses, the trial was a joint trial, so that his confession could be taken into consideration against the other accused. 2 I. C. 166 = 14 Cr. L. J. 566. A conviction under S. 456, Indian Penal Code, based on the confession of a co-accused who was being tried along with the prisoner under S. 411 Indian Penal Code, is unsound and must be set aside. 20 I. C. 136 = 14 Cr. L. J. 376.

RETRACTED CONFESSION, NOT OF VALUE AGAINST CO-ACCUSED.—43 Bom. 739 = 51 I. C. 657 = 21 Bom. L. R. 448. The confession referred to in S. 30 cannot be restricted to an unretracted confession and there is nothing to prevent a court from convicting after considering the confession but the rules of practice of the High Courts in India are to be observed when exercising the discretion. 15 Bom. L. R. 975 = 21 I. C. 673 = 38 B. 156. Where there is no real corroboration of the retracted confession, the accused

are entitled to the benefit of the doubt and must be acquitted. 16 Cr. L. J. 469 = 29 I. C. 101 = 163 P. L. R. 1915. *See also* 18 Cr. L. J. 779 = 41 I. C. 155 = 75 P. L. R. 1917 ; 17 Cr. L. J. 226 = 26 P. R. 1916 (Cr.) = 34 I. C. 642 ; 5 P. L. R. 1915 ; 16 Cr. L. J. 157 = 27 I. C. 221 = 3 P. W. R. 1915 (Cr.) ; 5 P. R. 1911 (Cr.) = 10 I. C. 857 = 12 Cr. L. J. 276. Extra-judicial confession by boys cajoled or frightened but retracted before the committing magistrate does not prove a case against persons jointly accused with the boys. 14 P. R. (Cr.) 1911 = 12 Cr. L. J. 597 = 12 I. C. 973. A retracted confession requires strong corroboration in all material particulars. 72 I. C. 497 = 24 Cr. L. J. 385 = 14 L. W. 474. The weight to be given to a retracted confession depends upon the circumstances under which it is made and on the intrinsic value of the confession. 18 Cr. L. J. 774 = 41 I. C. 150 ; 19 I. C. 179 = 14 Cr. L. J. 179.

PLEA OF GUILTY.—The plea of guilty of one co-accused who is removed from the dock while the other alone is tried cannot be taken into consideration against that other. 38 Cal. 446 = 16 C. W. N. 49 = 12 I. C. 87 = 12 Cr. L. J. 479. *See also* 15 P. R. (Cr.) 1911 = 12 Cr. L. J. 605 = 12 I. C. 981. It is for the prosecution to establish their case ; because an accused loses his head or gets frightened and does not tell the truth, he cannot on that account be convicted. 20 A. L. J. 178 = 23 Cr. L. J. 193 = 65 I. C. 849 = 1922 All. 24.

SELF-EXCULPATORY STATEMENTS.—Self-exculpatory statement of the wife to the effect that the white substance was administered on the assurance by her paramour that it would bring about good-feeling did not amount to a confession and could not be used against the paramour as criminal conspiracy was not proved. 14 Cr. L. J. 586 = 21 I. C. 378 = 18 C. L. J. 590 ; 9 N. L. J. 80 = *A. I. R.* 1926 Nag. 229. A confession by each of co-accused implicating self and co-accused as regards robbery but throwing entire burden for murder on the other is admissible as regards former but inadmissible as regards the latter. 1923 Lah. 293 ; 12 Cr. L. J. 562 = 12 I. C. 650 = (1911) 2 M. W. N. 375. A statement by an accused person which suggests an inference of guilt may amount to a confession though the person making the statement may directly repudiate his participation in the crime. Such a statement may be taken into consideration against the person making the statement, but it may be unsafe to use it against a co-accused. 53 I. C. 691 = 20 Cr. L. J. 787. An accused's statement which does not incriminate him is not a confession and cannot be used against his co-accused. 16 Cr. L. J. 25 = 26 I. C. 329. *See also* 19 Cr. L. J. 826 = 46 I. C. 842 = 1918 Pat 175 ; 45 All. 323 = 21 A. L. J. 179 = 76 I. C. 1025 = 1923 All. 322 ; 59 I. C. 913 ; 14 Cr. L. J. 570 = 21 I. C. 171.

31. Admissions are not conclusive proof of the matters admitted but they may operate as estoppels under the provisions hereinafter contained.

STATEMENTS BY PERSONS WHO CANNOT BE CALLED AS WITNESSES.

32. Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the Court unreasonable, are themselves relevant facts in the

Cases in which statement of relevant fact by person who is dead or cannot be found, etc., is relevant.

following cases :—

(1) When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.

Sec. 31.—See 103 I. C. 34 = A. I. R. 1927 All. 659.

Sec. 32.—Section should be very liberally construed. See 1 Luck. C. 97 = 104 I. C. 299 = A. I. R. 1927 Oudh 278.

DATE OF BIRTH—CERTIFICATE OF GUARDIANSHIP IS NOT ADMISSIBLE.—A certificate of guardianship is neither a book nor a register nor a record kept by an officer in accordance with any law but is a certificate as it professes to be, of which there is only one record and which is not a public record or register of any kind but is a document issued to a particular person giving to that particular person and only to him a kind of particular authority. On these grounds the certificate could not be regarded as evidence of minority. 71 I. C. 336 = 38 C. L. J. 186. Orders for the appointment and discharge of a guardian could not be received in evidence to prove the date of the birth of the defendant from the recitals contained therein. (*Ibid*). As to relevancy of entries in purohit's books to prove date of death, see 26 Bom. L.R. 563 = 46 M. L. J. 541 (P.C.)

CL. (1)—DYING DECLARATION WHEN ADMISSIBLE.—The dying declaration being the most important piece of evidence must be as exact and full as possible. 15 I. C. 308 = 13 Cr. L. J. 468 = 22 M. L. J. 453. See also 1924 Lah. 12 = 5 Lah. 305 = 1924 Lah. 581. As to mode of proving dying declaration, see 6 Lah. L. J. 115 = 1924 Lah. 12. Statement must relate to the injuries by which death was caused. Sub cl. (1) applies to the class of statements made by a dying person as to the injuries which have brought him or her to that condition, or the circumstances under which those injuries came to be inflicted. 4 L. 481 = 1924 Lah. 253. Evidence Act makes dying declarations relevant facts as written statements of deceased or written records of verbal statements which a deceased makes and which becomes substantive evidence of the cause of deceased's death 31 I. C. 359 = 16 Cr. L. J. 759 (Mad.). An oral statement of the deceased about the cause of his death may be proved by any one who heard it as well as by the person who recorded it. Under S 321, Criminal Procedure Code, it is not necessary that the magistrate recording the confession should be called and be asked to refresh his memory by referring to statements of witnesses under S. 159, Evidence Act, 31 I. C. 359;

16 Cr. L. J. 759 (Mad.). 8 C. 211; 6 C. W. N. 72 Diss. The rule as to the admissibility of evidence under S. 32 (1) has worked ill in India. 4 L. 481 = 1924 Lah. 253. On a trial for forgery one of the accused who had made a statement before the enquiring Magistrate died before the commencement of the trial. The statement was admitted by the Sessions Judge under S. 32, cl. 3. *Held*, that the statement was inadmissible since its maker had already rendered himself liable to criminal prosecution at the time it was made. 25 Bom. L.R. 248. Affidavit of a person who died subsequently and was not subjected to cross-examinations is not admissible. See 38 M. L. T. (H.C.) 275 = 102 I. C. 243 = A. I. R. 1927 Mad. 507 = 52 M. L. J. 477.

DYING DECLARATION—WHEN NOT ADMISSIBLE.—A statement by a dying person not about the circumstances of his death, but about a dacoity that was taking place at the time of his death is not admissible under S. 32 (1) in a trial for the dacoity. Nor can those statements be admissible under section 32 (3) unless they would have exposed him to criminal prosecution. 6 Bur. L. T. 183 = 20 I. C. 990 = 14 Cr. L. J. 510.

DYING DECLARATION, PROOF OF.—A statement of a deceased person recorded in the absence of the accused is not admissible under S. 33. Nor is it admissible under S. 32 (1) unless it is proved by the Magistrate who recorded it or by some one who heard it made. 20 I. C. 220 = 14 Cr. L. J. 396 = 6 Bur. L. T. 68. A dying declaration recorded by a Magistrate is not evidence unless proved by the statement of the Magistrate though he is himself the committing Magistrate in the case. A Court cannot go beyond the rule that every statement placed on the record must be properly proved. Dying declarations are not covered by the provisions of Chap. XLI of the Cr. P. Code. 18 I. C. 883 = 14 Cr. L. J. 131. A dying declaration reduced to writing but not signed by the deponent is not admissible in evidence, but must be proved by the oral testimony of the person who heard it. 23 I. C. 195 = 15 Cr. L. J. 243 = 10 N. L. R. 19. Notes of Police officer relating to a dying declaration are not admissible in evidence, unless signed by the deponent, but in testifying to it, he can refer to them to refresh his memory. (*Ibid*). Witnesses should not be allowed to prove a dying declaration as if it is a substantial piece of evi-

Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.

(2) When the statement was made by such person in the ordinary course of business, and in particular when it consists of any entry or memorandum made by him in books kept in the ordinary course of business, or in the discharge of professional duty; or of an acknowledgment written or signed by him of the receipt of money, goods, securities or property of any kind; or of a document used in commerce written or signed by him; or of the date of a letter or other document usually dated, written or signed by him.

(3) When the statement is against the pecuniary or proprietary interest of the person making it, or when, if true, it would expose him or would have exposed him to a criminal prosecution or to a suit for damages.

dence in the case. The relevant fact to be proved is the statement made and that statement is not the document made by the Magistrate. 23 Cr. L. J. 417=67 I. C. 577=6 L. L. J. 115=1924 Lah. 12. The only way of proving a dying declaration is by the evidence of some witness who heard it made, the witness being at liberty to refresh his memory by referring to the note made by him and read over by him at or about the time the statement is made. (*Ibid.*) See also 49 Cal. 358=71 I. C. 685=24 Cr. L. J. 221=1922 Cal. 382 (2). A dying declaration recorded by a Magistrate should be proved before it can be accepted as evidence and the fact that the Magistrate was the Committing Magistrate makes no difference. 17 P.R. 1911 (Cr.)=13 Cr. L. J. 225=14 I. C. 417. Dying declarations are not covered by Ch. XLI of the Criminal Procedure Code to enable them to be admitted without proof. (*Ibid.*) A dying declaration made after receiving extreme unction should generally be believed to be true and acted upon. 12 I. C. 206=12 Cr. L. J. 528. The questions and the signs made in reply by a person unable to speak taken together might properly be regarded as a "verbal statement" made by a person as to the cause of the death within the meaning of S. 32 and are therefore admissible in evidence. 49 Cal. 600=26 C.W.N. 414=1922 Cal. 409. Gestures made before death by the person murdered are admissible in evidence, but the opinion of the witnesses as to the meaning of such gestures is not evidence, the interpretation of the gestures being for the Court alone. 1 Pat. 401=3 Pat. L. T. 771=71 I. C. 353=24 Cr. L. J. 129

SUICIDE.—The accused were charged under S. 330, Indian Penal Code, with having, for the purpose of extorting a confession, caused hurt to one R, who committed suicide owing to the ill-treatment. *Held*, that ill-treatment was the cause though not the direct cause of the suicide and although the accused were not legally responsible for the suicide, the whole affair, ill-treatment, and subsequent suicide, being one transaction, the statement of the deceased was admissible under S. 32 (1). 20 P. R. 1916 (Cr.)=35 I. C. 998=17 Cr. L. J. 438. Statement in a will that one X left a certain house is not admissible to prove adverse possession. 80 I. C. 118.

Sec. 32 (2)—Where it is proved that a writer of some accounts kept in the regular course of business is absconding and cannot be found, the

entries in the accounts are relevant evidence under S. 32 and sufficient to charge a person with liability. 1. L. W. 136=22 I. C. 627. In case of death of attesters the written statement of deceased bond writer as to signing by attesters is admissible. See 11 N. L. R. 9=19 C. W. N. 1148=22 I. C. 654. Collection papers—Admissibility of. See 6 I. C. 369. "Course of business," meaning of. See 4 Bur. L. T. 185=11 I. C. 854; 13 C. W. N. 71=1 I. C. 376. Value of an incomplete record of a deposition, see 22 M. L. J. 453. An endorsement on the cover of a registered letter that the cover had been tendered to the addressee on a certain date and had been refused by him is at best a record of a statement by the peon and would be admissible either under S. 32 (2) or S. 33 of the Act if the requirements of those sections are complied with. Otherwise the post peon must be called to prove the facts relied on as being evidence of the endorsement. 19 C.W.N. 489=20 C.L.J. 455=26 I. C. 962. Statement of the deceased's grandfather as to age—Admissibility of. See 38 B. 61=12 I. C. 551. See also 20 C.L.J. 302. A statement made by a father before a Government Tahsildar as to the age of his son is relevant to prove the age of the son. 9 M. L. T. 220=9 I. C. 324. (25 M. 183; 11 M. L. J. 379; 20 C. 758 Foll.)

Sec. 32 (3).—RECITAL AS TO OWNERSHIP.—Recitals in a document relating not to suit land but to neighbouring land—Not admissible. 9 M. L. T. 51=8 I. C. 268=(1910) M. W. N. 668; 16 C. W. N. 252=12 I. C. 149; 11 A. L. J. 139=18 I. C. 752. See also 44 C. L. J. 587=99 I. C. 510=A. I. R. 1927 Cal. 234. As to admissibility of recitals in documents between strangers regarding boundaries of lands, see 45 C. L. J. 55; 44 C. L. J. 582=A. I. R. 1927 Cal. 230 and cases cited therein. A road-cess return filed by a Hindu widow under S. 95 of the Bengal Cess Act is admissible under this section. 18 C. L. J. 633=22 I. C. 594. Statement against interest—What is, and its admissibility. See (1911) 1 M. W. N. 368=11 I. C. 380; 100 I. C. 542=45 C. L. J. 138. See also 29 I. C. 607; 36 M. 19; 18 I. C. 989. Statement as to relationship—Prior statement by mother that she was the concubine of alleged father—Admissibility in evidence. 10 I. C. 188. Admission of one co-plaintiff or co-defendant, evidence against other. 33 M. L. J. 180=44 I. A. 201=40 All. 159 (P. C.).

(4) When the statement gives the opinion of any such person, as to the existence of any public right or custom or matter of public or general interest, of the existence of which, if it existed, he would have been likely to be aware, and when such statement was made before any controversy as to such right, custom or matter has arisen.

or gives opinion as to public right or custom, or matters of general interest ;

or
statement was made before any controversy as to such right, custom or matter has arisen.

(5) When the statement relates to the existence of any relationship [by blood, marriage or adoption]¹ between persons as to whose relationship [by blood, marriage or adoption]¹ the person making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised.

or relates to existence of relationship ;

marriage or adoption]¹ between persons as to whose relationship [by blood, marriage or adoption]¹ the person making the statement had special means of knowledge,

(6) When the statement relates to the existence of any relationship [by blood, marriage or adoption]¹ between persons deceased, and is made in any will or deed relating to the affairs of the family to which any such deceased person belonged, or in any family pedigree, or upon any tombstone, family portrait or other thing on which such statements are usually made, and when such statement was made before the question in dispute was raised.

or is made in will or deed relating to family affairs ;

marriage or adoption]¹ between persons deceased, and is made in any will or deed relating to the affairs of the family to which any such deceased person belonged, or in

or in document relating to transaction mentioned in section 13, clause (a) ;

(7) When the statement is contained in any deed, will or other document which relates to any such transaction as is mentioned in section 13, clause (a).

or is made by several persons and expresses feelings relevant to matter in question.

(8) When the statement was made by a number of persons, and expressed feelings or impressions on their part relevant to the matter in question.

Illustrations.

(a) The question is, whether A was murdered by B ; or

A dies of injuries received in a transaction in the course of which she was ravished. The question is, whether she was ravished by B ; or

Sec. 32 (4).—Statement of deceased as to custom.—Family custom made after controversy—Admissibility of. 42 C. 582=27 M.L.J. 373 (P.C.)

Sec. 32 (5).—Recital in deeds how far evidence. 25 M.L.J. 373=19 I.C. 740. Illustration to S. 32 shows that the relationship which may be proved by the statement of a deceased person may be relationship of the person making the statement. (*Ibid.*) Statement of deceased that his consent to adoption was purchased, how far evidence. 39 M. 12=18 I.C. 989. Statement of deceased members of a family regarding family history and seniority of members is admissible 1 Luck. 97=104 I.C. 299=A.I.R. 1927 Oudh 278. Statement as to commencement of relationship—If, and when can be admitted. 20 C.W.N. 122=21 C.L.J. 96=27 I.C. 739. Fosterage is not relationship within this section. Hearsay evidence of fosterage is not admissible under the section to prove the case of fosterage. 24 I.C. 643. Pedigree—Admissibility. See 30 A. 510=5 A.L.J. 701=13 C.W.N. 1 (P.C.). See also 37 A. 600. A pedigree in a Settlement Court is admissible in evidence upon proof that the person making the statement contained in the pedigree was dead and had special means of knowledge. 10 I.C. 1991; 8 I.C. 728. See also 25 I.C. 823; 105 I.C. 26. A horoscope which is not spoken to either by its writer or by one who had special means of knowledge as to its correctness is admissible in evidence. 38 M. 166=24 M.L.J. 517=19 I.C. 452. A recital in a testator's father's will mentioning the age of the testator is admissible to prove the age of the testator. (*Ibid.*) But see 4 S.L.R. 225=10 I.C. 967. (25 M. 183; 20 Cal. 758; 24 M.L.J. 49

Foll.). The words "relating to the existence of any relationship" are wide enough to include statements about the birth and death of relatives which events either commence or terminate the relationship. (7 I.C. 218. (20 C. 753; 24 C. 265 Foll.). A statement in a guardianship petition made by a person's aunt that he was born on a certain day and that she was his aunt is admissible in evidence as it relates to the existence of relationship. 20 C.L.J. 621=28 I.C. 595. Statements after dispute arose are not admissible. See 25 A.L.J. 861. On this clause see also 22 A.L.J. 657=46 All. 665=1924 All. 575.

Sec. 32 (6).—"FAMILY PEDIGREE"—meaning of. 1 Luck. C. 700. As to the presumption of genuineness of pedigree tables, See 105 I.C. 81. Entries in *Panda's* register or note-books are admissible in evidence upon a question of family pedigree but they should be received with caution and subjected to severe scrutiny in order to guard against the possibility of fabrication. 15 I.C. 625. [30 A. 510=35 I.A. 166=18 M. L.J. 424=13 C.W.N. 1 (P.C.)] Pedigree—Admissibility—Proof of—Person making the statement not known. See 37 A. 600=13 A.L.J. 817=30 I.C. 505. See also 30 A. 510 (P.C.); 8 I.C. 728; 21 I.C. 274. Objections to the admissibility of evidence taken at a late stage in litigation is not to be encouraged. The proper time to object is at the trial when the evidence is tendered. 37 A. 600=13 A.L.J. 817; 30 I.C. 505; see also 30 A. 510. (P.C.); 8 I.C. 274. Statements of deceased mortgagor in mortgage deed admissible to prove relationship. 29 I.C. 974.

These words were inserted by Act XVIII of 1872, S. 2.

The question is, whether *A* was killed by *B* under such circumstances that a suit would lie against *B* by *A*'s widow.

Statements made by *A* as to the cause of his or her death, referring respectively to the murder, the rape and the actionable wrong under consideration are relevant facts.

(b) The question is as to the date of *A*'s birth.

An entry in the diary of a deceased surgeon, regularly kept in the course of business, stating that, on a given day, he attended *A*'s mother and delivered her of a son, is a relevant fact.

(c) The question is, whether *A* was in Calcutta on a given day.

A statement in the diary of a deceased solicitor, regularly kept in the course of business, that on a given day the solicitor attended *A* at a place mentioned, in Calcutta, for the purpose of conferring with him upon specified business, is a relevant fact.

(d) The question is, whether a ship sailed from Bombay harbour on a given day.

A letter written by a deceased member of a merchant's firm by which she was chartered to their correspondents in London, to whom the cargo was consigned, stating that the ship sailed on a given day from Bombay harbour, is a relevant fact.

(e) The question is, whether rent was paid to *A* for certain land.

A letter from *A*'s deceased agent to *A* saying that he had received the rent on *A*'s account and held it at *A*'s orders, is a relevant fact.

(f) The question is, whether *A* and *B* were legally married.

The statement of a deceased clergyman that he married them under such circumstances that the celebration would be a crime, is relevant.

(g) The question is, whether *A*, a person who cannot be found, wrote a letter on a certain day, the fact that a letter written by him is dated on that day is relevant.

(h) The question is, what was the cause of the wreck of a ship.

A protest made by the Captain, whose attendance cannot be procured, is a relevant fact.

(i) The question is, whether a given road is a public way.

A statement by *A*, a deceased headman of the village, that the road was public, is a relevant fact.

(j) The question is, what was the price of grain on a certain day in a particular market.

A statement of the price, made by a deceased banya in the ordinary course of his business, is a relevant fact.

(k) The question is, whether *A*, who is dead, was the father of *B*.

A statement by *A* that *B* was his son, is a relevant fact.

(l) The question is, what was the date of the birth of *A*.

A letter from *A*'s deceased father to a friend announcing the birth of *A* on a given day, is a relevant fact.

(m) The question is, whether, and when, *A* and *B* were married.

An entry in a memorandum-book by *C*, the deceased father of *B*, of his daughter's marriage with *A* on a given date, is a relevant fact.

(n) *A* sues *B* for a libel expressed in a painted caricature exposed in a shop window.

The question is as to the similarity of the caricature and its libellous character. The remarks of a crowd of spectators on these points may be proved.

33. 1 Evidence given by a witness in a judicial proceeding or before any persons authorized by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or

Sec. 33.—*Cf.* S. 13 of Act XIV of 1908.

CONSTRUCTION.—S. 33 must be very strictly construed. 31 I. C. 354=17 Bom. L. R. 590. Affidavit of person who died subsequently and who was not subjected to cross examination is not admissible. 38 M. L. T. 275=102 I. C. 243=A. I. R. 1927 Mad. 507=52 M.L.J. 477. Conditions of admissibility of evidence. *Per May Oung, J.*—The power given by S. 33, Evidence Act, requires to be exercised with great care and the Court must insist on strict proof before holding that the requisite conditions have been satisfied. The Court must also in the judgment or preferably in a separate order, record the reasons for doing so. 1 Rang. 512=76 I. C. 817=1924 R. 209. *See also*

25 O. C. 142=74 I. C. 860=1922 Oudh 254. The provisions of this section are not in any way affected by S. 350 of the Criminal Procedure Code. 101 I. C. 483=28 Punj. L. R. 199=A. I. R. 1927 Lah. 332 (5 L. 115 doubted) Death of witness before completion of cross-Examination—Admissibility of deposition in evidence. 25 A.L.J. 775. *See also* 31 C.W.N. 908. On this section *see also* 1924 All. 85, 1925 Rang. 89. It is the duty of the Court to satisfy itself that the presence of the witness cannot be obtained without an amount of delay or expense which it considers unreasonable before the statement of the witness in a previous judicial proceeding can be admitted. The mere statement of the public prosecutor to

is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable :

Provided—

that the proceeding was between the same parties or their representatives in interest ;

that the adverse party in the first proceeding had the right and opportunity to cross-examine ;

that the questions in issue were substantially the same in the first as in the second proceeding.

Explanation.—A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section.

STATEMENTS MADE UNDER SPECIAL CIRCUMSTANCES.

- 34.** Entries in books of account, regularly kept in the course of business, are relevant whenever they refer to a matter into which the Court has to inquire, but such statements shall not alone be sufficient evidence to charge any person with liability,

Entries in books of account when relevant.

that effect is not sufficient. There must be independent evidence. *Prima facie* the consent of the accused or his counsel is presumptive evidence of the absence of prejudice. 28 M. L. J. 329 = 28 I. C. 518 = 39 M. 449 (2 A. 646 ; 3 M. 48 ; 41 C. 406 ; 5 C 958 Foll.). Evidence taken in trial for dacoity is not admissible in a trial under the Arms Act. 35 I. C. 480 = 10 Bur. L. T. 121. Evidence taken before Magistrate without jurisdiction is inadmissible in a subsequent trial before competent Magistrate. 27 Punj. L. R. 447 = 7 Lah. 396 = 97 I. C. 752 = A. I. R. 1926 Lah. 582. As to Statement made before enquiring Magistrate, see A. I. R. 1926 Pat. 58.

ILLUSTRATIVE CASES—Statements made in subsequent judicial proceedings are not admissible in proceedings instituted previously. 3 U. P. L. R. (B. R.) 74. As the person against whom proceedings have been instituted under S. 476 of the Criminal Procedure Code has no right to cross-examine witnesses during that enquiry, the evidence of witness in that enquiry, who is not forthcoming at the trial started on the result of such inquiry, is not admissible under S. 33. 34 I. C. 969 = 17 Cr. L. J. 249 = 18 Bom. L. R. 284 ; also evidence given in proceedings under S. 145, Cr. P. C. by one defendant for another. 30 C. W. N. 254 = 93 I. C. 115 = A. I. R. 1926 Cal. 705 The deposition of a material witness which was relied upon by the judge in his summing up to the jury, who resided within the jurisdiction and could be procured without unreasonable expense and delay is not to be admitted under S. 33 as justice requires that such a witness should be examined in the presence of the accused. 31 I. C. 354 = 17 Bom. L. R. 590. A mere statement of a police-officer that a witness is a man of another district and cannot be found is not a sufficient ground for the reception of evidence under S. 33. 41 C. 601 = 26 I. C. 161. At a Sessions enquiry an approver was examined in chief but the accused were not asked then and there to cross-examine him and did not in fact dare to cross-examine and he died before trial in the Court of Sessions. *Held*, that it was doubtful whether his evidence was admissible under S. 33 and that in any case its value was small. 18 I. C. 406 = 17 C. W. N. 230. Consent of parties to treat evidence in another case as evidence in the case—*Legality*. See (1914) M. W. N. 930 ; 39

M. L. J. 198 = 104 I. C. 518. See also 17 C. W. N. 230 = 18 I. C. 406 = 14 C. L. J. 70 In the absence of proof of the circumstances mentioned in the section the importing in bulk in a civil suit of deposition of witnesses recorded in a criminal trial is a serious irregularity. 39 Bom. 441 = 29 M. L. J. 34 = 19 C. W. N. 729 = 29 I. C. 639 = 42 I. A. 135 (P. C.). See also 106 P. R. 1915. Where the interests are identical and when the object of litigation is to advance a common claim, evidence given in former judicial proceedings can be received in evidence under this section in a subsequent proceeding even against persons not parties to the previous litigation. 28 M. L. J. 669 = 24 I. C. 519. (23 W. R. 42 ; 15 B. L. R. 1, Foll.). Suit to enforce registration of will—Judgment based on evidence adduced before the registering officer and treated as evidence in the suit by the consent of parties—Judgment unsustainable. 41 M. 731 = 34 M. L. J. 526 = 46 I. C. 849. See also 35 M. L. J. 657 = (1916) M. W. N. 931.

Sec. 33 Proviso.—The words "representative in interest" mean that the parties in the second proceeding in which evidence is tendered must be the representative in interest of the parties in the first proceeding, or in other words should be persons who derive their title through or claim under them or, shortly, are their privies. S. 33 cannot be applied without any reference to the subject-matter of the two suits. The interests involved in each case must be the same or similar. English and Indian case law referred to. 102 I. C. 713 = A. I. R. 1927 Mad. 733. The term "Representative in interest" includes "privies in estate" (as) partners and joint contractors. 5 P. 777.

PROCEDURE.—It cannot be accepted as a proposition of law that it is absolutely necessary to examine a qualified medical practitioner before evidence can be accepted under S. 33. Difference between English and Indian conditions regarding facilities for obtaining qualified doctors pointed out. 31 C. W. N. 908 = 103 I. C. 846 = 28 Cr. L. J. 766 = A. I. R. 1927 Cal. 679.

Sec. 34.—BOOKS "REGULARLY KEPT IN THE COURSE OF BUSINESS"—MEANING OF.—In order that books may be regularly kept in the course of business they must be kept in accordance with a uniform practice in the current routine of business of the person to whom they

Illustration.

A sues B for Rs. 1,000, and shows entries in his account-books showing B to be indebted to him to this amount. The entries are relevant, but are not sufficient, without other evidence to prove the debt.

35. An entry in any public or other official book, register or record, stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register or record

is kept, is itself a relevant fact.

belong. The particular method of keeping the books may affect their value as evidence. 14 Cr. L. J. 262 = 19 I. C. 534. As to what constitutes "regularly kept" accounts and as to the effect of irregularity in keeping accounts, see 95 I. C. 128 = A. I. R. 1926 Nag. 407. See also 4 B. 576; 13 C. L. J. 139 = 8 I. C. 81; 13 I. C. 678; 7 I. C. 1011. Proof of accounts, see 100 I. C. 863 = A. I. R. 1927 Nag. 177. Mere production without more, of account books does not prove anything. There must be proof, not only of the books, but as each entry and item of account. 23 I. W. 272 = 96 I. C. 429 = A. I. R. 1926 Mad. 955. Absence of entry in account book is no evidence. See 19 C. W. N. 611 = 28 I. C. 705. "Account" implies reckoning and totalling and balancing. Where these are not done there is no account. (*Ibid.*) See also 10 N. L. R. 44 = 23 I. C. 193. "Books" mean sheets of paper permanently bound. Unbound sheets are not books of account. 7 L.B.R. 84 = 15 Cr. L. J. 241 = 23 I. C. 193.

RELEVANCY OF ENTRIES IN BOOKS OF ACCOUNT.—See 5 M.I.A. 432; 4 Beng. L.R. (P.C.) 31; 13 M. I. A. 365; 3 N. W. P. 308; 5 W. R. 242. Such books can be used to refresh memory of witness. 29 C. 774. Such entries are relevant though not sufficient by themselves to charge a party with liability. 16 A. 161; 18 A. 92; 1 M. I. A. 47 = 5 W. R. (P.C.) 29. They would be good corroborative evidence. 23 W. R. (P.C.) 27. Such entries must be corroborated by other evidence in order to find a liability upon. 22 W. R. 549; 23 W. R. (Cr.) 27. Such entries need not be made by or at the dictation of a person who had a personal knowledge of the truth of the fact stated. 1 B. 610. The noting of the items in an account book kept regularly by a *munim* in whose presence the money was not paid is no evidence. 1923 Lah 431 (1). As to what constitutes being kept in the regular course of business, see 4 B. 576. Although the actual entries in books of account are relevant, the book itself is not relevant to disprove an alleged transaction by the absence of any entry concerning it. 10 C. 1024; 30 C. 24. But see *contra* 1924 Nag. 22 in which it was held that the absence of an entry in an account book is a relevant fact admissible in evidence. (4 C. W. N. 207, Foll.) *Jama-wasul-baki* papers—Admissibility of. See 5 W. R. 243; 7 W. R. 533; 27 C. 118; 32 C. 582; 8 C. 1926; 46 C. L. J. 253 = 104 I. C. 733 = A. I. R. 1927 Cal. 855. *Jamabandi* papers—Admissibility of. See 6 B. L. R. App. 62; 14 W. R. 472; 9 W. R. 451; 1 N.W.P. App. 65; 22 W. R. 256; 22 W. R. 207; *Ibid.* 540; 23 W. R. 456; 20 W. R. 142, 171. *Jathaki* papers, no admissible, unless party sought to be bound was shown to have agreed thereto. 9 W. R. 274. *Batwara Khasra* is admissible. 1922 P. 447. (39 I. C.

491, Foll.) *Batwara* papers, see 1923 Cal. 261; 59 I. C. 963. Purohit's books—Entries in purohit's books as to the relationship of the pilgrims are admissible in evidence. 30 P. L. R. 1922. *Isam-Navasi* papers, i.e., returns submitted by the police in respect of lands held by *Ghatwals* are admissible. 9 W. R. 158; 8 B. L. R. 504; 14 M. I. A. 259; 8 W. R. 232. Settlement *beheri* and *awargha* papers how far admissible, see 9 W. R. 239. As to entries in Settlement Register, see L. R. 5 A. 116 (Rev.). As to *hastabod* papers, see 9 W. R. 105. As to *Kanungo* papers, see 7 W. R. 533; 2 W. R. (Act X Rul.) 13; 8 W. R. 517. As to *hat chitta* books, see 1 Jur. (N. S.) 358. As to income-tax papers, held admissible against and not in favour of the person whom they may concern. 9 W. R. 275. As to *kawazima* papers, see 2 B. L. R. App. 37; see also 6 M. I. A. 88. As to Banker's books, see Banker's Books Evidence Act (XVIII of 1891). As to books of Post Office Savings Bank, see Act I of 1893.

OBJECTION TO ADMISSIBILITY.—Where entries in certain books of account are proved to be in the hand-writing of a person since deceased, any objection to their admissibility on the ground that they were not proved to have been kept in the regular course of business ought to be taken at the time of trial. 32 I. C. 665 = 17 Cr. L. J. 73 (Mad.).

Sec. 35.—As to admissibility of statement contained in public document, see A. I. R. 1925 P. C. 170 = 50 M. L. J. 120 (P.C.).

ILLUSTRATIVE CASE LAW.—The report of a Municipal overseer as to when the construction of *chaija* took place is inadmissible in evidence. 26 I. C. 670 = 12 A. L. J. 740. A letter of the Govt. of India in which *Anae-the-ne* is included in the list of recognised preparations is not admissible in evidence. 42 I. C. 166 = 32 P. W. R. 1917 (Cr.). An entry made in a *choukidar's* register of births and deaths is not admissible in evidence if it neither purports nor is proved to be signed by the station writer, the register not being one directed to be kept by any law. 22 O. C. 250 = 54 I. C. 166; 23 L. W. 688 = 95 I. C. 1005 = A. I. R. 1926 Mad. 985 (Birth's register). Entry of records in Native State, see 99 I. C. 307 = A. I. R. 1927 Bom. 11 = 28 Bom. L. R. 716. Mutation register, see 1 Luck. 529; A. I. R. 1926 Oudh 594. Survey register. 5 Bur. L. J. 116 = 98 I. C. 166 = A. I. R. 1926 Rang. 204; 31 C. W. N. 419 = A. I. R. 1927 Cal. 345. As between *Thakhaat* map and Revenue Survey map, the latter is more accurate and should be relied on to determine boundaries. 1926 P. H. C. C. 210 = 96 I. C. 1027 = A. I. R. 1926 P. 385. See also 30 C. W. N. 689 = 96 I. C. 959 = A. I. R. 1926 Cal. 862 (Record of Rights); A. I. R. 1926 Nag. 161 (*Parepatraha*); A. I. R. 1926 Cal. 290 (Map prepared for the pur-

36. Statements of facts in issue or relevant facts, made in published maps or charts generally offered for public sale, or in maps or plans made under the authority of Government, as to matters usually represented or stated in such maps, charts or plans are themselves relevant facts.

Relevancy of statements in maps, charts and plans.

37. When the Court has to form an opinion as to the existence of any fact of a public nature, any statement of it made in a recital contained in any Act of Parliament, or in any Act of the Governor-General of India in Council, or of [any other legislative authority in British India constituted for the time being under the Indian Councils Act, 1861, the Indian Councils Acts, 1861 and 1892, or the Indian Councils Acts, 1861 to 1909]¹ or in a notification of the Government appearing in the Gazette of India, or in the Gazette of any Local Government, or in any printed paper purporting to be the London Gazette, or the Government Gazette of any colony or possession of the Queen, is a relevant fact.

Relevancy of statement as to fact of public nature contained in certain Acts or notifications.

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38. When the Court has to form an opinion as to a law of any country, any statement of such law contained in a book purporting to be printed or published under the authority of the Government of such country and to contain any such law, and any report of a ruling of the Courts of such country contained in a book purporting to be a report of such rulings, is relevant.

Relevancy of statements as to any law contained in law-books.

pose of partition); A. I. R. 1926 Oudh 88 (Guardianship certificate). Remarks made by Survey officer at the time of inspection of a village. 2 Luck. 4=4 O. W. N. 15=8 L. R. 48 (Rev.)=98 I. C. 876=A. I. R. 1927 Oudh 74. Prescription register in Government hospitals is admissible though hand-writing of the entry is not proved. 1 Luck. 203=103 I. C. 512=A. I. R. 1927 Oudh 310. Entry in *Wajib ul-arz*. 101 I. C. 820=1 Luck. 73. Judgment not *inter partes*. 9 N. L. J. 215; A. I. R. 1927 Nag. 19; 18 Mad. 73. Any entry in a register of previous convictions where the conviction is relevant is admissible under S. 35 and can be proved by a certified copy under S. 65 of the Act and upon it accused might be asked if he admitted the conviction. On this, *see* 1922 Cal. 654; 1925 All. 79; 1924 Kang. 135 Report of Kanungo on criminal complaint is admissible. 1 Luck. 259=104 I. C. 287=A. I. R. 1927 Oudh 323. The following are examples of books, registers, and registered records in India which come within the purview of this section:—Log books (*see* sections 103-108, Act I of 1879, and sections 280-285 of the Merchants Shipping Act, 17 & 18 Vict., cap. 104); Marriage registers (*see* Ss. 28, 32 and 54 and Schedules III and IV, Act XV of 1872; 14 and 15 Vict., cap. 40; Ss. 14, 21 and 49 of the Repealed Act V of 1852; the Repealed Act XXV of 1864, XV of 1865 (Parsees); and Act III of 1832; S. 44, Act V of 1865, S. 6 and Schedule of Act Registers directed by Part XI of the Indian Registration Act, III of 1877; registers of printing presses; newspapers, and books published in India, Act XXV of 1867; of Copyright Act, the Act XX of 1847, III of 1914 of new inventions, designs, patterns, etc. S. 11, Act XV of 1859, Act XIII of 1872 of literary, scientific and charitable societies, Act XXI of 1860 of joint-stock com-

panies, etc., under the Indian Companies Act VI of 1882 (9 All. 366) of British ships, S. 4, Act X of 1841; 17 & 18 Vict. cap. 104 registers prescribed by the various Municipal Acts. Proceedings of Registered Companies and Municipal Committees recorded in accordance with the provisions of the particular Act applicable thereto of vessels on the river Indus, Act (I Bom. C.) of 1863. Record of Rights S. 14 of the Punjab Land-Revenue Act XXXIII of 1871, and Ss. 94-106 of the North-Western Provinces Land Revenue Act XIX of 1873; the Settlement Record prescribed by clause 9; S. 9, Bengal Regulation VII of 1822 Registers of Chakeran lands (W. R. 1864, 358); Quinquennial registers in the Bengal Presidency (7 W. R. 14) Registers of tenures under the Chota Nagpur Tenure Act, II of 1869 B. C. (19 Cal. 91) Register of Mahomedan Marriages, Act I of 1876 (B. C.); 10 Cal. 60) Revenue registers in the Madras Presidency (15 Mad. 19=A. I. R. 1926 Oudh 427); Register under the Bengal "Land Registration Act" VII (B. C.) of 1876. Entry is no evidence of title though it may be of possession. 8 Cal. 853=9 Cal. 401; 12 C. L. R. 12.

Sec. 36.—*See* 77 I. C. 1048; 7 C. L. J. 415=2 I. C. 648. As to evidentiary value of *Thak map*, *see* 31 C. W. N. 473=103 I. C. 13=46 C. L. J. 322=A. I. R. 1927 Cal. 403; Maps prepared under Calcutta Survey Act; 31 C. W. N. 419=102 I. C. 370=45 C. L. J. 474=A. I. R. 1927 Cal. 345. Entry in Revenue Survey Map, *see* 5 Bur. L. J. 116=98 I. C. 166=A. I. R. 1926 Rang. 204.

Sec. 37.—¹ These words were substituted by Act X of 1914, Sch. I.

² Last para. of section 37 which was added by Act V of 1899 has been omitted by Act X of 1914, Sch. II as being unnecessary.

How much of a Statement is to be Proved.

39. When any statement of which evidence is given forms part of a longer state-

What evidence to be given when statement forms part of a conversation, document, book or series of letters or papers.

ment, or of a conversation or part of an isolated document or is contained in a document which forms part of a book, or of a connected series of letters or papers, evidence shall be given of so much and no more of the statement, conversation, document, book or series of letters or papers as the Court considers necessary in that particular case to the full understanding of the nature and effect of the statement, and of the circumstances under which it was made.

such trial.

Judgments of Courts of Justice, when Relevant.

40. The existence of any judgment, order or decree which by law prevents any

Previous judgments relevant to bar a second suit or trial.

Courts from taking cognizance of a suit or holding a trial, is a relevant fact when the question is whether such Court ought to take cognizance of such suit or to hold

such trial.

41. A final judgment, order or decree of a competent Court, in the exercise of

Relevancy of certain judgments in probate, etc., jurisdiction.

probate, matrimonial admiralty or insolvency jurisdiction, which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing,

not as against any specified person but absolutely, is relevant when the existence of any such legal character, or the title of any such person to any such thing, is relevant.

Such judgment, order or decree is conclusive proof—

that any legal character which it confers accrued at the time when such judgment, order or decree came into operation ;

that any legal character, to which declares any such person to be entitled, accrued to that person at the time when such judgment, [order or decree]¹ declares it to have accrued to that person ;

that any legal character which it takes away from any such person ceased at the time from which such judgment, [order or decree]¹ declared that it had ceased or should cease ;

and that anything to which it declares any person to be so entitled was the property of that person at the time from which such judgment, [order or decree]¹ declares that it had been or should be his property.

Sec. 39.—Although the entries in books of account are relevant to the extent provided by this section, yet such a book is not by itself relevant to raise an inference from the absence of an entry. 3 I. C. 291 (10 C. 1024 ; 7 C. L. R. 256 ; 30 C. 231 at p. 247, Ref. foll.).

Sec. 40.—See 18 Bom. L. R. 185 = 41 B. 1. As to evidentiary value of judgments, see 19 S. L. R. 376 ; 43 C. L. J. 135 = A. I. R. 1926 Cal. 698 (decision in previous rent suit admissible) ; Decision as to age in guardianship proceedings—Admissibility in suit by ward for property, see 7 Ind. Cas. 505 ; as to admissibility of decision of probate Court unholding adoption. 38 B. 272 ; judgment of probate Court on question of status, see (1910) 1 U. B. R. 61 = 10 I. C. 987. 8 Pat. L. T. 510 ; Judgment of Probate Court—Effect—Refusal to grant probate. See 38 B. 309 = 16 Bom. L. R. 5. As to relevancy of judgment not *inter partes*, see 97 I. C. 282 = A. I. R. 1926 Pat. 577 ; 93 I. C. 321 = A. I. R. 1926 Sind 161, and notes under Ss. 13 and 244.

Sec. 41.—¹ The words " Order or decree " wherever they occur in the section were inserted by Act XVIII of 1872, S. 3. On this section, see 2 M. H. C. R. 276 ; 14 M. L. A. 367 ; 6 B. 703 ; 7 W. R. 338 (F. B.).

A judgment of the probate Court is inadmissible in evidence in a proceeding under S. 193, Penal Code, for perjury committed in a testamentary suit. 38 C. L. J. 163 = 76 I. C. 417 = 1924 Cal. 104 ; 8 Pat. L. T. 510 = 101 I. C. 289 = A. I. R. 1927 Pat. 61 ; 5 Mys. L. J. 107. Grant of probate of will, value of, as proving execution of will. 5 P. 777. As to the legal effect of grant of letters of administration see 4 Rang. 251 = 97 I. C. 1054 = A. I. R. 1926 Rang. 202. Such grant is no bar on matters not in issue in administration proceedings (*Ibid.*)

ORDER OF INSOLVENCY COURT.—Refusing to adjudicate a person a bankrupt is not a judgment *in rem*. See 46 M. L. J. 580 = (1924) Mad. 622.

Relevancy and effect of judgments, orders or decrees, other than those mentioned in S. 41.

42. Judgments, orders or decrees other than those mentioned in S. 41 are relevant if they relate to matters of a public nature relevant to the enquiry ; but such judgments, orders or decrees are not conclusive proof of that which they state.

Illustration.

A sues *B* for trespass on his land. *B* alleges the existence of a public right of way over the land, which *A* denies.

The existence of a decree in favour of the defendants, in a suit by *A* against *C* for a trespass on the same land, in which *C* alleged the existence of the same right of way, is relevant, but it is not conclusive proof that the right of way exists.

Judgments, etc., other than those mentioned in sections 40 to 42, when relevant.

43. Judgments, orders or decrees, other than those mentioned in sections 40, 41 and 42, are irrelevant, unless the existence of such judgment, order or decree is a fact in issue, or is relevant under some other provision of this Act.

Illustrations.

(a) *A* and *B* separately sue *C* for a libel which reflects upon each of them. *C* in each case says that the matter alleged to be libellous is true, and the circumstances are such that it is probably true in each case, or in neither.

A obtains a decree against *C* for damages on the ground that *C* failed to make out his justification. The fact is irrelevant as between *B* and *C*.

(b) *A* prosecutes *B* for adultery with *C*, *A*'s wife.

B denies that *C* is *A*'s wife, but the Court convicts *B* of adultery.

Afterwards, *C* is prosecuted for bigamy in marrying *B* during *A*'s lifetime. *C* says that she never was *A*'s wife.

The judgment against *B* is irrelevant as against *C*.

(c) *A* prosecutes *B* for stealing a cow from him. *B* is convicted.

Sec. 42.—On this section, see 6 C. 171 (F. B.) ; 12 A. 1 (F. B.). When a question of status is in issue, judgments and orders between the parties in mutation proceedings, succession certificate cases, rent suits, suits for possessions, etc., are admissible in evidence. They are of high evidentiary value and constitute proof sufficient to shift the burden. (1924) Nag. 387. A judgment in which a custom has been judicially recognised is admissible as evidence of the custom. 3 S. L. R. 5 = 1 Ind. Cas. 937 (16 A. 379 R.). The judgment of a Criminal Court and the depositions of the witnesses therein are inadmissible in evidence in a civil suit, to prove the liability of defendants. 106 P.R. 1915 = 32 Ind. Cas. 18. See also 117 P.R. 1912 = 16 Ind. Cas. 491. On a question as to the caste of a particular family evidence of members and decisions in previous litigation are relevant. 93 I. C. 705 = A. 1, R. 1925 Mad. 497. Judgments not between parties are inadmissible. See 12 A. L. J. 837 = 25 Ind. Cas. 30. Also 4 Ind. Cas. 997 and 8 Ind. Cas. 897. See also 25 B. 433 a copy of a judgment of a Swiss Court was held inadmissible against third party.

Sec. 43—Illustrations were a judgment in a previous suit not *inter partes* is not admissible as evidence of an admission said to have been made by one of the parties in the course of that suit. The judgment is no better than any other hearsay evidence of the admission 20 C.W.N. 648 = 22 C.L.J. 270 = 30 Ind. Cas. 821. See also 101 I. C. 774. An order of the Board of Revenue is not evidence in a case before the High Court but the latter should not make a decree in dissonance with a decision of the Board without fully considering and giving all weight to the reasons advanced in the making of that decision 3 Pat. L.J. 188

= 43 Ind. Cas. 393.

QUESTION OF LIABILITY—DECISION OF CIVIL COURT.—Where a person is charged with criminal breach of trust as regards certain items and the question of civil liability about the same items has been determined by a competent Civil Court, the judgment of that Court would be the best evidence of the civil rights of the parties and hence a relevant fact. 41 Bom. 1 = 33 I. C. 633 = 18 Bom. L. R. 185.

ADMISSIBILITY OF JUDGMENT "INTER PARTES".—See 1 C. W. N. 146 ; 7 P. R. 1895 (Cr.) ; 11 B. H. C. 90 ; 9 C. P. L. R. 8.

ADMISSIBILITY OF JUDGMENT NOT "INTER PARTES."—In a suit to consent a notice of ejectment the only evidence of a lease was a judgment in a suit not *inter partes*. Held, that the lease could not be held binding between the parties to the ejectment suit. 54 I. C. 574. On this section see also 9 C. P. L. R. (Cr.) 8 ; 9 Bom. L. R. 1134 ; 9 C. W. N. 402. Previous judgment not *inter partes*, though not *res judicata* is valuable proof of title and admissible in evidence. 101 I. C. 774. Findings in previous judgment are not admissible. 8 Lah. L. J. 492 = 96 I. C. 998 = 27 Punj. L. R. 544. Judgments in previous suit as regards the value of entries in revenue papers are admissible. 7 L. R. 10 (Rev.). Judgment of Criminal Court not admissible in subsequent suit for damages. 2 Rang. 549 = (1925) Rang. 143. Judgment in civil suit giving rise to criminal trial—Not legally admissible in a trial for the offence. 6 C. 247 = 7 C. L. R. 74. Record and judgment in a trial in which the principal was convicted of breach of the peace, if admissible against surety. See 25 C. 440 (Diss.: 32 P.R. 1903 (Cr.) ; 12 Cr. L. J. 404 = 11 I. C. 588.

A afterwards sues *C* for the cow, which *B* had sold to him before his conviction. As between *A* and *C* the judgment against *B* is irrelevant.

(*d*) *A* has obtained a decree for the possession of land against *B*. *C*, *B*'s son, murders *A* in consequence.

The existence of the judgment is relevant, as showing motive for a crime.

¹[(*e*) *A* is charged with theft and with having been previously convicted of theft. The previous conviction is relevant as a fact in issue.]

¹[(*f*) *A* is tried for the murder of *B*. The fact that *B* prosecuted *A* for libel and that *A* was convicted and sentenced is relevant under section 8 as showing the motive for the fact in issue.]

44. Any party to a suit or other proceeding may show that any judgment, order

Fraud or collusion in obtaining judgment, or incompetency of Court, may be proved.

or decree which is relevant under section 40, 41 or 42, and which has been proved by the adverse party, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion.

Opinions of Third Persons when relevant.

45. When the Court has to form an opinion upon a point of foreign law, or of science or art, or as to identity of hand-writing [or finger

Opinions of experts,

impressions]² the opinions upon that point of persons

specially skilled in such foreign law, science or art, [or in questions as to identity of hand-writing]³ [or finger impressions]² are relevant facts.

Sec. 43.—¹ Illustrations *e* and *f* were added by Act III of 1891, S. 5.

Sec. 44.—Collusive decree bind parties thereto and their representatives. It is not a nullity, 101 I. C. 765 = A. I. R. 1927 All. 494. Judgment—Validity of adoption—Evidence of, (1924) P. 298. Applicability and scope of section. See 34 All. 150 = 13 Ind. Cas. 80; 18 C. L. J. 264 = 21 Ind. Cas. 938; 6 Ind. Cas. 98; 37 B. 563 = 20 Ind. Cas. 530. Under this section a party to a compromise decree can show that his consent to it was obtained by misrepresentation and fraud without bringing a fresh suit to set it aside, 30 I. C. 63 (12 C. 156; 27 C. 11 R.). See also 1 L. W. 208 = 18 C. W. N. 601; 93 I. C. 385 = A. I. R. 1926 Cal. 1. Entry in record of right—Procured by fraud—Separate suit to set aside necessity for. See 18 C. W. N. 27. A party cannot plead his own collusion to avoid a decree to which he was himself a party. 6 N. L. R. 177 = 8 I. C. 1179 [13 W. R. 157; 26 C. 891; 11 B. 708 at pp. 713, 719, 721; 20 M. 383 at p. 388; 31 M. 485 at pp. 487, 488 F., 35 C. 551 (P. C.) D.] See also A. I. R. 1927 All. 494. Right of stranger to a decree affecting his right to show in a subsequent suit that the decree was invalid on the ground of fraud. Maintainability of subsequent suit without setting aside decree. See 21 C. W. N. 594 = 40 I. C. 607. Where the existence of certain evidence was stoutly denied and was afterwards discovered it is ground for setting aside decree. 29 Bom. L. R. 1046 = 105 I. C. 296 = A. I. R. 1927 Bom. 510.

Sec. 45.—² The words "or finger impressions" were added by Act V of 1899, Sec. 3 (1) and as to whether these words include thumb impressions see discussion in Council, Gazette of India, 1898, Part VI, p. 24, the words "or in questions as to identity of hand-writing" were inserted by Act XVIII of 1872, S. 4.

Secs. 45 and 46.—EXPERT EVIDENCE. (*a*)—Who are experts. See 32 C. 759. (*b*) How differs from ordinary evidence. See 3 N. L. R. 1. When evidence, (1924) Nag. 183. (*c*) Value to be attached to such evidence. See 11 B. 89; 29 C. 32; 15 C. 589. Expert evidence not based

on well defined inexorable laws of nature cannot be taken as decisive—Especially when there is direct evidence opposed to it, 96 I. C. 641 = A. I. R. 1926 Lah. 313. See also 29 O. C. 1 = A. I. R. 1925 Oudh 497. (*d*) As to admissibility of opinion evidence of persons not experts. See 18 P. R. 1915 (Cr.); 12 P. R. 1915 (Cr.). (*e*) As to Government experts, see 147 P. L. R. 1912 = 13 Cr. L. J. 563. (*f*) Validity of conviction based on expert evidence. 2 A. L. J. 444; 39 C. 245; 39 M. 169 = 11 M. L. T. 93 = 22 M. L. J. 270; 18 P. W. R. 1912.

ILLUSTRATIVE CASES.—COMPARISON OF HAND-WRITING.—To make the evidence of a hand-writing expert admissible it is not necessary that the hand-writing should be actually compared in Court. It is enough if the documents admittedly in the accused's hand-writing, are shown to him in open Court and he expresses his opinions thereon. 16 Cr. L. J. 703 = 30 I. C. 751 (Mad.); 16 C. W. N. 812 = 39 C. 606. See also 2 A. L. J. 444; 39 C. 245; 2 Weir 759. (Sub-Registrar not expert, 2 Weir 760). A comparison of hand-writing is to be used with great care and caution and especially in a criminal case when a large quantity of apparently different hand-writing is under comparison. 39 Cal. 606 = 16 C. W. N. 812. A. I. R. 1926 Pat. 575 (thumb-impression) 29 O. C. 1 = A. I. R. 1925 Oudh 413. See also 45 Cal. 60 = 21 C. W. N. 1076 = 42 I. C. 484 = 26 C. L. J. 187. A comparison of hand-writing is at all times, as a mode of proof, hazardous and inconclusive and especially when it is made by one not conversant with the subject and without such guidance as might be derived from the arguments of counsel and the evidence of experts. A comparison of writings has consequently been deemed a mode of ascertaining the truth which ought to be used with very great caution. 49 Cal. 215 = 26 C. W. N. 113 = 66 I. C. 774. The evidence of persons acquainted with the hand-writing of a person by whom the document is supposed to be written is admissible, though they are not experts. 18 P. R. 1915 (Cr.) = 28 I. C. 722. See also 147 P. L. R. 1912 = 15 I. C. 979. 7 Pat. L. T. 507 = 92 I. C. 1034 =

Such persons are called experts.

Illustrations.

(a) The question is, whether the death of *A* was caused by poison.

The opinions of experts as to the symptoms produced by the poison by which *A* is supposed to have died, are relevant.

(b) The question is whether *A*, at the time of doing a certain act, was, by reason of unsoundness of mind, incapable of knowing the nature of the act, or that he was doing what was either wrong or contrary to law.

The opinions of experts upon the question whether the symptoms exhibited by *A* commonly show unsoundness of mind, and whether such unsoundness of mind usually renders persons incapable of knowing the nature of the acts which they do, or of knowing that what they do is either wrong or contrary to law, are relevant.

(c) The question is, whether a certain document was written by *A*. Another document is produced which is proved or admitted to have been written by *A*.

The opinions of experts on the question whether the two documents were written by the same person or by different persons, are relevant.

46. Facts, not otherwise relevant, or relevant if they support or are inconsistent with the opinions of experts, when such opinions are relevant.

Illustrations.

(a) The question is, whether *A* was poisoned by a certain poison.

The fact that other persons, who were poisoned by that poison, exhibited certain symptoms which experts affirm or deny to be the symptoms of that poison, is relevant.

(b) The question is, whether an obstruction to a harbour is caused by a certain sea-wall.

The fact that other harbours similarly situated in other respects, but where there were no such sea-walls, began to be obstructed at about the same time, is relevant.

47. When the Court has to form an opinion as to the person by whom any document was written or signed, the opinion of any person acquainted with the hand-writing of the person by whom it is supposed to be written or signed that it was or was

Opinion as to hand-writing when relevant.

not written or signed by that person, is a relevant fact.

A. I. R. 1925 Pat. 787. In a case of forgery the only chief evidence being an expert's examination of the forged document as compared with the other documents alleged to be in the hand-writing of the accused, the other documents must be strictly proved to be in his hand-writing. 36 M. 159 = 22 M. L. J. 270. A mere statement therefore by a witness that it is the hand-writing of the accused is no evidence if he is not able to say how long ago they were written. (*Ibid.*) In arriving at a conclusion of the authorship of the forged document, the expert should show marked peculiarities in the hand-writing of the accused which are re-produced in the forged document and when the writing has no such peculiarities, the comparison is of no consequence and cannot be relied on. Also the fact that the disputed samples are put separately from the standard ones for the examination lessens its usefulness. (*Ibid.*) A conviction cannot be based on an expert's comparison, if it is not supported by corroborative evidence. (*Ibid.*)

FINGER PRINT.—If a finger-print expert has not been cross-examined as to the grounds of his opinion and as to the test to which he had put a particular finger-print, the weight to be attached to such witness's evidence cannot be diminished by applying to it considerations to which the witness's attention was never directed. 21 Cr. L. J. 257 = 55 I. C. 273 (Pat.). See also 97 I. C. 335 = A. I. R. 1926 Pat. 575. 43 C. L. J. 70 = 30 C. W. N. 373 = 93 I. C. 73 = A. I. R. 1926 Cal. 531.

THUMB IMPRESSION.—If the *finger prints* are clear enough to sustain an argument, there is no reason why an argument by way of deduction

should not be as sure a foundation for a conclusion and it may be a better one than any based on direct evidence. There is nothing in the so called science of finger print or the qualifications of an expert in it which need deter a Court from applying its own eyes and its own mind to the evidence and verifying the results submitted to it by the witness. 46 Mad. 715 = 69 I. C. 374 = 1923 Mad. 178; 9 P.R. (Cr.) 1914 = 27 I. C. 203. Taking thumb impression of accused in court for purpose of comparison is legal. 50 Mad. 462 = 98 I. C. 99 = A. I. R. 1927 Mad. 696 = 53 M. L. J. 597.

PHOTOGRAPHS.—Where the question of legitimacy arises photographs of the putative father and son to prove resemblance are admissible. 13 I. C. 678 = 15 C. L. J. 621. (On appeal 47 I. C. 513 = 45 Cal. 878.)

TECHNICAL WORKS.—Technical works cannot be used to refute an expert witness's opinion unless the passages to be used are put in cross-examination to the witness for him to explain them if he can. 22 C. W. N. 745 = 46 I. C. 593 = 28 C. L. J. 32 (23 C. 1 (P. C.) Ref.).

OPINION ON MEDICAL MATTERS.—Expert medical opinion of a Surgeon who conducted *post mortem* examination is relevant. 12 I. C. 93 = 12 Cr. L. J. 485.

TRADE MARK.—Similarity of trade mark is a matter for the court. 49 All. 92 = 99 I. C. 353 = A. I. R. 1927 All. 81 = 24 A. L. J. 975.

FOREIGN LAW.—Expert opinion on matters of foreign law. See 92 I. C. 112 = A. I. R. 1926 Mad 218.

Sec. 47.—See also Notes under Ss. 45 and 46.

Explanation.—A person is said to be acquainted with the hand-writing of another person when he has seen that person write, or when he has received documents purporting to be written by that person in answer to documents written by himself or under his authority and addressed to that person, or when, in the ordinary course of business, documents purporting to be written by that person have been habitually submitted to him.

Illustration.

The question is, whether a given letter is in the hand-writing of *A*, a merchant in London.

B is a merchant in Calcutta, who has written letters addressed to *A* and received letters purporting to be written by him. *C* is *B*'s clerk, whose duty it was to examine and file *B*'s correspondence. *D* is *B*'s broker, to whom *B* habitually submitted the letters purporting to be written by *A* for the purpose of advising with him thereon.

The opinions of *B*, *C*, and *D* on the question whether the letter is in the hand-writing of *A* are relevant, though neither *B*, *C* nor *D* ever saw *A* write.

48. When the Court has to form an opinion as to the existence of any general custom or right, the opinions, as to the existence of such custom or right, of persons who would be likely to know of its existence if it existed, are relevant.

Explanation.—The expression “general custom or right” includes customs or rights common to any considerable class of persons.

Illustration.

The right of the villagers of a particular village to use the water of a particular well is a general right within the meaning of this section.

Opinion as to usages, tenets, c., when relevant.

49. When the Court has to form an opinion as to—
the usages and tenets of any body of men or family,
the constitution and government of any religious or charitable foundation, or
the meaning of words or terms used in particular districts or by particular classes of people,
the opinions of persons having special means of knowledge thereon, are relevant facts.

50. When the Court has to form an opinion as to the relationship of one person to another, the opinion, expressed by conduct, as to the existence of such relationship of any person who, as a member of the family or otherwise, has special means of knowledge on the subject, is a relevant fact:

Opinion on relationship when relevant.

Although it is true that under the Evidence Act comparison of hand-writing is legitimate enough and the view of persons competent to express opinions may be in many cases of considerable value the opinions of those who have not carefully studied the art of caligraphy is not as a rule of very great utility. Indeed so uncertain and inexact is the science of the study of caligraphy that it has been for some years past the tendency to regard evidence even of experts as of somewhat inconclusive character. The mere fact that there is a resemblance between the signature alleged to be false and a signature admitted to be genuine does not carry great weight. If a signature is denied the onus of proving it is on the party relying on its genuineness. 64 I. C. 234 (P.). As to admissibility of opinions of persons not experts, but acquainted with the hand-writing of the person concerned. see 18 P. R. 1915 (Cr.); 12 P. W. R. 1915 (Cr.); 18 B. 66; 22 C. 313; 28 I. C. 722=16 Cr. L. J. 338; 147 P. L. R. 1912=15 I. C. 979; 16 C. W. N. 812; 29 O. C. 1=A. I. R. 1925 Oudh 411

Secs. 48 and 49.—The words “usages of any body of men” in S. 49 do not cover inferences or conclusions that may be drawn on the basis of past experience. 13 P. R. 1914 (Cr.)=16 Cr. L. J. 33=20 I. C. 625. On this section see also 7 I. A. 63=5 C. 744; 23 C. 427; 26 C. 184; 49 I. C. 843.

Sec. 50.—Difference between English and Indian Law 91 I. C. 462=A. I. R. 1926 Mad. 475. Sec. 50 is limited to opinion as expressed by conduct and there is no provision in the Act making general reputation receivable in evidence as in English law. (*Ibid*) On a question of the legality of the form of marriage conduct of parties is admissible. 93 I. C. 705=A. I. R. 1925 Mad. 407. Proof of paternity in case of a person claiming as illegitimate son, see 27 M. 32. In case of adultery and enticing away a married woman, fact of marriage must be strictly proved. 5 Cal. 566 (F. B.)=5 C. L. R. 579; 13 C. L. R. 125; 5 A. 233; 20 A. 166; 17 Bom. L. R. 75; 4 O. W. N. 172=100 I. C. 535=28 Cr. L. J. 311=A. I. R. 1927 Oudh 140.

Provided that such opinion shall not be sufficient to prove a marriage in proceedings under the Indian Divorce Act, or in prosecutions under section 494, 495, 497 or 498 of the Indian Penal Code.

Illustrations.

(a) The question is, whether *A* and *B* were married.

The fact that they were usually received and treated by their friends as husband and wife is relevant.

(b) The question is, whether *A* was the legitimate son of *B*. The fact that *A* was always treated as such by members of the family, is relevant.

51. Whenever the opinion of any living person is relevant, the grounds on which such opinion is based are also relevant.

Grounds of opinion when relevant

Illustration.

An expert may give an account of experiments performed by him for the purpose of forming his opinion.

CHARACTER WHEN RELEVANT.

52. In civil cases the fact that the character of any person concerned is such as to render probable or improbable any conduct imputed to him is irrelevant, except in so far as such character appears from facts otherwise relevant.

In civil cases character to prove conduct imputed, irrelevant.

53. In criminal proceedings the fact that the person accused is of a good character is relevant.

In criminal cases, previous good character relevant.

[54.] In criminal proceedings the fact that the accused person has a bad character is irrelevant, unless evidence has been given that he has a good character, in which case it becomes relevant.

Previous bad character not relevant, except in reply.

Explanation (1).—This section does not apply to cases in which the bad character of any person is itself a fact in issue.

Explanation (2)—A previous conviction is relevant as evidence of bad character.¹

Secs. 52-54.—ADMISSIBILITY OF EVIDENCE.—General evidence of bad character cannot in the first instance be given against accused. 7 W. R. 7 (Cr.); 6 W. R. 62 (Cr.); 59 I. C. 560=2 Lah. L. J. 658. Such evidence not generally admissible to prove commission of offence. 1 C. W. N. 146. But see also 27 C. 139. Proper object of proof of previous conviction is to determine amount of punishment if the accused be found guilty of offence charged. 11 B. H. C. 90. See also 32 M. 326.

USE OF PREVIOUS CONVICTION.—Where a previous conviction is relevant with reference to the question of the applicability of S. 562 and also on the question of punishment, it may be taken into consideration in giving punishment after the accused is found guilty. 39 Bom. 326 = 26 I. C. 995=16 Bom. L. R. 934. On this point, see also 5 C. 768=6 C. L. R. 219; U. B. R. (1908) 2nd Qr. Evidence 1=8 Cr. L. J. 411; U. B. R. (1892—1896), Vol. I, 82; 26 P. W. R. 1910; 14 Bom. L. R. 934=16 Cr. L. J. 83; 7 P. R. 1895 (Cr.): A. W. N. (1886) 47; 5 Bom. L. R. 1034; 14 C. 74; 2 Weir 760; 28 Punj. L. R. 313=A. I. R. 1927 Lah. 549.

ILLUSTRATIVE CASES.—The fact that an accused is of bad character or is reputed to be a

thief or a habitual thief is no evidence against him for a charge under S. 401, I. P. C. 13 P. R. 1914 (Cr.)=26 I. C. 625. See also 60 I. C. 331=5 Pat. L. J. 706. In a proceeding under S. 110, Cr. P. C., a list of crimes which a Police officer has suspected the accused to have committed, is inadmissible to establish the reputation of the accused. 13 I. C. 102=62 I. C. 545=22 Bom. L. R. 1274. The past history of a gang of dacoits would be significant only if an offence under S. 400, Penal Code, has been made out. 13 I. C. 279=16 C. W. N. 69. Statement by a prosecution witness in a prosecution for riot that he had brought a case under S. 107, Cr. P. C. against some of the accused who had been bound down, is admissible not for proving the bad character of the accused but as part of the *re gestae*, the events which had transpired before and which led up to the riot with which the accused were charged. 17 I. C. 565=40 Cal. 367. As to evidence of conduct as affecting character see 25 S. L. R. 55=A. I. R. 1927 Sind 28.

Sec. 54.—¹ This section was substituted for the original section by Act III of 1891, S. 6. Evidence of bad character of accused is admissible to prove the motive for crime. 5 Pat. 63=93 I. C. 884=7 Pat. L. T. 396.

Character as affecting damages.

55. In civil cases the fact that the character of any person is such as to affect the amount of damages which he ought to receive, is relevant.

Explanation.—In Ss. 52, 53, 54 and 55, the word "character" includes both reputation and disposition; but, [except as provided in S. 54] evidence may be given only of general reputation and general disposition, and not of particular acts by which reputation or disposition were shown.

PART II.

ON PROOF.

CHAPTER III.

FACTS WHICH NEED NOT BE PROVED.

Fact judicially noticeable need not be proved.

56. No fact of which the Court will take judicial notice need be proved.

Facts of which Court must take judicial notice.

57. The Court shall take judicial notice of the following facts :—

(1) all laws or rules having the force of law now or heretofore in force, or hereafter to be in force, in any part of British India :

(2) all public Acts passed or hereafter to be passed by Parliament, and all local and personal Acts directed by Parliament to be judicially notice :

(3) Articles of war for Her Majesty's Army or Navy :

(4) the course of proceeding of Parliament and of the Councils for the purposes of making Laws and Regulations established under the Indian Councils Act or any other law for the time being relating thereto.

Explanation.—The word "Parliament" in clauses (2) and (4) includes—

(1) the Parliament of the United Kingdom of Great Britain and Ireland ;

(2) the Parliament of Great Britain ;

(3) the Parliament of England ;

Sec. 55.—¹ Section 55 was inserted by Act III of 1891, S. 7. See 10 C. W. N. 522 = 3 C. L. J. 349 ; 2 C. P. L. R. 198 ; 41 I. C. 696.

Sec. 56. JUDICIAL NOTICE.—NOTORIOUS FACTS.—Judges are entitled to take judicial notice of any notorious fact without requiring actual positive evidence. 13 M. L. T. 131 = 24 M. L. J. 211 ; 18 I. C. 257.

Sec. 57. SECTION NOT EXHAUSTIVE.—The list given in this section of the facts of which the Court shall take judicial notice of is far from complete ; and Anglo-Indian Courts take judicial notice of the ordinary course of nature, the meaning of English words, and all other matters which they are directed by any other Act to notice, such as in Bengal, lists of landholders who have not made road cess returns (Beng. Act IX of 1880, S. 19) ; in Madras, by-laws framed by the Commissioners of Police (Mad. Act III of 1866, S. 4) ; in Bombay, notifications in the Gazette (Bom. Act X of 1866, S. 4) ; in Oudh, the list of talukdars and grantees published by the Chief Commissioner (Act I of 1868, S. 16)" (Whitley Stokes, Vol. II, p. 837.) In 10 C. L. R. 469 the Court refused to take judicial notice of the seal of a Kazi or Sudr. Amin whose appointment, said to have been made about 1820 was not proved. Though Courts take judicial notice of judgments, it does not follow that all statements of facts contained in judgments must be taken judicial notice of. 19 S. L. R. 376 = A. I. R. 1926 Sind 161.

REGISTERED LETTER.—Court may take judicial notice of the fact that a registered letter takes attract 24 hours longer than ordinary letter. 99 I. C. 622 = A. I. R. 1927 All. 215. Judi-

cial notice of.

CUSTOM OF RIGHT OF PRIVACY.—In Oudh See 13 O. L. J. 512. See also 93 I. C. 332 = A. I. R. 1926 Oudh 352. As to judicial notice of the existence of a local custom, see also 91 I. C. 583 = A. I. R. 1926 Oudh 101.

SIGNATURE OF A GAZETTED OFFICER.—The Court can take judicial notice of the signature of gazetted officer of the British Government and therefore the genuineness of his signature is not a matter which, unless the Court deems it necessary, need be proved. The applicability of the subsection is not contingent on the exhibition of a copy of the *Fort St. George Gazette* containing a notification of his appointment as such officer. 44 M. L. J. 557 = 72 I. C. 515 = 1923 Mad. 600. Honorary Magistrate's signature is taken judicial notice of only when made in his official capacity. 5 I. C. 537. Court take judicial notice of attestation and signature of such Registrar. 105 I. C. 422. As to signature of Justice of the Peace, see 1 Beng. L. R. 15 (Cr.). Judicial notice of Agra division records being destroyed during the Great Indian Mutiny, see 22 A. 294. For cases where appropriate books were referred to. see 17 A. 456 (P. C.) ; 12 C. L. R. 86 ; 22 C. W. N. 745 ; 32 C. 1 (P. C.) ; 18 M. (P. C.) ; 1 B. 369. Law Reports, 23 C. 289. 12 C. L. R. 86 ; 10 C. 140 ; 24 All. 445 ; 15 B. 452, 457 ; Medical Works, 12 C. L. R. 80 ; 10 C. 140 ; 14 A. 445 ; 15 B. 452 (457) ; 23 C. 604 at 608. Mill's History of India, Mill's Political Economy, Harrington's Analysis, Sanads, Treatises. See 3 W. R. (Act X, Rul.) 29 ; 7 B. L. R. 63 ; 15 W. R. (Cr.) 25 ; 15 M. 241. As to other histories (as) Menon's History of Travancore see 12 M. 495.

- (4) the Parliament of Scotland and Ireland ;
- (5) the accession and the sign manual of the Sovereign for the time being of the United Kingdom of Great Britain and Ireland ;
- (6) all seals of which English Courts take judicial notice : the seals of all the Courts of British India, and of all Courts out of British India, established by the authority of the Governor-General or any Local Government in Council ; the seals of Courts of Admiralty and Maritime jurisdiction and of Notaries Public, and all seals which any person is authorised to use by any Act of Parliament or other Act or Regulation having the force of law in British India ;
- (7) the accession to office, names, titles, functions and signatures of the persons filling for the time being any public office in any part of British India if the fact of their appointment to such office is notified in the Gazette of India, or in the official Gazette of any Local Government ;
- (8) the existence, title and national flag of every State or sovereign recognized by the British Crown ;
- (9) the divisions of time, the geographical divisions of the world, and public festivals, fasts and holidays notified in the official Gazette ;
- (10) the territories under the dominion of the British Crown ;
- (11) the commencement, continuance and termination of hostilities between the British Crown and any other State or body of persons ;
- (12) the names of the members and officers of the Court, and of their deputies and subordinate officers and assistants, and also of all officers acting in execution of its process, and of all advocates, attorneys, proctors, vakils, pleaders and other persons authorized by law to appear or act before it ;
- (13) the rule of the road-[on land or at sea].¹

In all these cases and also on all matters of public history, literature, science or art, the Court may resort for its aid to appropriate books or documents of reference.

If the Court is called upon by any person to take judicial notice of any fact, it may refuse to do so, unless and until such person produces any such book or document as it may consider necessary to enable it to do so.

58. No fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule or pleading in force at the time they are deemed to have admitted by their pleadings :

Provided that the Court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions.

CHAPTER IV. OF ORAL EVIDENCE.

Proof of facts by oral evidence.

59. All facts, except the contents of documents, may be proved by oral evidence.

Sec. 57, Expl. (13).—¹Inserted by Act XVIII of 1872, S. 5.

Sec. 58.—Section applies to criminal trial as well as criminal cases. 91 I. C. 233 = 27 Cr. L. J. 57 = A. I. R. 1926 Oudh 245. See Rat. 769 ; 5 B. 143 ; U. B. R. 1907 Evi. 1 ; 6 M. I. A. 521 (Proof of Will) ; 6 B. L. R. App. 49 (proof of documents not disputed) ; 1924 Rang. 155. (Partition admitted—unregistered deeds—If admissible). Admission made in course of examination—No necessity to prove. See 8 Bur. L. T. 18. Mortgage unregistered. Effect of an admission. See 6 Bur. L. T. 131 = 20 Ind. Cas. 666. When an agreement sued upon is admitted by the defendant proof of it is dispensed with. A court cannot dismiss a suit based on an admitted document on the ground that the document was not sufficiently stamped. 4 Bur. L. T. 171 = 11 Ind

Cas. 810. Admission of mortgage in pleadings—Attestation by one witness—No proof required. See 4 Bur. L. T. 182 = 11 Ind. Cas. 850. See also 13 N. L. R. 121 ; 42 Bom. 352 = 20 Bom. L. R. 354 = 45 I. C. 555 ; 42 M. 41 = 35 M. L. J. 555. Fact alleged in plaint and not denied in written statement may be established as admission. See 4 Bur. L. T. 26 = 9 Ind. Cas. 470. Pleader consenting to admit inadmissible evidence in Criminal Case—Conviction on such evidence—Propriety. 28 M. L. J. 329.

Sec. 59.—Proof by oral evidence (a) of adjustment of accounts. See B. L. R. (Sup. Vol). F. B. 3 ; (b) of payment of money. 1 A. 442. Value of documentary evidence—When there is conflict of oral evidence. See 4 M. I. A. 403 ; 2 Beng. L. R. (P. C.) 8. See also 1 M. I. A. 43.

Oral evidence must be **60.** Oral evidence must, in all cases whatever, be direct; that is to say—

if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it;

if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it;

if it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner;

if it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds:

Provided that the opinions of experts expressed in any treatise commonly offered for sale, and the grounds on which such opinions are held, may be proved by the production of such treatises if the author is dead or cannot be found, or has become incapable of giving evidence, or cannot be called as a witness without an amount of delay or expense which the Court regards as unreasonable:

Provided also that, if oral evidence refers to the existence or condition of any material thing other than a document, the Court may, if it thinks fit, require the production of such material thing for its inspection.

CHAPTER V.

OF DOCUMENTARY EVIDENCE.

Proof of contents of document.

61. The contents of documents may be proved either by primary or by secondary evidence.

Primary evidence.

62. Primary evidence means the document itself produced for the inspection of the Court.

Explanation (1).—Where a document is executed in several parts, each part is primary evidence of the document.

Where a document is executed in counterpart, each counterpart being executed by one or some of the parties only, each counterpart is primary evidence as against the parties executing it.

Explanation (2).—Where a number of documents are all made by one uniform process, as in the case of printing, lithography, or photography, each is primary evidence of the contents of the rest; but, where they are all copies of a common original, they are not primary evidence of the contents of the original.

Illustration.

A person is shown to have been in possession of a number of placards, all printed at one time from one original. Any one of placards is primary evidence of the contents of any other, but no one of them is primary evidence of the contents of the original.

Secondary evidence

63. Secondary evidence means and includes—

(1) certified copies given under the provisions hereinafter contained;

(2) copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies;

Sec. 60. SCOPE OF SECTION.—See 12 Beng. L. R. (App.) 18; 1924 Rang. 363. As to persons, who can give opinion evidence, see 25 M. 209; 23 A. 37. As to evidence of admission, see 5 M. 239; 4 L. B. R. 121; 2 Weir 762. When hearsay relevant evidence, see 6 Bom. L. R. 762; 52 M. L. J. 376 (P. C.); 24 L. W. 227.

As to statement by person to what another reported to him, how far evidence. (1924) Lah. 733. See also 24 L. W. 227=97 I. C. 785=A.I.R. 1926 Mad. 1003.

Reliance on text-books without expert evidence. See 22 C. W. N. 745; 38 Mad. 466.

Certified copy of translation of judgment.

4 I. C. 579.

Sec. 68. COPY OF A COPY is not evidence, 7 A. 738. Proof of copy being correct copy is no proof of the original (*i.e.*) of its execution, genuineness, etc., 22 W. R. 208.

Newspaper copy of a letter not proved to have been written by the accused is not evidence. 8 A. L. J. 302; 10 I. C. 852. Secondary evidence of a document which has not been proved to have been written by accused or even existed, cannot be admitted. A copy of a newspaper publishing a defamatory letter cannot be used as secondary evidence to prove a letter which has not been found or even proved to have existed. *Ibid.*

- (3) copies made from or compared with the original ;
- (4) counterparts of document as against the parties who did not execute them;
- (5) oral accounts of the contents of a document given by some person who has himself seen it.

Illustrations.

(a) A Photograph of an original is secondary evidence of its contents, though the two have not been compared, if it is proved that the thing photographed was the original.

(b) A copy compared with a copy of a letter made by a copying machine is secondary evidence of the contents of the letter if it is shown that the copy made by the copying machine was made from the original.

(c) A copy transcribed from a copy, but afterwards compared with the original, is secondary evidence; but the copy not so compared is not secondary evidence of the original, although the copy from which it was transcribed was compared with the original.

(d) Neither an oral account of a copy compared with the original, nor an oral account of a photograph or machine copy of the original, is secondary evidence of the original.

Proof of documents by primary evidence.

64. Documents must be proved by primary evidence except in the cases hereinafter mentioned.

Cases in which secondary evidence relating to documents may be given.

65. Secondary evidence may be given of the existence, condition or contents of a document in the following cases :—

- (a) when the original is shown or appears to be in the possession or power—

Cl. (3) See 1924 (Nag.) 375 ; 20 L. W. 719.
Cl. (5) See 22 A. L. J. 864=80 I. C. 939=
(1924) All. 792.

"PERSON WHO HAS SEEN" meaning of—
Evidence that witness saw the document and heard it read out, if admissible. See 54 I. A. 61=25 A.L.J. 65=(1927) M. W. N. 80=38 M.L. T. 41=5 Rang. 18=25 L. W. 342=31 C. W. N. 21=A. I. R. 1927 P. C. 15=52 M. L. J. 376 (P. C.).

Sec. 65, Cl. (a).—Effect of section. See 49 All. 78=24 A. L. J. 964. Any secondary evidence is admissible here. 16 I. A. 125=16 C. 753. Oral evidence cannot be given to prove the contents of a letter which was neither produced nor called for. 26 C 53. Where a lease deed is in the possession of the defendants, and they failed to produce it though summoned twice to do so, secondary evidence of the same is admissible L. R. 3 A. 8 (Rev.).

LOST DOCUMENT.—If it is found that a document has been lost, secondary evidence may be given and whether proof is sufficient in a case is a question of fact. L.R. 4 A. 201 (Rev.). On this clause see also 5 P. 777 referring to. 6 Mad. 80; 27 Cal. 639 P. C. 24 L. W. 227 ; 105 I. C. 502 ; 8 Pat. L. T. 510=101 I. C. 289=A. I. R. 1927 Pat. 61. (Original of public document destroyed—secondary evidence admissible.) A. I. R. 1926 Oudh. 161 (original Telegram destroyed). 14 I. A. 71 ; 8 W. R. 38 ; W. R. (1864) 301 (decree destroyed during mutiny) ; 22 W. R. 303 ; 5 C. 885 ; 7 C. 98 ; 6 C. 1. R. 199 ; As to evidence of search before document can be considered to be lost see 19 C. 438 ; 49 I. C. 1006. As to value of lathandi papers as secondary evidence of certificate of sale. See 21 W. R. 333. A compromise filed in a rent suit may be proved by producing a certified copy as the compromise so filed is a part of public record, L. R. I. A. 132 (Rev.) (1 A. L. J. 369 F.). See also U. B. R. (1909) 4th Qr. Evi. 19 (Supplementary survey records) ; 1 P. R. 1914 Cr. ; 15 Cr. L. J. 344 ; 5 P. R. 1903 (Cr.) Certified copies of registered deeds. 103 I. C. 752=9 Lah. L. J. 428. Secondary evidence of a com-

pulsorily registrable but unregistered deed is not admissible in evidence. 101 I. C. 839=A. I. R. 1927 Nag. 214 (33 Cal. 613 ref. to.) Secondary evidence of returns filed with the Registrar of Joint Stock Companies is admissible as such returns constitute the public records of private documents, within S. 74 (2) 45 Cal. 169=21 C. W. N. 1161=45 I. C. 338=26 C.L. J. 459 (F.B.) Secondary evidence of a document should not be rejected on appeal merely on the ground that the loss of the original has not been satisfactorily proved. 15 I. C. 625. [See also 19 C. 438=19 I. A. 79 F.] Secondary evidence admitted without objection, not to be excluded on appeal. 29 M. L. J. 307=19 C. W. N. 929 (P. C.) See also 14 I. C. 539. Where a suit is brought on certified copies of documents and the loss of the document is not proved the suit must be dismissed as no secondary evidence is admissible in the circumstances. 23 I. C. 886. The debt, pleaded that the original was not lost but had been suppressed because it contained an endorsement of payment; held that as the pleading of the debt amounted to an admission of execution, of a document, the plff. could maintain the suit on its copy without proving the loss of the original. 11 A. L. J. 734=20 I. C. 955 ; 11 A. L. J. 731=21 I. C. 81. Order granting Letters of administration with copy of will annexed, if public document—certified copy, if admissible. See 19 C. W. N. 1068=30 I. C. 690. Certified copy of probate in Australia—Secondary evidence. See 11 I. C. 261. Copy of award admissible when original in possession of party not subject to process of court (1917) Pat 241. A certified copy of a Robokari is admissible in evidence. 29 C. W. N. 742=46 I. C. 689. Contents of document called for but not produced—Court bound to receive secondary evidence. See 49 I. C. 507.

LOST DOCUMENT INSUFFICIENTLY STAMPED.—Inadmissible in evidence ; as no duty or penalty can be levied on a lost document. But proof of title by independent evidence is not barred. 4 Mys. L. J. 194.

of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the Court, or of any person legally bound to produce it, and when, after the notice mentioned in section 66, such person does not produce it ;

(b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest ;

(c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time ;

(d) when the original is of such a nature as not to be easily moveable ;

(e) when the original is a public document within the meaning of section 74 ;

(f) when the original is a document of which a certified copy is permitted by this Act, or by any other law in force in British India, to be given in evidence ;

(g) when the originals consist of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection.

In cases (a), (c) and (d), any secondary evidence of the contents of the document is admissible.

In case (b), the written admission is admissible.

In case (e), or (f), a certified copy of the document, but no other kind of secondary evidence, is admissible.

In case (g), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents.

66. Secondary evidence of the contents of the documents referred to in section

65, clause (a), shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is, [or to his attorney or pleader,]¹ such notice to produce it as is prescribed by law ; and if no notice is prescribed by law, then such notice as the Court considers reasonable under the circumstances of the case :

Provided that such notice shall not be required in order to render secondary evidence admissible in any of the following cases, or in any other case in which the Court thinks fit to dispense with it :—

(1) when the document to be proved is itself a notice ;

(2) when, from the nature of the case, the adverse party must know that he will be required to produce it ;

(3) when it appears or is proved that the adverse party has obtained possession of the original by fraud or force ;

(4) when the adverse party or his agent has the original in Court ;

(5) when the adverse party or his agent has admitted the loss of the document ;

(6) when the person in possession of the document is out of reach of, or not subject to, the process of the Court.

67. If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the hand-writing of so much of the document as is alleged to be in that person's hand-writing must be proved to be in his hand-writing.

Proof of signature and hand-writing of person alleged to have signed or written document produced.

Cl. (g).—See 6 M. 80 ; 5 C. 568.

Sec. 66.—¹The words were inserted by Act XVIII of 1872, S. 6. Section is mandatory. 31 C. W. N. 215 = 98 I. C. 147 = A. I. R. 1927 Cal. 102.

Sec. 66, proviso.—6 Pat. 102. Certified Copy of mortgage deed may, for proper reasons, be admitted without notice to produce the original

1926 P. H. C. C. 266 = 97 I. C. 348 = A. I. R. 1926 Pat. 512.

Cl. (6).—See 9 C. 939 ; 2 M. 295.

Sec. 67.—See 22 W. R. 390 ; 21 W. R. 429 ; 11 B. 690 ; 12 B. L. R. App. 18. A document does not prove itself, nor is an unproved signature proof of its having been written by the person whose signature it purports to bear. 37 C. 467 =

- 68.** If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive and subject to the process of the Court and capable of giving evidence.

Proof of execution of document required by law to be attested.

[" Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908, unless its execution by the person by whom it purports to have been executed is specifically denied."]¹

- 69.** If no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, it must be proved that the attestation of one attesting witness at least in his hand-writing, and that the signature of the

Proof where no attesting witness found.

person executing the document is in the hand-writing of that person.

- 70.** The admission of a party to an attested document of its execution by himself shall be sufficient proof of its execution as against him, though it be a document required by law to be attested.

Admission of execution by party to attested document.

- 71.** If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence.

Proof when attesting witness denies the execution.

14 C. W. N. 1114. Proof of document by examination of writer. *See* 19 C. W. N. 1148 = 22 I. C. 654. Hand-writing may be proved by circumstantial evidence under S. 67 which prescribes no particular kind of proof. 37 C. 467 = 14 C. W. N. 1114.

Sec. 68.—¹Proviso added by Act XXXI of 1926. *See* 104 I. C. 622; 45 C. L. J. 577. To prove a deed of gift, the production of a witness, who identified the donor and attesting witnesses and who was personally known to the Sub-Registrar, and an entry in favour of the donee in the village records is sufficient, 60 I. C. 234. A writer who signs his name in token of being the scribe of a mortgage deed does not attest the deed merely by subsequently seeing the mortgagor affix his signature. 6 N. L. R. 152 = 8 I. C. 1119. Attestation by mark—Illiterate witness—Effect of—*See* 12 A. L. J. 1114 = 26 I. C. 84. Executant of document or party to transaction not an "attesting" witness. 14 C. W. N. 1046 = 7 I. C. 735. The certificate of admission of execution endorsed by the registering officer upon a document registered by him could not be used as an admission of execution within the meaning of S. 70. 13 N. L. R. 197; 18 S. L. R. 282 = 93 I. C. 660 = A. I. R. 1926 Sind 88. *See also* 38 I. C. 605. Where the execution of a document is admitted it is not necessary to prove the attestation. 42 I. C. 91. (Under the present amendment want of specific denial dispenses unity of proof by attesting witness of a mortgage deed admission by, whether binds others not admitting. 44 C. 345 = 20 C. W. N. 1044. Mortgage, proof of—Only one attesting witness called, sufficient proof. 39 A. 24 = 15 A. L. J. 164. *Practice.*—Attestation being a misled question of law and fact cannot be raised for the first time in second appeal. 97 I. C. 611 = (1926) M. W. N. 559.

Sec. 69.—Mortgage—Proof of in case of—Death of attesting witness, *see* 24 All. 615 = 10 A. L. J. 217; 11 N. L. R. 9 = 27 I. C. 866; 35 A.

364 = 11 A. L. J. 379. Where a mortgage deed was produced regularly signed and attested and it was proved that the signature of all attesting witnesses who were dead were in their hand-writing and that of the mortgagor was in his hand-writing *held*, that there was a presumption of its due execution and it lay upon the other side to rebut it. 39 A. 112 = 15 A. L. J. 167; *See also* 41 I. C. 171. Admission of execution recorded in registration endorsement. If admissible to prove execution. 20 O. C. 18 = 38 I. C. 605; *See also* 13 N. L. R. 197.

Sec. 70.—The admission here spoken of does not include admissions made before the suit and sought to be proved by witnesses in the suit. 27 C. 190. As admission of execution before sub-registrar. 18 S. L. R. 282 = 93 I. C. 660 = A. I. R. 1926 Sind 88. *See also* 38 All. 1 = 13 A. L. J. 881 = 30 I. C. 376; 7 N. L. R. 85 = 11 I. C. 689; 47 I. C. 9. Section applies only to document which is duly attested. 5 Rang. 561 = 104 I. C. 386 = 6 Bur. L. J. 88 = A. I. R. 1927 Rang. 233. Where there is admission of execution in the written statement, but the attesting witness called stated the mortgagor did not signed the deed in his presence, *held* that the document must be taken to have been proved. *See* 94 I. C. 558 = A. I. R. 1926 Pat. 295. As to effect of admission of execution by pardana-shin lady. *See* 30 C. W. N. 364 = 5 Pat. 58 = A. I. R. 1925 P. C. 203.

Sec. 71.—Under S. 50 of the Indian Succession Act (X of 1865) witnesses must sign their names, and not merely affix their marks. *See* 3 B. 382; 11 C. 429; 5 C. 738; but initials will be sufficient. 15 M. 261. A statement of the attesting witnesses to a mortgage-deed that they signed the blank paper and not the completed deed is sufficient to attract the operation of this section and entitles the mortgagee to prove execution by evidence other than that of the attesting witnesses. 48 I. C. 624. *See also* 5 O. L. J. 667 = 48 I. C. 538,

Proof of document not required by law to be attested.

72. An attested document not required by law to be attested may be proved as if it was unattested.

73. In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made,

Comparison of signature, writing or seal with others admitted or proved.

any signature, writing or seal admitted or proved to the satisfaction of the Court to have been written or made by that person may be compared with the one which is to be

proved, although that signature, writing or seal has not been produced or proved for any other purpose.

The Court may direct any person present in Court to write any words or figures for the purpose of enabling the Court to compare the words or figures so written with any words or figures alleged to have been written by such person.

¹[This section applies also, with any necessary modifications, to finger-impresions.]

PUBLIC DOCUMENTS.

Public documents.

74. The following documents are public documents :—

Sec. 73.—¹ Words in brackets were added by Act V of 1899, S. 3 (2).

MEANING OF TERMS.—"Purports" means "alleged" 14 Bom. L. R. 310=15 I. C. 649. See also 35 M. L. J. 698=48 I. C. 68=8 L. W. 625. History of the section.—See 1 M. H. C. 160 at pp. 166-167. Section based on and follows English law. See (1914) M. W. N. 240. Procedure under the Section.—Rat. 452. Value of evidence afforded by comparison of hand-writing.—See 11 M. L. T. 424; 10 Cal. 1047; 37 C. 467. Question of comparison is different from question of admissibility. 53 Cal. 372=92 I. C. 442=A. I. R. 1926 Cal. 139. Danger of resting decision solely on of comparison hand-writing.—See 16 A. 157 (P.C.). Data for arriving at a conclusion. 62 I. C. 882. As to thumb impression, see 17 Cr. L. J. 316=35 I. C. 492; 1 Rang. 759 (F. B.); 1924 Rang. 115. Modes in which hand-writing can be proved. See 37 C. 467=14 C. W. N. 114. An anonymous writing ascribed to a particular person may be compared with a genuine signature. 14 Bom. L. R. 310=15 I. C. 649; (37 C. 467 dis.) Court ordering accused to make thumb impression for purpose of comparison. Accused refusing to do—Adverse inference against accused validity of. See 6 Pat. 623 Govt.

Sec. 74. **CONSTRUCTION OF SECTION.**—See 20 M. 189. Schoolmaster is an Executive Officer of Govt. under S. 74 (1) (iii) 28 Bom. L. R. 1225=50 Bom. 716=A. I. R. 1927 Bom. 11.

THE FOLLOWING ARE PUBLIC DOCUMENTS.—Municipal proceedings, 19 A. 293. But see also 30 I. C. 643=16 Cr. L. J. 659 (Cal.). Settlement record, with history of district attached to it (1924) Lah. 639. Canal Jamabandi papers, L. R. 3 A. 386 (Rev.)=4 U. P. L. R. 96. Loan register in public debt office in Bank of Bengal, 31 C. 284. Parchas distributed to cultivators, 19 Cr. L. J. 886=47 I. C. 82 (Pat.). Items of entry in Register of inventions 4 A. L. J. 11. District Gazette, 3 U. P. L. R. (B. R.) 30. *Dakal-namah* is public document A. I. R. 1927 All. 52; crop cutting report of Revenue Office, under Ben. Ten. Act, 8 Pat. L. T. 74=102 I. C. 391=A. I. R. 1927 Pat. 167, see also 7 Pat. L. T. 761=95 I. C. 966=A. I. R. 1926 Pat. 436. As to

Government Survey plan, see 9 M. L. T. 415; Records of acts of public officers are public documents, but they do not furnish proof of all facts to which they refer. 105 I. C. 353. Report in Form Bunder S. 173, Crim. Pro. Code is public document. 7 Mys. L. J. 231; also Deposition of witnesses. 5 Pat. 777=8 Pat. L. T. 510. 14 C. L. J. 578. See also 19 C. W. N. 1068 (Letters of Administration); 18 C. W. N. 644=23 I. C. 529 (Notice issued under S. 117 Cr. (P.C.)); 18 I. C. 250 (Pedigree filed before Settlement Court); 35 All. 165 (Return of village officer on reference by Political Agent). As to deposition of witnesses taken in court. See 8 Pat. L. T. 510=101 I. C. 289=A. I. R. 1927 Pat. 61; Pat. 777.

THE FOLLOWING ARE NOT PUBLIC DOCUMENTS.—Returns filed with registrar of Joint Stock Companies, 21 C. W. N. 1161; Printed proceedings of Municipality (by themselves) 30 I. C. 643=16 Cr. L. J. 659 (Cal.) Letter of an Executive Officer, 1 P. R. 1914; Notice under S. 107, Cr. P. C., 18 C. W. N. 644. *Dakhal-namah*, 25 I. C. 529; Teiskhana register, 23 C. 366. Document merely with rubber stamp initials of public-officer, but not signed by him. 3 U. P. L. R. (B. R.) 53, see also 50 C. 135=26 C. W. N. 878=36 C. L. J. 180; 71 I. C. 239; (1922) Cal. 298. A report by a village Nikha Khawan to the Mohavir in the central office informing him of the objection to an entry of marriage in the village register by the former husband of the woman is not a public document within S. 74 and no secondary evidence of its contents can be given under S. 5 of the Act. 1 P. R. (Cr.) 1914=15 Cr. L. J. 344=23 I. C. 696=139 P. L. R. 1914. A parcha slip granted in the course of survey proceedings is not a public document. 19 Cr. L. J. 886=47 I. C. 82 (Pat.) As to proof of public documents, see 56 P. L. R. 1903=5 P. R. 1903 (Cr.). Private Documents (as) Kobalas, conveyances, leases, etc., filed in courts or public offices, how proved. 22 W. R. 355; 14 I. A. 71=14 C. 486. As to proof by copy of compromise petition. 25 W. R. 68. As to proof of judgment, plaint and written statement. 10 B. L. R. Ap. 31. Plaint is not a public document, 7 Pat. L. T. 267=A. I. R. 1926 Pat.

- (1) documents forming the acts or records of the acts—
 (i) of the sovereign authority,
 (ii) of official bodies and tribunals, and
 (iii) of public officers, legislative, judicial and executive, whether of British India, or of any other part of Her Majesty's dominions, or of a foreign country;
 (2) public records kept in British India of private documents.

Private documents.

75. All other documents are private.

76. Every public officer having the custody of a public document, which any person has a right to inspect, shall give that person on demand a copy of it on payment of the legal fees therefor, together with a certificate written at the foot of such copy that it is a true copy of such document or part thereof, as the case may be, and such certificate shall be dated and subscribed by such officer with his name and his official title, and shall be sealed, whenever such officer is authorized by law to make use of a seal, and such copies so certified shall be called certified copies.

Explanation.—Any officer who, by the ordinary course of official duty, is authorized to deliver such copies, shall be deemed to have the custody of such documents within the meaning of this section.

Proof of documents by production of certified copies.

77. Such certified copies may be produced in proof of the contents of the public documents or parts of the public documents of which they purport to be copies.

Proof of other official documents.

78. The following public documents may be proved as follows :—

(1) Acts, orders or notifications of the Executive Government of British India in any of its departments, or of any Local Government or any department of any Local Government,—

by the records of the departments, certified by the heads of those departments respectively,
 or by any document purporting to be printed by order of any such Government :

(2) The proceedings of the Legislatures,—

by the journals of those bodies respectively, or by published Acts or abstracts, or by copies purporting to be printed by order of Government :—

(3) Proclamations, orders or regulations issued by Her Majesty or by the Privy Council, or by any department of Her Majesty's Government,—

by copies or extracts contained in the London Gazette, or purporting to be printed by the Queen's Printer :

(4) The acts of the Executive or the proceedings of the Legislature of a foreign country,—

by journals published by their authority, or commonly received in that country as such, or by a copy certified under the seal of the country or sovereign, or by a recognition thereof in some public Act of the Governor-General of India in Council :

(5) The proceedings of a municipal body in British India,—

by a copy of such proceedings, certified by the legal keeper thereof, or by a printed book purporting to be published by the authority of such body :

(6) Public documents of any other class in a foreign country,—

180; 93 I. C. 650 = A. I. R. 1926 Nag. 339. As to proof of Municipal proceedings, see 30 I. C. 643 = 16 Cr. L. J. 659.

See 76 and 77. **CONSTRUCTION.**—See 30 M. 466 = 17 M. L. J. 471. In order to be admissible copies must be duly certified. See 4 I. C. 929 = 87 P. L. R. 1909. Plaint is not a public document. 7 Pat. L. T. 267 = A. I. R. 1926 Pat. 180.

See 78.—Presumption as to authorized text of Indian Acts see A. I. R. 1927 Pat. 142; 97 I. C. 316; as to Government order and notification in official Gazette., 53 M. L. J. 603. Proof of Acts of the Indian Legislature. 92 I. C. 566 = A. I. R.

1926 Mad. 65. Reference to the District Gazetteer, in order to elucidate the history of a family, is admissible under S. 78. 3 U. P. L. R. (B. R.) 30.

Cl. (5).—Printed proceedings of Municipality themselves would not be sufficient legal proof unless they answer the description of a printed book purporting to be published under the authority of the committee as required by S. 78. 30 I. C. 643 = 16 Cr. L. J. 659 (Cal.). See also 17 C. W. N. 531 = 18 I. C. 651.

Cl. (6).—As to records of a German court, see 14 C. L. J. 375 = 15 C. W. N. 1053.

by the original, or by a copy certified by the legal keeper thereof, with a certificate under the seal of a Notary Public, or of a British Consul or diplomatic agent, that the copy is duly certified by the officer having the legal custody of the original, and upon proof of the character of the document according to the law of the foreign country.

PRESUMPTION AS TO DOCUMENTS.

79. The Court shall presume every document purporting to be a certificate,

Presumption as to genuineness of certified copies.

certified copy or other document, which is by law declared to be admissible as evidence of any particular fact and which purports to be duly certified by any

officer in British India, or by any officer in any Native State in alliance with Her Majesty, who is duly authorized thereto by the Governor-General in Council, to be genuine :

Provided that such document is substantially in the form and purports to be executed in the manner directed by law in that behalf.

The Court shall also presume that any officer by whom any such document purports to be signed or certified, held, when he signed it, the official character which he claims in such paper.

80. Whenever any document is produced before any Court, purporting to be a

Presumption as to documents produced as record of evidence.

record or memorandum of the evidence, or of any part of the evidence, given by a witness in a judicial proceeding or before any officer authorized by law to take such evidence or to be a statement or confession by any prisoner or accused person, taken in accordance with law, and purporting to be signed by any Judge or Magistrate, or by any such officer as aforesaid, the Court shall presume—

that the document is genuine ; that any statements as to the circumstances under which it was taken, purporting to be made by the person signing it, are true, and that such evidence, statement or confession was duly taken.

“ DIPLOMATIC AGENT ” includes Resident of Hyderabad. 99 I.C. 307 = A. I. R. 1927 Bom. 11 = 50 Bom. 716 ; Admissibility of attendance and leave register kept at native state. See A. I. R. 1926 Oudh 29.

Sec. 79.—A copy of a letter of sanction, headed from the Chief Secretary to the Government of Bengal and signed by an officer for the Chief Secretary, cannot be regarded as a certified copy under section 76. 50 Cal. 135 = 26 C.W.N. 878 = 1922 Cal. 298.

Sec. 80. PRESUMPTION OF GENUINENESS.—When raised. See 10 A. 174 = A. W. N. (1888) 11 ; 15 M. 63 ; 2 Weir 794 ; 12 C. W. N. 845 ; 18 C. 129. As to the nature and extent of presumption under the section See 93 I. C. 978 = A. I. R. 1925 Lah. 605 ; 94 I. C. 985 = A.I.R. 1926 Oudh 489. Presumption of genuineness of a document does not include the presumption that the document was printed or published by the particular person by whom it purports to have been published. 36 Mad. 457 = 22 M. L. J. 73.

ILLUSTRATIVE CASES.—A statement not read over to or corrected by the witness in accordance with law is not admissible against the person making the same. 13 Cr. L. J. 569 = 15 I. C. 985 See also 21 Cr. L. J. 500 = 56 I. C. 160. As to depositions before Commissioners. See 63 P. L. R. 1900. A deposition not read over to the witness in the presence of the presiding officer does not prove itself under S. 80. 18 N. L. R. 192 = 68 I. C. 36 = 1923 Nag. 39. Presumption under S. 80

can be raised if the deposition is read over by the witness himself in Court. 46 C. 895 = 50 I. C. 660 = 23 C. W. N. 661 ; 93 I. C. 978 = A. I. R. 1925 L. 605. (See also C. P. C., O. 18, R. 5.) The absence of a certificate by the Judge at the foot of the deposition of its having been read over, etc., does not deprive it of the presumption under S. 80. *Ibid.* The presumption under S. 80 that the circumstances under which a document appears to be taken are true, applies to a dying declaration to which a certificate is appended by the Magistrate who recorded it, that it was read over to him and declared to be correct. 40 Bom. 97 = 31 I. C. 361 ; 17 Bom. L. R. 881. See also 17 Cr. L. J. 23 ; 9 P. R. 1900 (Cr.) ; 11 B. H. C. 247. Under S. 80 confession by any prisoner or by any accused taken in accordance with law and purporting to be signed by the examining Magistrate shall be presumed to be so made. The officer who recorded the confession may be examined as a witness. 38 I. C. 1005 = 2 Pat. L. J. 80. The statement of an accused person recorded by a Magistrate in a Native State is inadmissible unless the Magistrate himself deposes to it in person. 15 Cr. L. J. 433 = 24 I. C. 169 = 16 Bom. L. R. 261. The recital in a judgment of a statement made by the witness is not same the thing as a record of the deposition of the witness. Nor can such recital be accepted as evidence under S. 80, 21 Cr. L. J. 500 = 56 I. C. 660 (P.).

81. The Court shall presume the genuineness of every document purporting to be the London Gazette or the Gazette of India or the

Presumption as to Gazettes, newspapers, private Acts of Parliament and other documents.

Government Gazette of any Local Government, or of any colony, dependency or possession of the British Crown, or to be a newspaper or journal, or to be a copy of a private Act of Parliament printed by the Queen's Printer and of every document purporting to be a document directed by any law to be kept by any person, if such document is kept substantially in the form required by law and is produced from proper custody.

82. When any document is produced before any Court, purporting to be a document which, by the law in force for the time being

Presumption as to document admissible in England without proof of seal or signature.

in England and Ireland, would be admissible in proof of any particular in any Court of justice in England or Ireland, without proof of the seal or stamp or signature authenticating it, or of the judicial or official character claimed by the person by whom it purports to be signed, the Court shall presume that such seal, stamp or signature is genuine, and that the person signing it held, at the time when he signed it, the judicial or official character which he claims,

and the document shall be admissible for the same purpose for which it would be admissible in England or Ireland.

83. The Court shall presume that maps or plans purporting to be made by the authority of Government were so made, and are accurate; but maps or plans made for the purposes of any cause must be proved to be accurate.

Presumption as to maps or plans made by authority of Government.

84. The Court shall presume the genuineness of every book purporting to be printed or published under the authority of the Government of any country and to contain any of the laws of that country,

Presumption as to collections of laws and reports of decisions.

and of every book purporting to contain reports of decisions of the Courts of such country.

85. The Court shall presume that every document purporting to be a power-of-attorney, and to have been executed before, and authenticated by, a Notary Public, or any Court, Judge, Magistrate, British Consul or Vice-Consul, or representative of

Presumption as to powers-of-attorney.

Her Majesty, or of the Government of India, was so executed and authenticated.

Sec. 81.—Presumption as to genuineness does not include presumption that it was printed and published by the person mentioned in it. 36 M. 457 = 12 I. C. 961.

Sec. 82.—As to presumption in case of printing and publishing a newspaper. See 36 M. 457 = 10 M. L. T. 506 = 12 I. C. 961. Documents admissible under English law in English Courts are relevant, see 22 C. 491. Chittas, see 2 I. C. 513; 19 C. W. N. 1068.

Sec. 83.—See 22 W. R. 519; 5 C. 287; 5 C. 822 = 6 C. L. R. 519; 9 C. 741; 23 C. 335 = 18 C. 224; 25 W. R. 179. Chittas made by government for private use in connection with resumption proceedings are not. Maps and plans prepared by patwari is not in discharge of their official duty—Accuracy—Presumption—Statements contained in—Relevancy. 16 P. R. 1913 = 18 I. C. 799. A map prepared by private arrangement by a District Collector for the settlement of the silted bed of river does not fall within purview of this section. 19 I. C. 572; 17 C. L. J. 642 = 16 I. C. 747.

Maps and survey plans prepared by Government Admissibility of in evidence. 9 M. L. T. 415 = 10 I. C. 653. Thak maps—Evidentiary value of maps more than 30 years old—Presumption—Map prepared by Collector in private capacity, see 16 C. W. N. 317 = 14 C. L. J. 578. Great weight should always be given to the accuracy of survey maps. They are not conclusive, but in the absence of evidence to the contrary they will be presumed to be accurate. 44 C. 328 = 21 C. W. N. 291 = 38 I. C. 379 = 43 I. A. 303 (P. C.) Survey maps are official documents prepared by competent persons and with such publicity and notice to persons interested as to be admissible, and would be valuable evidence as to the state of things at the time they were prepared. 44 I. C. 247.

Sec. 84.—Cf. Act XVIII of 1875 (Law Reports). **Sec. 85.** SECTION IS MANDATORY.—See 33 C. 625 = 9 C. W. N. 986; 16 C. 776. Mere registration is not in itself evidence of execution. 17 C. 903. But see 14 Cal. 176 Diss. As what is sufficient proof of power-of-attorney. See 21 M. 492

86. The Court may presume that any document purporting to be a certified copy of any judicial record of any country not forming part of Her Majesty's dominions is genuine and accurate, if the document purports to be certified in any manner which is certified by any representative of Her Majesty or of the Government of India [in or for]¹ such country to be the manner commonly in use in that country for the certification of copies of judicial records.

Presumption as to certified copies of foreign judicial records.

[An officer who, with respect to any territory or place not forming part of Her Majesty's dominions, is a Political Agent therefor, as defined in S. 3, Cl. (40) of the General Clauses Act, 1897, shall for the purposes of this section, be deemed to be a representative of the Government of India in and for the country comprising that territory or place]².

87. The Court may presume that any book to which it may refer for information on matters of public or general interest, and that any published map or chart, the statements of which are relevant facts, and which is produced for its inspection, was written and published by the person, and at the time and place, by whom or at which it purports to have been written or published.

Presumption as to books, maps and charts.

88. The Court may presume that a message, forwarded from a telegraph office to the person to whom such message purports to be addressed, corresponds with a message delivered for transmission at the office from which the message purports to be sent; but the Court shall not make any presumption as to the person by whom such message was delivered for transmission.

Presumption as to telegraphic messages.

89. The Court shall presume that every document called for and not produced after notice to produce, was attested, stamped and executed in the manner required by law.

Presumption as to due execution, etc., of documents not produced.

90. Where any document, purporting or proved to be thirty years old is produced from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document, which purports to be in the hand-writing of any particular person is in that person's hand-writing, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested.

Sec. 86.—¹ Substituted by Act III of 1891, S. 8 on account of 14 C. 546.

² Substituted by Act V of 1899, S. 4.

SCOPE OF SECTION.—See 27 C. 639; section mandatory. See 5 Lah. 105 = (1924) Lah. 493. Presumption of certified copies of German court, 15 C. W. N. 1053 = 14 C. L. J. 375. Presumption of certified copies of other foreign states. See 14 C. 546; 27 C. 639.

Sec. 87. See 21 C. L. J. 637.

Sec. 88. TELEGRAM—PROOF THAT IT EMANATED FROM GOVT.—The sanction of Local Govt. to prosecute a person for an offence under S. 124-A, Penal Code, communicated by telegram must be proved to have emanated from the Govt. The Court is forbidden by the express provisions of S. 88 to make any presumption as to the person by whom the telegram was sent. 42 Mad. 885 = 37 M. L. J. 81. See also 4 I. C. 240 = 10 Cr. L. J. 520; 21 I. C. 274; 91 I. C. 690 = A. I. R. 1926 Bom. 71.

Sec. 90.—See applies to copies of an event documents as well as originals. 4 Mys. L. J. 264 (46 Mad. 92, rel. on). As to proper custody see 94 I. C. 814; A. I. R. 1926 Cal. 370. As to the extent of presumption regarding old documents. See 6

Lah. L. J. 97 = 75 I. C. 57 = (1924) Lah. 145; 82 I. C. 487; 77 I. C. 472; 1924 All. 869 = 22 A. L. J. 857; Presumption contained in this section has to be applied with great deal of caution, 31 C. W. N. 215 = 98 I. C. 147 = A. I. R. 1927 Cal. 102; 11 Cal. 539; 27 Cal. 740; 98 I. C. 1021 = A. I. R. 1927 Cal. 229; *Jama Wazir Baki* papers, seventy years old—Presumptions as to. See 45 C. L. J. 129. Presumption under the section is not one which the court is bound to make. It is in the courts discretion notwithstanding this section court may require an old document to be proved in the ordinary manner. 104 I. C. 219 = A. I. R. 1927 Cal. 870; 51 Cal. 135 = 39 C. L. J. 380 = 81 I. C. 493. As to presumption of genuineness of pedigree tables. See 105 I. C. 81. When a document is suspicious on the force of it (as) when an important word is erased and re-written, presumption under S. 90 does not arise. 95 I. C. 261 = A. I. R. 1926 All. 537. Presumption of genuineness includes presumption of executants authority. 97 I. C. 292 = 24 A. L. J. 920 (A. I. R. 1925 All. 1, fol.) Presumption of genuineness only dispenses with proof, but the question of evidence is not affected thereby. 95 I. C. 261 = A. I. R. 1926 All. 537.

Explanation.—Documents are said to be in proper custody if they are in the place in which, and under the care of the person with whom, they would naturally be; but no custody is improper if it is proved to have had a legitimate origin, or if the circumstances of the particular case are such as to render such an origin probable.

This explanation applies also to S. 81.

Illustrations.

(a) A has been in possession of landed property for a long time. He produces from his custody deeds relating to the land, showing his title to it. The custody is proper.

(b) A produces deeds relating to landed property of which he is the mortgagee. The mortgagor is in possession. The custody is proper.

(c) A, a connection of B, produces deeds relating to lands in B's possession which were deposited with him by B for safe custody. The custody is proper.

CHAPTER VI.

OF THE EXCLUSION OF ORAL BY DOCUMENTARY EVIDENCE.

- 91.** When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except

Evidence of terms of contracts, grants and other dispositions of property reduced to form of document.

Sec. 91. SCOPE OF SECTION.—33 M. 413 = 11 Cr. L. J. 716.

ILLUSTRATIVE CASES.—Admissibility (i) of oral evidence to prove deposition of witnesses, Rat. 334; (ii) deposition not read over to witness, 13 Cr. L. J. 569; (iii) deposition of accused, 6 C. 762 = 8 C. L. R. 292; 54 P. R. 1887 Cr.; 21 M. L. J. 411 = 9 M. L. T. 325; (iv) admission of guilt in departmental enquiry, 36 A. 222; (v) Confession to Magistrate—Proof by oral evidence, 9 M. 224 = 2 Weir 125; 35 A. 260; 14 Cr. L. J. 211 = 11 A. L. J. 286; 10 B. H. C. 166; (vi) Search list—Proof of, 2 Weir 776. *See also* 21 M. L. J. 281; (vii) previous convictions, proof of, 28 C. 689, (viii) Warrant, if should be produced in a case of assault of process server, L. B. R. (1872-1892) 572.—A statement made by an accused at a departmental enquiry is not within S. 91, as it is not required by law to be reduced to the form of a document. Such confession can be proved at the time of the prosecution. 36 All. 222 = 25 I. C. 321. The confession of an accused made to magistrate holding an enquiry is a matter which must be reduced to the form of a document within the meaning of S. 91. 35 All. 260 = 19 I. C. 307 = 11 A. L. J. 286. Witnesses should not be allowed to prove a dying declaration as if it is a substantial piece of evidence in the case. 22 Cr. L. J. 417 = 67 I. C. 577 = 6 L. L. J. 115 = 1924 Lah. 12. The only way of proving a dying declaration is by the evidence of some witness who heard it made, the witness being at liberty to refresh his memory by referring to the note made by him or read over to him at or about the time the statement is made (*Ibid.*). The record by Court of a deposition is the only evidence admissible of the statements alleged to have been made by the witness and if it is not shown to have been read out to the witness he can't be convicted of perjury, 42 Mad. 561 = 36 M. L. J. 206 = 50 I. C. 987. S. 91 even if it covers a deposition, merely excludes oral evidence of its contents but does not make the document itself inadmissible nor prevent its being otherwise proved. 24 Cr. L. J. 781 = 74 I. C.

445 = 1923 Oudh 119. Where a deposition is not taken in accordance with S. 360, Cr. P.C., it is inadmissible in evidence and other evidence is shut out by S. 91, 18 Cr. L. J. 966 = 42 I. C. 326. S. 91 has no application to matters entered in a special diary under S. 172 of the Cr. P.C. Oral evidence is admissible to prove statements made to the police by witnesses who heard them made. 18 Cr. L. J. 1022 = 42 I. C. 766 = (19 A. 390 Expln.) Unregistered sale-deed and partition deed can be used as evidence to establish the nature of the possession of the person who claims under the deeds. The fact of possession and partition of property can also be proved by oral evidence. 98 I. C. 940 = 28 Punj. L. R. 88. *See also* 100 I. C. 153; 98 I. C. 448; (1926) M. W. N. 45 = 92 I. C. 1028 = A. I. R. 1926 Mad. 402 (Partition deed) 1926 M. N. W. 384 = 95 I. C. 584 = A. I. R. 1926 Mad. 872 (sale-deed); 39 M. L. T. 275 = 103 I. C. 281 = A. I. R. 1927 Mad. 830; 30 C. W. N. 254 = A. I. R. 1926 Cal. 705. Pro-note insufficiently stamped—Suit on original cause of action, 104 I. C. 470 = A. I. R. 1927 Nag. 241; 29 Bom. L. R. 432; *See also* 28 Bom. L. R. 631 = 95 I. C. 847 = A. I. R. 1926 Bom. 357. (Suit on Promissory note—Note inadmissible—Proof of claim by other evidence not barred); Renewal of Hundi—Suit on original cause of action. 25 A. L. J. 102. *See also* 25 A. L. J. 567 = 103 I. C. 634 = A. I. R. 1927 All. 503. But *see* 95 I. C. 704; A. I. R. 1922 Lah. 307; 63 P. R. 1917. Where a lease deed is inadmissible in evidence being unregistered, the tenancy can be proved by other evidence as by the doctrine of part performance. 105 I. C. 172. Written agreement regarding indent transactions—Proof of usage at variance with the terms of contract—Admissibility. 54 Cal. 549. Lease silent as to place of payment of rent—Evidence is admissible to prove subsequent agreement as to the place. 23 N. L. R. 26. Endorsement of payment on mortgage bond not registered—Admissibility of oral evidence to prove payment. 100 I. C. 129. Mortgages executed in favour of creditor—Debtor if can subsequently ask for taking of accounts regarding amounts

the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained :

Exceptions.—(1) When a public officer is required by law to be appointed in writing, and when it is shown that any particular person has acted as such officer, the writing by which he is appointed need not be proved.

(2) Wills [admitted to probate in British India]¹ may be proved by the probate.

Explanations.—(1) This section applies equally to cases in which the contracts, grants or dispositions of property referred to are contained in one document, and to cases in which they are contained in more documents than one.

(2) Where there are more originals than one, one original only need be proved.

(3) The statement, in any document whatever, of a fact other than the facts referred to in this section, shall not preclude the admission of oral evidence as to the same fact.

Illustrations.

(a) If a contract be contained in several letters, all the letters in which it is contained must be proved.

(b) If a contract is contained in a bill of exchange, the bill of exchange must be proved.

(c) If a bill of exchange is drawn in a set of three, one only need be proved.

(d) *A* contracts in writing, with *B*, for the delivery of indigo upon certain terms. The contract mentions the fact that *B* had paid *A* the price of other indigo contracted for verbally on another occasion.

Oral evidence is offered that no payment was made for the other indigo. The evidence is admissible.

(e) *A* gives *B* a receipt for money paid by *B*.

Oral evidence is offered of the payment.

The evidence is admissible.

92. When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section no evidence of any oral agreement or state-

Exclusion of evidence of oral agreement.

covered by mortgage. (1926) M.W.N. 828=3 O.W.N. 910=25 I.W. 910=31 C.W.N. 179=38 M.L.T. (P.C.) 1=A.I.R. 1926 P.C. 129 (P.C.). As to secondary evidence of contents of mortgage document. See 5 Rang. 650. Where a gift has been effected by an instrument, only the conduct of the parties can be considered for the purpose of showing that the transaction is not what it purports to be. 1 Luck. C. 97=104 I.C. 229=A.I.R. 1927 Oudh 278. Bond silent as to interest—Oral evidence to prove agreement to pay interest is admissible. 100 I.C. 794=A.I.R. 1927 Nag. 195.

Sec. 91.—¹ Substituted by Act XVIII of 1872, S. 7.

Sec. 92.—S. 92 is applicable only to parties to instrument—See 10 A. 421; 25 A. 337; 2 C.L.J. 338; 42 B. 512. Statement of fact in a written instrument, if open to contradiction. See 1 Luck. 160; 3 O.W.N. 248=A.I.R. 1926 Oudh 273 (case-law reviewed). Section is not applicable to strangers (*i.e.*) persons not parties to the contract. 104 I.C. 736. Section does not apply to decrees. See 91 I.C. 705=A.I.R. 1926 Cal. 643; 53 M.L.J. 533. There is nothing to prevent person arrayed on the same side to give evidence to vary terms. 54 I.C. 962; 1 Bur.L.J. 160. S. applicable only when the written instrument con-

tains the whole or the terms. 6 C. 328; 76 I.C. 215. But oral evidence may be admitted to prove that there was no agreement at all. 7 M.H.C.R. 189. As regards admissibility of oral evidence and to prove acts, conduct and intention of parties varying contract see 22 A. 149 (P.C.) the leading case. See also 25 M. 7; 8 C.W.N. 101; 34 B. 59. Oral evidence inadmissible to prove that two documents executed and registered on same day are part and parcel of one transaction. 25 A.L.J. 723=103 I.C. 399=A.I.R. 1927 All. 696. (33 All. 340 rel on.) Oral evidence may be admitted to consideration did not pass. 45 A. 679; 44 A. 53. See also 94 I.C. 371=A.I.R. 1926 Sind 202; 91 I.C. 612; A.I.R. 1926 Nag. 301; 92 I.C. 787=A.I.R. 1926 Oudh 301. That a sale deed is only a mortgage. 34 B. 59; 35 B. 231; 17 C.W.N. 1053. That an apparent mortgage deed was really intended to be different. 7 Pat. L.T. 293; A.I.R. 1925 Bom. 501; 6 Bur. L.J. 195=5 Rang. 644. As to scope of section. See 38 C. 892 (P.C.) As to application of Section to Criminal cases. S. 11, Cr. L.J. 738=8 I.C. 952. Oral evidence as to representation of intention to deliver goods not embodied in pro-note. See 13 I.C. 386=4 Bur. L. T. 99. Where by mistake of parties the duration of a lease was wrongly entered in the written instru-

ment shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from its terms :

Provisos.—(1) Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, [want or failure]¹ of consideration, or mistake in fact of law.

(2) The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved. In considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document.

(3) The existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved.

(4) This existence of any distinct subsequent oral, agreement to rescind or modify any such contract, grant or disposition of property may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents.

(5) Any usage or custom by which incidents not expressly mentioned in any contract or usually annexed to contracts of that description, may be proved :

Provided that the annexing of such incident would not be repugnant to, or inconsistent with, the express terms of the contract.

(6) Any fact may be proved which shows in what manner the language of a document is related to existing facts.

Illustrations.

(a) A policy of insurance is effected on goods "in ships from Calcutta to London." The goods are shipped in a particular ship which is lost. The fact that that particular ship was orally excepted from the policy cannot be proved.

(b) A agrees absolutely in writing to pay B Rs. 1,000 on the 1st March, 1873. The fact, that at the same time an oral agreement was made that the money should not be paid till the thirty-first March, cannot be proved.

ment evidence can be let into prove the real intention of the parties. I.R. 4 All. 302 (Rev.) The making of a pro-note by way of security for a sum of money advanced or given to the maker does not shut out oral evidence as to the purpose for which the money is given. 13 Bur. L.T. 239 = 64 I.C. 33 = 22 Cr. L.J. 721. There is no reason in S. 92 why the fact whether in case of a joint contract both or either of the workmen have actually, or constructively received all or part of the advance should not be proved. 44 M.L.J. 53 = 71 I.C. 61 = 1923 Mad. 184. Intention of parties—Fraud—Oral evidence to prove—Representation of intention on which the deed is silent 4 Bur. L.T. 279 = 13 I.C. 386 = 13 Cr. L.J. 50. As to admissibility of oral evidence to prove extension of time in respect of the date of performing contract, see 18 S.L.R. 320; to explain meaning of words used in document, 93 I.C. 193 = A.I.R. 1926 Nag. 301; agreement varying terms of sale deed in respect of easement (latrine) 96 I.C. 276; as between lessor and lessee 24 A.L.J. 548 = A.I.R. 1926 All. 445; Proof of condition precedent to sale deed taking effect. 5 Rang. 636. Oral evidence to prove discharge of debt admissible. 30 C.W.N. 710 = 96 I.C. 11 = A.I.R. 1926 Cal. 906; 42 C.L.J. 582 = A.I.R. 1926 Cal. 170; 44 C.L.J. 449; A.I.R. 1926 Cal. 27 (discharge by part payment and partly by remission. See also 42 C.L.J. 582 = A.I.R. 1926 Cal.

170); that one of two co-executants of a promissory note was only a surety. 92 I.C. 667 = A.I.R. 1926 Sind 156; that pro-note was given merely as a security. 49 All. 464 = 25 A.L.J. 305; a plea of benami. See 5 Bur. L.J. 2 = 95 I.C. 512 = A.I.R. 1926 Rang. 94 (case-law reviewed); oral evidence of surrounding circumstances. 104 I.C. 736. Evidence of conduct of parties to prove partition. (1926) M. W. N. 45 = 92 I.C. 1028 = A.I.R. 1926 Mad. 402. Relinquishment of interest by mortgagee. 48 All. 705; Oral evidence to prove that mortgagee agreed to charge lower rate of interest (or receive less 52 M.L.J. 224 = 100 I.C. 54) than that entered in the deed is inadmissible. 3 O. W. N. 248 = 95 I.C. 1019 = A.I.R. 1926 Oudh 273. See also 52 M.L.J. 224; 53 M.L.J. 863; Sale deed—whether oral agreement to resell can be proved. See 5 Bur. L.J. 210 = 105 I.C. 482 = A.I.R. 1927 Rang. 314.

Sec 92.—¹The words in proviso 1 were substituted by Act XVIII of 1872, S. 8.

Sec. 92, provisos 1 to 3.—The statement of law in Amir Ali's evidence that though evidence to vary the terms of an agreement in writing is not admissible, yet evidence that there is not an agreement at all is admissible" is too wide and must be qualified by the express provisos 1 to 3 to S. 92 of the Act. 49 All. 680 = 100 I.C. 1029 = 25 A.L.J. 349 = A.I.R. 1927 All. 422.

(c) An estate called "the Rampore tea estate" is sold by a deed which contains a map of the property sold. The fact that land not included in the map had always been regarded as part of the estate and was meant to pass by the deed cannot be proved.

(d) A enters into a written contract with B to work certain mines, the property of B, upon certain terms. A was induced to do so by a misrepresentation of B's as to their value. This fact may be proved.

(e) A institutes a suit against B for the specific performance of a contract, and also prays that the contract may be reformed as to one of its provisions, as that provision was inserted in it by mistake. A may prove that such a mistake was made as would by law entitle him to have the contract reformed.

(f) A orders goods of B by a letter in which nothing is said as to the time of payment, and accepts the goods on delivery. B sues A for the price. A may show that the goods were supplied on credit for a term still unexpired.

(g) A sells B a horse and verbally warrants him sound. A gives B a paper in these words: "Bought of A a horse for Rs. 500." B may prove the verbal warranty.

(h) A hires lodgings of B, and gives B a card on which is written—"Rooms, Rs. 200 a month." A may prove a verbal agreement that these terms were to include partial board.

A hires lodgings of B for a year, and a regularly stamped agreement, drawn up by an attorney is made between them. It is silent on the subject of board. A may not prove that board was included in the term verbally.

(i) A applies to B for a debt due to A by sending a receipt for the money. B keeps the receipt and does not send the money. In a suit for the amount A may prove this.

(j) A and B make a contract in writing to take effect upon the happening of a certain contingency. The writing is left with B, who sues A upon it. A may show the circumstances under which it was delivered.

93. When the language used in a document is, on its face, ambiguous or defective, evidence may not be given of facts which would show its meaning or supply its defects.

Illustrations.

(a) A agrees, in writing, to sell a horse to B for Rs. 1,000 or Rs. 1,500. Evidence cannot be given to show which price was to be given.

(b) A deed contains blanks. Evidence cannot be given of facts which would show how they were meant to be filled.

Exclusion of evidence against application of document to existing facts.

94. When language used in a document is plain in itself, and when it applies, accurately to existing facts, evidence may not be given to show that it was not meant to apply to such facts.

Illustration.

A sells to B, by deed, "my estate at Rampur containing 100 bighas." A has an estate at Rampur containing 100 bighas. Evidence may not be given of the fact that the estate meant to be sold was one situated at a different place and of a different size.

Evidence as to document unmeaning in reference to existing facts.

95. When language used in a document is plain in itself, but is unmeaning in reference to existing facts evidence may be given to show that it was used in a peculiar sense.

Sec. 93. GRANT.—Opinions and intentions of Government officers not legitimate materials for construing a grant. See 29 M. L. J. 289. Kabuliya—Oral evidence to explain—Interest rate of prior transactions Custom—See 41 C. 349=18 C. W. N. 582 see also 22 I. C. 844. Patent ambiguity—Hand note—"Interest at 2½ per cent."—Evidence admissible to show what the rate of interest was per mensem. 14 C. W. N. 1100=14 C. L. J. 97; 62 I. C. 702: But see also 19 C. L. J. 66=41 C. 342. Ambiguity—Oral evidence as to contents of documents. Sp. Relief Act, S. 31. See 130 P. L. R. 1910=8 I. C. 554. Evidence as regards identity of property leased admissible. 20 A. L. J. 377. Where language is defective oral evidence inadmissible. (1921) M. W. N. 519. See also 80 I. C. 944.

Sec. 94. DOCUMENT CLEAR AND UNAM-

BIGUOUS.—Section does not apply in cases of misdescription, 104 I. C. 736. Oral evidence of one not a party to document if admissible, see 57 P. L. R. 1915; 16 O. C. 213=21 Ind. Cas. 429. Where the language of a document like a deed of compromise is clear and applies without difficulty to the facts of the case no extrinsic evidence can be admitted for the purpose of affecting its interpretation. 40 I. C. 491. On this section. See 3 Bom. L. R. 768; (1925) M. W. N. 325; 38 A. 103=42 M. L. J. 475. Oral evidence to show that one of the executants of a bond signed it only as a surety is not admissible, 5 Rang. 168=103 I. C. 70=A. I. R. 1927 Rang. 199. (8 C. W. N. 101 Rel. on.)

Sec. 95.—Though the sale-deeds containing recitals that the property belong to the vendors is not admissible under S. 13 they are admissible

Illustration.

A sells to *B* by deed, "my house in Calcutta."

A had no house in Calcutta, but it appears that he had a house at Howrah, of which *B* had been in possession since the execution of the deed.

These facts may be proved to show that the deed related to the house at Howrah.

- 96.** When the facts are such that the language used might have been meant to apply to any one, and could not have been meant to apply to more than one, of several persons or things, evidence may be given of facts which show which of those persons or things it was intended to apply to.

Evidence as to application of language which can apply to one only of several persons.

Illustrations.

(a) *A* agrees to sell to *B* for Rs. 1,000, "my white horse." *A* has two white horses. Evidence may be given of facts which show which of them was meant.

(b) *A* agrees to accompany *B* to Haidarabad. Evidence may be given of facts showing whether Haidarabad in the Dekkhan or Haidarabad in Sindh was meant.

Evidence as to application of language to one of two sets of facts, to neither of which the whole correctly applies.

- 97.** When the language used applies partly to one set of existing facts, and partly to another set of existing facts, but the whole of it does not apply correctly to either, evidence may be given to show to which of the two it was meant to apply.

Illustration.

A agrees to sell to *B* "my land at *X* in the occupation of *Y*." *A* has land at *X*, but not in the occupation of *Y*, and he has land in the occupation of *Y*, but it is not at *X*. Evidence may be given of facts showing which he meant to sell.

- 98.** Evidence may be given to show the meaning of illegible or not commonly intelligible characters, of foreign, obsolete, technical, local and provincial expressions, of abbreviations and of words used in a peculiar sense.

Evidence as to meaning of illegible characters, etc.

Illustration.

A, a sculptor, agrees to sell to *B*, "all my models." *A* has both models and modelling tools. Evidence may be given to show which he meant to sell.

Who may give evidence of agreement varying terms of document.

- 99.** Persons who are not parties to a document, or their representatives in interest, may give evidence of any facts tending to show a contemporaneous agreement varying the terms of the document.

Illustration.

A and *B* make a contract in writing that *B* shall sell *A* certain cotton, to be paid for on delivery. At the same time they make an oral agreement that three months credit shall be given to *A*. This could not be shown as between *A* and *B*, but it might be shown by *C*, if it affected his interests.

Saving of provisions of Indian Succession Act relating to wills.

- 100.** Nothing in this chapter contained shall be taken to affect any of the provisions of the Indian Succession Act (X of 1865) as to the construction of wills.

Ss. 95 and 96 to explain the expression used in the documents that property is the vendor's family property (1914) M. W. N. 770 = 26 I. C. 747. Release deed conditional—Extrinsic Evidence of claim released admissible. See 20 M. L. J. 383 = 6 I. C. 758; 21 I. C. 69. Original documents in possession of defendant—Document referred to in plaint but not produced secondary evidence admissible. See 37 I. C. 794. Contract—Construction—offer kept open 'until' and 'upto' a certain date—Oral evidence inadmissible to explain. 22 C. W. N. 416 = 44 I. C. 305.

Sec. 98.—If the language of a document directly describes two sets of circumstances, but can-

not have intended to apply to both, evidence may be given to show to which it is intended to apply. 10 Bur. L. T. 245.

Sec. 97.—Latest ambiguity—Mortgage deed—Ambiguity in the description of land—Evidence aliunde to clear up ambiguity is admissible. 43 I. C. 721. See also 57 I. C. 2; 58 I. C. 67; 18 B. 283; 30 M. 207.

Sec. 99.—Section merely an enabling provision one. 27 M. 329; Evidence by strangers to show real nature of transaction is admissible. 8 I. C. 501, 28 A. 473; 23 L. W. 664 = 96 I. C. 26 = (1926) M. W. N. 939 = A. I. R. 1926 Mad. 744.

PART III.
PRODUCTION AND EFFECT OF EVIDENCE.
CHAPTER VII.

OF THE BURDEN OF PROOF.

101. Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

Burden of proof.

When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

Illustrations.

(a) *A* desires a Court to give judgment that *B* shall be punished for a crime which *A* says *B* has committed.

A must prove that *B* has committed the crime.

(b) *A* desires a Court to give judgment that he is entitled to certain land in the possession of *B*, by reason of facts which he asserts, and which *B* denies, to be true.

A must prove the existence of those facts.

102. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

Illustrations.

(a) *A* sues *B* for land of which *B* is in possession, and which, as *A* asserts, was left to *A* by the will of *C*, *B*'s father.

If no evidence were given on either side, *B* would be entitled to retain his possession. Therefore the burden of proof is on *A*.

(b) *A* sues *B* for money due on a bond.

The execution of the bond is admitted, but *B* says that it was obtained by fraud which *A* denies.

If no evidence were given on either side, *A* would succeed as the bond is disputed and the fraud is not proved.

Therefore the burden of proof is on *B*.

103. The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

Burden of proof as to particular fact.

Sec. 101.—When all evidence is in the question of burden of proof has little or no importance in appeal. 103 I. C. 166. The burden of establishing a case is rests on the party who asserts the affirmative. 35 C. 1051; 9 W. R. 192; Applies to probate cases, 39 C. 245. Party alleging that a contract is conditional must prove the condition. Debtor paying debt to a person other than creditor—Onus is on debtor to prove that the person was authorized by creditor to receive payment. 28 Bom. L. R. 1391 (P. C.)=49 M. 435=A. I. R. 1926 P. C. 34=31 C. W. N. 1=3 O. W. N. 568=94 I. C. 767=53 I. A. 84=51 M. L. J. 570. When a tenant of lands in India in a suit by his landlord to eject him from them, sets up a defence that he has right of permanent tenancy in the lands, the onus of proving that he has such a right is upon the tenant, and proof of long occupation at a fixed rent does not satisfy that onus. 46 M. L. J. 546=51 I. A. 83=47 Mad. 337 (P. C.) [16 C. 224 (P. C.); 43 M. 567 (P. C.), Ref.] Where a recorded tenant files a suit to eject a recorded sub-tenant the onus of proof lies on the latter to prove that the relationship of landholder and tenant did not exist between the parties. L. R. 2 A. 39 (Rev.). Agreement for sale with one but sale to another—Burden of proving *bona fides* is on vendee. A. I. R. 1926

Lah 580=96 I. C. 175 As to evidence of conduct and probabilities, 75 I. C. 733=(1923) Lah. 436. It is not in accordance with law to lay onus "on parties." Onus of each issue must be laid on one party or the other. 3 U. P. L. R. (B. R.) 44. Suit on lost mortgage bond—Denial of execution by defendant—Alternative plea of payment does not relieve plaintiff from proving loss. 49 All. 78. Easement—Ejectment suit—Burden of proof. See 105 I. C. 560.

Sec. 102.—The section embodies a test which party would be successful if no evidence at all were given. 3 A. 85. In criminal cases the onus of proving beyond reasonable doubt the guilt of the accused is on the prosecution. 31 C. L. J. 310=56 I. C. 849=24 C. W. N. 619. Execution of document admitted—Onus on executant to prove that he did not understand its terms—Even if he is illiterate. A. I. R. 1926 Lah. 692. The burden of proving that a suit is barred under O. 2, R. 2, C. P. C., is upon the defendant. 102 I. C. 31 (20 Cal. 716, foll.).

Sec. 103.—¹ *Sic*, in the Act as published in *Gazette of India*, 1872, Pt. IV, p. 1. There is no illustration (b). Where it has been admitted or proved that an admission of passing of consideration has been made in the document, the burden of proving want of consideration rests on the

Illustration.

(a)¹ *A* prosecutes *B* for theft, and wishes the Court to believe that *B* admitted the theft to *C*. *A* must prove the admission.

B wishes the Court to believe that, at the time in question, he was elsewhere. He must prove it.

Burden of proving fact to be proved to make evidence admissible.

104. The burden of proving any fact is necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence.

Illustrations.

(a) *A* wishes to prove a dying declaration by *B*. *A* must prove *B*'s death.

(b) *A* wishes to prove, by secondary evidence, the contents of a lost document.

A must prove that the document has been lost.

105. When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the General Exceptions in the Indian Penal Code, or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances.

Burden of proving that case of accused comes within exceptions.

Illustrations.

(a) *A*, accused of murder, alleges that, by reason of unsoundness of mind, he did not know the nature of the act.

The burden of proof is on *A*.

(b) *A*, accused of murder, alleges that, by grave and sudden provocation, he was deprived of the power of self-control.

The burden of proof is on *A*.

(c) Section 325 of the Indian Penal Code provides that whoever, except in the case provided for by section 335, voluntarily causes grievous hurt, shall be subject to certain punishments.

A is charged with voluntarily causing grievous hurt under section 325.

The burden of proving the circumstances bringing the case under section 335 lies on *A*.

Burden of proving fact especially within knowledge.

106. When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

person asserting the same. 104 I. C. 173 (A. I. R. 1925 Lah. 471 (F. B.)); A. I. R. 1927 Lah. 272, foll.; 17 P. R. 1888, diss.; A. I. R. 1926 Lah. 692.

Sec. 104.—Letter posted is presumed to have reached addressee. 8 Pat. L. T. 633 = A. I. R. 1927 Pat. 305.

Sec. 106. PRINCIPLE OF THE SECTION.—See 20 A. 459; 11 C. W. N. 1085; A. W. N. (1905) 2; 25 Cr. L. J. 1077; (1925) Nag 37. Burden of proof that case comes within exceptions of the Penal Code, see 6 A. 220; A. W. N. (1898) 209; Exceptions not pleaded in court below cannot be allowed to be raised in appeal. 21 A. 121; 23 C. 604; 3 A. L. J. 652; 17 B. 573; 8 I. C. 259; 8 C. W. N. 714; 7 A. L. J. 438; 4 P. W. R. 1910 (Cr.). Proof of right of private defence. 1 C. L. R. 60.

BURDEN OF PROOF IN SPECIAL CASES.—As to grave and sudden provocation. L. B. R. (1893-1900) 257; Private defence. 11 C. L. R. 234; A. W. N. (1904) 113; that game is a mere game of skill, see 15 Cr. L. J. 270 = 23 I. C. 484; as to possession of excess quantity of liquor, 2 I. C. 543; Shifting burden of proof, Rat. 820; 4 C. 124.

ILLUSTRATIVE CASES.—Plea of insanity to be proved by the accused. 21 A. L. J. 776 = 77 I. C. 236 = 25 Cr. L. J. 349 = 1924 All. 186 (2). General exceptions under Penal Code—Onus lies

on accused. But this does not mean that the accused must lead evidence. 45 A. 329 = 71 I. C. 689 = 1923 All. 327 (2). See also 29 Bom. L. R. 713 = 102 I. C. 511 = A. I. R. 1927 Bom. 436; 98 I. C. 707 = A. I. R. 1927 All. 119. If it is apparent from the evidence on the record, whether produced by the prosecution or by the defence, that the general exception would apply; then the presumption is removed and it is open to the Court to consider whether the evidence proves to the satisfaction of the Court that the accused comes within the exception. 45 All. 329 = 71 I. C. 689 = 24 Cr. L. J. 225 = 1923 All. 327 (2). See also 3 Lah. 144 = 68 I. C. 113 = 1922 Lah. 1. Exemption from criminal liability—Unsoundness of mind.—When unsoundness is pleaded as a defence to a criminal charge, the burden of proof rests on the accused. 29 C. L. J. 209 = 50 I. C. 991 = 23 C. W. N. 621. Gambling—Proof that it is a game of mere skill—Onus on the accused. 23 I. C. 484 = 15 Cr. L. J. 276 (Cal.). Exception may be proved by circumstances in prosecution evidence together with statement of accused. 6 Cr. R. 467.

Sec. 106. SCOPE OF SECTION.—The burden of proving facts peculiarly within the knowledge of any person that person. See 9 W. R. 190; 1 Pat. L. J. 168; 47 M. 800; 20 I. C. 600 = 6 Bur. L. T. 129; see also 2 Rang. 549 = 1925 Rang. 143.

Illustrations.

(a) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.

(b) A is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him.

Burden of proving death of person known to have been alive within thirty years.

107. When the question is whether a man is alive or dead, and it is shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it.

108. [Provided that when]¹ the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is [shifted to]¹ the person who affirms it.

Burden of proving that person is alive who has not been heard of her seven years.

109. When the question is whether persons are partners, landlord and tenant, or principal and agent, and it has been shown that they have been acting as such, the burden of proving that they do not stand, or have ceased to stand, to each other in those relationships respectively, is on the person who affirms it.

Burden of proof as to relationship in the cases of partners, landlord and tenant, principal and agent.

ILLUSTRATIVE CASES.—Where a person accused of lurking house trespass by night pleads in defence that he had a specific intention in entering the house, *i.e.*, to carry on a love intrigue in secret and not intimidate, insult, or annoy, the onus of proof is on him. 49 I. C. 103 = 40 All. 221; 37 All. 395 = 29 I. C. 67. *See also* 22 C. 164; 22 C. 591; 23 M. 152; 23 A. 124. Employing girl as prostitute—Onus is on accused to show absence of intention—Penal Code, S. 373. 35 Cal. L. J. 451 = 71 I. C. 232 = 1922 Cal. 539. The presumption under S. 106 is very weak as compared to the presumption of innocence when the trial is one for murder. If an accused after a case has been proved against him withholds evidence in disproof, inferences unfavourable to him may be drawn. 43 I. C. 241 = 19 Cr. L. J. 81 = 21 C. W. N. 1152. An accused person is always entitled to hold his tongue; but when the only alternative theory to his guilt is a remote possibility, which, if correct, he is in a position to explain, the absence of an explanation must be considered in determining whether the possibility should be disregarded or taken into account. 43 I. C. 605 = 19 Cr. L. J. 189. As to burden of proof in the case of material alteration of documents, *see* 25 A. 580 (F. B.); 7 M. 302; 9 M. 399; 12 M. 239; 7 C. 616; 12 C. 313; 7 B. 418.

Sec. 107.—Presumption of life or death—Minor not heard of for some months—Mother appointed guardian. *See* 1 I. C. 465. Death—Presumption of—Inheritance depending on proof of person surviving female onus—Date of death. *See* 19 M. L. J. 502 = 2 I. C. 977. *See also* 11 I. C. 202. There is no presumption as to death at any particular time. 4 O. W. N. 1077. (53 I. A. 24.) It depends upon the circumstances of each case whether a Court would not make a presumption that a person last heard of within seven years is alive, even assuming that a Court may make such presumption. 37 M. 440 = 23 M. L. J. 443. A person who has been found to have no title cannot tack on the possession of another when the former has not entered into possession as the latter's heir. (*Ibid.*)

Sec. 108.—¹ Substituted for the original words "from" and "on" respectively by Act XVIII of 1872, S. 9

When a person has not been heard of for 7 years, there is a presumption that he is dead. There is no further presumption authorized by the Evidence Act. L. R. 3 A. 393 (Rev.).

Sec. 108 is a proviso to S. 107. The rule in S. 108 supersedes the rules in Hindu and Mahomedan law. 43 M. L. J. 725; 2 Beng. L. R. 134. There can be a presumption and inference of death irrespective of S. 108. 103 I. C. 329 = A. I. R. 1927 All. 687.

The rules as to presumption of death contained in this section would govern the case of a Mahomedan who was missing for more than seven years. 7 A. 297, foll. The only presumption which is enacted by this section is that the party is dead at the time of suit, but there is no presumption as to the precise time of his death. 11 C. L. J. 580; 6 I. C. 244 [8 A. 614; 23 B. 296; 35 C. 25]; 54 I. C. 186; 100 I. C. 833 = A. I. R. 1927 Lah. 284; 22 N. L. R. 175 = 100 I. C. 446 = A. I. R. 1927 Nag. 104; 4 O. W. N. 1077; 53 I. A. 24. This section raises a presumption of death at the end of a continuous absence of seven years and not at the time when the question is raised or the suit is instituted. The party on whom the burden of proving the life of the absentee lies, cannot get rid of that burden by admitting the absentee's death at some subsequent time. 8 I. C. 55; 35 C. 25; 37 C. 103; 33 C. 173 (P. C.); 8 Bom. L. R. 226, R. No presumption as to the death of a person at a particular time—Person relying on the fact bound to establish it by evidence—No presumption that a person died leaving no heirs. 33 M. L. J. 295 = 12 I. C. 241; *see* 38 P. R. 1918 = 45 I. C. 70; 21 O. C. 143 = 46 I. C. 80.

Sec. 109. CONTINUANCE — PRESUMPTION OF.—*See* 18 C. W. N. 33 = 22 I. C. 383. When it is shown that the person in possession before the defendant was a tenant of the plaintiff at one time, it is for the defendant to show when the tenancy ceased and possession became adverse to

- 110.** When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner.

Burden of proof as to ownership.

- 111.** Where there is a question as to the good faith of a transaction between parties, one of whom stands to the other in a position of active confidence, the burden of proving the good faith of the transaction is on the party who is in a position of active confidence.

Proof of good faith in transactions where one party is in relation of active confidence.

Illustrations.

(a) The good faith of a sale by a client to an attorney is in question in a suit brought by the client. The burden of proving the good faith of the transaction is on the attorney.

(b) The good faith of a sale by a son just come of age to a father is in question in a suit brought by the son. The burden of proving the good faith of the transaction is on the father.

- 112.** The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.

Birth during marriage conclusive proof of legitimacy.

the plaintiff, 28 M. L. J. 361 = 27 I. C. 804; 26 B. 410; 7 C. L. J. 202. Tenant for a year—Holding over—Presumption. See 39 I. C. 125. On this section, see also 89 I. C. 674 = A. I. R. 1927 Nag. 99.

Sec. 110.—Admissibility of oral evidence to prove factum of gift under an unregistered lease, 4 I. C. 314. Inquiry at mutation by Revenue Officer—If relevant. See (*ibid.*) Where in a suit against the Secretary of State for declaration of the plaintiff's title to a certain vacant site, the plaintiff proved his possession for over 30 years. Held, that the burden of proving that the plaintiff was not the owner was upon the defendant and that the mere classification of the land as village site by the Government had no legal effect whatsoever except on assertion of title, 33 M. 173 = 20 M. L. J. 71 (19 M. 165; 22 M. 100; 20 B. 798; 25 B. 287, foll.; 13 M. L. J. 209, expl.) Plaintiff is not bound to prove adverse possession for sixty years to establish his title as against the Secretary of State for India in Council. (*Ibid.*) Onus on the party out of possession—Shifting of onus. See 4 Bur. L. T 159 = 11 I. C. 777. Presumption from judicial possession—Suit against Government, see 6 S. L. R. 210 = 19 I. C. 565. A plaintiff who has omitted to sue under S. 9 of the Specific Relief Act when first dispossessed, is not debarred when the summary relief under that section has become barred by limitation, from relying, in a suit for ejectment, on this section. As soon as he has proved that the defendant has dispossessed him the onus is thrown upon the latter to prove his title, 2 Pat. L. J. 61; 38 I. C. 797. Where nothing else is known, the person in possession of property is presumed to be owner, 45 I. C. 217. Where plaintiff is in possession alleging ownership onus of proving that he is not owner lies on defendant, 103 I. C. 36. Under this section it is presumed that a woman has power to dispose of all property which was in her possession at the time of her

death, 4 O. W. N. 1179.

Sec. 111.—See 11 O. L. J. 319 = 78 I. C. 850 = 1925 Oudh 18; 8 N. L. R. 150 = 17 I. C. 363; 36 Cal. 493 = 2 I. C. 553; 25 A. 358; 30 M. 160 (F. B.) (Donor and donee) 18 C. 545 (P. C.) (agent and principal) 11 M. L. A. 551; 20 A. 447 (Husband and wife); A. I. R. 1926 Nag. 414 (Deed by pardanashin lady).

Sec. 112. PROOF OF PATERNITY OF CHILD.—Where the question of paternity is one of evidence only, the case is governed by S. 112 and not by the personal law of the parties 26 I. C. 996 = 16 Cr. L. J. 84. The presumption of legitimacy created by S. 112 can be rebutted only by proof of non-access leaving no room for doubt. If the husband has had access, the wife's adultery will not justify a finding of illegitimacy—Proof of impotence would be equivalent to proof of non-access. 26 I. C. 996; 16 Cr. L. J. 84; (1914) 11 U. B. L. R. 23; 10 I. C. 389 = (1911) 1 M. W. N. 312; 77 P. R. 1911 = 12 I. C. 946; 22 I. C. 409; see also 1 Luck. 71; 5 Mys. L. J. 240. Nature of evidence to disprove access and onus, see 18 B. 468; U. B. R. (1892-1896), Vol. I, p. 74. Competency of discharged co-accused to testify in the case, see 9 Cr. L. J. 370; 4 L. B. R. 362. A child born 11 months after marital intercourse between its parents had ceased is illegitimate. 38 M. 466 = 25 M. L. J. 594 (F. B.). See also 27 M. L. J. 580 = 26 I. C. 61. Where there is an acknowledgment by parents as son by repute and habit for a long time, the burden is on the other side to disprove the presumption of paternity by other reliable evidence. 102 I. C. 713 = A. I. R. 1927 Mad. 733. As to applicability of section, see 48 A. 625; 7 I. A. 368; 49 M. 553. Word 'valid' in section means 'flawless', and hence presumption will not apply in case of 'facid' marriages under Mahomedan Law. A. I. R. 1926 Oudh 231. Difference between English and Indian Law. 28 Bom. L. R. 607. As to proof needed to establish paternity, see 24 L. W. 409.

Grantor's duty to disclose defects.

of the licensee, of which the grantor is, and the licensee is not, aware.

Grantor's duty not to render property unsafe.

Grantor's transferee not bound by license.

License when revocable.

57. The grantor of a license is bound to disclose the licensee any defect in the property affected by the license, likely to be dangerous to the person or property of the licensee, of which the grantor is, and the licensee is not, aware.

58. The grantor of a license is bound not to do anything likely to render the property affected by the license dangerous to the person or property of the licensee.

59. When the grantor of the license transfers the property affected thereby, the transferee is not as such bound by the license.

60. A license may be revoked by the grantor, unless—

Secs. 57 and 58. Per Curiam.—It is necessary that the legislature in India especially in view of conditions prevalent in Bombay should undertake legislation on the lines of the Housing of Working Classes Act of 1890 in England. 51 Bom. 274 = 101 I. C. 210 = 29 Bom. L. R. 78 = A. I. R. 1927 Bom. 115.

Sec. 59.—Enjoyment under a license for a long time does not constitute adverse possession. 44 A. 726 = 20 A. L. J. 608 = 1923 All. 140 (1). S. 59 has no application to a case in which one of two joint licensors transfers his interest in the property with respect to which the license has been granted in favour of his co-licensor. The transferee contemplated by the section must be a person who was not the licensor himself. 98 I. C. 814 = A. I. R. 1927 All. 197. S. 59 cannot be interpreted so as to give the transferee a right of revocation of a license which would not be exercisable by the transferor himself. (37 All. 91, fol.) 1 Luck. C. 44 = 102 I. C. 26 = A. I. R. 1927 Oudh 206. The transferee of a licensor cannot revoke a license, when the licensee has effected a work of permanent character and incurred expenses, 37 All. 91 = 26 I. C. 445 = 13 A. L. J. 1. See also 91 I. C. 1031 = 13 O. L. J. 170; 97 I. C. 337 = A. I. R. 1926 All. 714; 84 I. C. 264 = 1924 All. 750.

Sec. 60.—The grantor of a license is under an obligation to place the licensee in a position to enjoy the license. 36 C. L. J. 271 = 1923 Cal. 49. Where a license coupled with a transfer of property is granted, the transferee of the licensor is not entitled to revoke such license. 30 I. C. 581 = 13 A. L. J. 886. (16 C. 649, Ref.). See also 4 M. H. C. 98. An appropriation of the land licensed to any use inconsistent with the enjoyment of the license works a revocation and the licensee may maintain an action for damages against the licensor for breach of contract in unlawfully revoking it. (*Ibid.*) A license to catch elephants for consideration is not revocable, for it is a license coupled with an interest. (*Ibid.*) Where there is a grant of an exclusive right to catch elephants within a specified area for a specified period it does not follow as a matter of course that the grantee would be entitled to exclusive occupation of the entire territory during that time. 36 C. L. J. 271 = 1923 Cal. 49. Building license—Effect of revocation. 19 I. C. 353 = 19 C. L. J. 321; See also 3 A. L. J. 760 = 29 All. 133; 34 I. C. 471 = 12 N. L. R. 75 (34 I. C. 471 ref.; 16 Cal. 640.) A licensee permitted to build a house and reside therein is entitled to

be indemnified if evicted by the licensor's successor. A bare license may be revoked at the grantor's will and on reasonable notice, but a license coupled with grant is irrevocable. 19 I. C. 853 = 19 C. L. J. 321; 22 N. L. R. 162. Where a license is granted to building houses on a site and the licensee erects a work of a permanent nature, the license cannot be revoked. 106 I. C. 479 = A. I. R. 1927 All. 342; The principle of this section is also applicable to Berar. See 94 I. C. 923 = A. I. R. 1926 Nag. 376. Section also applies to transferee of property. 97 I. C. 337 = A. I. R. 1926 All. 714 (39 All. 91, fol. A. I. R. 1923 All. 140 dist.) A licensor cannot be allowed to revoke the license on condition of his making compensation to the licensee for loss incurred by the revocation of the license. 98 I. C. 814 = A. I. R. 1927 All. 197. Buildings of mud walls and thatched roof built for the purpose of school and which were in existence and kept under regular repair for about 30 years were held to be a work of a permanent character. (28 All. 741, fol.) 1 Luck. C. 44 = 102 I. C. 26 = A. I. R. 1927 Oudh 206; see also 97 I. C. 337 = A. I. R. 1926 All. 714. A licensee is entitled to damages for breach of any contract or for an improper revocation of his license in a proper case; the Court will allow revocation only on payment. 49 I. C. 811 = (1918) M. W. N. 772. Under the Act a license is of a personal character not merely as regards the grantee, but also as regards the grantor. It ceases the moment the property passes to another from the grantor whether by inheritance or otherwise. 18 N. L. R. 76 = 1922 Nag. 162. The heirs of the licensor may treat the licensee as a trespasser and eject him without notice of revocation. *Ibid.* A license coupled with a void grant is revocable save (1) when the licensee entered into occupation and paid rent and (2) when the licensee acting on the license has executed a work of permanent character, and incurred expense in so doing. 34 I. C. 471 = 12 N. L. R. 75 (21 Ch. D. 9; (1901) 2 Ch. 598; and 8 A. 60, ref. to.) Thatched house may be a work of permanent character. See 1925 All. 203. A license cannot be revoked during licensee's lifetime when the license had made permanent improvements. 48 I. C. 723. When plff. allowed deft. to execute on plff.'s land an irrigation scheme of considerable expense and permanent benefit to a very large number of villages, held, that the agreement created a license which could not be revoked at the instance of the plff. 47 I. C. 166. A licensee in possession does not, like the tenant, by denying title of the

(g) that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it ;

(h) that, if a man refuses to answer a question which he is not compelled to answer by law, the answer, if given, would be unfavourable to him ;

(i) that when a document creating an obligation is in the hands of the obligor, the obligation has been discharged.

But the Court shall also have regard to such facts as the following, in considering whether such maxims do or do not apply to the particular case before it :—

as to *illustration* (a)—a shop-keeper has in his till a marked rupee soon after it was stolen, and cannot account for its possession specifically, but is continually receiving rupees in the course of his business :

as to *illustration* (b)—A, a person of the highest character, is tried for causing a man's death by an act of negligence in arranging certain machinery. B, a person of equally good character, who also took part in the arrangement, describes precisely what was done, and admits and explains the common carelessness of A and himself :

as to *illustration* (b)—a crime is committed by several persons. A, B and C, three of the criminals, are captured on the spot and kept apart from each other. Each gives an account of the crime implicating D, and the accounts corroborate each other in such a manner as to render previous concert highly improbable :

as to *illustration* (c)—A, the drawer of a bill of exchange, was a man of business. B, the acceptor, was a young and ignorant person, completely under A's influence :

as to *illustration* (d)—it is proved that a river ran in a certain course 5 years ago, but it is known that there have been floods since that time which might change its course :

as to *illustration* (e)—a judicial act, the regularity of which is in question, was performed under exceptional circumstances :

as to *illustration* (f)—the question is, whether a letter was received. It is shown to have been posted, but the usual course of the post was interrupted by disturbances :

as to *illustration* (g)—a man refuses to produce a document which would bear on a contract of small importance on which he is sued, but which might also injure the feelings and reputation of his family :

ILLUSTRATION (a).—As to possession of stolen property—presumption from. *See* 32 I. C. 160 ; 18 I. C. 684 = 11 A. L. J. 94 ; 46 I. C. 158 = 22 C. W. N. 597 ; 21 I. C. 156 = 17 C. W. N. 1077 ; 53 I. C. 819 ; 26 M. L. J. 389 ; 19 Cr. L. J. 189 = 43 I. C. 605 ; 13 Cr. L. J. 140 = 13 I. C. 828 = (1912) M. W. N. 97 ; 12 I. C. 652 = 21 M. L. J. 1071 ; 53 I. C. 481 = 20 Cr. L. J. 753 (N.).

ILLUSTRATION (b).—As to corroboration of accomplice evidence, *see* 5 Lah. L. J. 572 ; (1923) Lah. 683 = 68 I. C. 821 = 23 Cr. L. J. 597 ; 20 Cr. L. J. 561 = 52 I. C. 49 (All.) ; 19 I. C. 321 = 15 Bom. L. R. 288 ; 15 Mad. 814 ; 14 Bom. L. R. 367 ; 3 Lah. 144 ; 65 I. C. 622 = 23 Cr. L. J. 158 ; 20 A. R. (Cr.) 1919 = 49 I. C. 607 ; 35 Mad. 397 = 14 I. C. 806 = 12 M. L. T. 2 = 17 P. R. (Cr.) 195 ; 16 Cr. L. J. 634 ; 17 Cr. L. J. 97 ; 17 Cr. L. J. 107 ; A. I. R. 1927 Cal. 63 ; *Ibid.* 536 = 54 Cal. 721 ; 1 Luck. 339 = A. I. R. 1927 Oudh 369 ; 8 Lah. L. J. 610 = A. I. R. 1927 Lah. 78 ; 31 C. W. N. 554 ; 8 Lah. L. J. 616 = A. I. R. 1927 Lah. 10 ; 102 I. C. 500. Without material corroboration there should be no conviction, when accused can explain for articles found with them, 76 I. C. 716 = 1923 Lah. 385. The discovery of blood marks on the person and in the house of the accused as well as his suspicious conduct immediately after the murder were held to be sufficient corroboration of the evidence of the accomplice. 4 Lah. L. J. 405. An approver's evidence is in itself tainted evidence though in some cases it may be worthy of belief. 4 Lah. L. J. 284. To support a conviction on the statement of an approver especially of one whose initial statement was very long delayed, the statement requires material corroboration connecting each individual accused with the crime committed. 63 I. C. 612 = 22 Cr. L. J.

676 (Lah.) ; 10 O. L. J. 280 = 1924 Oudh 65.

ILLUSTRATION (c).—Presumption that oath was duly administered. *See* 11 A. L. J. 933 = 35 All. 575. Presumption of regularity of official acts. *See* 18 I. C. 651 = 17 C. W. N. 531 ; 49 I. C. 171 = 3 Pat. L. J. 636. *See also* 37 Bom. 19 ; 19 A. 493 ; 9 A. 920 ; 18 C. 129. Presumption of correctness of entries in settlement papers. 28 I. C. 239. Presumption that things remain in their original state, *see* 11 M. I. A. at p. 209 = 11 I. C. 472 ; 9 I. C. 322. Presumption as to identification parade. *See* 4 Lah. L. J. 448 = 67 I. C. 721 = (1922) Lah. 31.

ILLUSTRATION (f).—The mere fact that a cover insured for a certain amount is sent, raises no presumption in law that that cover contains the necessary amount of Government currency notes. 21 A. L. J. 865 = 1924 All. 205.

ILLUSTRATION (g).—Where the prosecution does not call all available eye-witnesses, the court may draw an inference adverse to the prosecution. *See* 42 Cal. 422 = 27 I. C. 554 = 19 C. W. N. 28 ; 51 I. C. 679 = 20 Cr. L. J. 519 ; but *see contra* 74 I. C. 434 = 1923 Oudh 217. On this point, *see also* 34 I. C. 987 = 12 P. R. 1916 (Cr.). (As to presumption from "refusal" of a registered letter, *see* 3 Bom. L. R. 420.) The non-production of material witnesses like the investigation officers is a serious omission which cannot but throw suspicion on the whole prosecution case. 1 Pat. 630 = 4 Pat. L. T. 76 = 71 I. C. 219. *See also* 2 Pat. 309 = 74 I. C. 705 = 24 Cr. L. J. 801. Criminal trial—Some eye-witnesses not called—No reference favourable to accused can be drawn. 1 O. L. J. 68 ; 74 I. C. 434 = 1923 Oudh 217.

as to *illustration (h)*—a man refuses to answer a question which he is not compelled by law to answer, but the answer to it might cause loss to him in matters unconnected with the matter in relation to which it is asked :

as to *illustration (i)*—a bond is in possession of the obligor, but the circumstances of the case are such that he may have stolen it.

CHAPTER VIII.

ESTOPPEL.

115. When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.

ILLUSTRATION (h).—Where the crown withholds relevant documents in its possession, the court will draw an inference adverse to it. 50 Cal. 276=70 I. C. 510=1923 Cal. 233. Presumption from refusal to take oath. See 2 C. L. R. 476; 22 B. 680.

ILLUSTRATION (i).—Presumption of discharge of mortgage arising from the mortgagor's possession of the mortgage bond, when rebutted. 46 C. L. J. 292=(1927) M. W. N. 709=39 M. L. T. 290=29 Bom. L. R. 1388=105 I. C. 263=53 M. L. J. 215 (P. C.); 103 I. C. 488.

Sec. 115.—See 20 C. 206 (P. C.); 46 A. 728 (P. C.). Estoppel is a rule of civil action. There is no estoppel in Criminal Law. 40 All. 393=45 I. C. 519=16 A. L. J. 414. Plea open to plaintiffs as well as defendants. A. I. R. 1927 Oudh 97. Plea open only to person for whom representation was meant, and hence in the re-declarations in sale proclamation only auction purchaser can plead estoppel and not private purchaser from judgment-debtor. A. I. R. 1927 Cal. 34.

Sec. 115 is not exhaustive of the doctrine of estoppel by representation. 33 Cal. 915. See also 20 C. W. N. 1335; 23 M. L. J. 335. But see 35 Cal. 924=12 C. W. N. 721 (P. C.). There are three kinds of estoppel:—(1) by record, see Evidence Act, Ss. 40 (44). 39 C. L. J. 40; 48 I. A. 49. (2) Estoppel by deed. (3) Estoppel *in pais* or by conduct which is dealt with in Ss. 115-117. To bring a case within the section there must be (1) a representation which amounts to an intentional causing or permitting belief in another, (2) a belief on the part of the other in its truth, (3) the declaration must have caused the other to act on the faith of it and alter his position. See 22 C. W. N. 891 (P. C.); 57 I. C. 263. No fraudulent intention is necessary. 20 Cal. 296 (P. C.). But see 4 O. W. N. 1019. A statement to found an estoppel should be clear and unambiguous. Certainty is essential. 13 Beng. L. R. 12 (P. C.); 26 Bom. 75; 25 Bom. 499; A. I. R. 1926 Mad. 1052. There can be no estoppel when both parties are equally conversant with true facts. 23 Bom. 182; 35 Bom. 182 (188); 48 Bom. 38; 2 Pat. 585; 27 Cal. 107 (P. C.); 46 P. R. 1912; 13 M. L. A. 585; 47 M. L. J. 622; 2 Lah. 88, or presumed in law to be A. I. R. 1926 Oudh 330. Representation must be of an existing fact, not of promises or intention. 42 Cal. 254; 39 I. C. 385; 28 Bom. 399; 7 Bom. L. R. 184; 41 Mad. 315; 34 M. L. J. 463. Estoppel must be pleaded. 22 C. W. N. 179; 43 I. C. 556=46 P. R. 1918; 52 I. C. 739; 23 C. L. J. 122. Recital of receipt of consideration in deed does not operate as estoppel. 49 A. 707. See also

A. I. R. 1926 Lah. 471. The onus of establishing facts giving rise to estoppel rests on the party pleading it. A. I. R. 1924 P. C. 213. There can be no estoppel on a point of law. 21 All. 285; 20 N. L. R. 162; 30 Cal. 883; 35 M. 75; 44 M. 421 (P. C.). No estoppel against transactions declared void by legislature. 7 S. L. R. 58; 28 Bom. 399. There can be no estoppel where a man misconceived the legal effect of an order which was of no legal force. 27 M. L. J. 465. Where two persons not eligible for marriage live as husband and wife, the marriage not being valid cannot be supported by an estoppel. Opinions on the legal effect of an adoption is not a "thing" within S. 115. 46 P. R. 1912=13 I. C. 482. No estoppel against statute. 52 I. A. 126=52 Cal. 408=49 M. L. J. 136 (P. C.); 49 Cal. 507; 2 R. 459; 19 Mad. 200; 44 Mad. 187; 38 Mad. 519; 38 Bom. 709; 22 C. W. N. 894; 36 Cal. 920. A party is not bound by the lawyer's admission on a point on law. 11 C. W. N. 341; 24 Bom. 360. Estoppel by conduct. See 80 I. C. 994; 15 All. 189; 22 All. 83; 18 C. W. N. 420. 46 All. 214; 15 C. W. N. 741 (P. C.); A. I. R. 1927 Mad. 1066. Estoppel by acquiescence, see 23 C. L. J. 82; 29 B. 580; 41 C. 771; 2 L. 258; 2 Pat. L. J. 600; A. I. R. 1927 Oudh 89; *ibid*. 66. Estoppel by silence, 6 C. L. J. 601; 7 C. L. J. 604; 9 All. 413; 32 Cal. 359. See also 31 Bom. 566 (P. C.). Estoppel by omission. 1 P. L. J. 16; 24 C. W. N. 269; 15 Mad. 303. As to creating title by estoppel, see 101 I. C. 803. As between parties *in pari delicto* there can be no estoppel. 23 C. 962; 33 C. 967; 35 C. 551 (P. C.); 31 M. 97. But see 8 C. W. N. 620; 32 M. L. J. 488; 36 C. L. J. 391. No estoppel against infants. 25 Cal. 616; 26 Cal. 381. Attestation when amounts to estoppel. 49 Cal. 334=42 M. L. J. 434 (P. C.). See also 42 C. 876; 36 C. 780 (P. C.); 37 A. 350. Attestation by minor—Effect. A. I. R. 1927 Rang. 108. Attestation by legatee—Effect. 8 Lah. 181. Estoppel by inconsistent position—A party cannot take up inconsistent positions, approbate or reprobate, to the detriment of his opponent. 15 C. W. N. 725; 16 C. W. N. 736. Suit filed in Small Cause Court—Defendant's contention as to jurisdiction—Suits represented on original side—Defendant estopped from pleading that suit is Small Cause. A. I. R. 1926 All. 664. Major allowing decree to be passed as minor—Estopped to question decree in subsequent suit. 48 A. 661. Minor executing sale deed representing himself as major—No estoppel to plead invalidity of sale. 23 L. W. 521. See also A. I. R. 1926 Nag. 491. Estoppel is purely personal. 14 Cal. 406. Equitable estoppel, see 37

Illustration.

A intentionally and falsely leads *B* to believe that certain land belongs to *A*, and thereby induces *B* to buy and pay for it.

The land afterwards becomes the property of *A*, and *A* seeks to set aside the sale on the ground that, at the time of the sale, he had no title. He must not be allowed to prove his want of title.

116. No tenant of immoveable property, or person claiming through such tenant shall, during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immoveable property; and no person who came upon any immoveable property by the licence of the person in possession thereof shall be permitted to deny that such person had a title to such possession at the time when such licence was given.

117. No acceptor of a bill of exchange shall be permitted to deny that the drawer had authority to draw such bill or to endorse it; nor shall any bailee or licensee be permitted to deny that his bailor or licensor had, at the time when the bailment or licence commenced, authority to make such bailment or grant such licence.

Explanation (1).—The acceptor of a bill of exchange may deny that the bill was really drawn by the person by whom it purports to have been drawn.

Explanation (2).—If a bailee delivers the goods bailed to a person other than the bailor, he may prove that such person had a right to them as against the bailor.

CHAPTER IX.

OF WITNESSES.

118. All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions,

M. 270; 25 C. W. N. 29 (F. B.); 48 A. 353. As to part performance, see 39 M. 509 (P. C.); 42 C. 801; 40 M. 1134.

LANDLORD AND TENANT.—Where in rent receipts given by the agent of the Zemindar, the tenants are described as occupancy tenants, in the absence of evidence to show that the agent had power to confer occupancy rights, the Zemindar is not estopped from asserting that the tenants had no occupancy rights. L. R. 3 A. 517 (Rev.). The granting of receipts in the ordinary course of business by a landlord to his tenant is not an admission of such a formal and deliberate character as to prevent the former from denying the relationship of tenancy. L. R. 4 A. 174 (Rev.). Where a Zemindar took nazrana and admitted the tenant into land pending the execution of a lease deed he is estopped from denying that he had admitted the tenant into the land with the intention of giving a lease. L. R. 3 A. 543 (Rev.). The fact that a registered lease was not given does not affect the question. L. R. 3 A. 543 (Rev.).

Sec. 118.—See notes under S. 115. Scope and principle of, see 19 M. 200; 37 A. 557 (P. C.); 44 C. 771; 35 C. L. J. 146. Section is applicable to the case of immovable property only. 4 R. 303 = 99 I. C. 996 = A. I. R. 1927 Rang. 94. If a tenant has been let into possession by a landlord he cannot deny and set up adverse title. 50 C. W. N. 1335; 34 B. 329; 28 M. 526; 51 Bom. 43 = A. I. R. 1927 Bom. 129; 103 I. C. 421 = A. I. R. 1927 Lah. 626. Tenant cannot deny landlord's title until he surrenders possession. 101 I. C. 771; 97 I. C. 992. See also 104 I. C. 892. Where lease

was executed through ignorance or fraud, no estoppel. A. I. R. 1926 Cal. 720. No estoppel in case of tenant evicted actually or constructively by true owner. 23 L. W. 296. Lessors also are estopped from denying validity of lease. A. I. R. 1926 Cal. 882. As regards the right of the tenant to question *benami* title of his landlord, see 41 M. 461; 24 C. 711; 26 M. L. J. 597. As to licensee's estoppel, see 39 C. 439; 42 C. 262. Adverse possession cannot be set up by the tenant against landlord. 45 I. C. 656; 30 I. C. 218. Plea of title in third person, see 7 C. W. N. 596; 15 M. L. J. 368.

Sec. 117.—See 36 Bom. 455 = 12 I. C. 257 (estoppel between banker and customer).

Sec. 118. SCOPE OF SECTION.—S. 118 suggests that in India the rule generally is in favour of the admission of all the evidence of doubtful character though the weight to be attached will be a matter for the Court's discretion. 34 I. C. 976 = 17 Cr. L. J. 356 = 18 Bom. L. R. 266. Witness may be competent without being compellable. See Field, p. 402 (6th ed.). Test of competency is that witness should be able to understand questions put to him. 102 I. C. 349 = 8 Pat. L. T. 594 = 28 C. L. J. 541.

Evidence of child or minor of tender years though taken without solemn affirmation, is admissible in evidence, though such evidence must be received with due care and caution. But the Court must be satisfied before receiving the testimony, if the witness is capable of understanding the nature and obligation of an oath. 45 I. C. 497 = 20 Bom. L. R. 365. The absence of such examination does not invalidate

by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind.

Explanation.—A lunatic is not incompetent to testify, unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them.

119. A witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible, as by writing or by signs ; but such writing must be written and the signs made in open Court. Evidence so given shall be deemed to be oral evidence.

Parties to civil suit, and their wives or husbands. Husband or wife of person under criminal trial.

120. In all civil proceedings the parties to the suit, and the husband or wife of any party to the suit, shall be competent witnesses. In criminal proceedings against any person, the husband or wife of such person respective shall be a competent witness.

121. No Judge or Magistrate shall, except upon the special order of some Court to which he is subordinate, be compelled to answer any questions as to his own conduct in Court as such Judge or Magistrate, or has to anything which came to his knowledge in Court as such Judge or Magistrate ; but he may be examined as to other matters which occurred in his presence whilst he was so acting.

Illustrations.

(a) *A*, on his trial before the Court of Session, says that a deposition was improperly taken by *B*, the Magistrate. *B* cannot be compelled to answer questions as to this, except upon the special order of a superior Court.

(b) *A* is accused before the Court of Session of having given false evidence before *B*, a Magistrate. *B* cannot be asked what *A* said, except upon the special order of the superior Court.

(c) *A* is accused before the Court of Session of attempting to murder a police-officer whilst on his trial before *B*, a Sessions Judge. *B* may be examined as to what occurred.

the trial. 41 Cal. 406 = 14 Cr. L. J. 485. (11 C. W. N. 51 Diss. from.) As to competency to testify, see also 23 A. 90; 11 A. 180. As to child witness, see also 15 Cr. L. J. 161; 20 Bom. L. R. 365; 16 B. 359; 16 M. 105; 10 A. 207. See also 3 Pat. L. T. 649 = 23 Cr. L. J. 233 = 66 I. C. 73; 41 Mad. 365 = 34 M. L. J. 460. Notwithstanding S. 5 of the Oaths Act, a child's evidence is not inadmissible merely on the ground that no oath was administered to it. S. 13 of the Oaths Act governs such cases. 22 I. C. 737; 38 Mad. 550. When two persons though accused of complicity in the same offence are tried separately each is a competent witness at the trial of the other, though the case could be different if they are tried together. 45 Cal. 720 = 45 I. C. 999 = 22 C. W. N. 405. Evidence of husband to disprove access on the question of legitimacy of child born during wedlock see 38 M. 466 = 25 M. L. J. 594. As to competency to testify a person who is unable to understand oath and its significance, see 10 O. C. 337 = 7 Cr. L. J. 89; 20 Bom. L. R. 305. Police officers as witnesses. 6 C. P. L. R. (Cr.) 1. Accomplice evidence. 8 P. R. 1904 (Cr.). Evidence of witness illegally pardoned by Police. 16 B. 661 = Rat. 776. See also 19 B. 363.

Sec. 119.—See 5 O. C. 246. When a witness is so deaf and dumb that it is impossible to make him understand the question put to him in cross-examination he cannot be a competent witness and his evidence if taken ought to be struck out and a conviction based solely on his evidence ought to be quashed. 14 I. C. 653 = (1912) M.

W. N. 100.

Sec. 120. ILLUSTRATIVE CASES.—Where the husband in divorce proceedings relied on the birth of a child as evidence of adultery, under Ss. 118 and 120, Evidence Act, his evidence as to non-access was admissible. 38 M. 466 = 25 M. L. J. 594 = 21 I. C. 645. A child born 11 months after the marital intercourse between its parents had ceased, is illegitimate. (*Ibid.*) A person against whom are launched proceedings for order for maintenance under S. 488. Cr. P. Code, is competent witness on his own behalf in such proceedings. 18 A. 107. See also 16 C. 781; 5 P. R. 1914 (Cr.); 7 C. P. L. R. 127; 19 P. R. (Cr.) 1903.

Secs. 121-125.—As to the principle of the section 121, see 3 A. 573. On this section 121 see also 3 M. at p. 177; 2 Weir 777 = 6 M. H. C. App. 42; 12 Cr. L. J. 277 = 10 I. C. 917; 20 C. 857.

SCOPE OF SECTIONS.—Questions mentioned in Ss. 121, 124 and 125 are not barred. The witness has simply a privilege of refusing to answer them and a Magistrate may warn the witness of his privilege. But he cannot disallow such questions. 10 I. C. 917 = 12 Cr. L. J. 277. As to whether a judge can be a witness in a case tried by himself, see 4 B. L. R. (Cr.) 15; 20 W. R. (Cr.) 76; 2 C. 405; *Ibid.*, 23; W. R. (Cr.) 60; 23 C. 328; 24 C. 167; 19 M. 263; 16 B. H. C. 81; 28 C. 709; 5 C. W. N. 846; 4 C. W. N. 604; 7 W. R. 190.

122. No person who is or has been married shall be compelled to disclose any communication made to him during marriage by any person to whom he is or has been married; nor shall he be permitted to disclose any such communication, unless the person who made it, or his representative in interest, consents, except in suits between married persons, or proceedings in which one married person is prosecuted for any crime committed against the other.

123. No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit.

124. No public officer shall be compelled to disclose communications made to him in official confidence, when he considers that the public interests would suffer by the disclosure.

[125. No Magistrate or police-officer¹ shall be compelled to say whence he got any information as to the commission of any offence, and no revenue-officer shall be compelled to say whence he got any information as to the commission of any offence against the public revenue.

Sec. 122. SCOPE OF SECTION.—*See* 22 M. 1 at p. 3.

APPLICATION OF SECTION.—Before admitting evidence under S. 122 the Court should ask the party against whom the evidence is to be given whether he or she would consent to the evidence being given. The consent must be express. 14 Cr. L. J. 316 = 27 P. R. (Cr.) 1913 = 19 I. C. 1004. The restriction in S. 122 is not one that can be waived or that a Court can relax, so that disclosure by a widow of certain communications made to her by her husband immediately before his death cannot only be not compelled but should not be permitted at all. 23 I. C. 511 = 40 Cal. 891. No statement of an incriminating nature made by the appellant as to her guilt under S. 302 to her husband could be received in evidence. 1923 Lah. 40 (10 P. R. 1914 foll.) *See also* 27 I. C. 664 = 34 P. R. 1914 (Cr.); 14 Cr. L. J. 273 = 19 I. C. 705. A woman's confession to her husband is inadmissible in view of S. 122. An offence against a person in the section does not include an offence against a son though it may cause grief to the father. 10 P. R. (Cr.) 1914 = 25 I. C. 525. On a trial for breach of trust by a public servant a letter of the accused to his wife found by the Police was held admissible against him in evidence 22 M. 1.

SECS. 123-126. SCOPE OF SECTIONS.—Questions referred to in Ss. 123 and 126 should be disallowed by the Magistrate. 10 I. C. 917 = 12 Cr. L. J. 277. Non-production of a complaint when demanded merely for ascertaining the informer's name is not improper but privileged under S. 125, the disclosure of the informer's name being contrary to S. 123. 37 I. C. 54 = 18 Cr. L. J. 70. Statements in departmental enquiry into bribery case, 16 C. W. N. 431 = 13 Cr. L. J. 415. Communications between ministers of State. 27 B. 189; 32 M. 62. As to production of State records to which protection of this section does not extend, *see* 2 Weir 781. An entry in a posting register kept by the Customs department showing the sections to which officers are posted, is not a State document for which privilege can be claimed under S. 123 or

162. 45 I. C. 284. A statement made by a subordinate officer to his superior regarding the apprehension of an accused person within the hearing of various other people is a relevant fact and is admissible under S. 124. 45 I. C. 284 = 22 C. W. N. 451. Statements made by witnesses in the course of a departmental inquiry into the conduct of police-officers are not privileged under Ss. 123, 124 or 125. 15 I. C. 77 = 16 C. W. N. 431. (2 Bom. L. R. 329, foll.) The Magistrate is bound to call for them under S. 162 and to allow the accused to cross-examine the witnesses under S. 155 on the statements made whether they are in favour of the accused or against them. (*Ibid.*) Section 163 entitles the prosecution to make use of them if they turn out to be not in favour of the defence. 15 I. C. 77 = 16 C. W. N. 431.

Sec. 124.—*See* notes under S. 123. *See also* 6 Bom. L. R. 131; (1911) 2 M. W. N. 369; 2 Bom. L. R. 329; 7 C. W. N. 246. Resolution of Government containing opinions of Government officers, whether privileged. 99 I. C. 293 = 21 Bom. L. R. 1213 = A. I. R. 1926 Bom. 590. A Magistrate who came across a document during trial of a crim. case consulted the 1st Magistrate and declined to allow the document to be produced on ground that it was a document of state *Held*, his action was correct. 22 N. L. R. 34.

Sec. 125.—This section was substituted by Act III of 1887, S. 1.

¹ All the privileges which a police-officer has under S. 125 of this Act have been conferred on a Commandant or Second-in-Command of military police in Burma, *see* the Burma Military Police Act (XV of 1887), S. 13, Bur. Code. *See also* the revised edition of the Act as modified up to 1st May, 1899, printed by the Government of Burma.

SCOPE AND OBJECT OF THE SECTION.—S. 125 rests upon policy and it protects the name of a spy or informant, not the nature of the information and it has no application to an informant who lays a sworn information and thereby initiates criminal proceedings. This rule is clearly applicable to gambling cases. 29 I. C.

Explanation.—"Revenue-officer" in this section means any officer employed in or about the business of any branch of the public revenue.]

126. No barrister, attorney, pleader or vakil shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such barrister, pleader, attorney or vakil, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment :

Provided that nothing in this section shall protect from disclosure—

- (1) any such communication made in furtherance of any [illegal]¹ purpose ;
- (2) any fact observed by any barrister, pleader, attorney or vakil, in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment.

It is immaterial whether the attention of such barrister, [pleader]² attorney or vakil was or was not directed to such fact by or on behalf of his client.

Explanation.—The obligation stated in this section continues after the employment has ceased.

Illustrations.

(a) *A*, a client, says to *B*, an attorney—"I have committed forgery and I wish you to defend me."

As the defence of a man known to be guilty is not a criminal purpose, this communication is protected from disclosure.

(b) *A*, a client, says to *B*, an attorney—"I wish to obtain possession of property by the use of a forged deed on which I request you to sue."

The communication, being made in furtherance of a criminal purpose, is not protected from disclosure.

(c) *A*, being charged with embezzlement, retains *B*, an attorney, to defend him. In the course of the proceedings, *B* observes that an entry has been made in *A*'s account book, charging *A* with the sum said to have been embezzled, which entry was not in the book at the commencement of his employment.

This being a fact observed by *B* in the course of his employment, showing that a fraud has been committed since the commencement of the proceedings, it is not protected from disclosure.

127. The provisions of section 126 shall apply to interpreters, and the clerks or servants of barristers, pleaders, attorneys and vakils.

128. If any party to a suit gives evidence therein at his own instance or otherwise he shall not be deemed to have consented thereby to such disclosure as is mentioned in section 123; and, if any party to a suit or proceeding calls any such barrister, [pleader]² attorney or vakil as a witness, he shall be deemed to have consented to such disclosure only if he questions such barrister, attorney or vakil on matters which, but for such question, he would not be at liberty to disclose.

129. No one shall be compelled to disclose to the Court any confidential communication which has taken place between him and his legal professional adviser, unless he offers himself as a witness, in which case he may be compelled to disclose

79 = 16 Cr. L. J. 447. In criminal prosecutions, the witnesses for the Crown are privileged from disclosing the channel through which they received or communicated information. But this privilege cannot be claimed by a detective. 42 Cal. 957 = 16 Cr. L. J. 497 = 29 I. C. 513 = 19 C. W. N. 676.

Sec. 126.—¹ Substituted for the original word "criminal" by Act XVIII of 1872, S. 10.

Secs. 126 and 128.² Inserted by Act XVIII of 1872, S. 10. The Court cannot rule out the evi-

dence of a counsel as inadmissible on the ground of the incompetency of the counsel to be a witness. 24 I. C. 165 = 12 Cr. L. J. 429. On this section see also 3 A. 91; 28 B. 263; 4 B. 576; 4 Bom. L. R. 460; 12 A. L. J. 285.

Sec. 127.—Protection to interpreters is of peculiar importance in India as there are so many races speaking different languages. 26 C. 52; 2 C. W. N. 649.

Sec. 129.—See 4 B. 576; 2 Bom. 453; 11 Cal. 655; 21 C. 392; 29 Bom. L. R. 414.

any such communications as may appear to the Court necessary to be known in order to explain any evidence which he has given, but no others.

130. No witness who is not a party to a suit shall be compelled to produce his title-deeds to any property or any document in virtue of

Production of title deeds of witness, not a party.

which he holds any property as pledgee or mortgagee, or any document the production of which might tend to

criminate him, unless he has agreed in writing to produce them with the person seeking the production of such deeds or some person through whom he claims.

Production of documents which another person, having possession, could refuse to produce.

131. No one shall be compelled to produce documents in his possession, which any other person would be entitled to refuse to produce if they were in his possession, unless such last-mentioned person consents to their production.

132. A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit or in any

Witness not excused from answering on ground that answer will criminate.

civil or criminal proceeding, upon the ground that the answer to such question will criminate, or may tend directly or indirectly to criminate, such witness, or that it will expose, or tend directly or indirectly to expose, such witness to a penalty or forfeiture of any kind ;

Provided that no such answer, which a witness shall be compelled to give, shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer.

Proviso.

133. An accomplice shall be a competent witness against an accused person ; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an

Accomplice.

Sec. 130.—Witness present in Court, it can be compelled to produce document. *See* 12 Cr. L. J. 250 ; 14 C. L. J. 120. Effect of non-production. 15 C. L. J. 7 = 17 C. W. N. 108 = 13 I. C. 120.

Sec. 132.—A witness must claim the benefit of the protection afforded by S. 132 before he makes the statement in respect of which a question is subsequently raised. 40 All. 271 = 43 I. C. 823. Unless a person objects to any question the answer to which is likely to criminate him, he cannot be said to have been compelled to give such answer within S. 132 proviso of the Act. 59 I. C. 324 = 22 Bom. L. R. 1247 ; 50 B. 162. The protest from a witness is not necessary in respect of every question for the benefit of the privilege afforded by S. 132. 43 All. 92 = 18 A. L. J. 940 = 58 I. C. 825. But *see* A. I. R. 1926 Lah. 385. Where the witness was compelled to answer the question put to him by the Judge under S. 132 proceedings for defamation could not be taken against him. 42 All. 257 = 21 Cr. L. J. 186 ; 54 I. C. 890. (16 A. 88 not foll. 40 A. 271 ref.) A person making a defamatory statement as a party or as a witness in a judicial proceeding is liable to be charged under S. 500, I. P. C., irrespective of the liability for perjury. Such person can be protected if he pleads and succeeds in applying any of the exceptions mentioned in S. 499, I. P. C. 10 I. C. 682 = 12 Cr. L. J. 191. The English doctrine of absolute privilege in cases of defamation does not apply in India. 13 I. C. 217 = 13 Cr. L. J. 25. *See* 51 M. L. J. 112 (F. B.). The taking of a thumb impression is not equivalent to asking a question and receiving an answer and may be proved against the person in any criminal proceeding and the proviso to S. 132 does not apply where no objec-

tion is taken to the thumb impression being taken. 39 Cal. 348 = 13 I. C. 925 = 16 C. W. N. 503. (3 M. 271 ; 21 C. 392 foll.) Where a charge for perjury is based on two contradictory statements every possible presumption in favour of their reconciliation should be made. 15 Cr. L. J. 379 = 23 I. C. 747. A sanction to prosecute for perjury should not be given on the basis of two contradictory statements where two statements are reconcilable and every possible presumption must be in favour of such reconciliation. 24 I. C. 576 = 15 Cr. L. J. 488. (7 A. 44 foll.) A person who is tried for an offence under S. 3 of the Gambling Act has every right to cite as his witness another person who is a co-accused with him for an offence under S. 4 in a separate trial. The co-accused's position is sufficiently protected by S. 132. 73 I. C. 521 = 1924 Lah. 247. As to privilege of statement made before the coroner, *see* 50 B. 56.

Sec. 133. ACCOMPLICE IS A COMPETENT WITNESS.—45 All. 226 = 21 A. L. J. 42 = 1923 All. 91. "Accomplice"—Meaning of. One who deposes that he only helped the accused in disposing of the body of the deceased after he was killed by the accused is no accomplice. 73 I. C. 506 = 1923 Lah. 345. *See also* 45 C. L. J. 581 ; 8 Lah. L. J. 610. An accomplice is a witness and not an accused person, 9 P. R. (Cr.) 1911 = 10 I. C. 340 = 12 Cr. L. J. 267. A suspected participant in the crime appearing as a prosecution witness is on the same basis as an accomplice and a conviction cannot be based upon his uncorroborated testimony. 15 Cr. L. J. 440 = 24 I. C. 146. Persons taking part in negotiations for bribe cannot be said to be independent witnesses and their evidence is not free from doubt, but

accomplice.

persons merely present are not accomplices. 20 Cr. L. J. 238=50 I.C. 18. Person having knowledge of commission of offence and keeping quiet for some days is no better than accomplice. 30 C. W. N. 816. Accomplice and detective—Distinction. The detectives and accomplices are distinguished clearly when a conspiracy contains persons of both the characters. The former enter with a design of detecting or betraying it, while the latter do concur fully with other accomplices till they are alarmed or they turn upon their associates and expose them. In the case of those corroboration equal to that of other is necessary. 15 C.L.J. 517=16 I.C. 257=16 C.W.N. 1105.

WHO IS NOT AN APPROVER.—Where a person was not granted a formal pardon but was examined under S. 10, Gambling Act, he is not an approver and therefore his evidence can be accepted without corroboration. L. R. 1 A. (Cr.) 101. One who is already convicted of a different offence could not be considered as an accomplice as he has nothing to gain or lose by the evidence he gives in Court. 14 I.C. 607 (2)=15 C.L.J. 962.

VALUE OF ACCOMPLICE'S OR APPROVER'S EVIDENCE.—The evidence of an approver, if believed, is sufficient foundation whereon to repose a conviction but in practice the Court *ex maiori cautela* insists upon corroboration of the approver's statements in material particulars. 69 I.C. 452=23 Cr. L. J. 754=1925 Lah. 153. The confession of an accomplice should be subjected to the most anxious scrutiny in so far as it incriminates others, and received with caution as it is not sifted by cross-examination. 14 Cr. L. J. 179=19 I.C. 179; 16 Cr. L. J. 233; 27 I.C. 905=8 S. I. R. 203=103 I.C. 49=28 Cr. L. J. 625=A. I. R. 1927 Lah. 581; 24 A. I. J. 1050; 1 Luck. C. 339; 8 Lah. L. J. 610. The evidence of an approver should not be believed without material corroboration and in order to see whether there is such corroboration the Court should scrutinise and marshal out very carefully the facts. 9 I. C. 232=12 Cr. L. J. 35. The statement of an approver, veracious though it may appear to be, and though the truth of a large part of it be established, beyond all doubt, nevertheless requires corroboration. 34 I. C. 993=17 Cr. L. J. 273. Evidence of approver may, in exceptional cases and for reasons stated be admitted though uncorroborated. 17 Cr. L. J. 220=34 I. C. 332. There should be direct and material corroboration of the statement of an approver who is of very bad character. 32 I. C. 843=17 Cr. L. J. 107. Where the complicity of a person is due solely to coercion and his evidence cannot be ascribed to any desire to escape legal consequences, the discredit attaching to his evidence is practically negligible. 19 I. C. 207=14 Cr. L. J. 207=(1912) M. W. N. 1108. As to necessity for corroboration of accomplice evidence, *see also* 73 I. C. 808=24 Cr. L. J. 696=1924 Lah. 235; 19 A. L. J. 725=22 Cr. L. J. 663=63 I. C. 455; 17 Cr. L. J. 256=34 I. C. 976=18 Bom. L. R. 266.

NECESSITY FOR CORROBORATION.—An approver's evidence cannot be accepted unless it is corroborated in material particulars by other independent evidence. 11 P. L. R. 1912=13 I.C. 998=13 Cr. L. J. 182. A conviction based on the evidence of an accomplice is not bad but in

established practice it is necessary that such evidence should be corroborated by some untainted evidence in material particulars. 24 I. C. 174=15 Cr. L. J. 438=18 C. W. N. 550; 73 I. C. 963=24 Cr. L. J. 723=4 Pat. L. T. 381; 2 Pat. L. T. 773=22 Cr. L. J. 200=60 I. C. 56. Conviction on uncorroborated evidence, when approver is a scoundrel, is not warranted. 1 R. 603=77 I.C. 429=1924 Rang. 173. The probative value of the evidence of an accomplice is practically the same as the confession of a co accused. 24 I. C. 153 (38 B. 156 foll.). A conviction based on the evidence of an accomplice or the confession of a co accused is not illegal though it is not safe to act on such testimony unless corroborated in material particulars. 24 I. C. 153=15 Cr. L. J. 417.

WHAT IS GOOD CORROBORATION AND WHAT IS NOT.—In all cases depending upon informer's evidence the degree of support required for the evidence depends in each case upon the individual's credit. 15 I. C. 987=16 C. W. N. 669. An approver's evidence supported by their retracted confession of a co accused behind the back of the accused is not sufficient to convict the accused. Such a retracted confession is not a corroboration of a high value. 18 I. C. 672=11 A. L. J. 73. It is unsafe to rely upon the uncorroborated testimony of the approver; the corroboration must be of the statement connecting the accused with the offence. 12 I. C. 513=12 Cr. L. J. 537 (All). There is nothing in S. 133 to suggest that the statement of one approver cannot be regarded as corroborating that made by another approver. No doubt if it could be shown that the approvers had ample opportunity of consultation, this corroborative value would be greatly diminished. 1923 Lah. 666; *see also* 76 I. C. 698=1923 Lah. 335; 1923 Lah. 152; 96 I. C. 127=A. I. R. 1926 All. 705. Confession of one accused cannot be said to be corroborated by the confession of another as against a third accused who has not confessed at all. But between the first two the confession of one may be said to be corroborated by the confession of the second and *vice versa*. 60 I. C. 786=22 Cr. L. J. 290 (Lah) (38 Bom. 156 dist.). The rule that testimony of an approver must be corroborated not only as to the crime but also as to the identity of each accused person and that the corroboration must proceed from an untainted source is not a technical rule but is founded on long judicial experiment. 38 Cal. 559=10 I. C. 582=15 C. W. N. 593. The fabrication of a false defence cannot be regarded as sufficient to corroborate an approver. The evidence of one approver cannot be said to corroborate another except where both have, at the earliest opportunity and before there has been any chance of consultation, deposed to the same acts as having been committed by particular accused person. 3 Lah. 144=8 I. C. 113=1922 Lah. 1. An accused should not be convicted on the statement of an approver unless such testimony is strongly corroborated and the corroboration distinctly implicates the accused with crime committed. 40 I. C. 696=9 P. W. R. (Cr.) 1917; 39 I. C. 680=9 P. R. (Cr.) 1917. The evidence of one accomplice is not sufficient corroboration of the evidence of other accomplices nor are previous statements made by the same person sufficient. 21 M. L. J. 283=9 I. C.

Number of witnesses.

134. No particular number of witness shall in any case be required for the proof of any fact.

CHAPTER X.

OF THE EXAMINATION OF WITNESSES.

135. The order in which witnesses are produced and examined shall be regulated by the law and practice for the time being relating to civil and criminal procedure respectively, and, in the absence of any such law, by the discretion of the Court.

136. When either party proposes to give evidence of any fact, the Judge may ask the party proposing to give the evidence in what manner the alleged fact, if proved, would be relevant; and the Judge shall admit the evidence if he thinks that the fact, if proved, would be relevant and not otherwise.

If the fact proposed to be proved is one of which evidence is admissible only upon proof of some other fact; such last-mentioned fact must be proved before evidence is given of the fact first mentioned, unless the party undertakes to give proof of such fact, and the Court is satisfied with such undertaking.

If the relevancy of one alleged fact depends upon another alleged fact being first proved, the Judge may, in his discretion, either permit evidence of the first fact to be given before the second fact is proved, or require evidence to be given of the second fact before evidence is given of the first fact.

Illustrations.

(a) It is proposed to prove a statement about a relevant fact by a personal alleged to be dead, which statement is relevant under section 32.

The fact that the person is dead must be proved by the person proposing to prove the statement, before evidence is given of the statement.

(b) It is proposed to prove, by a copy, the contents of a document said to be lost.

The fact that the original is lost must be proved by the person proposing to produce the copy, before the copy is produced.

(c) A is accused of receiving stolen property knowing it to have been stolen

It is proposed to prove that he denied the possession of the property.

The relevancy of the denial depends on the identity of the property. The Court may, in its discretion, either require the property to be identified before the denial of the possession is proved, or permit the denial of the possession to be proved before the property is identified.

897 = 10 M. L. T. 84 = (1911) 1 M. W. N. 327; 12 I. C. 650 = (1911) 2 M. W. N. 375. Corroboration—Nature and extent of.—Whether English and Indian Law on the point same. See 69 I. C. 257 = 17 N. L. R. 113; 5 Pat. 63 = 93 I. C. 884.

RETRACTED STATEMENT IS ADMISSIBLE.—A retracted statement of an approver is admissible as evidence against an accused person. 61 I. C. 528 = 12 L. W. 385. May be sufficient corroboration of the approver's story as against himself but not against a co-accused. 20 Cr. L. J. 188 = 49 I. C. 604.

DELAY IN MAKING STATEMENTS.—Long delay in making their statements would make their evidence liable to grave suspicion. 23 Cr. L. J. 476 = 67 I. C. 828 (2) = 2 Lah. L. J. 296.

Sec. 134. SCOPE AND PRINCIPLE OF SECTION.—Explained. 10 W. R. 236; 22 C. W. N. 408. Court may believe one witness in preference to a larger number on the other side. 24 W. R. 18 (Cr.). Evidence in case of perjury.—Necessity for more than one witness. 5 W. R. (Cr.) 23; B. L. R. (Sup. Vol.) F. B. 457. Case of two contradictory statements.—Conviction on alternative charges. See 4 B. L. R. (Ap. Cr.) 9; 13 C. 405; 8 W. R. (Cr.) 79; 9 W. R. (Cr.) 52; 9 W. R. (Cr.) 25; 12 W. R. (Cr.) 11; 12 W. R.

(Cr.) 66; 4 B. L. R. (A. C.) 4; 3 B. L. R. (Ap. Cr.) 36; 12 W. R. (Cr.) 31; 22 W. R. (Cr.) 2; 4 B. L. R. (Ap. Cr.) 9; 10 B. 124; 11 B. 702. See Field, 6th Ed., p. 433.

Sec. 135.—Order of examination of witnesses generally left to discretion of Counsel. 5 C. W. N. 15. Power of Court to regulate order of examining witnesses, 39 C. 245 = 16 C. W. N. 265. See also 8 B. 200; 12 B. 459; 7 C. L. R. 274. Effect of Judge's suggestion that further evidence need not be given. 6 Bom. I. R. 636. "No matter how often the same case comes before the Court, if the accused persons be different on each occasion, the witnesses for the prosecution must be examined *de novo*." See W. R. (1864) Cr. 38; *Ibid.* 1; 13; 18; 22 W. R. (Cr.) 38; 1 B. L. R. (O. Cr.) 37; 9 M. 83. Omission to do this though illegal yet if it has not occasioned a failure of justice, a new trial need not be ordered.

Sec. 136.—See notes under S. 135. Where in cross-examining a witness for the prosecution, questions are disallowed by the Court on the ground of irrelevancy or other grounds, the evidence should show what the questions are and the reason for disallowing them. 55 I. C. 593 = 1 Pat. L. T. 632.

(d) It is proposed to prove a fact (A) which is said to have been the cause or effect of a fact in issue. There are several intermediate facts (B, C and D) which must be shown to exist before the fact (A) can be regarded as the cause or effect of the fact in issue. The Court may either permit A to be proved before B, C and D is proved, or may require proof of B, C and D before permitting proof of A.

Examination-in-chief.

137. The examination of a witness by the party who calls him shall be called his examination-in-chief.

Cross-examination.

The examination of a witness by the adverse party shall be called his cross-examination.

Re-examination.

The examination of a witness, subsequent to the cross-examination by the party who called him, shall be called his re-examination.

138. Witnesses shall be first examined-in-chief, then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined.

Order of examinations.

The examination and cross-examination must relate to relevant facts but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief.

The re-examination shall be directed to the explanation of matters referred to in cross-examination; and, if new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine upon that matter.

Direction of re-examination.

Cross-examination of person called to produce a document.

he is called as a witness.

139. A person summoned to produce a document does not become a witness by the mere fact that he produces it, and cannot be cross-examined unless and until

Witnesses to character.

140. Witnesses to character may be cross-examined and re-examined.

Leading questions.

leading question.

141. Any question suggesting the answer which the person putting it wishes or expects to receive is called a

When they must not be asked.

142. Leading questions must not, if objected to by the adverse party, be asked in an examination-in-chief, or in a re-examination, except with the permission of the Court.

The Court shall permit leading questions as to matters which are introductory or undisputed, or which have, in its opinion, been already sufficiently proved.

SECS. 137-138. APPLICATION OF S. 138.—It is certainly implied by S. 138 that the party should have an opportunity to cross-examine and does not mean that merely a right to cross-examine a witness without an opportunity being offered for cross examination is sufficient compliance with the requirements of the law. 73 I. C. 339 = 24 Cr. L. J. 595.

SCOPE OF CROSS-EXAMINATION.—The right of cross-examination given by S. 138 is not fettered by the fact that there are police papers which are not referred to by the Prosecution; and the cross-examination can be made on all matters allowed by the Evidence Act. The cross-examination is not limited to matters raised in evidence elsewhere. 10 I. C. 917 = 4 Bur. L. T. 113. Court should generally leave cross-examination to the parties. See 11 O. L. J. 333 = 82 I. C. 154 = 25 Cr. L. J. 1226 = 1924 Oudh 372.

LIMITS OF CROSS-EXAMINATION.—2 Jur. N. S. 161; 7 B. L. R. App. 88; 9 W. R. 386; 12

M. I. A. 380; 3 B. L. R. (A. C.) 273.

USE OF CROSS-EXAMINATION.—See 6 W. R. 181; 21 C. 401; 6 C. 279 = 7 C. L. R. 385. Object of cross-examination. 30 C. 625. There is no hard and fast rule as to the right of a counsel to demand in cross-examination the repetition of the whole story told in the examination-in-chief. 15 Cr. L. J. 148 = 22 I. C. 724.

SCOPE OF RE-EXAMINATION.—After the cross-examination of the witness on behalf of the accused the re-examination would ordinarily be directed to the explanation of the matter referred to in the cross-examination. 3 Pat. L. T. 32. See also 44 I. C. 343.

See 139.—See 12 B. 63.

Sec. 142.—A LEADING QUESTION to the prosecution witness by the prosecution cannot be allowed nor can the reply be used. 1 Pat. 630 = 4 Pat. L. T. 76. On this section see also 12 M. I. A. 380.

When they may be asked.

143. Leading questions may be asked in cross-examination.

144. Any witness may be asked, whilst under examination, whether any contract, grant or other disposition of property, as to which he is giving evidence, was not contained in a document, and if he says that it was, or if he is about to make any

Evidence as to matters in writing.

statement as to the contents of any document, which, in the opinion of the Court, ought to be produced, the adverse party may object to such evidence being given until such document is produced, or until facts have been proved which entitle the party who called the witness to give secondary evidence of it.

Explanation.—A witness may give oral evidence of statements made by other persons about the contents of documents if such statements are in themselves relevant facts.

Illustration.

The question is, whether *A* assaulted *B*.

C deposes that he heard *A* say to *D*—“*B* wrote a letter accusing me of theft, and I will be revenged on him.” This statement is relevant, as showing *A*'s motive for the assault, and evidence may be given of it, though no other evidence is given about the letter.

145. A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters

Cross-examination as to previous statements in writing.

in question, without such writing being shown to him, or being proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.

146. When a witness is cross-examined, he may, in addition to the questions hereinbefore referred to, be asked any questions which tend—

- (1) to test his veracity,
- (2) to discover who he is and what is his position in life, or
- (3) to shake his credit, by injuring his character, although the answer to such questions might tend directly or indirectly to criminate him or might expose or tend directly or indirectly to expose him to a penalty or forfeiture.

Sec. 143.—In the course of cross examination by the defence for eliciting facts in their favour from the prosecution witnesses, the defence are entitled under S. 143, to ask leading questions. 21 C. L. J. 331=19 C. W. N. 676=42 Cal 957. The Court may, in its discretion under S. 143, permit the prosecution to cross examine a witness even though he had been originally called by them with regard to the matters elicited by the defence. (*Ibid.*) Leading questions such as can properly be put in cross examination of a hostile witness cannot be put by the Public Prosecutor in examination in-chief. 2 Pat. L. T. 757. If a Judge disallows a question, the pleader should have the question, and order disallowing it recorded if such a refusal is illegal. 36 I. C. 468=9 Bur. L. T. 133. On this sec. see 37 C. 467.

Sec. 144.—See 35 C. 141; 19 A. 390 at p. 421; 12 Cr. L. J. 214

Sec. 145.—As to the application of S. 145 to police-diaries, see the Code of Criminal Procedure, 1898 (Act V of 1898), S. 172. Scope and application of the section. See 19 A. 390; Rat. 610 and 924; 11 B. H. C. 120; 20 C. 642; 31 C. 142; 33 C. 1023; 28 C. W. N. 587. First information report. See 8 Lah. 665; see also 54 Cal. 237; Deposition not read over to witness as required by S. 360, Cr. P. C. 6 Pat. 478=104 I. C. 100=8 Pat. L. T. 773=A. I. R. 1927 Pat. 315. Attention of complainant to be drawn to statements used in cross-examination to contradict.

31 I. C. 354=17 Bom. L. R. 59. Previous statements can be used only for the purposes of cross-examining a witness. They cannot be admitted as evidence against an accused. 12 Cr. L. J. 214=157 P. L. R. 1911=10 I. C. 119. Statements taken under S. 164, Cr. P. C. and not covered by S. 288 are inadmissible against the accused. But they can be used for the purpose of contradicting the statements subsequently made in Court by the persons making the former statements. 27 I. C. 196=17 O. C. 363. Advocates and Pleaders may examine witnesses in their chambers or elsewhere before such witnesses appear in Court if they think fit. 14 I. C. 763=5 Bur. L. T. 38. Such examination is not made with intent to fix witnesses down to certain evidence, but is made to ascertain what they know and to enable the case to be conducted properly. *Ibid.* Writing need not be produced in absence of intention to contradict A. I. R. 1925 Mad. 145.

Secs. 146—152. RELEVANCY OF QUESTIONS.—A question put to a female witness whether she was made pregnant by one X, in a case relating to title to property would be relevant if the point was whether by reason of unchastity she could not inherit her husband's property. But if the object was to impeach her credit, Ss. 146 and 148 to 152 must be considered. 45 I. C. 692. On sec. 146, see 3 M. 271; 9 Cr. L. J. 370; 18 C. W. N. 185. Putting scandalous questions in cross-examination. 2 Weir 819.

When witness to be compelled to answer.

147. If any such question relates to a matter relevant to the suit or proceeding, the provisions of section 132 shall apply thereto.

148. If any such question relates to a matter not relevant to the suit or proceeding, except in so far as it affects the credit of the witness by injuring his character, the Court shall decide whether or not the witness shall be compelled to answer it, and may, if it thinks fit, warn the witness that he is not obliged to answer it. In exercising its discretion, the Court shall have regard to the following considerations :—

(1) such questions are proper if they are of such a nature that the truth of the imputation conveyed by them would seriously affect the opinion of the Court as to the credibility of the witness on the matter to which he testifies ;

(2) such questions are improper if the imputation which they convey relates to matters so remote in time, or of such a character, that the truth of the imputation would not affect, or would affect in a slight degree, the opinion of the Court as to the credibility of the witness on the matter to which he testifies ;

(3) such questions are improper if there is a great disproportion between the importance of the imputation made against the witness's character and the importance of his evidence ;

(4) the Court may, if it sees fit, draw, from the witness's refusal to answer, the inference that the answer if given would be unfavourable.

Question not to be asked without reasonable grounds.

149. No such questions as is referred to in section 148 ought to be asked, unless the person asking it has reasonable grounds for thinking that the imputation which it conveys is well-founded.

Illustrations.

(a) A barrister is instructed by an attorney or vakil that an important witness is a dakait. This is a reasonable ground for asking the witness whether he is a dakait.

(b) A pleader is informed by a person in Court that an important witness is a dakait ; the informant, on being questioned by the pleader, gives satisfactory reasons for his statement. This is a reasonable ground for asking the witness whether he is a dakait.

(c) A witness, of whom nothing whatever is known, is asked at random whether he is a dakait. There are here no reasonable grounds for the question.

(d) A witness, of whom nothing whatever is known, being questioned as to his mode of life and means of living, gives unsatisfactory answers. This may be a reasonable ground for asking him if he is a dakait.

150. If the Court is of opinion that any such question was asked without reasonable grounds, it may, if it was asked by any barrister, pleader, vakil or attorney, report the circumstances of the case to the High Court or other authority to which such barrister, pleader, vakil or attorney is subject in the exercise of his profession.

Procedure of Court in case of question being asked without reasonable grounds.

151. The Court may forbid any questions or inquiries which it regards as indecent or scandalous, although such questions or inquiries may have some bearing on the questions before the Court, unless they relate to facts in issue, or to matters necessary to be known in order to determine whether or not the facts in issue existed.

Indecent and scandalous questions.

Sec. 147.—17 C. 344 ; 39 Bom. 386.
Sec. 148.—See 26 A. 371 ; 17 C. 878 ; 11 Cr. L. J. 403 = 6 I. C. 782 ; 21 C. 392 ; 4 C. W. N. 684.

Sec. 149.—Counsel for prisoner should not state as existing facts, matters which he had been told in his instruction on the authority of the

prisoner but which he does not propose to prove by evidence or suggest in cross-examination of prosecution witnesses. 30 I. C. 128 = 19 C. W. N. 923 = 21 C. L. J. 396 ; See 18 C. W. N. 185.

Sec. 150.—See 19 B. 340.

Sec. 151.—Indecent or scandalous question—Latitude to Counsel. 52 I. C. 54 = 29 Cr. L. J. 566.

Questions intended to insult or annoy.

offensive in form.

153. When a witness has been asked and has answered any question which is relevant to the inquiry only in so far as it tends to shake his credit by injuring his character, no evidence shall be given to contradict him; but, if he answers falsely, he may afterwards be charged with giving false evidence.

Exception.—(1) If a witness is asked whether he has been previously convicted of any crime and denies it, evidence may be given of his previous conviction.

(2) If a witness is asked any question tending to impeach his impartiality and answers it by denying the facts suggested, he may be contradicted.

Illustrations.

(a) A claim against an underwriter is resisted on the ground of fraud.

The claimant is asked whether, in a former transaction, he had not made a fraudulent claim. He denies it.

Evidence is offered to show that he did make such a claim.

The evidence is inadmissible.

(b) A witness is asked whether he was not dismissed from a situation for dishonesty. He denies it.

Evidence is offered to show that he was dismissed for dishonesty.

The evidence is not admissible.

(c) A affirms that on a certain day he saw B at Lahore.

A is asked whether he himself was not on that day at Calcutta. He denies it.

Evidence is offered to show that A was on that day at Calcutta.

The evidence is admissible, not as contradicting A on a fact which affects his credit, but as contradicting the alleged fact that B was seen on the day in question in Lahore.

In each of these cases the witness might, if his denial was false, be charged with giving false evidence.

(d) A is asked whether his family has not had a bloodfeud with the family of B against whom he gives evidence.

He denies it. He may be contradicted on the ground that the question tends to impeach his impartiality.

154. The Court may, in its discretion, permit the person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party.

Question by party to his own witness.

party.

155. The credit of a witness may be impeached in the following ways by the adverse party, or, with the consent of the Court, by the party who calls him:—

Impeaching credit of witness.

Sec. 152—See 18 Bom. 468 (470); 3 M. H. C. 372; 2 Weir 819.

Sec. 153—See 11 B.H. C. 169; 9 Cr. L.J. 226. The principle of this section should be observed in examination on commission also. 47 C. 1043.

Sec. 154—See 28 C. 594; 13 C. 53; 12 M.L.A. 380. Hostile witness, who is—A witness is not necessarily hostile because in an absent-minded moment he admits the truth. Before a prosecution witness can be declared hostile, there must be good ground for believing that the statement he made in favour of the defence is due to enmity to the prosecution. 44 I. C. 33 = 3 Pat. L. J. 419 = (1918) Pat. 254. A witness who is unfavourable is not necessarily hostile; a hostile witness is one who from the manner in which he gives his evidence shows that he is not desirous of telling the truth. 49 Cal. 93 = 34 C. L. J. 107 = 1922 Cal. 267; (47 Cal. 1043 Ref.) It must be understood that a witness should be cross-examined to be discredited altogether and not merely to get rid of part of his testimony. 71

I. C. 657 = 37 C. L. J. 173 = 1923 Cal. 463. Result of cross examining one's own witness, 53 C. 372.

Secs. 155—167. IDENTIFICATION IN JAIL—VALUE OF, AS EVIDENCE.—Evidence of identification in the jail cannot be treated as substantive evidence in the trial as it is not on oath, and is made in extra-judicial proceedings. 19 A. L. J. 947. When a person, who makes such an identification, states in Court that he can identify no one, the evidence of identification is not admissible. *Ibid.* Where in the Sessions Court witnesses retracted the statements made before the committing magistrate, *Held*, under S. 155, the statements made to the police and to the committing magistrate are relevant to contradict their evidence before the Sessions Court given in place of their retracted statements. 46 Bom. 97 = 23 Bom. L. R. 820 = 1922 Bom. 108. Statements of witnesses made to the Police should be used to corroborate them except in very special circumstances. The evidence of a witness hostile to the Crown may be impeached by reference to the

(1) by the evidence of persons who testify that they, from their knowledge of the witness, believe him to be unworthy of credit ;

(2) by proof that the witness has been bribed, or has [accepted]¹ the offer of a bribe, or has received any other corrupt inducement to give his evidence ;

(3) by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted ;

(4) when a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character.

Explanation.—A witness declaring another witness to be unworthy of credit may not, upon his examination-in-chief, give reasons for his belief, but he may be asked his reasons in cross-examination, and the answers which he gives cannot be contradicted, though, if they are false, he may afterwards be charged with giving false evidence.

Illustrations.

(a) A sues B for the price of goods sold and delivered to B.

C says that he delivered the goods to B.

Evidence is offered to show that, on a previous occasion, he said that he had not delivered the goods to B.

The evidence is admissible.

(b) A is indicted for the murder of B.

C says that B, when dying, declared that A had given B the wound of which he died.

Evidence is offered to show that, on a previous occasion, C said that the wound was not given by A or in his presence.

The evidence is admissible.

156. When a witness whom it is intended to corroborate gives evidence of any relevant fact, he may be questioned as to any other circumstances which he observed at or near to the time or place at which such relevant fact occurred, if the Court is of opinion that such circumstances, if proved, would corroborate the testimony of the witness as to the relevant fact which he testifies.

Questions tending to corroborate evidence of relevant fact admissible.

relevant fact, he may be questioned as to any other circumstances which he observed at or near to the time or place at which such relevant fact occurred, if the Court is of opinion that such circumstances, if proved, would corroborate the testimony of the witness as to the relevant fact which he testifies.

Illustrations.

A, an accomplice, gives an account of a robbery in which he took part. He describes various incidents unconnected with the robbery which occurred on his way to and from the place where it was committed.

Independent evidence of these facts may be given in order to corroborate his evidence as to the robbery itself.

Former statements of witness may be proved to corroborate later testimony as to same fact.

157. In order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved.

Police diary. 45 I. C. 272 = 5 Pat. L. J. 568 = 1918 Pat. 95. S. 162, Cr. P. Code, allows the credit of a witness to be impeached, by a statement which he is alleged to have made to the Police in the course of an investigation under Chapter XIV of the Code though no person is bound to state the truth to the Police in the course of the above investigation. 41 I. C. 668 = 18 Cr. L. J. 844. The statement to the Police is not evidence like a statement made on oath before a competent authority. *Ibid.*

Sec. 155.—¹ Substituted by Act XVIII of 1872. S. 11. See 6 Bur. L. J. 86 = 104 I. C. 377 = A. I. R. 1927 Rang. 247 ; 25 A. L. J. 994. Section if affected by S. 162, Cr. P. C. 4 Rang. 72 ; Statement made before coroner is admissible at trial. 28 Bom. L. R. 775 = A. I. R. 1926 Bom. 404. First Information Report admissible in defence to impeach informant's veracity. A. I. R. 1927 Cal. 17 = 44 C. L. J. 253.

Sec. 157. MEANING OF WORDS.—The words

'legally competent' mean having power under some law, statutory or otherwise. The section is controlled by S. 162, Cr. P. C. 25 M. L. T. 379 = 50 I. C. 834 = 10 L. W. 239. See also 35 M. 397 = 14 Ind. Cas. 896 = 12 M. L. T. 1 (F. B.) ; 4 Rang. 72 = 27 Cr. L. J. 881 = 96 I. C. 145 = 5 Bur. L. J. 30 = A. I. R. 1926 Rang. 116. A statement of raped girl in answer to person who saw her weeping is admissible. 5 Lah. 324 = 82 I. C. 129 = 25 Cr. L. J. 1201 = (1924) Lah. 609 ; *Kanungo* is a person in authority. 12 Cr. L. J. 480. Document showing ownership of land adjacent to disputed land is admissible to corroborate the testimony of ownership. 44 C. L. J. 582 = 99 I. C. 907 = A. I. R. 1927 Cal. 230.

SCOPE AND APPLICATION OF SECTION.—12 Bom. L. R. 663 ; 25 M. 183 (210) ; 7 A. L. J. 468 ; 34 C. 129 ; 2 C. W. N. 702 ; 4 Bom. L. R. 434.

ILLUSTRATIVE CASES.—*Sanderson, C. J.*—Where a party files a petition on the date of hearing asking for adjournment on the ground

158. Whenever any statement, relevant under section 32 or 33, is proved, all

What matters may be proved in connection with proved statement relevant under Section 32 or 33.

matters may be proved either in order to contradict or to corroborate it, or in order to impeach or confirm the credit of the person by whom it was made, which might have been proved if that person had been called as a witness and had denied upon cross-examination the truth of the

matter suggested.

159. A witness may, while under examination, refresh his memory by referring

Refreshing memory.

to any writing made by himself at the time of the transaction concerning which he is questioned, or so soon

afterwards that the Court considers it likely that the transaction was at that time fresh in his memory.

The witness may also refer to any such writing made by another person, and read by the witness within the time aforesaid, if when he read it he knew it to be correct.

When witness may use copy of document to refresh memory.

Whenever a witness may refresh his memory by reference to any document, he may, with the permission of the Court, refer to a copy of such document :

Provided the Court be satisfied that there is sufficient reason for the non-production of the original.

An expert may refresh his memory by reference to professional treatises.

that his pleader cannot attend Court that day on account of *Hartal* the fact of filing the petition as well as its contents can be proved and are admissible, though not perhaps sufficient, to charge the pleader with professional misconduct. *Woodroffe, J.*—The petition is admissible. 49 Cal. 732 = 35 C.L.J. 356 = 26 C.W.N. 589 (F.B.). First Information Report is admissible. 54 Cal. 237 = 99 I. C. 227 = A. I. R. 1927 Cal. 17 Where a statement made to a Police officer is not the first information under S. 154 of Cr. P. Code, the Magistrate must take from the police-officer, a statement, that the particular statement was made to him. 61 I. C. 650 = 22 Cr. L. J. 410 (Cal.) ; see also 5 Lah. 324 = 82 I. C. 129 = 1924 Lah. 609. A *Kanungo* deputed to make inquiry under S. 148 of the Cr. P. Code may give his deposition and his report is admissible to corroborate his sworn testimony. 12 I. C. 88 = 12 Cr. L. J. 480 (Cal.). A statement made to the Deputy Superintendent of Police in which the informant gave an account of what occurred is admissible in evidence as the Deputy Superintendent of Police is an officer legally competent to investigate the facts of a murder and dacoity, within the meaning of S. 157. 45 M. L. J. 279 = 75 I. C. 695 = 1923 Mad. 694. Statements by witnesses recorded by a Police Superintendent during investigation are not admissible in evidence nor oral evidence based on such statements. 45 M. 766 ; (35 M. 397 Ref. to) (Per *White, C. J.* and *Ayling, J.*)—The 'Local area', of an officer of C. I. D. is the Presidency of Madras and he is therefore competent to investigate an offence under the Cr. P. Code (*Sankaran Nair, J. Contra.*) An Inspector of the C. I. D. is not one of the officers legally entitled to investigate an offence under Ss. 157 to 167 of the Cr. P. C., and so his evidence is not admissible under S. 157. (*White, C. J. Sankaran Nair and Ayling, J.J.*) 35 Mad 247 = 22 M. L. J.

490 = 14 I. C. 849. But see A. I. R. 1927 Cal. 17 = 44 Cr. L. J. 253. An officer of the C. I. D. who investigates a matter under the order of his superior is not an officer 'legally competent', within the meaning of S. 157 as he does not derive his power from the Police Act or the Cr. P. C. 35 Mad. 397 = 13 Cr. L. J. 352 = 14 I. C. 896 (F. B.). A *Parchanna* is not evidence of the statements contained therein and it should be proved and exhibited as relevant evidence of those statements. 12 I. C. 209 = 12 Cr. L. J. 480. Anybody who has seen a place may be examined as to what he saw under the general provisions of law. 12 I. C. 88 = 12 Cr. L. J. 480 (Cal.) A statement admissible under S. 157 can be proved by a person to whom it was made. Evidence of a person who hears a statement being made is as direct proof of the same as the evidence of a person who sees a deed is proof of the deed being done. 58 I. C. 344 = 21 Cr. L. J. 760.

Sec. 158. See 8 Pat. L.T. 510 = 101 I. C. 289 = 5 Pat. 777 = A. I. R. 1927 Pat. 61. Scope of. A. I. R. 1926 Lah. 122.

Sec. 159. REFRESHING MEMORY.—A witness can be compelled to refresh his memory by reference to any memorandum or other writing prepared by the witness, if there is a lapse of memory on a point asked of the witness. On this section, see also 8 C. 732 ; 19 C. W. N. 890 ; 11 B. H. C. 123 ; 11 B. 657 ; 32 M. 384 ; A. I. R. 1926 Lab. 51. Where the writing brings to the mind of the witness neither any recollection of the facts mentioned in it nor any recollection of the writing itself, but which nevertheless enables him to swear to a particular fact from the conviction of his mind on seeing a writing, which he knows to be genuine the witness may refresh his memory by referring to the writing. 49 C. 573 = 26 C. W. N. 680 = 35 C. L. J. 279.

Testimony to facts stated in document mentioned in section 159.

in the document.

160. A witness may also testify to facts mentioned in any such document as is mentioned in section 159, although he has no specific recollection of the facts themselves, if he is sure that the facts were correctly recorded

Illustration.

A book-keeper may testify to facts recorded by him in books regularly kept in the course of business, if he knows that the books were correctly kept, although he has forgotten the particular transactions entered.

Right of adverse party as to writing used to refresh memory.

161. Any writing referred to under the provisions of the two last preceding sections must be produced and shown to the adverse party if he requires it : such party may, if he pleases, cross-examine the witness thereupon.

162. A witness summoned to produce a document shall, if it is in his possession or power, bring it to Court, notwithstanding any objection which there may be to its production or to its admissibility. The validity of any such objection shall be decided on by the Court.

The Court, if it sees fit, may inspect the document, unless it refers to matters of State, or take other evidence to enable it to determine on its admissibility.

If for such a purpose it is necessary to cause any document to be translated, the Court may, if it thinks fit, direct the translator to keep the contents secret, unless the document is to be given in evidence ; and, if the interpreter disobeys such direction, he shall be held to have committed an offence under section 166 of the Indian Penal Code.

Translation of documents.

163. When a party calls for a document which he has given the other party notice to produce, and such document is produced and inspected by the party calling for its production, he is bound to give it as evidence if the party producing it requires him to do so.

Giving, as evidence, of document called for and produced on notice.

Using, as evidence, of document production of which was refused on notice.

164. When a party refuses to produce a document which he has had notice to produce, he cannot afterwards use the document as evidence without the consent of the other party or the order of the Court.

Illustration.

A sues B on an agreement and gives B notice to produce it. At the trial A calls for the document and B refuses to produce it. A gives secondary evidence of its contents. B seeks to produce the document itself to contradict the secondary evidence given by A, or in order to show that the agreement is not stamped. He cannot do so.

165. The Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time of any witness, or of the parties about any fact relevant or irrelevant ; and may order the production of any docu-

Judge's power to put question or order production.

Sec. 160.—See also notes under S. 159 ; See 19 A. 390 (Special Diary) ; 11 B. 657 ; 31 C. 1050 ; 32 M. 384 ; 11 B. H. C. 120 (Statement to police officers). 97 I. C. 200 = A. I. R. 1926 Cal. 988 = 43 C. L. J. 479 (Engineer's report).

Sec. 161.—See 8 C. 745 ; 5 L. B. R. 40 = 2 I. C. 535.

Sec. 162. See 3 C. 742 ; 16 C. W. N. 431 = 15 I. C. 77 ; 45 I. C. 898.

Sec. 163.—Production of documents by defendant.—Inspection by plaintiff—Court cannot admit without proof. 72 I. C. 459 = 18 L. W. 165 = 1923 Mad. 607. S. 163 does not render proof of the document unnecessary nor alter the normal incidence of burden of proof. *Quære.* Whether S. 163 is applicable to accounts produced under the procedure for discovery or only to accounts produced after the trial has begun. (*Ibid.*).

Sec. 165.—The provisions of the section cannot be used in contravention of S. 162, Cr.P.C. 4 Rang. 471 = 99 I. C. 1019 = A. I. R. 1927 Rang. 74 ; 27 Cr. L. J. 277 = 92 I. C. 453 = 5 Cr. R. 526 = A. I. R. 1926 Cal. 147. Power of Judge to send for additional witness, to summon material witness, and to examine persons present. See 6 C. 279 = 7 C. L. R. 385. Judge not to cross-examine on points which pleaders will examine upon (*Ibid.*). Whether Judge can put irrelevant questions, see Cr. Rg. 14-10 1885 ; Right to cross-examine witnesses summoned by Court. 3 B. L. R. (A. C.) 158 ; 5 C. 164 ; 24 C. 288 ; 29 C. 287 ; 10 B. 185 = 11 B. H. C. 166. Mere sending for document does not make evidence in the case. 11 B. H. C. 166. In criminal cases, the moment witness commences giving evidence which is inadmissible he should be stopped by the Court. Per *Markby*,

ment or thing; and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the Court, to cross-examine any witness upon any answer given in reply to any such question:

Provided that the judgment must be based upon facts declared by this Act to be relevant, and duly proved:

Provided also that this section shall not authorize any Judge to compel any witness to answer any question or to produce any document which such witness would be entitled to refuse to answer or produce under sections 121 to 131, both inclusive, if the question were asked or the document were called for by the adverse party; nor shall the Judge ask any question which it would be improper for any other person to ask under section 148 or 149; nor shall he dispense with primary evidence of any document, except in the cases hereinbefore excepted.

166. In cases tried by jury or with assessors, the jury or assessors, may put any questions to the witnesses, through or by leave of the Judge, which the Judge himself might put and which he considers proper.

Power of jury or assessors to put question.

CHAPTER XI.

OF IMPROPER ADMISSION AND REJECTION OF EVIDENCE.

167. The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case, if it shall appear to the Court before which such objection is raised that, independently of the evidence

No new trial for improper admission or rejection of evidence.

J. in 7 W. R. (Cr.) 25; *see also* Field 6th Ed., p. 482. Even though a document is not produced at the first hearing of a case the Court can call for the document under S. 165. 25 O. C. 286=70 I. C. 278=1923 Oudh 59.

Sec. 167. SCOPE OF SECTION.—Under S. 167, improper admission is no ground for a new trial if there is other evidence sufficient to support the conviction. 59 I. C. 560=22 Cr. L. J. 128=2 Lah. L. J. 663. *See also* 82 I. C. 283=25 Cr. L. J. 1275; 99 I. C. 189=A. I. R. 1927 Cal. 1=31 C. W. N. 32; 95 I. C. 273=A. I. R. 1926 P. 211=7 Pat. L. T. 673=27 Cr. L. J. 753. Where the High Court after excluding the evidence improperly admitted, found that the remaining evidence was not of such a character that a conviction might reasonably be based upon it, the conviction and sentence were set aside. 1 C. 207; 2 Bom. 61; 9 Bom. H. C. 358. Duty of appellate Court where evidence has been improperly admitted in the lower Court. *See* 15 W. R. (P.C.) 8; 6 B. L. R. 495; 14 M. I. A. 86=12 W. R. (P. C.) 11; 6 M. I. A. 232; 8 M. I. A. 199; 7 C. 293; 8 C. 739. Effect of relevant evidence improperly proved. *See* 11 B. 320; 6 C. L. R. 497. Effect of evidence admitted at improper stage of the case. *See* 13 M. I. A. 83=5 B. L. R. App. 54. Additional evidence in appellate Court, where relevant evidence was improperly shut out in lower Court. 4. A. 306. A Magistrate cannot, import his personal opinion, about the personal character, in the decision of the case before him nor can he refuse to believe evidence in the accused's favour on that account. 20 Cr. L. J. 283; 50 I. C. 171. A misdirection to the jury is strictly not a case of improper admission or a rejection of evidence within the meaning of S. 167. 42 I. C. 161=18 Cr. L. J. 929=10 Bur. L. T. 123 (F. B.).

GROUND ON WHICH RE-HEARINGS ARE ALLOWED.—The High Court upon the hearing of second or special appeal have remanded cases

for reconsideration and fresh decision by the lower appellate Court where important evidence had not been carefully considered by such Court. (1 Jur N. S. 35.); where the judgment of the lower Appellate Court was based on part of the evidence only (24 W. R. 160; 24 W. R. 293); where the importance of a particular piece of evidence has been much under-rated (24 W. R. 192); where witnesses were discredited for general reasons not affecting the credit of any individual deponent (24 W. R. 251); where the Judge of the lower Appellate Court had not recorded his judgment in the manner required by law, *viz.*, section 359 of the old (section 203 of the new) Code of Civil Procedure, which requires that the judgment should contain the point or points for determination, the decision thereupon, and the reasons for such decision. (7 B. L. R. App. 14=23 W. R. 266); where the lower Appellate Court had otherwise dealt with the evidence in an improper manner (24 W. R. 119; *Ibid* 289; *Ibid* 343; *Ibid* 338; *Ibid* 431; 8 W. R. 395; 7 B. L. R. App. 47; where a fact had been found by the lower Court upon evidence part of which was inadmissible. (3 B. L. R. 258); where the judgment showed on the face of it want of due consideration of the evidence and the introduction of extraneous matter (22 W. R. 9); where the judgment of the lower Court mis-stated the most important facts (24 W. R. 171); where relevant evidence was considered to be no safe guide, and treated as worthless without being disbelieved (7 C. 263=8 C. L. R. 449), it was held to be an error in law within the meaning of section 372 of the old Code of Civil Procedure, when the lower Court found on no evidence or on what was not legal evidence (Marshall's Reports 322); when secondary evidence was improperly admitted in the place of primary (9 W. R. 517); when the lower Court dealt improperly with presumptions of law (9 W. R. 338); or with presumptions of fact (1 M. H. C. 139); *See also* the following

objected to and admitted, there was sufficient evidence to justify the decision, or that if the rejected evidence had been received it ought not to have varied the decision.

SCHEDULE.

ENACTMENTS REPEALED.

(See section 2.)

Number and year.	Title.	Extent of Repeal.
Stat. 26 Geo. III, Cap. 57. ¹	For the further regulation of the trial of persons accused of certain offences committed in the East Indies; for repealing so much of an Act, made in the twenty-fourth year of the reign of His present Majesty (intituled "An Act for the better regulation and management of the affairs of the East India Company, and of the British possessions in India, and for establishing a Court of Judicature for the more speedy and effectual trial of persons accused of offences committed in the East Indies"), as requires the servants of the East India Company to deliver inventories of their estates and effects for rendering the laws more effectual against persons unlawfully resorting to the East Indies; and for the more easy proof in certain cases, of deeds and writings executed in Great Britain or India.	Section 38 so far as it relates to Courts of Justice in the East Indies.
Stat. 14 & 15 Vict., cap. 99. ²	To amend the law of evidence	Section 11 and so much of section 19 as relates to British India.
[* * *]	Repealed by Act XII of 1927	So much as has not been heretofore repealed Section 237.
[* * *]	* * *	* * *

cases, 2 N. W. P. 172. (Discretion properly or improperly exercised by Lower Court) 22 W. R. 352; 23 W. R. 144; 23 W. R. 250 (construction of deposition of witnesses not a question of law) See Field, 6th Ed. p. 489.

GROUND ON WHICH REVIEWS AND RE-HEARINGS HAVE BEEN ALLOWED OR NOT.—On the subject of reviews the following cases may be usefully referred to:—8 B. L. R. Appel. 34 (Review not to be granted without proof of the truth of the ground on which it is asked.) 6 B. L. R. 126 (Raising of new point which had been discussed at the original hearing). 6 B. L. R. 333. (Cannot be admitted by Lower Appellate Court after a special appeal). 3 B. L. R. 346 (Grounds for admitting); 7 Moo. I. A. 304 (Distinction between review and appeal); 3 W. R. Act X 169 (Judge improperly granting review of predecessor's judgment). 11 B. L. R. 423; 20 W. R. 84 (Appeal allowed when no enquiry or proof that new evidence could not have been produced at original trial). 20 W. R. 180. (Power to grant strictly limited by the provisions of the Code) (1883) 5 All. 14 (Grounds not of review but of appeal); (1880) 9 Cal. 209; 12 C. L. R. 64 (Discretion of Court to re-hear whole case or particular point merely); (1876) 1 Mad. 396. (Omission to consider important documentary

evidence a ground of review. (1877) 2 Cal. 131 = L. R. 3 I. A. 221. (Review though no error in law and no discovery of fresh evidence); (1870) 2 Mad. 10 (Review by successor) (1882) 8 Cal. 700 = (1884) 10 Cal. 297 (Review or new trial in Provincial Small Cause Court (1882) 8 Cal. 287 = 10 C. L. R. 275 = (1884) 7 Mad. 307. (How far a new ruling entitles to a review) (1884) 6 All. 292. The Privy Council have, however, in recent cases repeatedly pointed out that in second appeal the finding of the lower Courts cannot be interfered with however erroneous they may appear to be unless there be an error or defect in procedure, provided they had before them evidence proper for their consideration in support of their findings. But a finding without evidence to support it is a substantial error in the proceedings and a good ground for second appeal. (14 C. 740 = 14 I. A. 101; 17 C. 297 = 16 I. A. 233; 18 C. 23; 19 C. 249 = 19 I. A. 1; 20 C. 93; 9 C. 309; 17 C. 875 = 17 I. A. 65). The duties of Criminal Courts exercising appellate jurisdiction are defined in Code of Criminal Procedure (Act V of 1898).

¹ SCHED. The East India Company Act, 1786, Col. of Stat. Vol. I.

² Short Title. The evidence Act, 1857—See the Short Titles Act, 1876 (59 & 60 Vic. C. 14)

THE FATAL ACCIDENTS ACT (XIII OF 1855).¹

Short title given, Act 14 of 1897.

Rep. in pt., Act 9 of 1871.

Ss. 1, 4 rep. in pt., Act 10 of 1914.

Declared in force—

Throughout B. I., except as regards the Scheduled Districts, Act 15 of 1874, s. 3; in the Santhal Parganas, Reg. 3 of 1872, S. 3, as amended by Reg. of 1899, S. 3 in the Angul District, Reg. 3 of 1913, S. 3; in Upper Burma (except the Shan States), Act 13 of 1898, S. 4.

[27th March, 1855.]

*An Act to provide compensation to families for loss occasioned
by the death of a person caused by actionable wrong.*

WHEREAS no action or suit is now maintainable in any Court against a person who, by his wrongful act, neglect or default, may have caused the death of another person, and it is often-times right and expedient that the wrong-doer in such case should be answerable in damages for the injury so caused by him; It is enacted as follows:—

1. Whenever the death of a person shall be caused by wrongful act, neglected or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, the party who would have been liable if death had not ensued shall be liable to an action or suit

Suit for compensation to the family of a person for loss occasioned to it by his death by actionable wrong.

¹ Short title, "The Indian Fatal Accidents Act, 1855." See the Indian Short Titles Act, (14 of 1897).

Based on the Fatal Accidents Act, 1846 (9 & 10 Vict., c. 93).

This Act has been declared to be in force in the whole of British India, except as regards the Scheduled Districts, by the Laws Local Extent Act, 1874 (15 of 1874), S. 3.

Sec. 1.—To establish civil liability under the Act against any person, it must be proved either that he actually committed the wrongful act himself, or at the least, that he actively aided or abetted its commission and so took part directly in causing it. 16 I. C. 491=117 P. R. 1912. It is not enough that he knew that the Act was likely to be committed or that it was committed in the prosecution of a common object. (*Ibid.*) Where a death is caused by wrongful act, the right of heirs of deceased to sue for damages is governed by the principle of the Act even where the Act is not in force. 64 I. C. 311. If a person who has obtained a decree under the Fatal Accidents Act dies after the decree, his legal representatives are entitled to the benefit of the decree. 103 I. C. 297.

BASIS OF COMPENSATION.—"No very definite rule has been laid down as to how many years' income should be allowed as compensation to the heirs of the deceased in a suit under the Act. Everything is to be taken into account, possibility of the earner's death, his age and earning capacity for calculating the amount of damages. 101 I. C. 642=A. I. R. 1927 Lah. 417. Reasonable sum and not actual loss is to be awarded. Length of life and value to the plaintiffs determine the amount of compensation. 9 N. L. J. 76=96 I. C.

403=A. I. R. Nag. 271. Value of life depends on the earning capacity of the deceased. 96 I. C. 681=A. I. R. 1926 All. 703; (A. I. R. 1922 Cal. 317, Fol.) The principle on which compensation under the Act will be awarded is the same as that under which it would be awarded under Lord Campbell's Act in England. It is compensation for the loss of the actual pecuniary benefit which the beneficiaries might reasonably have expected to enjoy, had the man not been killed. (38 T. L. R. 899 and (1922) 1 K. B. 329, relied on.) 29 Bom. L. R. 402=102 I. C. 400=A. I. R. 1927 Bom. 357. Where the sole source of income of the deceased was cultivation by personal labour, the probable duration of the capacity of the deceased to supply labour for cultivation must be taken into consideration while assessing damages for his death. A. I. R. 1927 All. 684 following 42 L. J. Ex. 153. In a suit for damages, any fine realised from the defendant and paid to the plaintiff in the criminal case against the defendant should be taken into consideration. A. I. R. 1927 All. 684. In a suit for damages under the Act no sentimental considerations are relevant. The plaintiff cannot get higher damages because the deceased was brutally murdered by the defendant than if the death had been due merely to an error of judgment. A. I. R. 1927 All. 684. Appellate Court should not set aside award of lower Court unless it is capricious or unreasonable. See 96 I. C. 278=A. I. R. 1926 All. 702. High Court would not interfere if the amount awarded is sufficient protection or reasonable compensation. 96 I. C. 681=A. I. R. 1926 All. 703.

WHO CAN INSTITUTE SUIT—SCALE OF COMPENSATION.—"Representative" meaning of.

for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony or other crime.

[* * * *] 1 every such action or suit shall be for the benefit of the wife, husband, parent and child, if any, of the person whose death shall have been so caused, and shall be brought by and in the name of the executor, administrator or representative of the person deceased ;

and in every such action the Court may give such damages as it may think proportioned to the loss resulting from such death to the parties respectively, for whom and for whose benefit such action shall be brought ; and the amount so recovered, after deducting all costs and expenses, including the costs not recovered from the defendant, shall be divided amongst the beforementioned parties, or any of them, in such shares as the Court by its judgment or decree shall direct.

2. Provided always that not more than one action or suit shall be brought for, and in respect of the same subject-matter of complaint

Not more than one suit to be brought.

[* * * *] 2 : Provided that, in any such action or suit, the executor, administrator or representative of the deceased may insert a claim for and recover any pecuniary loss to the estate of the deceased occasioned by such wrongful act, neglect or default, which sum, when recovered, shall be deemed part of the assets of the estate of the deceased.

Claims for loss to estate may be added.

3. The plaintiff in any such action or suit shall give a full particular of the person or persons for whom, or on whose behalf, such action or suit shall be brought, and of the nature of the claim in respect of which damages shall be sought to be recovered.

Plaintiff shall deliver particulars, etc.

4. The following words and expressions are intended to have the meaning hereby assigned to them respectively, so far as such meanings are not excluded by the context or by the

Interpretation clause.

See 28 Mad. 479=15 M. L. J. 363. Court has powers to divide damages claimed and award between some only of the parties for whose benefit the claim is made. 1922 Cal. 317. Compensation for death caused by railway accident—Discretionary with Court in apportioning among relatives—Circumstances to be taken into consideration—Child—Meaning. 22 I. C. 846=52 P. R. 1914. For purposes of awarding compensation under this section a son adopted after the death of the deceased is not a 'Child' within the meaning of the section (*Ibid.*) A co-parcener of the deceased man is not entitled to compensation under the Act. Compensation should be awarded looking to the members of the family of the deceased. 105 P. R. 1915=32 I. C. 18. In a claim for damages under the Act the reasonable expectation of pecuniary advantage by the relatives remaining alive may be taken into account by a jury and damages assessed as the probable pecuniary loss thereby occasioned. 69 I. C. 854. Landlord and tenant—Dwelling-house in a bad state of repair—License to use privies—Privy portion collapsing—Tenant killed—Right of heirs to sue for damages. 29 Bom. L. R. 78. The fact that the deceased in some way provoked the quarrel as a result of which he died, is immaterial so far as regards the claim for damages under the Act (*Ibid.*). The test of injury under this section is not the legal liability alone, but the reasonable expectation of pecuniary advantage by the deceased's remaining alive. 112 P. R. 1913=20 I. C. 425. The reasonableness of the expectation is largely founded upon a record of pecuniary benefit received in the past and there

must be something more than a mere speculation in the future (*Ibid.*). (16 B. 254, Expl.) See also 1 All. 60. Nothing can be allowed to the survivors as compensation for mental suffering. See 4 M. L. T. 238 and cases referred to therein. Effect of contributory negligence, see 85 P. R. 1894. In estimating the amount of damages to be awarded in an action under the Act, the Court must take into account all the circumstances which are material for considering the pecuniary loss sustained. The Court must view the matter broadly. 52 Cal. 602=89 I. C. 679=1925 Cal. 893. Death caused by negligence of Railway—Legal representatives—Suit for loss of currency notes in possession of deceased—Maintainability. 6 Lah. 451=90 I. C. 1026=1925 Lah. 636. Scale of costs for pleader, in case where damages are awarded under this Act. See 52 Cal. 602=89 I. C. 679=1925 Cal. 893.

Sec. 1.—¹ The words "And it is enacted further that" were repealed by Act X of 1914, Sch. II.

Sec. 2.—Act does not create fresh liability but only provides procedure for enforcing the liability under the ordinary law. 6 Lah. 451=90 I. C. 1026=1925 Lah. 636. The section has no application to a suit instituted against the wrong doer. 23 M. L. J. 255=17 I. C. 226 (13 B. 677 ; 28 M. 487, foll.).

² The words "and that every such action shall be brought within twelve calendar months after the death of such deceased person" were repealed by the Indian Limitation Act, (IX of 1871). For limitation, see now the Indian Limitation Act (IX of 1908).

nature of the subject-matter; that is to say [* * *]¹ and the word "person" shall apply to bodies politic or corporate; and the word "parent" shall include father and mother² and grand-father and grand-mother; and the word "child" shall include son and daughter and grand-son and grand-daughter and step-son and step-daughter.

THE INDIAN FINANCE ACT (V OF 1928).

[27th March, 1928.

An Act to fix the duty on salt manufactured in, or imported by land into, certain parts of British India, to fix maximum rates of postage under the Indian Post Office Act, 1898, further to amend the Indian Paper Currency Act, 1923, and to fix rates of income-tax.

WHEREAS it is expedient to fix the duty on salt manufactured in, or imported by land into, certain parts of British India, to fix maximum rates of postage under the Indian Post Office Act, 1898, further to amend the Indian Paper Currency Act, 1923, and to fix rates of income-tax; It is hereby enacted as follows:—

Short title, extent and duration.

1. (1) This Act may be called THE INDIAN FINANCE ACT, 1928.

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas.

(3) Sections 2 and 3 shall remain in force only up to the 31st day of March, 1929.

2. The provisions of section 7 of the Indian Salt Act, 1882, shall, in so far as they enable the Governor-General in Council to impose by rule made under that section a duty on salt manufactured in, or imported into, any part of British India other than Burma and Aden, be construed as if, with effect from the 1st day of April, 1928, they imposed such duty at the rate of one rupee and four annas per maund of eighty-two and two-sevenths pounds avoirdupois of salt manufactured in, or imported by land into, any such part, and such duty shall, for all the purposes of the said Act, be deemed to have been imposed by rule made under that section.

3. With effect from the 1st day of April, 1928 the schedule contained in the First Schedule to this Act shall be inserted in the Indian Post Office Act, 1898, as the First Schedule to that Act.

4. In sub-section (7) of section 19 of the Indian Paper Currency Act, 1923, for the figures "1928" the figures "1929" shall be substituted.

5. (1) Income-tax for the year beginning on the 1st day of April, 1928, shall be charged at the rates specified in Part I of the Second Schedule.

(2) The rates of super-tax for the year beginning on the 1st day of April, 1928, shall, for the purposes of section 55 of the Indian Income-tax Act, 1922, be those specified in Part II of the Second Schedule.

(3) For the purposes of the Second Schedule, "total income" means total income as determined, for the purposes of income-tax or super-tax, as the case may be, in accordance with the provisions of the Indian Income-tax Act, 1922.

See, 4.—¹ The words "word denoting the singular number are to be understood to apply also to a plurality of persons or things and words directing the masculine gender are to be under-

stood to apply also to persons of the feminine gender" were repealed by Act X of 1914 Sch.

² Step-father and Step-mother are designedly omitted.

SCHEDULE I.

SCHEDULE TO BE INSERTED IN THE INDIAN POST OFFICE ACT, 1898.

(See Section 3.)

"THE FIRST SCHEDULE.

INLAND POSTAGE RATES.

[See Section 7.]

Letters.

For a weight not exceeding two and a half tolas	..	One anna.
For every two and a half tolas, or fraction thereof, exceeding	..	One anna.
two and a half tolas	..	One anna.

Postcards.

Single	..	Half an anna.
Reply	..	One anna.

Book, Pattern and Sample Packets.

For every five tolas or fraction thereof	..	Half an anna.
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Registered Newspapers.

For a weight not exceeding eight tolas	..	Quarter of an anna.
For a weight exceeding eight tolas and not exceeding twenty tolas	..	Half an anna.
For every twenty tolas, or fraction thereof, exceeding twenty tolas	..	Half an anna.

Parcels.

For a weight not exceeding twenty tolas	..	Two annas.
For a weight exceeding twenty tolas and not exceeding forty tolas	..	Four annas.
For every forty tolas, or fraction thereof, exceeding forty tolas.	..	Four annas."

SCHEDULE II.

(See Section 5.)

PART I.

Rates of Income-tax.

A. In the case of every individual, Hindu undivided family, unregistered firm and other association of individuals not being a registered firm or a company—		Rate.
(1) When the total income is less than Rs. 2,000	..	<i>Nil.</i>
(2) When the total income is Rs. 2,000 or upwards, but is less than Rs. 5,000	..	Five pies in the rupee.
(3) When the total income is Rs. 5,000 or upwards, but is less than Rs. 10,000	..	Six pies in the rupee.
(4) When the total income is Rs. 10,000 or upwards, but is less than Rs. 20,000	..	Nine pies in the rupee.
(5) When the total income is Rs. 20,000 or upwards, but is less than Rs. 30,000	..	One anna in the rupee.
(6) When the total income is Rs. 30,000 or upwards, but is less than Rs. 40,000	..	One anna and three pies in the rupee.
(7) When the total income is Rs. 40,000 or upwards	..	One anna and six pies in the rupee.
B. In the case of every company and registered firm, whatever its total income	..	One anna and six pies in the rupee.

PART II.

Rates of Super-tax.

In respect of the excess over fifty thousand rupees of total income:—		Rate.
(1) in the case of every company	..	One anna in the rupee.
(2) (a) in the case of every Hindu undivided family—		
(i) in respect of the first twenty-five thousand rupees of the excess	..	<i>Nil.</i>
(ii) for every rupee of the next twenty-five thousand rupees of such excess	..	One anna in the rupee.
(b) in the case of every individual, unregistered firm and other association of individuals not being a registered firm or a company, for every rupee of the first fifty thousand rupees of such excess	..	One anna in the rupee,
(c) in the case of every individual, Hindu undivided family, unregistered firm and other association of individuals not being a registered firm or a company—		

(i) for every rupee of the second fifty thousand rupees of such excess	..	One and a half annas in the rupee.
(ii) for every rupee of the next fifty thousand rupees of such excess	..	Two annas in the rupee.
(iii) for every rupee of the next fifty thousand rupees of such excess	..	Two and a half annas in the rupee
(iv) for every rupee of the next fifty thousand rupees of such excess	..	Three annas in the rupee.
(v) for every rupee of the next fifty thousand rupees of such excess	..	Three and a half annas in the rupee.
(vi) for every rupee of the next fifty thousand rupees of such excess	..	Four annas in the rupee.
(vii) for every rupee of the next fifty thousand rupees of such excess	..	Four and a half annas in the rupee.
(viii) for every rupee of the next fifty thousand rupees of such excess	..	Five annas in the rupee.
(ix) for every rupee of the next fifty thousand rupees of such excess	..	Five and a half annas in the rupee.
(x) for every rupee of the remainder of the excess	..	Six annas in the rupee.

THE FOREIGN MARRIAGE ACT (XIV OF 1903).

PREFATORY NOTE :—This Act is intended to give effect to Foreign Marriages Order in Council (*See Statement of Objects and Reasons*).

The following are the remarks of the Hon'ble Mr. Arundale in moving for leave to introduce the Bill :—“ On several occasions difficulties have arisen in connection with the intended marriage of British subjects under the provisions of the Foreign Marriage Act and Foreign Marriages Order in Council, 1892, in cases where one of the parties has been resident in India.

“ The Foreign Marriages Order in Council requires that in cases where one of the parties has not been resident within the district of the Marriage Officer, who is to celebrate the marriage, that party shall produce a certificate from the Marriage Officer of the place in which he or she has been resident, that proper notice has been given of the marriage ; but these requirements of the Order in Council relate only to foreign countries and to the United Kingdom, while no instructions are given concerning notice of marriage by persons resident in India.

After some correspondence between the Secretary of State and the Government of India, an Order in Council was issued on the 12th March, 1903, to the following effect :—

1. The following further modifications of the requirements of the Foreign Marriage Act, 1892, as to residence and notice which appear to His Majesty to be consistent with the observance of due precautions against the solemnization of clandestine marriages, shall have effect in cases where one only of the parties has dwelt within the district of the Marriage Officer and the other of such parties has dwelt in a Colony or in India that is to say :

(i) If the Marriage Officer is satisfied that such notice has been given by the party dwelling in such Colony or in India as may be provided by any law in that Colony or of the Governor-General of India in Council (as the case may be), giving effect to this order ;

(ii) In any such case the oath, affirmation or declaration required by section 7 of the Foreign Marriage Act shall be made subject to the modifications thereof to which effect is given by article 6 of the Foreign Marriages Order in Council, 1892.

2. A law enacted by the Legislature of a Colony or by the Governor-General of India in Council shall be deemed to give effect to this Order if it makes provision (in whatever terms expressed) as follows :

(i) That a notice of a marriage intended to be solemnized under the Foreign Marriage Act may be given by one of the parties intending such marriage who has had his or her usual place of abode for three consecutive weeks immediately proceeding in some place in that Colony or in India (as the case may be) to such Marriage Registrar or other officer as may be designated by the law in this behalf.

(ii) that such notice shall be published either by proclamation of bans or in such other manner as the law may provide ; and

(iii) that such Marriage Registrar or other officer, unless he is aware of any impediment or objection which should obstruct the solemnization of the marriage, shall, on payment of such fee, if any, as the law may provide, give a certificate that the said notice has been so given and published as aforesaid.

“ This Bill which I beg for leave to introduce is intended to give effect to this Order in Council. It extends to the whole of British India, and applies to all British subjects and to all servants of the King, whether British subjects or not, in the territories of any Native Prince or State in India. “ The Bill is a purely permissive and nothing in it affects a valid marriage solemnized outside its provisions.”

(“See Proceedings of the Council of the Governor-General of India, dated 28th August, 1903.”)

THE FOREIGN MARRIAGE ACT (XIV OF 1903).³

[23rd October, 1903.

An Act to give effect to the Foreign Marriages Order in Council, 1903.

WHEREAS it is expedient to give effect to the Foreign Marriages Order in Council, 1903 ; it is hereby enacted as follows :—

Short title, extent and application. 1. (1) This Act may be called THE INDIAN FOREIGN MARRIAGE ACT, 1903.

(2) It extends to the whole of British India, inclusive of British Baluchistan, the Santhal Parganas, the Shan States and the Pargana of Spiti ; and

(3) It applies also to all British subjects and to all servants of the King, whether British subjects or not, in the territories of any Native Prince or State in India.

2. (1) Notice in writing of a marriage which it is intended to solemnize under the Foreign Marriage Act, 1892, may be given by one of the parties intending such marriage, to—

Notice of marriage intended to be solemnized under 55 and 56 Vict., c. 23.

(a) a Marriage Registrar appointed under the Indian Christian Marriage Act, 1872, where either of such parties is a person professing the Christian religion ;

(b) a District Magistrate, Chief Presidency Magistrate or Political Agent where neither of such parties is a person professing the Christian religion :

Provided that the party giving such notice as aforesaid shall have had his usual place of abode for not less than three consecutive weeks immediately preceding the giving of notice within the local limits of the area for which the Marriage Registrar, Magistrate or Political Agent to whom the notice is given, is appointed.

(2) Every notice given under this section shall state—

(a) the name, surname, age and profession or condition of each of the parties intending marriage ;

(b) the residence of each of them ;

(c) the time during which each of them has dwelt there ; and

(d) the place in which the intended marriage is to be solemnized ;

and it shall contain in a declaration by the party giving the notice to the effect that he believes that there is no impediment of kindred or affinity or other lawful hindrance to the solemnization of the said intended marriage.

(3) A copy of every notice given under this section shall be published by being affixed in some conspicuous place in the office of the officer to whom the notice is given.

(4) On the expiration of four clear days after such notice as aforesaid has been published in the manner prescribed by sub-section (3), the officer to whom the notice is given, unless he is aware of any impediment of kindred or affinity or other lawful hindrance to the solemnization of the said intended marriage shall, on payment of such fee (if any) as the Governor-General in Council may fix in this behalf, furnish the party by whom the notice was given, with a certificate, under his hand and seal, to the effect that the notice has been so given and published.

THE INDIAN FOREST ACT (XVI OF 1927).

PREFATORY NOTE :—The general law relating to forests in British India was contained in the Indian Forest Act, 1878, and its amending Acts. The present Act brings the law together within the scope of one enactment. The Act is a straightforward consolidating Bill, but the original Act having been passed before the General Clauses Act of 1897 (X of 1897), it had been found possible to shorten the language of the Act by taking advantage of that Act. The ambiguous language of the second paragraph of section 42 of Act VII of 1878 had been altered in Sec. 43 (2) so as to bring it into conformity with what appeared to have been the original intention of the law. The only other point which

¹ For Statement of Objects and Reasons, see Proceedings in Council, see *ibid.*, Pt. VI, pp. 137 and Gazette of India, 1903, Pt. V. p. 466 ; for Pro- 165.

may call for further notice is the extent clause. The original Act extended to the Province of Assam, but by Regulation VII of 1891 the Indian Forest Act, 1878, was repealed as far as it related to Assam. This Act accordingly omits Assam from the extent clause. (See Statement of Objects and Reasons).

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THE SCHEDULE.

[21st September, 1927.]

An Act to consolidate the law relating to forests, the transit of forest-produce and the duty leviable on timber and other forest-produce.

WHEREAS it is expedient to consolidate the law relating to forests, the transit of forest-produce and the duty leviable on timber and other forest-produce; it is hereby enacted as follows :—

CHAPTER I.

PRELIMINARY.

Short title and extent. (Old Act, S. 1.)

1. (1) This Act may be called THE INDIAN FOREST ACT, 1927.

(2) It extends to Bombay, Bengal, Bihar and Orissa, the United Provinces, the Punjab, the Central Provinces and the North-West Frontier Province (except the District of Hazara).

(3) The Local Government of any other province may, by notification in the local official Gazette, extend this Act to the whole or any specified part of the province. (Cf. Act XXXVIII of 1920, S. 2 and Sch. I.)

Interpretation clause. (Old Act, S. 2.)

2. In this Act, unless there is anything repugnant in the subject or context,—

(1) "cattle" includes elephants, camels, buffaloes, horses, mares, geldings, ponies, colts, fillies, mules, asses, pigs, rams, ewes, sheep, lambs, goats and kids;

Sec. 1. LEGISLATIVE REFERENCES.—For the forest law in force in the Hazara District, see the Hazara Forest Regulation, 1893 (VI of 1893), P. and N. W. Code.

For Madras, Ajmere-Merwara, Burma, British Baluchistan and Assam there are special forest laws—see Madras Forest Act, 1882 (V of 1882); Madras Code; the Ajmere Forest Regulation, 1874 (VI of 1874), Aj. Code; the Burma Forest Act, 1902 (IV of 1902); the British Baluchistan Forest Regulation, 1890 (V of 1890), Bal. Code; the Assam Forest Regulation, 1891 (VII of 1891), E. B. and A. Code.

In the Punjab, the Land Preservation (Chos) Act, 1900 (Punjab Act II of 1900), is to be read with and taken as part of this Act, see P. and N. W. Code. For rules for the conservancy of forests and jungles in the hill districts of the Punjab territories, see Appendix to *ibid.* These rules are also in force in the North-West Frontier Province, see S. 4 and second schedule to Reg. VII of 1901, *ibid.*

CASE-LAW.—The Act does not oust jurisdiction of Civil Courts to decide whether certain land is forest land or waste land. 7 Bom. L.

R. 496. This Act is one that curtails proprietary rights. See 55 P. L. R. 1901 (Cr.) (where the scope and nature of this Act is discussed).

INFRINGEMENT OF THE FOREST RULES.—Not provided for in the rules should be tried under the Penal Code. 4 P. R. 1869 (Cr.).

Sec. 2.—For notification appointing Forest-officers for the Santhal Parganas and empowering them to compound for offences mentioned in S. 67 within certain specified areas, see Calcutta Gazette, 1901, Pt. I, p. 28; in the North-West Frontier Province for certain specified forests for all purposes of the Act, see Gazette of India, 1904, Pt. II, p. 113; in the Punjab, for Rawalpindi Forest division for the purpose of carrying out the duties of Forest-officers, see Punjab Gazette, 1907, Pt. I, p. 32.

CASE LAW.—Forest-officer is a public servant. 10 B. 124. Forest Settlement Officer, whether a Civil Court, 17 M. 193; Karkones who issue process if forest officers; see 2 Bom. L. R. 675 (679). Forest produce.—Stems of trees are such produce. 1 Weir 757, but not logs fastened to buildings. 9 M. 373.

(2) "Forest-officer" means any person whom the Governor-General in Council, or the Local Government or any officer empowered by the Governor-General in Council or the Local Government in this behalf, may appoint to carry out all or any of the purposes of this Act or to do anything required by this Act or any rule made thereunder to be done by a Forest-officer ;

(3) "forest-offence" means an offence punishable under this Act or under any rule made thereunder ;

(4) "forest-produce" includes—

(a) the following whether found in, or brought from, a forest or not, that is to say :—(Cf. Act V of 1890, S. 2)

"timber, charcoal, caoutchouc, catechu, wood-oil, resin, natural varnish, bark, lac, mahua flowers, mahua seeds and myrabolams, and (See Act XV of 1911, S. 2.)

(b) the following when found in, or brought from, a forest, that is to say,—

(i) trees and leaves, flowers and fruits, and all other parts or produce not hereinbefore mentioned, of trees,

(ii) plants not being trees (including grass, creepers, reeds and moss), and all parts or produce of such plants,

(iii) wild animals and skins, tusks, horns, bones, silk, cocoons, honey, and wax, and all other parts or produce of animals, and

(iv) peat, surface soil, rock, and minerals (including limestone, laterite, mineral oils, and all products of mines or quarries) ;

(5) "river" includes any stream, canal, creek or other channels, natural or artificial ;

(6) "timber" includes trees when they have fallen or have been felled, and all wood whether cut up or fashioned or hollowed out for any purpose or not ; and (See Act V of 1890, S. 2, cl. 2.)

(7) "tree" includes palms, bamboos, stumps, brush-wood and canes. (See Act V of 1890, S. 2, cl. 1.)

CHAPTER II.

OF RESERVED FORESTS.

3. The Local Government may constitute any forest-land or waste-land which

Power to reserve forests.
(Old Act, S. 3.)

is the property of Government, or over which the Government has proprietary rights, or to the whole or any part of the forest-produce of which the Government is entitled, a reserved forest in the manner hereinafter provided.

Notification by Local Government. (Old Act, S. 4.)

4. (1) Whenever it has been decided to constitute any land a reserved forest, the Local Government shall issue a notification in the local official Gazette—

(a) declaring that it has been decided to constitute such land a reserved forest;

(b) specifying, as nearly as possible, the situation and limits of such land, and

(c) appointing an officer (hereinafter called "the Forest Settlement-officer") to inquire into and determine the existence nature and extent of any rights alleged to exist in favour of any person in or over any land comprised within such limits, or in or over any forest-produce, and to deal with the same as provided in this Chapter.

Explanation.—For the purpose of clause (b), it shall be sufficient to describe the limits of the forest by roads, rivers, ridges or other well known or readily intelligible boundaries.

(2) The officer appointed under clause (c) of sub-section (1) shall ordinarily be a person not holding any forest-office except that of Forest Settlement-officer.

(3) Nothing in this section shall prevent the Local Government from appointing any number of officers not exceeding three, not more than one of whom shall be

Sec. 3.—As to application of provisions relating to reserve forests (1) to village-forests, see S. 27, last paragraph ; (2) to forests and lands not the property of the Government, see Ss. 36, 38 ; (3) to forest waste lands or produce the joint property of the Government and other persons, see S. 79.

Sec. 4. SCOPE OF SECTION.—29 B. 480; Power of Government to reserve forest—What is reserved forest. 29 B. 484 ; Jenmis ought to claim compensation for land notified as reserved forest. 7 M. L. J. 13. Absence of notification—Effect of. 1 Weir 759.

a person holding any forest-office except as aforesaid, to perform the duties of a Forest Settlement-officer under this Act.

5. After the issue of a notification under section 4, no right shall be acquired in or over the land comprised in such notification, except by succession or under a grant or contract in writing made or entered into by or on behalf of Government or some person in whom such right was vested when the notification was issued; and no fresh clearings for cultivation or for any other purpose shall be made in such land except in accordance with such rules as may be made by the Local Government in this behalf.

Proclamation by Forest Settlements-officer. (Old Act, S. 6 and S. 5 of Act V of 1890.)

6. When a notification has been issued under section 4, the Forest Settlement-officer shall publish in the local vernacular in every town and village in the neighbourhood of the land comprised therein, a proclamation—

(a) specifying, as nearly as possible, the situation and limits of the proposed forest;

(b) explaining the consequences which, as hereinafter provided, will ensue on the reservation of such forest; and

(c) fixing a period of not less than three months from the date of such proclamation, and requiring every person claiming any right mentioned in section 4 or section 5 within such period either to present to the Forest Settlement-officer a written notice specifying or to appear before him and state, the nature of such right and the amount and particulars of the compensation (if any) claimed in respect thereof.

7. The Forest Settlement-officer shall take down in writing all statements made under section 6, and shall at some convenient place inquire into all claims duly preferred under that section, and the existence of any rights mentioned in section 4 or section 5 and not claimed under section 6 so far as the same may be ascertainable from the records of Government and the evidence of any persons likely to be acquainted with the same.

Inquiry by Forest Settlement-officer. (Old Act, S. 7.)

8. For the purpose of such inquiry, the Forest Settlement-officer may exercise the following powers, that is to say:—

(a) power to enter, by himself or any officer authorised by him for the purpose upon any land, and to survey, demarcate and make a map of the same; and

(b) the powers of a Civil Court in the trial of suits.

9. Rights in respect of which no claim has been preferred under section 6, and of the existence of which no knowledge has been acquired by inquiry under section 7, shall be extinguished, unless, before the notification under section 20 is published, the person claiming them satisfies the Forest Settlement-officer that he had sufficient cause for not preferring such claim within the period fixed under section 6.

Extinction of rights. (Old Act, S. 9.)

10. (1) In the case of a claim relating to the practice of shifting cultivation, the Forest Settlement-officer shall record a statement setting forth the particulars of the claim and of any local rule or order under which the practice is allowed or regulated, and submit the statement to the Local Government, together with his opinion as to whether the practice should be permitted or prohibited wholly or in part.

Treatment of claims relating to practice of shifting cultivation. (S. 5 of Act V of 1890.)

(2) On receipt of the statement and opinion, the Local Government may make an order permitting or prohibiting the practice wholly or in part.

Sec. 5.—When a person cuts trees in a plot marked as waste number, the prosecution should lie not under the Forest Act, but under the Land Rev. Code or the rules framed thereunder Rat. 873 Cr. Reg. 49 of 1896. See also 22 P. R. 1876 (Cr.)

Sec. 6 (c).—As to presumption from long possession and enjoyment as to burden of proof in

such cases, see 15 Mad. 315; 7 M. L. T. 241.

Sec. 8.—As to the powers of Forest Settlement-officer, see 14 Mad. 247. Notification closing forest for an indefinite period is not bad for indefiniteness, when it is not known at that time, how long it may be necessary to close the forest. 19 P. R. 1880 (Cr.).

(3) If such practice is permitted wholly or in part, the Forest Settlement-officer may arrange for its exercise—

(a) by altering the limits of the land under settlement so as to exclude land of sufficient extent, of a suitable kind, and in a locality reasonably convenient for the purposes of the claimants, or

(b) by causing certain portions of the land under settlement to be separately demarcated, and giving permission to the claimants to practice shifting cultivation therein under such conditions as he may prescribe.

(4) All arrangements made under sub-section (3) shall be subject to the previous sanction of the Local Government.

(5) The practice of shifting cultivation shall in all cases be deemed a privilege subject to control, restriction and abolition by the Local Government.

11. (1) In the case of a claim to right in or over any land, other than a right-of-way or right-of-pasture, or a right to forest-produce or a water-course, the Forest Settlement-officer shall pass an order admitting or rejecting the same in whole or in part.

Power to acquire land over which right is claimed. (Old Act, s. 10.)

(2) If such claim is admitted in whole or in part, the Forest Settlement-officer shall either—

(i) exclude such land from the limits of the proposed forest ; or

(ii) come to an agreement with the owner thereof for the surrender of his rights ; or

(iii) proceed to acquire such land in the manner provided by the Land Acquisition Act, 1894.

(3) For the purpose of so acquiring such land—

(a) the Forest Settlement-officer shall be deemed to be a Collector proceeding under the Land Acquisition Act, 1894;

(b) the claimant shall be deemed to be a person interested and appearing before him in pursuance of a notice given under section 9 of that Act ;

(c) the provisions of the preceding sections of that Act shall be deemed to have been complied with ; and

(d) the Collector, with the consent of the claimant, or the Court, with the consent of both parties, may award compensation in land, or partly in land, and partly in money.

Order on claims to rights of pasture or to forest-produce. (Old Act, s. 11.)

12. In the case of a claim to rights of pasture or to forest-produce, the Forest Settlement-officer shall pass an order admitting or rejecting the same in whole or in part.

Record to be made by Forest Settlement-officer. (Old Act, s. 12.)

13. The Forest Settlement-officer, when passing any order under section 12, shall record, so far as may be practicable,—

(a) the name, father's name, caste, residence and occupation of the person claiming the right ; and

(b) the designation, position and area of all fields or groups of fields (if any), and the designation and position of all buildings (if any) in respect of which the exercise of such rights is claimed.

14. If the Forest Settlement-officer admits in whole or in part any claim under

Record where he admits claim. (Old Act, s. 13.)

section 12, he shall also record the extent to which the claim is so admitted, specifying the number and description of the cattle which the claimant is from time to time entitled to graze in the forest, the season during which such pasture is permitted, the quantity of timber and other forest-produce which he is from time to time authorised to take or receive, and such other particulars as the case may require. He shall also record whether the timber or other forest-produce obtained by the exercise of the rights claimed may be sold or bartered.

Sec. 11.—As to acquisition of land one which riparian rights are claimed see 20 Mad. 279 ; As to claim on mortgage. See 21 Bom. 396. As to

burden of proof on questions of title see 3 M. L. J. 231.

15. (1) After making such record the Forest Settlement-officer shall, to the best of his ability, and having due regard to the maintenance of the reserved forest in respect of which the claim is made, pass such orders as will ensure the continued exercise of the rights so admitted.

Exercise of rights admitted.
(Old Act, §. 14.)

(2) For this purpose the Forest Settlement-officer may—

(a) Set out some other forest-tract of sufficient extent, and in a locality reasonably convenient, for the purposes of such claimants, and record an order conferring upon them a right of pasture or to forest-produce (as the case may be) to the extent so admitted ; or

(b) so alter the limits of the proposed forest as to exclude forest-land of sufficient extent, and in a locality reasonably convenient, for the purposes of the claimants ; or

(c) record an order, continuing to such claimants a right of pasture or to forest-produce, as the case may be, to the extent so admitted, at such seasons, within such portions of the proposed forest, and under such rules, as may be made in this behalf by the Local Government.

16. In case the Forest Settlement-officer finds it impossible, having due regard to the maintenance of the reserved forest, to make such settlement under section 15 as shall ensure the continued exercise of the said rights to the extent so admitted, he shall, subject to such rules as the Local Government may make in this behalf, commute such rights, by the payment to such persons of a sum of money in lieu thereof, or by the grant of land, or in such other manner as he thinks fit.

Commutation of rights. (Old Act, §. 15.)

17. Any person who has made a claim under this Act, or any Forest-Officer or other person generally or specially empowered by the Local Government in this behalf, may, within three months from the date of the order passed on such claim by the Forest Settlement-officer under section 11, section 12, section 15 or section 16, present an appeal from such order to such officer of the Revenue Department, of rank not lower than that of a Collector, as the Local Government may, by notification in the local official Gazette, appoint to hear appeals from such orders.

Appeal from order passed under section 11, section 12, section 15 or section 16. (Old Act, §. 16.)

Provided that the Local Government may establish a Court (hereinafter called the Forest Court) composed of three persons to be appointed by the Local Government, and, when the Forest Court has been so established, all such appeals shall be presented to it.

18. (1) Every appeal under section 17 shall be made by petition in writing, and may be delivered to the Forest Settlement-officer, who shall forward it without delay to the authority competent to hear the same.

Appeal under section 17.
(Old Act, §. 17.)

(2) If the appeal be to an officer appointed under section 17, it shall be heard in the manner prescribed for the time being for the hearing of appeals in matters relating to land-revenue.

(3) If the appeal be to the Forest Court, the Court shall fix a day and a convenient place in the neighbourhood of the proposed forest for hearing the appeal, and shall give notice thereof to the parties, and shall hear such appeal accordingly.

(4) The order passed on the appeal by such officer or Court, or by the majority of the members of such Court, as the case may be, shall, subject only to revision by the Local Government, be final.

19. The Local Government, or any person who has made a claim under this Act, may appoint any person to appear, plead and act on its or his behalf before the Forest Settlement-officer, or the appellate officer or Court, in the course of any inquiry or appeal under this Act.

Pleaders. (Old Act, §. 18.)

Notification declaring forest reserved. (Old Act, S. 19.)

20. (1) When the following events have occurred, namely:—

(a) the period fixed under section 6 for preferring claims has elapsed, and all claims, if any, made under that section or section 9 have been disposed of by the Forest Settlement-officer;

(b) If any such claims have been made, the period limited by section 17 for appealing from the orders passed on such claims has elapsed, and all appeals (if any) presented within such period have been disposed of by the appellate officer or Court; and

(c) all lands (if any) to be included in the proposed forest, which the Forest Settlement-officer has, under section 11, elected to acquire under the Land Acquisition Act, 1894, have become vested in the Government under section 16 of that Act, the Local Government shall publish a notification in the local official Gazette, specifying definitely, according to boundary marks erected or otherwise, the limits of the forest which is to be reserved, and declaring the same to be reserved from a date fixed by the notification.

(2) From the date so fixed such forest shall be deemed to be a reserved forest.

Publication of translation of such notification in neighbourhood of forest. (Old Act, S. 20.)

21. The Forest-officer shall, before the date fixed by such notification, cause a translation thereof into the local vernacular to be published in every town and village in the neighbourhood of the forest.

22. The local Government may, within five years from the publication of any notification under section 20, revise any arrangement made

Power to revise arrangement made under section 15 or section 18. (Old Act, S. 21.)

under section 15 or section 18, and may for this purpose rescind or modify any order made under section 15 or section 18, and direct that any one of the proceedings specified in section 15 be taken in lieu of any other of such proceedings, or that the rights admitted under section 12 be commuted under section 16.

23. No right of any description shall be acquired in or over a reserved forest

No right acquired over reserved forest, except as here provided. (Old Act, S. 22.)

except by succession or under a grant or contract in writing made by or on behalf of the Government or some person in whom such right was vested when the notification under section 20 was issued.

24. (1) Notwithstanding anything contained in section 23, no right continued

Rights not to be alienated without sanction. (Old Act, S. 23.)

under clause (c) of sub-section (2) of section 15 shall be alienated by way of grant, sale, lease, mortgage or otherwise, without the sanction of the Local Government.

Provided that when any such right is appendant to any land or house, it may be sold or otherwise alienated with, such land or house.

(2) No timber or other forest-produce obtained in exercise of any such right shall be sold or bartered except to such extent as may have been admitted in the order recorded under section 14.

25. The Forest-officer may, with the previous sanction of the Local Government

Power to stop ways and water-courses in reserved forests. (Old Act, S. 24.)

or of any officer duly authorised by it in this behalf, stop any public or private way or water-course in a reserved forest, provided that a substitute for the way or water-course so stopped, which the Local Government deems to

be reasonably convenient, already exists, or has been provided or constructed by the Forest-officer in lieu thereof.

Acts prohibited in such forests. (Old Act, S. 25, Act V of 1890, S. 7.)

26. (1) Any person who—

Sec. 20. See 12 Mad. 226; Removal of grass from Govt. land, when offence. 1 Weir 492.
Sec. 26.—For rules made under this clause for—

(1) Bombay, see Bom. R. and O;

(2) Central Provinces, see C. P. R. and O.; and

- (a) makes any fresh clearing prohibited by section 5, or
 (b) sets fire to a reserved forest or, in contravention of any rules made by the Local Government in this behalf, kindles any fire, or leaves any fire burning, in such manner as to endanger such a forest; or who, in a reserved forest—
 (c) kindles, keeps or carries any fire except at such seasons as the Forest-officer may notify in this behalf;
 (d) trespasses or pastures cattle, or permits cattle to trespass;
 (e) causes any damage by negligence in felling any tree or cutting or dragging any timber;
 (f) fells, girdles, lops, taps or burns any tree or strips off the bark or leaves from, or otherwise damages, the same;
 (g) quarries stone, burns lime or charcoal, or collects, subjects to any manufacturing process, or removes, any forest-produce;
 (h) clears or breaks up any land for cultivation or any other purpose;
 (i) in contravention of any rules made in this behalf by the Local Government hunts, shoots, fishes, poisons water or sets traps or snares; or
 (j) in any area in which the Elephants' Preservation Act, 1879, is not in force, kills or catches elephants in contravention of any rules so made;

(3) United Provinces, *see* p. 59 of the North-Western Provinces and Oudh List of Local Rules and Orders, Ed. 1894.

Sec. 26, Cl. (i) For notification prohibiting the killing, injuring or capturing of any rhinoceri in reserved forests in the Jalpaiguri and Darjiling Districts. *See* Calcutta Gazette, 1899, Pt. 1, p. 1368. For rules under this clause in conjunction with s. 75 (d), as to hunting, shooting, fishing, etc., in reserved forests in the United Provinces, *see* United Provinces Gazette, 1906, Pt. I, p. 651: *Ibid.*, for Central Provinces, *see* C. P. Gazette, 1907, Pt. I, p. 678.

Sec. 26, Cl. (b).—Punjab Government Notifications—"Sets fire to" meaning of—A person sets fire to a thing if he puts a match to it or sets it on fire directly, and not if it catches fire as an indirect consequence of his act. The accused kindled a fire in his master's garden which spread to an unclassified forest, and then to a reserved forest. The accused should not be said to have set fire to either of the forests within the meaning of S. 25 (b), 30 P. R. (Cr.) 1916 = 17 Cr. L. J. 458 = 36 I. C. 138.

Cl. (c).—Possession of flint or steel.—The mere possession of a flint or steel within forest limits does not constitute an offence under s. 25 (c); 4 Bom. L. R. 935.

Cl. (d).—Applicability.—Liability of licensee for agent's acts.—A licensee under this Act would be liable criminally for every act of his agent done in carrying on the business delegated to him if there is a breach of the condition of the license or any rule thereunder. If the owner of some cattle entrusts them to a grazier who takes them into a forest reserved to afford them better pasturage, the owner is not criminally liable but is only civilly liable. The words of section 25 (d) clearly apply only to the person who does any of the acts mentioned therein. 16 Cr. L. J. 485 = 29 I. C. 325 = 11 N. L. R. 76. Trespass in reserved forest.—The trespass of a human being in a reserved forest is punishable under s. 25 (d). Rat. 602 = Cr. Rg. 21 of 1892. *See also* 87 I. C. 918 = 26 Cr. L. J. 1030. Permitting cattle to trespass.—The question whether the owner of cattle, whose animals trespass in a reserved forest, is criminally liable for committing an offence under s. 25,

depends upon the whole circumstances of each particular case. 16 P. R. 1909 (Cr.). The levy of pound fines under Act 1 of 1871, S. 12, in respect of an offence of allowing cattle to trespass in a reserved forest is not a punishment, and does not, therefore, bar a prosecution, under S. 25 of the Forest Act. 19 P. R. 1885 (Cr.) In a great many cases the question will resolve itself into, 'did he or did he not take proper precautions to prevent such trespass,' and it does not depend upon the presence of the owner at the moment. 16 P. R. 1909 (Cr.).

Barar grazing Rules do not enforce a liability on a master for the acts of his servants. 87 I. C. 918 = 26 Cr. L. J. 1030. *See also* A. I. R. 1926 Nag. 73.

Cl. (f).—Cutting trees—Felling of each tree—Distinct offence.—A person felling a number of trees in a forest is guilty of as many offences under S. 25 (f) as the number of the trees felled by him. 19 Cr. L. J. 161 = 43 I. C. 577 (All.) There is no provision, either in the Act or the rules framed thereunder, to award compensation for damages in respect of the protected forest. 8 Bom. L. R. 987 = 5 Cr. L. J. 9. Theft of wood from Government forest to which Forest Act does not apply.—In the absence of anything in a Special Act (like the Forest Act) to exclude the operation of the general criminal law, an intention on the part of the legislature to exclude it should not be inferred. Further S. 66 negatives any such intention. Theft of wood from a Government forest to which the Forest Act had not been applied, is punishable under the Penal Code. 10 P. R. 1885 Cr. (22 P. R. 1876 Cr. Disapproved).

Cl. (i).—Hunting and shooting without a permit in a reserved forest is punishable under S. 25, 40 All. 38 = 15 A. L. J. 824 = 42 I. C. 922 = 19 Cr. L. J. 10. Hunting and killing a tiger in a reserved forest even though it be for killing the tiger which killed the cattle of the accused, amounts to hunting. 42 Bom. 406 = 19 Cr. L. J. 610 = 45 I. C. 514 = 20 Bom. L. R. 384. A conviction recorded under S. 25 (i), for shooting in a reserved forest in contravention of any rules which the Local Government from time to time prescribes, is illegal where no such rules have been passed

shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both, in addition to such compensation for damage done to the forest as the convicting Court may direct to be paid.

(2) Nothing in this section shall be deemed to prohibit—

(a) any act done by permission in writing of the Forest-officer, or under any rule made by the Local Government; or

(b) the exercise of any right continued under clause (c) of sub-section (2) of section 15, or created by grant or contract in writing made by or on behalf of Government under section 23.

(3) Whenever fire is caused wilfully or by gross negligence in a reserved forest, the Local Government may (notwithstanding that any penalty has been inflicted under this section) direct that in such forest or any portion thereof the exercise of all rights of pasture or to forest-produce shall be suspended for such period as it thinks fit.

27. (1) The Local Government may, subject to the control of the Governor-General in Council, by notification in the Local Official Gazette, direct that, from a date fixed by such notification, any forest or any portion thereof reserved under this Act shall cease to be a reserved forest.

(2) From the date so fixed, such forest or portion shall cease to be reversed; but the rights (if any) which have been extinguished therein shall not revive in consequence of such cessation.

CHAPTER III.

OF VILLAGE-FORESTS.

28. (1) The Local Government may assign to any village-community the rights of Government to or over any land which has been constituted a reserved forest, and may cancel such assignment. All forests so assigned shall be called village forests.

(2) The Local Government may make rules for regulating the management of village forests, prescribing the conditions under which the community to which any such assignment is made may be provided with timber or other forest-produce or pasture, and their duties for the protection and improvement of such forest.

by the Government. Rat. 684=Cr. Rg. 50 of 1893.

MISCELLANEOUS.—Conviction under the Act—Order for confiscation.—An order for confiscation cannot be regarded as an order incidental to a conviction under the Act. The confiscation is by the terms of S. 54 declared to be a punishment, for it is in addition to any other punishment prescribed for the offence, the order for confiscation should be passed simultaneously with the punishment for the offence. 24 C. 450. (4 A. 417 R.). It is illegal to impose a fine where the Forest Act provides the penalty of confiscation. Col. Dig. Cr. 69 of 1877. Payment of rewards out of fines and confiscations is not a part of the sentence, but is a matter for the Executive Government to deal with, in the exercise of the power vested in then by the rules framed under the Act. Rat. 950=Cr. Rg. 13 of 1898. These rules give the Government the power to pay one half of the proceeds of fines and confiscations by way of reward without any order of the convicting Court, but more than one half cannot, however, be paid unless the Magistrate so directs. Rat. 950=Cr. Rg. 13 of 1898. Forest offence—Court-fees—Court Fees Act, S. 31.—Where persons convicted of an offence under the Forest Act, where each is sentenced to pay a fine of thirteen annas, or in default to suffer

one day's simple imprisonment, and all of them were ordered to pay annas five as compensation for the loss of Forest fuel or wood and Rs. 1-4 as Court-fee expenses under S. 31 of the Court Fees Act, *held* that the order as to payment of Court-fees was not a valid order. 10 P. R. 1885 (Cr.).

SUMMONS CASE—ACQUITTAL—FURTHER ENQUIRY—REVISION.—In this case the accused was tried and acquitted by a Tahsildar of the offence under s. 25. The District Magistrate disagreeing with the decision of the Tahsildar sent the case for further enquiry to the Assistant Commissioner, Attack, who convicted the accused. The Sessions Judge declined to submit the case to the Chief Court for revision holding that the accused was tried in a summons case, and could only be discharged, but could not be acquitted, and that the order directing further enquiry was not illegal. *Held*, that the order of the District Magistrate was illegal and that the view of the law taken by the Sessions Judge was erroneous. P. L. R. 1900 Cr. p. 50=19 P. R. 1900 Cr. A case under S. 25 is a "Summons case" and the Tahsildar if he did not find the accused guilty, was bound to acquit him, and no order under S. 437, Crim. Pro. Code, directing further enquiry, could be passed. The order of the District Magistrate and conviction and sentence were set aside. *Ibid*.

(3) All the provisions of this Act relating to reserved forests shall (so far as they are not inconsistent with the rules so made) apply to village-forests.

CHAPTER IV.

OF PROTECTED FORESTS.

29. (1) The Local Government may, by notification in the local official Gazette, declare the provisions of this Chapter applicable to any forest-land or waste-land which is not included in a reserved forest, but which is the property of Government, or over which the Government has proprietary rights or to the whole or any part of the forest-produce of which the Government is entitled.

(2) The forest-land and waste-lands comprised in any such notification shall be called a "protected forest".

(3) No such notification shall be made unless the nature and extent of the rights of Government and of private persons in or over the forest-land or waste-land comprised therein have been inquired into and recorded at a survey or settlement, or in such other manner as the Local Government thinks sufficient. Every such record shall be presumed to be correct until the contrary is proved :

Provided that, if, in the case of any forest-land or waste-land, the Local Government thinks that such inquiry and record are necessary, but that they will occupy such length of time as in the meantime to endanger the rights of Government, the Local Government may, pending such inquiry and record, declare such land to be a protected forest, but so as not to abridge or affect any existing rights of individuals or communities.

Power to issue notification reserving trees, etc. (Old Act, §. 29.)

30. The Local Government may, by notification in the local official Gazette,—

(a) declare any trees or class of trees in a protected forest to be reserved from a date fixed by the notification ;

(b) declare that any portion of such forest specified in the notification shall be closed for such term, not exceeding thirty years, as the Local Government thinks fit, and that the rights of private persons, if any, over such portion shall be suspended during such term, provided that the remainder of such forest be sufficient, and in a locality reasonably convenient, for the due exercise of the rights suspended in the portion so closed ; or

(c) prohibit, from a date fixed as aforesaid, the quarrying of stone, or the burning of lime or charcoal, or the collection or subjection to any manufacturing process, or removal of, any forest-produce in any such forest, and the breaking up or clearing for cultivation, for building, for herding cattle or for any other purpose, of any land in any such forest.

31. The Collector shall cause a translation into the local vernacular of every notification issued under S. 30 to be affixed in a conspicuous place in every town and village in the neighbourhood of the forest comprised in the notification.

Publication of translation of such notification in neighbourhood. (Old Act, §. 30.)

Power to make rules for protected forests. (Old Act, §. 31.)

32. The Local Government may make rules to regulate the following matters, namely :—

(a) The cutting, sawing, conversion and removal of trees and timber, and the collection, manufacture and removal of forest-produce, from protected forests ;

Secs. 29, 30 and 32.—*See* Bom L.R. 462; 46 All. 128 = A. I. R. 1924 All. 539. Where a notification regarding a reserved forest did not state the date from which it shall come into force, *held*, that the notification was invalid, and that consequently there was nothing on which to base

an offence under S. 33 of the Forest Act. *Held also*, that a Forest-officer is not entitled to arrest a person for the breach of S. 30 (a) and that his custody cannot be said to be lawful. 54 C. 296 = 102 I.C. 498 = 28 Cr.L.J. 562 = A. I. R. 1927 Cal. 516.

(b) the granting of licences to the inhabitants of towns and villages in the vicinity of protected forests to take trees, timber or other forest-produce for their own use, and the production and return of such licences by such persons ;

(c) the granting of licences to persons felling or removing trees or timber or other forest-produce from such forests for the purposes of trade, and the production and return of such licences by such persons ;

(d) the payments, if any, to be made by the persons mentioned in clauses (b) and (c) for permission to cut such trees, or to collect and remove such timber or other forest-produce ;

(e) the other payments, if any, to be made by them in respect of such trees, timber and produce, and the places where such payment shall be made ;

(f) the examination of forest-produce passing out of such forests ;

(g) the clearing and breaking up of land for cultivation or other purposes in such forests ;

(h) the protection from fire of timber lying in such forests and of trees reserved under S. 30 ;

(i) the cutting of grass and pasturing of cattle in such forests ;

(j) hunting, shooting, fishing, poisoning water and setting traps or snares in such forests, and the killing or catching of elephants in such forests in areas in which the Elephants' Preservation Act, 1879, is not in force ;

(k) the protection and management of any portion of a forest closed under S. 30 ; and

(l) the exercise of rights referred to in S. 29.

Penalties for acts in contravention of notification under S. 30 of rules under S. 32. (Old Act, s. 32.)

33. (1) Any person who commits any of the following offences, namely :—

(a) fells, girdles, lops, taps or burns any tree reserved under S. 30, or strips off the bark or leaves from, or otherwise damages, any such tree ;

(b) contrary to any prohibition under S. 30, quarries any stone, or burns any lime or charcoal, or collects, subjects to any manufacturing process, or removes any forest-produce ;

(c) contrary to any prohibition under S. 30, breaks up or clears for cultivation or any other purpose any land in any protected forest ;

(d) sets fire to such forest, or kindles a fire without taking all reasonable precautions to prevent its spreading to any tree reserved under S. 30, whether standing, fallen or felled, or to any closed portion of such forest ;

(e) leaves burning any fire kindled by him in the vicinity of any such tree or closed portion ;

(f) fells any tree or drags any timber so as to damage any tree reserved as aforesaid ;

(g) permits cattle to damage any such tree ;

(h) infringes any rule made under S. 32 ;

Sec. 32, Cl. (g)—Mere 'clearing' does not amount to 'breaking' of ground where the notification issued under the Forest Act prohibited 'breaking' of ground in a protected forest and the evidence only showed that the accused had cleared the ground. *Held*, that no offence was committed. 49 A. 291 = 25 A. L. J. 148 = 8 L. R. 27 (Cr.) = 99 I. C. 407 = 28 Cr. L. J. 151 = 7 A. I. C. R. 200 = A. I. R. 1927 All. 121. On this section, see 11 A. L. J. 340 = 20 I. C. 408.

For rules under this section for—

(1) Bombay, see Bom. R. and O. ;

(2) for protected Forests of Naini Tal, Ranthambur and Lallipur, see p. 62 of the North-Western Provinces and Oudh List of Local Rules and

Orders, Ed. 1894 ;

(3) for rules made by the Government of Bengal under this section and S. 41 for the protected forests in the Santhal Parganas, see Calcutta Gazette, 1901, Pt. I, p. 571; in the Sunderbans, see Calcutta Gazette, 1906, Pt. I, p. 1973; in the Angul Protected Forests, see Calcutta Gazette, 1901, Pt. I, p. 879; (4) or protected forests in the Punjab, see Punjab Gazette, 1904, Pt. I, p. 76.

Sec. 33 (c).—Where breaking of ground only is forbidden by notification under the Forest Act, no offence is committed when there has been only 'cleaning'. 8 L. R. 112 (Cr.) = 102 I. C. 559 = 28 Cr. L. J. 591 = 8 A. I. C. R. 111.

shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both.

(2) Whenever fire is caused wilfully or by gross negligence in a protected forest, the Local Government may, notwithstanding that any penalty has been inflicted under this section, direct that in such forest or any portion thereof the exercise of any right of pasture or to forest-produce shall be suspended for such period as it thinks fit. (Cf. Act V of 1901, S. 2.)

34. Nothing in this Chapter shall be deemed to prohibit any act done with the permission in writing of the Forest-officer, or in accordance with rules made under S. 32, or, except as regards any portion of a forest closed under S. 30, or as regards any rights the exercise of which has been suspended under S. 33, in the exercise of any right recorded under S. 29.

CHAPTER V.

OF THE CONTROL OVER FORESTS AND LANDS NOT BEING THE PROPERTY OF GOVERNMENT.

Protection of forests for special purposes. (Old Act, S. 35.)

35. (1) The Local Government may, by notification in the local official Gazette, regulate or prohibit in any forest or waste-land—

- (a) the breaking up or clearing of land for cultivation ;
- (b) the pasturing of cattle ; or
- (c) the firing or clearing of the vegetation ;

when such regulation or prohibition appears necessary for any of the following purposes :—

- (i) for protection against storms, winds, rolling stones, floods and avalanches ;
- (ii) for the preservation of the soil on the ridges and slopes and in the valleys of hilly tracts, the prevention of land-slips or of the formation of ravines and torrents, or the protection of land against erosion, or the deposit thereon of sand, stones or gravel ;
- (iii) for the maintenance of a water-supply in springs, rivers and tanks ;
- (iv) for the protection of roads, bridges, railways and other lines of communication ;
- (v) for the preservation of the public health.

(2) The Local Government may, for any such purpose, construct at its own expense, in or upon any forest or waste-land, such work as it thinks fit.

(3) No notification shall be made under sub-section (1) nor shall any work be begun under sub-section (2), until after the issue of a notice to the owner of such forest or land calling on him to show cause, within a reasonable period to be specified in such notice, why such notification should not be made or work constructed, as the case may be, and until his objections, if any, and any evidence he may produce in support of the same, have been heard by an officer duly appointed in that behalf and have been considered by the Local Government.

36. (1) In case of neglect of, or wilful disobedience to, any regulation or prohibition under section 35, or if the purposes of any work to be constructed under that section so require, the Local Government may, after notice in writing to the owner of such forest or land and after considering his objections, if any, place the same under the control of a Forest-officer, and may declare that all or any of the provisions of this Act relating to reserved forests shall apply to such forest or land.

(2) The net profits, if any, arising from the management of such forest or land shall be paid to the said owner.

37. (1) In any case under this Chapter in which the Local Government considers that, in lieu of placing the forest or land under the control of a Forest-officer, the same should be acquired for public purposes, the Local Government may proceed to acquire it in the manner provided by the Land Acquisition Act, 1894.

Expropriation of forests in certain cases. (Old Act, S. 37.)

(2) The owner of any forest or land comprised in any notification under section 35 may, at any time not less than three or more than twelve years from the date thereof, require that such forest or land shall be acquired for public purposes, and the Local Government shall acquire such forest or land accordingly.

38. (1) The owner of any land or, if there be more than one owner thereof, the owners of shares therein amounting in the aggregate to at least two-thirds thereof may, with a view to the formation or conservation of forests thereon, represent in writing to the Collector their desire—

Protection of forests at request of owners. (Old Act, S. 38.)

(a) that such land be managed on their behalf by the Forest-officer as a reserved or a protected forest on such terms as may be mutually agreed upon ; or

(b) that all or any of the provisions of this Act be applied to such land.

(2) In either case, the Local Government may, by notification in the local official Gazette, apply to such land such provisions of this Act as it thinks suitable to the circumstances thereof and as may be desired by the applicants.

CHAPTER VI.

OF THE DUTY ON TIMBER AND OTHER FOREST-PRODUCE.

Power to impose duty on timber and other forest produce. (Old Act, S. 39; cf. Act V of 1890, S. 8 (2).)

39. (1) The Local Government may levy a duty in such manner, at such places and at such rates as it may declare by notification in the local official Gazette on all timber or other forest-produce—

(a) which is produced in British India, and in respect of which the Government has any right ;

(b) which is brought from any place outside British India :

Provided that a notification directing the levy of a duty, in the case of a timber and other forest-produce brought from any place outside British India which is not under the control of the Local Government, shall not be issued without the previous sanction of the Governor-General in Council.

(2) In every case in which such duty is directed to be levied *ad valorem*, the Local Government may fix by like notification the value on which such duty shall be assessed.

(3) All duties on timber or other forest-produce which, at the time when this Act comes into force in any territory, are levied therein under the authority of the Local Government, shall be deemed to be and to have been duly levied under the provisions of this Act.

40. Nothing in this Chapter shall be deemed to limit the amount, if any,

Limit not to apply to purchase-money or royalty. (Old Act, S. 40.)

chargeable as purchase-money or royalty on any timber or other forest-produce, although the same is levied on such timber or produce while in transit, in the same manner as duty is levied.

CHAPTER VII.

OF THE CONTROL OF TIMBER AND OTHER FOREST-PRODUCE IN TRANSIT.

Power to make rules to regulate transit of forest-produce. (Old Act, S. 41; see also Act V of 1890, S. 8 Cls. 3 & 4.)

41. (1) The control of all rivers and their banks as regards the floating of timber, as well as the control of all timber and other forest produce in transit by land or water, is vested in the Local Government, and it may make rules to regulate the transit of all timber and other

forest produce.

Secs. 39-41.—See 76 I. C. 104 = A. I. R. 1925 Lah. 225.

Sec. 41. See 21 Cr. L. J. 659 = 57 I. C. 819 (Cal.) The words "Timber" and "Forest-produce" in this Section are used in their widest sense. See 106 I. C. 790 = A. I. R. 1928 Lah. 80.

RULE FRAMED BY GOVERNMENT OF BOMBAY UNDER S. 41 (b).—*Ultra vires*. R. 4 of the

rules for Sind framed by the Government of Bombay under S. 41 (b) of the Act, prohibiting the moving of timber from private land without a certificate from the holder or manager of such land is *ultra vires*: consequently a conviction for a breach of that rule under S. 42 of the Act cannot stand. 17 Cr. L. J. 364 = 35 I. C. 668 = 10 S. L. R. 9.

(2) In particular and without prejudice to the generality of the foregoing power such rules may—

(a) prescribe the routes by which alone timber or other forest-produce may be imported, exported or moved into, from or within British India ;

(b) prohibit the import or export or moving of such timber or other produce without a pass from an officer duly authorised to issue the same, or otherwise than in accordance with the conditions of such pass ;

(c) provide for the issue, production and return of such passes and for the payment of fees therefor ;

(d) provide for the stoppage, reporting, examination and marking of timber or other forest-produce in transit, in respect of which there is reason to believe that any money is payable to Government on account of the price thereof, or on account of any duty, fee, royalty or charge due thereon, or, to which it is desirable for the purposes of this Act to affix a mark ;

(e) provide for the establishment and regulation of depots to which such timber or other produce shall be taken by those in charge of it for examination, or for the payment of such money, or in order that such marks may be affixed to it ; and the conditions under which such timber or other produce shall be brought to, stored at and removed from such depots ;

(f) prohibit the closing up or obstructing of the channel or banks of any river used for the transit of timber or other forest-produce, and the throwing of grass, brushwood, branches or leaves into any such river or any act which may cause such river to be closed or obstructed ;

(g) provide for the prevention or removal of any obstruction of the channel or banks of any such river, and for recovering the cost of such prevention or removal from the person whose acts or negligence necessitated the same ;

(h) prohibit absolutely or subject to conditions, within specified local limits, the establishment of saw-pits, the converting cutting, burning, concealing or marking of timber, the altering or effacing of any marks on the same, or the possession or carrying of marking hammers or other implements used for marking timber ;

(i) regulate the use of property marks for timber, and the registration of such marks ; prescribe the time for which such registration shall hold good ; limit the number of such marks that may be registered by any one person, and provide for the levy of fees for such registration.

(3) The Local Government may direct that any rule made under this section shall not apply to any specified class of timber or other forest-produce or to any specified local area.

Penalty for breach of rules made under section 41. (Old Act, s. 42.)

42. (1) The Local Government may by such rules prescribe as penalties for the contravention thereof imprisonment for a term which may extend six months, or fine which may extend to five hundred rupees, or both.

(2) Such rules may provide that penalties which are double of those mentioned in sub-section (1) may be inflicted in cases where the offence is committed after sunset and before sunrise, or after preparation for resistance to lawful authority, or where the offender has been previously convicted of a like offence.

43. The Government shall not be responsible for any loss or damage which may occur in respect of any timber or other forest-produce while at a depot established under a rule made under section 41, or while detained elsewhere, for the purposes of this Act ; and no Forest-officer shall be responsible for any such loss or damage, unless he causes such loss or damage negligently, maliciously or fraudulently.

Government and Forest-officers not liable for damage to forest-produce at depot. (Old Act, s. 43.)

COMPENSATION IN ADDITION TO IMPOSITION OF FINE—CRIM. PRO. CODE, S. 545 (1).—Where a person is convicted of an offence under rules 21, 26, framed under S. 41, compensation

cannot be awarded in addition to the imposition of fine, 5 Bom. L.R. 126. On this section see 1925 Lah. 225; 1924 Bom. 489=84 I.C. 250=26 Cr. L. J. 250.

44. In case of any accident or emergency involving danger to any property at any such depot, every person employed at such depot,

All persons bound to aid in case of accident at depot. (Old Act, §. 44.)

whether by the Government or by any private person, shall render assistance to any Forest-officer or Police-officer demanding his aid in averting such danger or securing such property from damage or loss.

CHAPTER VIII.

OF THE COLLECTION OF DRIFT AND STRANDED TIMBER.

45. (1) All timber found adrift, beached, stranded or sunk ;

Certain kinds of timber to be deemed property of Government until title thereto proved, and may be collected accordingly. (Old Act, §. 45.)

all wood or timber bearing marks which have not been registered in accordance with the rules made under section 41, or on which the marks have been obliterated, altered or defaced by fire or otherwise ; and

in such areas as the Local Government directs, all unmarked wood and timber ; shall be deemed to be the property of Government, unless and until any person establishes his right and title thereto, as provided in this Chapter.

(2) Such timber may be collected by any Forest-officer or other person entitled to collect the same by virtue of any rule made under section 51, and may be brought to any depot which the Forest-officer may notify as a depot for the reception of drift timber.

(3) The Local Government may, by notification in the local official Gazette, exempt any class of timber from the provisions of this section.

46. Public notice shall from time to time be given by the Forest-officer of timber collected under section 45. Such notice shall

Notice to claimants of drift-timber. (Old Act, §. 46.)

contain a description of the timber, and shall require any person claiming the same to present to such officer, within a period not less than two months from the date of such notice, a written statement of such claim.

47. (1) When any such statement is presented as aforesaid, the Forest-officer may, after making such inquiry as he thinks fit, either reject the claim after recording his reasons for so doing, or deliver the timber to

Procedure on claim preferred to such timber. (Old Act, §. 47.)

the claimant.

(2) If such timber is claimed by more than one person, the Forest-officer may either deliver the same to any of such persons whom he deems entitled thereto, or may refer the claimants to the Civil Courts, and retain the timber pending the receipt of an order from any such Court for its disposal.

(3) Any person whose claim has been rejected under this section may, within three months from the date of such rejection, institute a suit to recover possession of the timber claimed by him ; but no person shall recover any compensation or costs against the Government, or against any Forest-officer, on account of such rejection, or the detention or removal of any timber, or the delivery thereof to any other person under this section.

(4) No such timber shall be subject to process of any Civil, Criminal or Revenue Court until it has been delivered, or a suit has been brought, as provided in this section.

48. If no such statement is presented as aforesaid, or if the claimant omits to

Disposal of unclaimed timber. (Old Act, §. 48 and Act V of 1890, §. 10.)

prefer his claim in the manner and within the period fixed by the notice issued under section 46, or on such claim having been so preferred by him and having been rejected, omits to institute a suit to recover possession of such timber within the further period fixed by section 47, the ownership of such

timber shall vest in the Government, or, when such timber has been delivered to another person under section 47, in such other person free from all encumbrances not created by him.

49. The Government shall not be responsible for any loss or damage which may

Government and its officers not liable for damage to such timber. (Old Act, S. 49.)

occur in respect of any timber collected under section 45, and no Forest-officer shall be responsible for any such loss or damage, unless he causes such loss or damage negligently, maliciously or fraudulently.

Payments to be made by claimant before timber is delivered to him. (Old Act, S. 50.)

50. No person shall be entitled to recover possession of any timber collected or delivered as aforesaid until he has paid to the Forest-officer or other person entitled to receive it such sum on account thereof as may be due

under any rule made under section 51.

Power to make rules and prescribe penalties (Old Act, S. 51.)

51. (1) The Local Government may make rules to regulate the following matters, namely:—

- (a) the salving, collection and disposal of all timber mentioned in section 45 ;
- (b) the use and registration of boats used in salving and collecting timber ;
- (c) the amounts to be paid for salving, collecting, moving, storing or disposing of such timber ; and
- (d) the use and registration of hammers and other instruments to be used for marking such timber.

(2) The Local Government may prescribe, as penalties for the contravention of any rules made under this section, imprisonment for a term which may extend to six months, or fine which may extend to five hundred rupees, or both.

CHAPTER IX.

PENALTIES AND PROCEDURE.

52. (1) When there is reason to believe that a forest-offence has been committed in respect of any forest-produce, such produce, together

Seizure of property liable to confiscation. (Old Act, S. 52.)

with all tools, boats, carts or cattle used in committing any such offence, may be seized by any Forest-officer or

Police-officer.

(2) Every officer seizing any property under this section shall place on such property a mark indicating that the same has been so seized, and shall, as soon as may be, make a report of such seizure to the Magistrate having jurisdiction to try the offence on account of which the seizure has been made :

Provided that, when the forest-produce with respect to which such offence is believed to have been committed is the property of Government, and the offender is unknown, it shall be sufficient if the officer makes, as soon as may be, a report of the circumstances to his official superior.

53. Any Forest-officer of a rank not inferior to that of a Ranger who, or whose

Power to release property seized under section 52. (Act of 1918, S. 3.)

subordinate, has seized any tools, boats, carts or cattle under section 52, may release the same on the execution by the owner thereof of a bond for the production of the property so released, if and when so required, before the

Sec. 51.—A warrant drawn up in the name of a Forester can be validly endorsed by him to a Forest Watcher. *Per curiam*. In order to justify the action of a Police or Forest Officer in arresting without warrant a person suspected of a forest offence he must either have refused to give his name or must have given a false name and residence or there must have been reason to believe that he would abscond. In the absence of any of these conditions, no Police Officer or Forest Officer could lawfully arrest a person without a warrant. (1928) M. W. N. 310.

Sec. 52. SUB-ASSISTANT CONSERVATOR OF

FORESTS—SEIZURE AND DETENTION OF TIMBER—WANT OF A VALID PASS.—Where a Sub-Assistant Conservator of Forests seized timber under the suspicion that it was property stolen from the Government forests, *held*, that he could justify the seizure on the ground of the commission of a forest offence arising from the want of a valid pass, 15 B. 229. According to S. 52, a Forest-officer cannot justify the detention of goods on the ground of an offence against the forest laws, where he had not taken the course which that section prescribes of taking the matter before a Magistrate. 15 B. 229.

Magistrate having jurisdiction to try the offence on account of which the seizure has been made.

54. Upon the receipt of any such report, the Magistrate shall, with all convenient despatch, take such measures as may be necessary for the arrest and trial of the offender and the disposal of the property according to law.

Procedure thereupon. (Old Act, s. 53.)

55. (1) All timber or forest-produce which is not the property of Government and in respect of which a forest-offence has been committed, and all tools, boats, carts and cattle used in committing any forest-offence, shall be liable to confiscation.

Forest produce, tools, etc., when liable to confiscation.

(2) Such confiscation may be in addition to any other punishment prescribed for such offence.

56. When the trial of any forest-offence is concluded, any forest-produce in respect of which such offence has been committed shall, if it is the property of Government or has been confiscated, be taken charge of by a Forest-officer, and, in any other case, may be disposed of in such manner as the Court may direct.

Disposal, on conclusion of trial for forest-offence, of produce in respect of which it was committed. (Old Act, s. 55.)

57. When the offender is not known or cannot be found, the Magistrate may, if he finds that an offence has been committed, order the property in respect of which the offence has been committed to be confiscated and taken charge of by the Forest-officer, or to be made over to the person whom the Magistrate deems to be entitled to the same :

Procedure when offender not known, or cannot be found. (Old Act, s. 56 and Act V of 1890, s. 11.)

Provided that no such order shall be made until the expiration of one month from the date of seizing such property, or without hearing the person, if any, claiming any right thereto, and the evidence, if any, which he may produce in support of his claim.

58. The Magistrate may, notwithstanding anything hereinbefore contained, direct the sale of any property seized under section 52 and subject to speedy and natural decay, and may deal with the proceeds as he would have dealt with such property if it had not been sold.

Procedure as to perishable property seized under section 52. (Old Act, s. 57.)

Sec. 55. N. B.—See also notes under S. 26 and S. 33.

CONFISCATION OF FOREST-PRODUCE—THE PROPERTY OF GOVERNMENT.—No confiscation order is necessary, or can be made, in respect of forest produce, which is the property of Government, and regarding which a forest offence has been committed. All that need be done is, to direct that it should be taken by some Forest-officer. 4 A. 417.

POWER TO CONFISCATE.—It is only in respect of forest-produce with regard to which an offence has been committed, that power to direct confiscation is given by law. Such an order, regarding forest-produce not belonging to Government, can only be made at the time when the offender is convicted. 4 A. 417, [F. 27 C. 450.]

REWARD—FOREST PRODUCE.—Since there can be no legal confiscation of Government property, a reward cannot be paid out of such property. Rat. 620 = Cr. Kg. 44 of 1892.

Sec. 56.—See also notes under S. 33

DISPOSAL OF PROPERTY.—Under S. 55, the property, regarding which an offence is committed, should be awarded to Government. 5 Bom. L. R. 124.

GOVERNMENT FOREST-PRODUCE, OFFENCE RELATING TO—PROPER ORDER.—When the

forest-produce, in respect of which an offence is committed, is found to be the property of Government the only order which the Magistrate can legally make regarding it, under S. 56 is that it should be taken charge of by a Forest officer. An order for its sale and the payment of a reward to the informer from its proceeds is therefore illegal. Rat. 361 = Cr. Kg. 3 of 1888.

Sec. 57.—(1) Sub-s. by Act V of 1890, s. 11.

FORFEITURE FOR FOREST OFFENCE WHEN A GOOD TITLE HAS VESTED IN A THIRD PERSON.

—Under the orders issued by the Collector of Kandesh, certain Bhils entered the forest, brought from it teak logs under the customary passes, and sold them in open market to applicants who purchased in good faith. The Government sought to forfeit them on the ground that a forest-offence had been committed in respect of them, inasmuch as the permission under which the Bhils acted, only allowed them to cut deadwood and the logs did not fall under the description. *Held*, ordering the logs to be restored to the custody of purchasers, that it was clear from the terms of S. 57 that a forfeiture was not a consequence of a forest-offence, under the conditions stated in that section, where a good title has vested in a third person. 2 Bom. L. R. 675.

59. The officer who made the seizure under section 52, or any of his official superiors, or any person claiming to be interested in the property so seized, may, within one month from the date of any order passed under section 55, section 56 or section 57, appeal therefrom to the Court to which orders made by such Magistrate are ordinarily appealable, and the order passed on such appeal shall be final.

60. When an order for the confiscation of any property has been passed under section 55 or section 57, as the case may be, and the period limited by section 59 for an appeal from such order has elapsed, and no such appeal has been preferred, or when, on such an appeal being preferred, the Appellate Court confirms such order in respect of the whole or a portion of such property, such property or such portion thereof, as the case may be, shall vest in the Government free from all incumbrances.

61. Nothing hereinbefore contained shall be deemed to prevent any officer empowered in this behalf by the Local Government from directing at any time the immediate release of any property seized under section 52.

62. Any Forest-officer or Police-officer who vexatiously and unnecessarily seizes any property on pretence of seizing property liable to confiscation under this Act shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both.

Property when to vest in Government. (Old Act, s. 59.)

Penalty for wrongful seizure. (Old Act, s. 61.)

Penalty for counterfeiting or defacing marks on trees and timber and for altering boundary marks. (Old Act, s. 62.)

63. Whoever, with intent to cause damage or injury to the public or to any person, or to cause wrongful gain as defined in the Indian Penal Code—

(a) knowingly counterfeits upon any timber or standing tree a mark used by Forest-officers to indicate that such timber or tree is the property of the Government or of some person, or that it may lawfully be cut or removed by some person; or

(b) alters, defaces or obliterates any such mark placed on a tree or on timber by or under the authority of a Forest-officer; or

(c) alters, moves, destroys or defaces any boundary-mark of any forest or waste-land to which the provisions of this Act are applied, shall be punishable with imprisonment for a term which may extend to two years, or with fine, or with both.

64. (1) Any Forest-officer or Police-officer, may, without orders from a Magistrate and without a warrant, arrest any person against whom a reasonable suspicion exists of his having been concerned in any forest-offence punishable with imprisonment for one month or upwards.

(2) Every officer making an arrest under this section shall, without unnecessary delay and subject to the provisions of this Act as to release on bond, take or send the person arrested before the Magistrate having jurisdiction in the case, or to the officer in charge of the nearest police station.

(3) Nothing in this section shall be deemed to authorise such arrest for any act which is an offence under Chapter IV unless such act has been prohibited under clause (c) of section 30.

Sec. 59. REVISION BY HIGH COURT OF AN ORDER OF A SUBORDINATE TRIBUNAL.—The terms of s. 59 do not exclude the ordinary revisional powers of the High Court over a subordi-

nate tribunal in the exercise of its criminal jurisdiction, where there had been judicial proceeding. 4 A. 417.

65. Any Forest-officer of a rank not inferior to that of a Ranger, who, or whose

Power to release on a bond a person arrested. (Act I of 1918, S. 5.)

subordinate, has arrested any person under the provisions of section 64, may release such person on his executing a bond to appear, if and when so required, before the

Magistrate having jurisdiction in the case, or before the officer in charge of the nearest police-station.

Power to prevent commission of offence. (Old Act, S. 64.)

66. Every Forest-officer and Police-officer shall prevent, and may interfere for the purpose of preventing, the commission of any forest-offence.

67. The District Magistrate or any Magistrate of the first class specially empowered in this behalf by the Local Government may try summarily, under the Code of Criminal Procedure, 1898,

Power to try offences summarily. (Old Act, S. 65.)

any forest-offence punishable with imprisonment for a term not exceeding six months, or fine not exceeding five hundred rupees, or both.

Power to compound offences. (Act V of 1890, S. 13.)

68. (1) The Local Government may, by notification in the local official Gazette, empower a Forest-officer—

(a) to accept from any person against whom a reasonable suspicion exists that he has committed any forest-offence, other than an offence specified in section 62 or section 63, a sum of money by way of compensation for the offence which such person is suspected to have committed, and

(b) when any property has been seized as liable to confiscation, to release the same on payment of the value thereof as estimated by such officer.

(2) On the payment of such sum of money, or such value, or both, as the case may be, to such officer, the suspected person, if in custody, shall be discharged, the property, if any, seized shall be released, and no further proceedings shall be taken against such person or property.

(3) A Forest-officer shall not be empowered under this section unless he is a Forest-officer of a rank not inferior to that of a Ranger and is in receipt of a monthly salary amounting to at least one hundred rupees, and the sum of money accepted as compensation under clause (a) of sub-section (1) shall in no case exceed the sum of fifty rupees.

69. When in any proceedings taken under this Act, or in consequence of

Presumption that forest-produce belongs to Government. (Old Act, S. 68.)

anything done under this Act, a question arises as to whether any forest-produce is the property of the Government, such produce shall be presumed to be the property of the Government until the contrary is proved.

CHAPTER X.

CATTLE-TRESPASS.

70. Cattle trespassing in a reserved forest or in any portion of a protected forest

Cattle-trespass Act, 1871, to apply. (Old Act, S. 69.)

which has been lawfully closed to grazing shall be deemed to be cattle doing damage to a public plantation within the meaning of section 11 of the Cattle-trespass Act,

1871, and may be seized and impounded as such by any Forest-officer of Police-officer.

71. The Local Government may, by notification in the local official Gazette

Power to alter fines fixed under that Act. (Old Act, S. 70.)

direct that, in lieu of the fines fixed under section 12 of the Cattle-trespass Act, 1871, there shall be levied for each head of cattle impounded under section 70 of this Act such fines as it thinks fit, but not exceeding the

following, that is to say:—

For each elephant	ten rupees.
For each buffalo or camel	two ..
For each horse, mare, gelding, pony, colt, filly, mule, bull, bullock, cow or heifer	one rupee.
For each calf, ass, pig, ram, ewe, sheep, lamb, goat or kid	eight annas.

Sec. 68.—See Rat. 591 = Cr. Reg. 6 of 1892.

ed forest, 22 Bom. 933.

Sec. 70.—Liability for cattle straying in reserv-

CHAPTER XI. OF FOREST-OFFICERS.

Local Government may invest Forest-officers with certain powers. (Old Act S. 71.)

72. (1) The Local Government may invest any Forest-officer with all or any of the following powers, that is to say:—

(a) power to enter upon any land and to survey, demarcate and make a map of the same;

(b) the powers of a Civil Court to compel the attendance of witnesses and the production of documents and material objects;

(c) power to issue a search-warrant under the Code of Criminal Procedure, 1888; and

(d) power to hold an inquiry into forest-offences, and, in the course of such inquiry, to receive and record evidence.

(2) Any evidence recorded under clause (d) of sub-section (1) shall be admissible in any subsequent trial before a Magistrate, provided that it has been taken in the presence of the accused person.

Forest-officers deemed public servants. (Old Act S. 72.)

73. All Forest-officers shall be deemed to be public servants within the meaning of the Indian Penal Code.

Indemnity for acts done in good faith. (Old Act S. 73.)

74. No suit shall lie against any public servant for anything done by him in good faith under this Act.

75. Except with the permission in writing of the Local Government, no Forest-officer shall, as principal or agent, trade in timber or other forest-produce, or be or become interested in any lease of any forest or in any contract for working any forest, whether in or outside British India.

CHAPTER XII. SUBSIDIARY RULES.

Additional powers to make rules. (Old Act S. 75.)

76. The Local Government may make rules—

Sec. 76.—For rules made under this section for—

(1) Bombay, *see* Bom. R. and O.;
(2) Central Provinces, *see* C. P. R. and O. and Central Provinces Gazette, 1900, Pt. I, p. 214;

(3) United Provinces, *see* pp. 68 to 70 of the North-Western Provinces and Oudh List of Local Rules and Orders, Ed. 1894. *See also* North-Western Provinces and Oudh Gazette, 1899, Pt. I, p. 494; *ibid.*, 1900, Pt. I, p. 491; U. P. Gazette, 1907, Pt. I, p. 189;

(4) Punjab, *see* Punjab Gazette, 1899, Pt. I, p. 748.

For notification declaring that certain officers shall exercise the powers of Forest-officers under certain sections. *See* Calcutta Gazette, 1901, Pt. I, p. 28.

For rules made by the Government of Bengal, *see* Calcutta Gazette, 1906, Pt. I, p. 1094.

For rules under this clause as to measurement and registration of boats in the Sundarban Division, *see* Calcutta Gazette, 1906, Pt. I, p. 1657. *See also* notes under S. 26.

Interpretation of Section—Excise law—Confiscation in the owner's absence. *See* 12 C.W.N. 139.

RULES FRAMED UNDER THE ACT BY LOCAL GOVERNMENT.—When the Local Government has framed rules under the Forest Act prohibiting hunting and shooting in reserved forests

during such periods and in such portions as the conservator may appoint, the conservator, in notifying periods and localities left unascertained by the Local Government cannot be said to be exercising the authority delegated to the Local Government by the Act. 19 P. R. 1880 (Cr.).

PASS—CONTRACTOR—AUTHORITY.—Of the rules framed under the Forest Act, Rule 3, prohibits the removal of forest-produce beyond certain limits without a pass from the Conservator or some person duly authorised in that behalf under Rule 13, *held*, that a contractor under the Forest Department to whom the Forest-officer has given a pass book containing passes bearing the office seal with an endorsement that he might thereby remove timber was sufficiently authorised under Rule 13 to issue passes. Rat. 424 : Cr. Reg. 88 of 1888.

OFFENCE UNDER THE SECTION, WHAT CONSTITUTES.—The offence under S. 75 of the Forest Act is only committed under the express terms of the Act and rules, when the trees cut are the property of Government. The Court, before convicting, is bound to satisfy itself of Government proprietary rights in the usual modes and by means of the usual materials recognised in Courts. The declared opinion of the executive Government merely as such can have no more weight with the Court than that of the humblest of Her Majesty's subjects. 18 B. 670. [F. Rat. 828.]

(a) to prescribe and limit the powers and duties of any Forest-officer under this Act ;

(b) to regulate the rewards to be paid to officers and informers out of the proceeds of fines and confiscation under this Act ;

(c) for the preservation, reproduction and disposal of trees and timber belonging to Government, but grown on lands belonging to or in the occupation of private persons ; and

(d) generally, to carry out the provisions of this Act.

77. Any person contravening any rule under this Act, for the contravention of

Penalties for breach of rules.
(Old Act S. 76.)

which no special penalty is provided, shall be punishable with imprisonment for a term which may extend to one month, or fine which may extend to five hundred rupees,

or both.

78. All rules made by the Local Government under this Act shall be published

Rules when to have force of law. (Old Act S. 77.)

in the local official Gazette, and shall thereupon, so far as they are consistent with this Act, have effect as if enacted therein.

CHAPTER XIII.

MISCELLANEOUS.

79. (1) Every person who exercises any right in a reserved or protected forest,

Persons bound to assist Forest-officers and Police-officers.
(Old Act S. 78.)

or who is permitted to take any forest-produce from, or to cut and remove timber or to pasture cattle in, such forest, and every person who is employed by any such person in such forest, and

every person in any village contiguous to such forest who is employed by the Government, or who receives emoluments from the Government for services to be performed to the community,

shall be bound to furnish without unnecessary delay to the nearest Forest-officer or Police-officer any information he may possess respecting the commission of, or intention to commit, any forest-offence, and shall forthwith take steps whether, so required by any Forest-officer or Police-officer or not,—

(a) to extinguish any forest fire in such forest of which he has knowledge or information ;

(b) to prevent by any lawful means in his power any fire in the vicinity of such forest of which he has knowledge or information from spreading to such forest, and shall assist any Forest-officer or Police-officer demanding his aid—

(c) in preventing the commission in such forest of any forest-offence ; and

(d) when there is reason to believe that any such offence has been committed in such forest, in discovering and arresting the offender.

(2) Any person who, being bound so to do, without lawful excuse (the burden of proving which shall lie upon such person) fails—

(a) to furnish without unnecessary delay to the nearest Forest-officer or Police-officer any information required by sub-section (1) ;

Rules made by Bombay Government prohibiting a person who has made a tender from withdrawing it, if valid. See 49 Bom. 759 = 89 I. C. 498 = 1925 Bom. 485 (F. B.).

Sec. 77.—See 18 B. 670 cited under S. 75 and see also notes under S. 26 *supra*.

RULES FRAMED UNDER THE ACT—MISQUOTING OF THE SECTION—APPEAL.—A misquoting of the section of the Act under which a rule otherwise valid has been framed, does not render the rule void. 19 P. R. 1880 (Cr.). Where a conviction and sentence proceeds under the provisions of the Act it is not competent to a Magistrate to pass an order of reward to the complainant for detecting the offence. Cr. Rg. 48 of 1896.

Sec. 79.—Section renumbered and Cl. (2) added by Act I of 1918, S. 6.

REFUSAL TO SERVE AS MEMBER OF PANCH.—A person refusing to serve as member of a *panch* appointed for the purpose of drawing a *panchnama* with reference to certain wood alleged to have been illegally cut in the reserved forests, was held not to be liable to be convicted under S. 187, I.P.C., as he was not shown to be a person contemplated in the provisions of the first three paragraphs of S. 78 of Act VII of 1878, and as the purpose for which he was called upon to give his assistance was also not one of the purposes mentioned in clauses (a) and (d) of that section. 22 B. 769.

(b) to take steps as required by sub-section (1) to extinguish any forest fire in a reserved or protected forest ;

(c) to prevent, as required by sub-section (1), any fire in the vicinity of such forest from spreading to such forest, or

(d) to assist any Forest-officer or Police-officer demanding his aid in preventing the commission in such forest of any forest-offence, or when there is reason to believe that any such offence has been committed in such forest in discovering and arresting the offender ;

shall be punishable with imprisonment for a term which may extend to one month, or with fine which may extend to two hundred rupees, or with both.

Management of forests the joint property of Government and other persons. (Old Act s. 79.)

80. (1) If the Government and any person be jointly interested in any forest or waste-land, or in the whole or any part of the produce thereof, the Local Government may either—

(a) undertake the management of such forest, waste-land or produce, accounting to such person for his interests in the same ; or

(b) issue such regulations for the management of the forest, waste-land or produce by the person so jointly interested as it deems necessary for the management thereof and the interests of all parties therein.

(2) When the Local Government undertakes under clause (a) of sub-section (1) the management of any forest, waste-land or produce, it may, by notification in the local official Gazette, declare that any of the provisions contained in Chapters II and IV shall apply to such forest, waste-land or produce, and thereupon such provisions shall apply accordingly.

81. If any person be entitled to a share in the produce of any forest which is the property of Government or over which the Government has proprietary rights or to any part of the forest-produce of which the Government is entitled, upon the condition of duly performing any service connected with such forest, such share shall be liable to confiscation in the event of the fact being established to the satisfaction of the Local Government that such service is no longer so performed.

Failure to perform service for which a share in produce of Government forest is enjoyed. (Old Act s. 80.)

Provided that no such share shall be confiscated until the person entitled thereto, and the evidence, if any, which he may produce in proof of the due performance of such service, have been heard by an officer duly appointed in that behalf by the Local Government.

82. All money payable to the Government under this Act, or under any rule made under this Act, or on account of the price of any forest-produce or of expenses incurred in the execution of this Act in respect of such produce, may, if not paid when due, be recovered under the law for the time being in force as if it were an arrear of land-revenue.

Recovery of money due to Government. (Old Act s. 81.)

83. (1) When any such money is payable for or in respect of any forest-produce, the amount thereof shall be deemed to be a first charge on such produce, and such produce may be taken possession of by a Forest-officer until such amount has been paid.

Lien on forest produce for such money. (Old Act s. 82.)

(2) If such amount is not paid when due, the Forest-officer may sell such produce by public auction, and the proceeds of the sale shall be applied first in discharging such amount.

(3) The surplus, if any, if not claimed within two months from the date of the sale by the person entitled thereto, shall be forfeited to His Majesty.

Land required under this Act to be deemed to be needed for a public purpose under the Land Acquisition Act, 1894. (Old Act S. 83.)

85. When any person,

Recovery of penalties due under bond. (*Cf.* Act V of 1890, S. 14 and Act V of 1918, S. 7.)

in accordance with any provision of this Act, or in compliance with any rule made thereunder, binds himself by any bond or instrument to perform any duty or act, or covenants by any bond or instrument that he, or that he and his servants and agents will abstain from any act, the whole sum mentioned in such bond or instrument as the amount to be paid in case of a breach of the conditions thereof may, notwithstanding anything in section 74 of the Indian Contract Act, 1872, be recovered from him in case of such breach as if it were an arrear of land revenue.

Repeals.

86. The enactments mentioned in the Schedule are hereby repealed to the extent specified in the fourth column thereof.

THE SCHEDULE.

(See Section 86.)

ENACTMENTS REPEALED.

Year.	No.	Short title.	Extent of repeal.
1	2	3	4
1878	VII	The Indian Forest Act, 1878	.. So much as has not already been repealed.
1890	V	The Forest Act, 1890	.. Do.
1891	XII	The Amending Act, 1891	.. So much of Part I of Schedule IF as relates to the Indian Forest Act, 1878.
1901	V	The Indian Forest (Amendment) Act, 1901.	So much as has not already been repealed.
1911	XV	The Indian Forest (Amendment) Act, 1911.	Do.
1914	X	The Repealing and Amending Act, 1914.	So much of the Second Schedule as relates to the Indian Forest Act, 1878, the Forest Act, 1890, and the Indian Forest (Amendment) Act, 1901.
1918	I	The Indian Forest (Amendment) Act, 1918.	The whole.
1920	XXXVIII	The Devolution Act, 1920	.. So much of Schedule I, Part I, as relates to the Indian Forest Act 1878.

THE GENERAL CLAUSES ACT (X OF 1897).

PREFATORY NOTE: SCOPE AND NATURE OF THE ENACTMENT.—The first Act of the kind that was passed in England was an Act called Lord Brougham's Act, passed in 1851. That Act contained definitions of certain words which were continually used and defined in Acts of Parliament, and further contained one or two convenient rules of construction.

Lord Brougham's Act was adopted and somewhat extended by the Indian Act of 1868. The Acts in both countries were found to be convenient and work well, and in 1887, the second Indian General Clauses Act was passed, further extending the same principle. The Act was drafted by Sir Courteney Ilbert, afterwards Parliamentary Counsel. When he went home, he carried the principle rather further, and he drafted the English Interpretation Act, 1889, which carried on the same principle. In this General Clauses Act, the Government proposed, *1st* to consolidate the previous two Indian Acts on the subject and *2ndly* to adopt some of the provisions of the English Interpretation Act, 1889, as were applicable to Indian Legislation and other circumstances. Mr. Chalmers on whom devolved the drafting of the Indian Bill consulted Sir Courteney Ilbert about it, and improved it in the light of his criticisms and advice on the provisions of the bill. The English Act was very carefully considered by a strong committee of the lawyers of the House of Lords, and its provisions were very carefully sifted by the committee. As to the general policy of the Act, it is always convenient to have one *prima facie* meaning for every term which is in constant use; and in all Acts, wherever possible, the same words should have the same meaning. But, of course, the definitions are only *prima facie* definitions. The Act provides that in future Acts, these particular terms defined in this Act will have the meaning given to them, unless a special Act otherwise provides in any particular Act. It is always open to give a special definition to any word or phrase, if it is required for the purposes of that Act. Certain general principle of construction have also been adopted from the English Interpretation Act. The Act is not one for creating new legislation, but may be described as one intended to prevent accidental slips in drafting future bills or as Mr. Chalmers put it when introducing the bill "a Drafting Accidents Prevention Bill."

"The following extracts from the Statement of Objects and Reasons may also be noted:—

This Bill does not propose to effect any change in the Law. Its object like that of the Acts it consolidates is to shorten the language of statutory enactments and to provide for uniformity of expression in cases where there is identity of subject-matter.

The first enactment of the kind was Lord Brougham's Act (13 and 14 Viet., c. 21). The provisions of that statute were adopted to India and somewhat amplified by the General Clauses Act (I of 1868) and the General Clauses Act (I of 1887) was a further extension of the same principle. It is obviously expedient that the Legislative dictionary, as it may be called, should be contained in a single enactment and that the two Acts above referred to should be consolidated, and it seems desirable to take the opportunity of making any additions that later experience may have suggested and in particular to incorporate *sua* provisions of the Interpretation Act, 1889 (52 and 53 Viet., c. 64) as are applicable to India. That statute like the Indian Act of 1887 was drafted by Sir C. Ilbert and is in effect a careful revision and extension of the later. For example the definition of British India in the English Act of 1889 is merely an expansion of the definition given by the Indian Act of 1868. Its legal effect is the same, but it is more intelligible and it avoids a reference to another statute. The proposed measure will have this further advantage that it will secure uniformity of language and construction in Indian and in English legislation, in so far as both have to deal with the same subject-matter."

EFFECT OF SUBSEQUENT LEGISLATION.—S. 1 rep. in pt. and S. 3 am. Act X of 1914; Ss. 3, 20, 21, 24, am. S. 2 and sch. rep. Act I of 1903; Ss. 3, 24, am. S. 30 ins. Act XVII of 1914; Ss. 3 (a), 5 (a), 16 (a), 30, 44 (a), 55 (a), ins. Act X of 1914; Ss. 3, cl. 3 (a) (5), 5 (A), (6) 8 (a), (8) (b), (30), 44 (a), (46), 55 (a) (5), 30, am. Act XXIV of 1917, I Sch. S. 8 am., S. 13-A ins. S. 14, am. S. 3 (28) rep. S. 4 rep. in pt. Act XVIII of 1919; S. 31 ins. Act XXXI of 1920; S. 30-A, ins. by Act XI of 1923. Declared in force in the Sonthal Parganas Reg. III of 1872, S. 3 as amended by Reg. III of 1899, S. 3: in the Chittagong Hill Tracts Reg. I of 1900, S. 4 in Upper Burma (except the Shan States Act XIII of 1898, S. 4); in British Baluchistan Reg. II of 1913, S. 3; in the Angul District Reg. III of 1913, S. 3; in the Arakan Hill District Reg. I of 1916, S. 2.

THE GENERAL CLAUSES ACT (X OF 1897).

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THE GENERAL CLAUSES ACT (X OF 1897).

[11th March 1897.]

An Act to consolidate and extend the General Clauses Acts, 1868 and 1887.

WHEREAS it is expedient to consolidate and extend the General Clauses Acts, 1868 and 1887; it is hereby enacted as follows :—

Preliminary.

Short title and commencement.

1. (1) This Act may be called THE GENERAL CLAUSES ACT, 1897; [2]1

(2) [* * * * *]1

2. [Repeal] *Rep. by the Repealing and Amending Act (I of 1903).*

General Definitions.

3. In this Act, and in all Acts of the Governor-General in Council and Regulations made after the commencement of this Act, unless there is anything repugnant in the subject or context—

(1) “abet” with its grammatical variations and cognate expressions shall have the same meaning as in the Indian Penal Code :

(2) “act” used with reference to an offence or a civil wrong shall include a series of acts, and words which refer to acts done extend also to illegal omissions :

(3) “affidavit” shall include affirmation and declaration in the case of persons by law allowed to affirm or declare instead of swearing :

(3-a) “Assam Act” shall mean an Act made by the Chief Commissioner of Assam in Council under the Indian Councils Act, 1861 to 1909 [or the Government of India Act, 1915],² [or by the local Legislature or the Governor of Assam under the Government of India Act]³ :

Sec. 1.—¹ Rep. by Act X of 1914, Sch. II.

Secs. 1 and 3.—APPLICABILITY TO BOMBAY ABKARI ACT.—The General Clauses Act has no application to the Bombay Abkari Act, passed by the Governor of Bombay in Council. 1 Bom. L. R. 164 (16 B. 669, F.).

This Act applies only to Acts passed by the Governor General in Council and not to Acts passed by the Local Legislatures. 1 Bom. L. R. 614. As to its applicability to Oudh Rent Act, see 16 O. C. 341.

Sec. 3.—In clauses (3-a), (5), (5-a), (6), (8-a), (8-b), (30), (44-a), (46), (55-a), of Sec. 3, the

last clause has been added by Act XVIII of 1928.

Sec. 3 (2).—*Cf.* The Indian Penal Code (Act XLV of 1860), and the Madras General Clauses Act, 1891 (Madras Act III of 1891).

Cl. (3).—*Cf.* The definitions of “Oath” and “Swear” in sub-ss. (36) and (55), respectively, *infra*. As to affidavits in civil proceedings, see Code of Civil Procedure (Act V of 1901), 1st Sch., Order XIX; as to Criminal Proceedings, see Code of Criminal Procedure (Act V of 1898).

Cl. (3-a).—² Ins. by Act X of 1914; (1) Added by Act XXIV of 1917.

³ Added by Act XVIII of 1928.

(4) "barrister" shall mean a barrister of England or Ireland, or a member of the Faculty of Advocates in Scotland :

"Barrister."

(5) "Bengal Act" shall mean in the case of Acts passed prior to the 1st April,

"Bengal Act."

1912, an Act made by the Lieutenant-Governor of Bengal in Council under the Indian Councils Act, 1861, or the Indian Councils Acts, 1861 and 1892, or the Indian Councils Acts, 1861 to 1909, and in the case of Acts passed after that date, an Act made by the Governor of the Presidency of Fort William in Bengal in Council under the Indian Councils Acts, 1861 to 1909 [or the Government of India Act, 1915],¹ [or by the local Legislature or the Governor of the Presidency of Bengal under the Government of India Act] :

(5-a) "Bihar and Orissa Act" shall mean an Act made by the Lieutenant-Governor of Bihar and Orissa in Council under the Indian Councils Act, 1861 to 1909 [or the Government of India Act, 1915],¹ [or by the local Legislature or the Governor of Bihar and Orissa under the Government of India Act] :

(6) "Bombay Act" shall mean an Act made by the Governor of Bombay in Council under [the Indian Councils Act, 1861],² or the Indian Councils Acts, 1861 and 1892 [or the Indian Councils Acts, 1861 to 1909],³ [or the Government of India Act, 1915],¹ [or by the local Legislature or the Governor of the Presidency of Bombay under the Government of India Act] :

"Bombay Act."

(7) "British India" shall mean all territories and places within Her Majesty's dominions which are for the time being governed by Her Majesty through the Governor-General of India or through any Governor or other officer subordinate to the Governor-General of India :

"British India."

(8) "British possession" shall mean any part of Her Majesty's dominions, exclusive of the United Kingdom, and, where parts of those dominions are under both a central and a local Legislature, such under the central Legislature shall, for the purposes of this definition, be deemed to be one British possession :

"British possession."

[(8-a) "Burma Act" shall mean an Act made by the Lieutenant-Governor of Burma in Council under the Indian Councils Acts, 1861 and 1892] [or the Indian Councils Acts, 1861 to 1909],³ [or the Government of India Act, 1915],¹ [or by the local Legislature or the Governor of Burma under the Government of India Act] :

[(8-b) "Central Provinces Act" shall mean an Act made by the Chief Commissioner of Central Provinces in Council under the Indian Councils Acts, 1861 to 1909], [or the Government of India Act, 1915],¹ [or by the local Legislature or the Governor of the Central Provinces under the Government of India Act] :

"Chapter."

(9) "Chapter" shall mean a Chapter of the Act or Regulation in which the word occurs :

(10) "Collector" shall mean, in a Presidency town, the Collector of Calcutta, Madras or Bombay as the case may be, and elsewhere the chief officer in charge of the revenue-administration

"Collector."

of a district :

Sec. 3, Cl. (5).—Substituted by Act X of 1914.

¹ Added by Act XXIV of 1917.

Cl. (5-a).—Inserted by Act X of 1914.

Cl. (8).—² Inserted by Act I of 1903.

³ Inserted by Act X of 1914.

Cl. (8-a).—Words in first inserted by Act I of 1903, S. 3; Second inserted by Act X of 1914; third added by Act XXIV of 1917.

Cl. (8-b).—Inserted by Act XVII of 1914.

Cl. (4).—*Cf.* The Indian High Courts Act, 1861 (24 and 25 Vict., c. 104), S. 19, Col. Stats. Ind. Vol. I.

Cl. (6).—The Acts of the recently constituted Council for Eastern Bengal and Assam, may by

analogy be referred to as Eastern Bengal and Assam Acts.

Cl. (7).—*Cf.* The Interpretation Act, 1889 (52 and 53 Vict., c. 63), S. 18 (4), Col. of Stats. Ind. Vol. II. For definition of "India," see *infra* sub-sec. (27). See 6 P. R. 1878 (Cr.).

Cl. (8).—*Cf.* The Interpretation Act, 1889 (52 and 53 Vict., c. 63), S. 18 (2), Col. of Stats. Ind. Vol.

Cl. (10).—*Cf.* The Bombay General Clauses Act (Tom. Act I of 1904), S. 3 (12) and the U. P. General Clauses Act (U. P. Act I of 1887), S. 2 (12).

(11) "Colony" shall mean any part of Her Majesty's dominions exclusive of the British Islands and of British India, and, where parts of those dominions are under both a central and a local Legislature, all parts under the central Legislature shall for the purposes of this definition be deemed, to be one colony :

"Colony."
 (12) "commencement," used with reference to an Act or Regulation shall mean the day on which the Act or Regulation comes into force :

"Commencement."
 (13) "Commissioner" shall mean the chief officer in charge of the revenue-administration of a division :

(14) "consular officer" shall include consul-general, consul, vice-consul, consular agent, pro-consul and any person for the time being authorized to perform the duties of consul-general, consul, vice-consul or consular agent :

"Consular officer."
 (15) "District Judge" shall mean the Judge of a principal Civil Court of original jurisdiction, but shall not include a High Court in the exercise of its ordinary or extraordinary original civil jurisdiction :

"District Judge."
 (16) "document" shall include any matter written, expressed or described upon any substance by means of letters, figures or marks or by more than one of those means, which is intended to be used, or which may be used, for the purpose of recording that matter :

[(16-a) "Eastern Bengal and Assam Act" shall mean an Act made by the Lieutenant-Governor of Eastern Bengal and Assam in Council under the Indian Councils Acts, 1861 and 1892, or the Indian Councils Acts, 1861 to 1909:]

(17) "enactment" shall include a Regulation (as hereinafter defined) and any Regulation of the Bengal, Madras or Bombay Code and shall also include any provision contained in any Act or in any such Regulation as aforesaid :

"Enactment."
 (18) "father," in the case of any one whose personal law permits adoption, shall include an adoptive father :

"Father."
 (19) "financial year" shall mean the year commencing on the first day of April :

"Financial year."
 (20) a thing shall be deemed to be done in "good faith" where it is in fact done honestly, whether it is done negligently or not :

"Good faith."
 (21) "Government" or "the Government" shall include the Local Government as well as the Government of India :

Sec. 3, Cl. (11).—*Cf.* The Interpretation Act, 1889 (52 and 53 Vic., c. 63), S. 18 (3), Col. Stats. Ind. Vol. II.

Cl. (12).—For rules determining when any given Act is to come into force, *see* Sec. 5 *infra*.

Cl. (13).—*Cf.* U. P. General Clauses Act (U. P. Act I of 1887), U. P. Code, Vol. II.

Cl. (14).—*Cf.* The Consular Salaries and Fees Act, 1891 (54 and 55 Vic., c. 36), S. 3.

Cl. (15).—As to definition of High Court, *see* sub-sec. (24) *infra*.

In Lower Burma the District Court is the Court of the District Judge as defined by this clause, *see* Lower Burma Courts Act VI of 1900, S. 25 (c), Bur. Code.

As to status of High Court on original side, *see* 27 M. L. J. 645.

Cl. (16).—*Cf.* Indian Evidence Act I of 1872.

As to definition of "written", *see* sub-sec. (58).

Cl. (16-a).—Inserted by Act X of 1914.

Cl. (19).—*Cf.* The Interpretation Act, 1889 (52 and 53 Vic., c. 63), S. 22, Col. Stats. Ind. Vol. II.

Cl. (20).—*Cf.* The Bill of Exchange Act, 1882 (42 & 43 Vic., c. 61), S. 90; and the Sales of Goods Act, 1893 (56 and 57 Vic., c. 71), S. 62. *Cf. also* S. 52 of the Indian Penal Code (XIV of 1860).

As to discussion in Council regarding definition of "good faith", *see* *Gazette of India*, 1897, Pt. VI, pp. 56 to 62 and 76 to 79.

See 13 I. C. 260 = 5 S. L. R. 181; 12 I. C. 809 = 4 Bur. L. T. 128.

Cl. (21).—As to definition of Local Government, *see* sub-sec. (29) *infra*; *see* 6 P.W.R. 1913 (Cr.).

(22) "Government of India" shall mean the Governor-General in Council or, during the absence of the Governor-General from his Council, the President in Council, or the Governor-General alone as regards the powers which may be lawfully exercised by them or him respectively :

(23) [* * * * *]

(24) "High Court," used with reference to civil proceedings, shall mean the highest Civil Court of Appeal in the part of British India in which the Act or Regulation containing the expression operates :

(25) "immoveable property" shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth ;

"Imprisonment." (26) "imprisonment" shall mean imprisonment of either description as defined in the Indian Penal Code ;

(27) "India" shall mean British India, together with any territories of any Native Prince or Chief under the suzerainty of Her Majesty exercised through the Governor-General of India or through any Governor or other officers subordinate to the Governor-General of India :

(28) "local authority" shall mean a municipal committee, district board, body of port commissioners or other authority legally entitled to, or entrusted by the Government with the control or management of a municipal or local fund :

(29) "Local Government" shall mean the person authorized by law to administer executive Government in the part of British India in which the Act or Regulation containing the expression operates, and shall include a Chief Commissioner :

(30) "Madras Act" shall mean an Act made by the Governor of Fort St. George in Council under [the Indian Councils Act, 1861, or the Indian Councils Acts, 1861 and 1892], [or the Indian Councils Acts, 1861 to 1909], [or the Government of India Act, 1915], [or by the local

Sec. 3, Cl. (23).—Repealed by Act XVIII of 1919.

Cl. (24).—*Cf.* S. 2 (1) (d) of the Bombay Record of Rights Act (IV of 1903) as to Sadar Court in Sindh—Bom. Code, Vol. IV.

Cl. (25).—As to growing crops and timber so far as they are affected by the Indian Registration Act (XVI of 1908), *see* Sec. 2 (6) of that Act. Doors, whether immoveable property. 16 M. L. T. 429 = 25 I. C. 837.

The expression "benefits to arise out of land" in the Act was never intended to cover such a matter as the security held by a mortgagee under a simple mortgage bond, by such 'benefits' as the right to a ferry. L. R. 5 All. 674. A Kolhu (*i.e.*, an iron sugarcane press) fastened to the ground is immoveable property. 23 I. C. 250. The term 'immoveable property' in the General Clauses Act may include a right of way. But is not always necessarily included. It is not excluded by T. P. Act, S. 3. 34 I. C. 450 = 20 C. W. N. 1158. Malikana, if immoveable property, *see* 21 I. C. 779 = 19 C. W. N. 410. Standing crops are immoveable property. 23 M. L. J. 620 = 17 I. C. 185 ; 25 M. L. J. 447 = 21 I. C. 213; also standing trees. 25 A. L. J. 199. A right to fishery is an interest in immoveable property. 43 I. C. 962 = 14 N. L. R. 35 (24 C. 449 ; 19 C. 544, F.). A simple mortgage debt is to be attached as a debt and not as immoveable property. 50 I. C. 157 = 21 O. C. 400. As to

money charged on immoveable property, *see* 83 I. C. 555. A pugmill affixed to the earth is immoveable property. 43 I. C. 625 = 11 Bur. L. T. 199

Cl. (26).—*See* 9 All. 240 = 7 A. W. N. 540.

Cl. (27).—*Cf.* The Interpretation Act, 1889 (52 & 53 Vic., c. 63), S. 18 (5) ; *see* 7 C. W. N. 635.

The definition of 'land' must be applied to the word 'land' as used in the C. P. C. and therefore 'land' in C. P. C. includes trees. 10 I. C. 473 = 7 N. L. R. 63.

Cl. (28).—*Cf.* The Local Authorities Loans Act (XI of 1879).

Cl. (29).—There are at present 13 Local Governments in British India, *viz.*, the Governors of Madras and Bombay in Council, the Lieutenant-Governors of Bengal, the United Provinces of Agra and Oudh, the Punjab, Burma and Eastern Bengal, Assam, and of the Central Provinces. The Chief Commissioners of Ajmer-Merwara, Coorg, British Baluchistan and of the North-West Frontier Province and the Chief Commissioner of the Andaman and Nicobar Islands. The Commissioner in Sindh exercises by delegation certain powers of a Local Government, *See* Act V of 1868, Commissioner in Sindh.

Cl. (30)—1st bracket words inserted by Act I of 1903, S. 3 ; 2nd inserted by Act X of 1914 ; 3rd by Act XXIV of 1917.

Legislature or the Governor of the Presidency of Madras under the Government of India Act] :

(31) "Magistrate" shall include every person exercising all or any of the powers of a Magistrate under the Code of Criminal Procedure for the time being in force :

"Magistrate."

(32) "master," used with reference to a ship, shall mean any person (except a pilot or harbour-master) having for the time being control or charge of the ship :

"Master" (of a ship).

"Month."

(33) "month" shall mean a month reckoned according to the British calendar :

"Moveable property."

(34) "moveable property" shall mean property of every description, except immoveable property :

(35) "North-Western Provinces and Oudh Act" shall mean an Act made by the Lieutenant-Governor of the North-Western Provinces and Oudh in Council under [the Indian Councils Act, 1861, or]¹ the Indian Councils Acts, 1861 and 1892 :

"North-Western Provinces and Oudh Act."

"Oath."

(36) "oath" shall include affirmation and declaration in the case of persons by law allowed to affirm or declare instead of swearing :

"Offence."

(37) "offence" shall mean any act or omission made punishable by any law for the time being in force :

"Part."

(38) "part" shall mean a part of the Act or Regulation in which the word occurs :

"Person."

(39) "person" shall include any company or association or body of individuals, whether incorporated or not :

"Political Agent."

(40) "Political Agent" shall include—

(a) the principal officer representing the Government in any territory or place beyond the limits of British India, and

(b) any officer of the Government of India or of any Local Government appointed by the Government of India or the Local Government to exercise all or any of the powers of a Political Agent for any place not forming part of British India under the law for the time being in force relating to foreign jurisdiction and extradition.

(41) "Presidency-town" shall mean the local limits for the time being of the ordinary original civil jurisdiction of the High Court of Judicature at Fort William, Madras or Bombay, as the case may be :

"Presidency-town."

"Privy Council."

(42) "Privy Council" shall mean the Lords and others for the time being of Her Majesty's Most Honourable Privy Council :

Sec. 3, Cl. (31).—The Code now in force is Act V of 1898. Village Munsif is magistrate, *see* 2 M. 5 ; 2 Weir 123 = 27 M. 223 ; 2 Weir 208 = 14 M. L. J. 74 ; 2 Weir 577.

Cl. (32).—*See* S. 742 of the Merchant Shipping Act, 1894 (57 & 58 Vic., c. 60), Col. Stats. Ind. Vol. II.

Cl. (33).—*See* 13 C. W. N. 425.

Cl. (34).—For a comprehensive definition of the word 'property', *see* S. 168 of the Bankruptcy Act, 1883 (46 and 47 Vic., c. 52). Immoveable property includes a debt. 4 L. W. 613 = 36 I. C. 833 = 18 Cr. L. J. 1.

Cl. (35).—¹ Words within brackets were inserted by Act I of 1903, S. 3.

Read now "United Provinces of Agra and Oudh" and "Lieutenant-Governor of the United Provinces of Agra and Oudh in Council," respectively, *see* S. 2 of the U. P. (Designation) Act (V of 1903).

Cl. (37).—*See* a similar definition in S. 4 (a) of the Code of Criminal Procedure (V of 1898). Offence committed under Stamp Act, 1862 (since repealed) while it was in force, is still an offence and may be tried under the Act. 7 M. H. C. App. 8 = 1 Weir 781.

Cl. (39).—The word 'person' clearly includes a firm and when the return is made on behalf of the firm by a partner, it is the firm that is the person who makes the return. 48 M. 702 = 1925 Mad. 1048 = 49 M. L. J. 124. A company is a 'person' and can sue through its liquidator *in forma pauperis*. 41 Mad. 624 = 34 M. L. J. 421 = 45 I. C. 164.

Cl. (41).—*See* S. 4 (b) of the repealed Crim. Pro. Code (X of 1882) and *Cf.* S. 3 (25) of the Mad. General Clauses Act (Mad. Act I of 1891).

Cl. (42).—*Cf.* S. 12 (5) of the Interpretation Act, 1889 (52 and 53 Vic., c. 63).

- "Province." (43) "Province" shall mean the territories for the time being administered by any Local Government :
- "Public nuisance." (44) "public nuisance" shall mean a public nuisance as defined in the Indian Penal Code :
- (44-a) "Punjab Act" shall mean an Act made by the Lieutenant-Governor of the Punjab in Council under the Indian Councils Acts, 1861 and 1892 [or the Indian Councils Acts, 1861 to 1909], [or the Government of India Act, 1915], [or by the local Legislature or the Governor of the Punjab under the Government of India Act] :
- "Registered." (45) "registered," used with reference to a document, shall mean registered in British India under the law for the time being in force for the registration of documents :
- (46) "Regulation" shall mean a Regulation made under the Government of India Act, 1870 [or the Government of India Act, 1915],¹ [or the Government of India Act].
- "Regulation." (47) "rule" shall mean a rule made in [exercise of a power conferred by any enactment, and shall include a regulation made as a rule under any enactment :
- "Rule." (48) "schedule" shall mean a schedule to the Act or regulation in which the word occurs :
- "Schedule." (49) "scheduled district" shall mean a "Scheduled District" as defined in the Scheduled Districts Act, 1874 :
- "Scheduled district." (50) "section" shall mean a section of the Act or Regulation in which the word occurs :
- "Section." (51) "ship" shall include every description of vessel in navigation not exclusively propelled by oars ;
- "Ship." (52) "sign" with its grammatical variations and cognate expressions, shall, with reference to a person who is unable to write his name, include "mark" with its grammatical variations and cognate expressions :
- "Sign." (53) "son", in the case of any one whose personal law permits adoption, shall include an adopted son :
- "Son." (54) "sub-section" shall mean a sub-section of the section in which the word occurs :
- "Sub-section." (55) "swear," with its grammatical variations and cognate expressions, shall include affirming and declaring in the case of persons by law allowed to affirm or declare instead of swearing :
- "Swear." (55-a) "United Provinces Act" shall mean an Act made by the Lieutenant-Governor of the North-Western Provinces and Oudh (or of the United Provinces of Agra and Oudh) in Council under the Indian Councils Act, 1861, or the Indian Councils Acts, 1861 and 1892 [or the Indian Councils Acts, 1861 to 1909],² [or the Government of India Act, 1915],² [or by the Local Legislature or the Governor of the United Provinces under the Government of India Act]:
- "United Provinces Act."

Sec. 3, Cl. (43).—*Cf.* S. 4 (g) of the repealed Crim. Pro. Code (X of 1882).

Cl. (44-a).—Inserted by Act I of 1903, S. 3—First bracket inserted by Act X of 1914 and second added by Act XXIV of 1917.

Cl. (45).—*Cf.* S. 3 (11) of the Mad. General Clauses Act (Mad. Act I of 1891). As to law now in force, see the Indian Registration Act (XVI of 1908).

Cl. (46).—¹ Added by Act XXIV of 1917.

Cl. (47).—The provisions of Ss. 20 to 24, *infra* apply to rules defined in this sub-section.

Cl. (51).—*Cf.* S. 742 of the Merchant Shipping Act, 1894 (57 and 58 Vic., c. 60).

Cl. (52).—See also definition of "in sub-S. 58, *infra*. See 32 C. 550=2 Cr. L. J. 405.

Cl. (53).—See 34 P. R. 1883.

Cl. (55).—See also definition of "affidavit" and "Oath" *supra*, sub-Secs. (3) and (36), respectively, and as to oaths, see the Indian Oaths Act (X of 1873).

Cl. (55-a).—Inserted by Act I of 1903, S. 3.

² First bracket inserted by Act X of 1914 ; Second added by Act XXIV of 1917.

- "Vessel." (56) "vessel" shall include any ship or boat or any other description of vessel used in navigation ;
- "Will." (57) "will" shall include a codicil and every writing making a voluntary posthumous disposition of property ;
- (58) expressions referring to "writing" shall be construed as including reference to printing, lithography, photography and other mode of representing or reproducing words in a visible form ; and
- "Writing"
- "Year." (59) "year" shall mean a year reckoned according to the British calendar.

4. (1) The definitions in S. 3 of the following words and expressions, that is to say, "affidavit," "barrister," "British India," "District Judge," "father," "Government of India," [* * *], "High Court," "immoveable property," "imprisonment," "local government," "magistrate," "month," "moveable property," "oath," "person," "section," "son," "swear," "will," and "year," apply also, unless there is anything repugnant in the subject or context to all Acts of the Governor-General in Council made after the third day of January, 1868, and to all Regulations made on or after the fourteenth day of January, 1887.

(2) The definitions in the said section of the following words and expressions, that is to say, "abet," "Chapter," "commencement," "financial year," "local authority," "master," "offence," "part," "public nuisance," "registered," "schedule," "ship," "sign," "sub-section," and "writing," apply also, unless there is anything repugnant in the subject or context, to all Acts of the Governor-General in Council and Regulations made on or after the fourteenth day of January, 1887.

General Rules of Construction.

5. (1) Where any Act of the Governor-General in Council is not expressed to come into operation on a particular day, then it shall come into operation on the day on which it receives the assent of the Governor-General.

(2) [Where any Act of the Governor-General in Council is reserved, under S. 68 of the Government of India Act, 1915, for the signification of His Majesty's pleasure thereon, then, if no later date is expressed, it shall come into operation, if assented to by His Majesty, on the day on which that assent is duly notified.]

(3) Unless the contrary is expressed, an Act of the Governor-General in Council or Regulation shall be construed as coming into operation immediately on the expiration of the day preceding its commencement.

Sec. 3, Cl. (56).—*Cf.* S. 742 of the Merchant Shipping Act, 1894 (57 & 58 Vic., c. 60). This definition supplements the definition of ship in sub-S. (51), *supra*. See also definition of vessel in S. 48 of the Indian Penal Code, 1860 (Act XLV of 1860), and in S. 3 (4) of the Northern India Canal and Drainage Act (VIII of 1873) and in S. 3 (7) of the Sea Customs Act (VIII of 1878).

Cl. (57).—See the definition of will in S. 3 of the Indian Succession Act (X of 1865).

Mere authority to adopt, though revocable and taking effect on the death of a person, cannot be considered a will though the document is styled a will. There must be a disposition of property in addition to the authority to adopt if it is to be treated as a will. 25 M. L. T. 204 = 9 L. W. 385 = 49 I. C. 929. A mere direction for management of the property by a manager during minority is not a disposition by a will. (*Ibid.*)

Cl. (58).—*Cf.* S. 20 of the Interpretation Act,

1889 (52 and 53 Vic., c. 63).

Cl. (59).—As to "financial year," see sub-S. 19 *supra*.

Where the probabilities are not, and the evidence does not show, that the parties usually went by the Gregorian Calendar, provisions of S. 3 (59) do not apply. 1922 Nag. 265.

Sec. 4.—¹Rep. by Act XVIII of 1919.

Sec. 5 (2).—Substituted by Act XXIV of 1917.

Cl. (3).—*Cf.* S. 36 (2) of the Interpretation Act, 1889 (52 and 53 Vic., c. 63)

As to power to make rules between the passing and commencement of an Act which does not come into force at once, see S. 22, *infra*. Section applies only to offences and sentences passed under Acts which came into force after General Clauses Act came into force. L. B. R. (1872-1892) 473; not to Acts and Regulations passed prior to passing of the Act. Rat. 57. See also 9 N. L. R. 49.

6. Where this Act, or any Act of the Governor-General in Council or Regulation made after the commencement of this Act, repeals any

Effect of repeal.
enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not—

(a) revive anything not in force or existing at the time at which the repeal takes effect ; or

(b) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder ; or

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed ; or

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed ; or

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid ; and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the Repealing Act or Regulation had not been passed.

7. (1) In any Act of the Governor-General in Council or Regulation made after

Revival of repealed enactments.

the commencement of this Act, it shall be necessary, for the purpose of reviving either wholly or partially, any enactment wholly or partially repealed, expressly to state

that purpose.

(2) This section applies also to all Acts of the Governor-General in Council made after the third day of January, 1868, and to all Regulations made on or after the fourteenth day of January, 1887.

8. (1) Where this Act, or any Act of the Governor-General in Council or Regu-

Construction of references to repealed enactments.

lation made after the commencement of this Act, repeals and re-enacts, with or without modification any provision of a former enactment, then references in any other enact-

Sec. 6.—*Cf.* S. 38 of the Interpretation Act, 1889 (52 and 53 Vic., c. 63).

This section applies only to cases where the change in the law is the result of the repeal of an enactment and does not extend where it is due to an addition to it. 13 I. C. 264 = 5 S. L. R. 184 (22 C. 767, Foll.). It is doubtful if an application for setting aside an *ex parte* decree comes under a right of privilege under S. 6. 37 I. C. 292 = 101 P. R. 1916. In the event of its being deemed to be a right its acquisition must be under the C. P. C. and not under the Limitation Act. (*Ibid.*) A vested right under the Old Code which had been repealed by the New Code is saved by S. 6 if the right had already vested before the coming into force of the New Code. 9 I. C. 337 = 14 O. C. 10 ; 8 Pat. L. T. 397. *See also* 20 C. W. N. 952 = 34 I. C. 27 = 1 Pat. L. J. 214 ; 97 I. C. 608 = A. I. R. 1926 Pat. 561.

Cl. (b).—An acknowledgment of liability only extends the period of limitation and does not confer title and is not a thing done within S. 6 (b) of the Act. 35 All. 227 = 40 I. A. 74 = 25 M. L. J. 131 = 17 C. W. N. 605 (P. C.). (Affirming 32 All. 38 = 6 A. L. J. 931).

Cl. (c).—Where an execution sale was held under the old C.P.C., 1882, the auction purchaser had a contingent right to sue for recovery of the purchased money in case the judgment-debtor had no saleable interest. 45 I. C. 109 = 40 Mad. 1009. The right is not affected by the new provision of O. 21, R. 93 which negatives a right of suit in such a case. (*Ibid.*)

Cl. (d).—Offence may be tried under repealed enactment if committed while the old Act was in force. 7 M.H.C. App. 89 = 1 Weir 781.

Cl. (e).—Trial of criminal cases to be in accordance with rules in force at time of commencement, 6 M. 836; what is a legal proceeding. 16 C. 267 ; includes both judicial and ministerial. 15 C. 357. Sanction obtained before amendment of S. 195, Criminal Procedure Code in 1923—Amending Act abolishing provision as to sanction and revocation, effect of. *See* 91 I. C. 395 = A. I. R. 1925 Mad. 911.

Sec. 7.—*Cf.* S. 11 of the Interpretation Act, 1889 (52 and 53 Vic., c. 63).

REPEAL OF A REPEALING ENACTMENT, EFFECT OF.—The mere repeal of a Repealing Act or the repealing portion of a Repealing Act does not, by itself, revive the original Act or the repealed portion thereof. 1 Weir 781 = 7 M.H.C. App. 8. *See also* 6 M. 336.

REPEAL OF STATUTE REPEALING ANOTHER STATUTE—EFFECT.—The repeal of a statute repealing a certain enactment does not revive the repealed enactment. The law on this point as embodied in S. 7 of Act X of 1897, is the same as in England. 25 C. 333 = 2 C. W. N. 11 (12 M. 94 = 14 B. 381, K. and Appr.).

Sec. 8.—Renumbered as S. 8 (1) and Clause (2) added by Act XVIII of 1919.

Cf. S. 38 (1) of the Interpretation Act, 1889 (52 and 53 Vic., c. 63). *See* a similar provision in S. 3 of the Code of Criminal Procedure (V of 1898).

ment or in any instrument to the provision so repealed shall, unless a different intention appears, be construed as references to the provision so re-enacted.

[(2) Where any act of Parliament repeals and re-enacts, with or without modification, any provision of a former enactment, then references in any Act of the Governor-General in Council or in any Regulation or instrument to the provision so repealed shall, unless a different intention appears, be construed as references to the provision so re-enacted.]

9. (1) In any Act of the Governor-General in Council or Regulation made after the commencement of this Act, it shall be sufficient, for the purpose of excluding the first in a series of days or any other period of time, to use the word "from" and, for the purpose of including the last in a series of days or any other period of time, to use the word "to."

(2) This section applies also to all Acts of the Governor-General in Council made after the third day of January, 1868, and to all Regulations made on or after the fourteenth day of January, 1887.

10. (1) Where, by any Act of the Governor-General in Council or Regulation made after the commencement of this Act, any act or proceeding is directed or allowed to be done or taken in any Court or office on a certain day or within a prescribed period, then, if the Court or office is closed on that day or the last day of the prescribed period, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards on which the Court or office is open :

Provided that nothing in this section shall apply to any act or proceeding to which the Indian Limitation Act, 1877, applies.

(2) This section applies also to all Acts of the Governor-General in Council and Regulations made on or after the fourteenth day of January, 1887.

11. In the measurement of any distance, for the purposes of any Act of the Governor-General in Council or Regulation made after the commencement of this Act, distance shall, unless a different intention appears, be measured in a straight line on a horizontal plane.

12. Where by any enactment now in force or hereafter to be in force, any duty of customs or excise, or in the nature thereof, is leviable on any given quantity, by weight, measure or value of any goods or merchandise, then a like duty is leviable according to the same rate on any greater or less quantity.

13. In all Acts of the Governor-General in Council and Regulations, unless there is anything repugnant in the subject or context—

(1) words importing the masculine gender shall be taken to include females ; and

(2) words in the singular shall include the plural, and *vice versa*.

Sec. 10.—*See* Madras General Clauses Act (Mad. Act I of 1891), S. 11. *See* 2 Weir 200 ; 22 C. 176. This section of the General Clauses Act is applicable to those cases where period of limitation has been given in the section and to the condition put in the decree. 41 All. 47 = 48 I. C. 353. This section does not apply to the period of grace allowed by S. 31 (1) of the Limitation Act. 36 Bom. 268 = 12 I. C. 811. When a certain day is fixed for complying with an order of the Court the party is entitled to have reasonable opportunity of presenting his case or substantiating it in the proper course. 35 I. C. 650.

Sec. 11.—*Cf.* S. 34 of the Interpretation Act, 1889 (52 and 53 Vic., c. 63).

Sec. 12.—As to definition of "enactment," *see* S. 3, sub-sec. (17), *supra*.

Sec. 13.—WORDS IN SINGULAR NUMBER.—The General Clauses Act provides that words in the singular shall include the plural and *vice versa* ; this provision applies only where there is nothing repugnant in the subject or context. 33 C. 292 = 10 C. W. N. 32 = 3 Cr. L. J. 126. The word "person" in Cr. P. C., Ss. 234 and 239 does not include "person". 22 Cr. L. J. 657 = 63 I. C. 449 = 19 A. L. J. 798.

[13-A. In all Acts of the Governor-General in Council and Regulations, references to the Sovereign or to the Crown shall, unless a different intention appears, be construed as references to the Sovereign for the time being.]

Powers and Functionaries.

14. (1) Where, by any Act of the Governor-General in Council or Regulation made after the commencement of this Act any power is conferred [* * * *] then [unless a different intention appears]² that power may be exercised from time to time as occasion requires.

Powers conferred on the Government to be exercisable from time to time.

(2) This section applies also to all Acts of the Governor-General in Council and Regulations made on or after the fourteenth day of January, 1887.

15. Where, by any Act of the Governor-General in Council or Regulation, a power to appoint any person to fill any office or execute

To face p. 1111.

In section 16 after the word "having" the words "for the time being" shall be inserted, and for the words "by it" the words "whether by itself or any other authority" shall be substituted. (Act XVIII of 1928.)

power to suspend or dismiss. to make the appointment shall also have power to suspend or dismiss any person appointed by it in exercise of that power.

17. (1) In any Act of the Governor-General in Council or Regulation made after the commencement of this Act, it shall be sufficient, for the purpose of indicating the application of a law to every person or number of persons for the time being executing the functions of an office, to mention the official title of the officer at present executing the functions, or that of the officer by whom the functions are commonly executed.

Substitution of functionaries.

(2) This section applies also to all Acts of the Governor-General in Council made after the third day of January, 1868, and to all Regulations made on or after the fourteenth day of January, 1887.

18. (1) In any Act of the Governor-General in Council or Regulation made after the commencement of this Act, it shall be sufficient, for the purpose of indicating the relation of a law to the successors of any functionaries or of corporations having perpetual succession, to express its relation to the functionaries or corporations.

Successors.

(2) This section applies also to all Acts of the Governor-General in Council made after the third day of January, 1868, and to all Regulations made on or after the fourteenth day of January, 1887.

19. (1) In any Act of the Governor-General in Council or Regulation made after the commencement of this Act, it shall be sufficient, for the purpose of expressing that a law relative to the chief or superior of an office shall apply to the deputies or subordinates lawfully performing the duties of that office in the place of their superior, to prescribe the duty of the superior.

Official chiefs and subordinates.

(2) This section applies also to all Acts of the Governor-General in Council made after the third day of January, 1868, and to all Regulations made on or after the fourteenth day of January, 1887.

Sec. 13-A.—This section was inserted by Act XVIII of 1919.

Sec. 14.—¹ Omitted by *ibid.*

² Inserted by *ibid.*

Sec. 15.—See similar provision in S. 39 of the Code of Criminal Procedure (V of 1893).

Sec. 16.—See as to this provision the State-

ment of Objects and Reasons.

Sec. 17 (1).—It is competent to an Acting Magistrate to grant sanction for the prosecution of an offence wherever the permanent Magistrate could have done so. 42 Mad. 69 = 35 M. L. J. 736 = 49 I.C. 161.

Provisions as to Orders, Rules, etc., made under Enactments.

20. Where, by any Act of the Governor-General in Council or Regulation, a power to issue any order, [notification],¹ scheme, rule, form or by-law is conferred, then expressions used in the order, [notification],¹ scheme, rule, form or by-law if it is

Construction of orders, etc., issued under enactments.

made after the commencement of this Act, shall, unless there is anything repugnant in the subject or context, have the same respective meanings as in the Act or Regulation conferring the power.

21. Where, by any Act of the Governor-General in Council or Regulation, a power to [issue notifications],² orders, rules or by-laws is conferred, then that power includes a power, exercisable in the like manner and subject to the like sanction and conditions (if any) ; to add, to amend, vary or rescind any [notifications],³ orders, rules or by-laws so [issued].²

Power to make to include power to add, to amend, vary or rescind, orders, rules or by-laws.

22. Where, by any Act of the Governor-General in Council or Regulation which is not to come into force immediately on the passing thereof, a power is conferred to make rules or by-laws, or to issue orders with respect to the application of the Act or Regulation, or with respect to the establishment of any Court or office or appointment of any Judge or officer thereunder, or with respect to the person by whom, or the time when, or the place where, or the manner in which, or the fees for which, anything is to be done under the Act or Regulation, then that power may be exercised at any time after the passing of the Act or Regulation ; but rules, by-laws or orders so made or issued shall not take effect till the commencement of the Act or Regulation.

Making of rules or by-laws and issuing of orders between passing and commencement of enactment.

23. Where, by any Act of the Governor-General in Council or Regulation, a power to make rules or by-laws is expressed to be given subject to the condition of the rules or by-laws being made after previous publication, then the following provisions shall apply, namely :—

Provisions applicable to making of rules or by laws after previous publication.

(1) the authority having power to make the rules or by-laws shall before making them publish a draft of the proposed rules or by-laws for the information of persons likely to be affected thereby :

(2) the publication shall be made in such manner as that authority deems to be sufficient, or, if the condition with respect to previous publication so requires, in such manner as the Governor-General in Council or the Local Government prescribes ;

(3) there shall be published with the draft a notice specifying a date on or after which the draft will be taken into consideration ;

(4) the authority having power to make the rules or by-laws, and where the rules or by-laws are to be made with the sanction, approval or concurrence of another authority, that authority also, shall consider any objection or suggestion which may be received by the authority having power to make the rules or by-laws from any person with respect to the draft before the date so specified ;

(5) the publication in the Gazette of a rule or by-law purporting to have been made in exercise of a power to make rules or by-laws after previous publication shall be conclusive proof that the rule or by-law has been duly made.

Sec. 20.—¹ Inserted by Act I of 1903, S. 3.—*Cf.* S. 31 of the Interpretation Act, 1889 (52 & 53 Vic., c. 63), and S. 10 of the Mad. General Clauses Act (Mad. Act I of 1897).

Sec. 21. LEG. CHANGES.—² Substituted by Act I of 1903, S. 3.

³ Inserted by *ibid.*

Cf. S. 32 (3) of the Interpretation Act, 1889 (52 & 53 Vic., c. 63). The Inspector of Factories approving a system of working a particular

factory can, under S. 21, cancel the approval. 59 I.C. 857=22 Cr. L.J. 153. But where an appeal is pending from the order of cancellation it is not desirable so long as the appeal is pending to institute a criminal prosecution in respect of the factory having been worked in contravention of the order of cancellation. 59 I.C. 857=22 Cr. L.J. 153.

Sec. 22.—*Cf.* S. 37 of the Interpretation Act, 1889 (52 & 53 Vic., c. 63).

24. Where any Act of the Governor-General in Council or Regulation is, after

Continuation of orders, etc.,
issued under enactments re-
pealed and re enacted.

the commencement of this Act, repealed and re-enacted with or without modification, then, unless it is otherwise expressly provided, any [appointment, notification]¹ order, scheme, rule, form or by-law, [made or]¹ issued under the repealed Act or Regulation shall, so far as it is not inconsistent with the provisions re-enacted, continue in force, and be deemed to have been issued under the provisions so re-enacted, unless and until it is superseded by any [appointment, notification]² order, scheme, rule, form or by-law (made or)¹ issued under the provisions so re-enacted [and when any Act of the Governor-General in Council or Regulation, which, by a notification under section 5 or 5-A of the Scheduled Districts Act, 1874, or any like law, has been extended to any local area, has, by subsequent notification, been withdrawn from and re-extended to such area or any part thereof, the provisions of such Act or Regulation shall be deemed to have been repealed and reenacted in such area or part within the meaning of this section.]²

Miscellaneous.

25. Sections 63 to 70 of the Indian Penal Code and the provisions of the Code

Recovery of fines.

of Criminal Procedure for the time being in force in relation to the issue and the execution of warrants for the levy of fines shall apply to all fines imposed under any Act, Regulation, rule or by-law, unless the Act, Regulation, rule or by-law contains an express provision to the contrary.

26. Where an act or omission constitutes an offence under two or more enact-

Provision as to offences
punishable under two or more
enactments.

ments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence.

27. Where any Act of the Governor-General in Council or Regulation made

Meaning of service by post.

after the commencement of this Act authorizes or requires any document to be served by post, whether the expression "serve" or either of the expressions, "give" or "send" or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post, a letter containing the document, and unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.

Sec. 24.—¹ Inserted by Act I of 1903, S. 3.

² Inserted by Act XVII of 1914—*Cf.* S. 18 of Madras General Clauses Act (Mad. Act I of 1891).

Where a notification was made under S. 3 of the Provincial Insolvency Act of 1907 investing certain officer with certain powers, the same remains in force without a fresh notification under the Act V of 1920, as S. 3 has been re-enacted word for word in the new Act. 80 I. C. 858 = 1925 Cal. 335. Subsequent passing of the Registration Act (1908)—Effect—Notification exempting agricultural leases. 28 I. C. 577 = 12 A.L.J. 702. Notifications under earlier Acts continue in force by implication 32 C. W. N. 576.

Sec. 25.—*See* now S. 386 *et seq.* of the Code of Criminal Procedure (Act V of 1899). *See* L. B. R. (1893-1900) 385. L. B. R. (1893-1900) 494; 1 L.B.R. 150. Mere temporary rights of a tenant at will to reap the produce as tenant are not "immoveable property." 1 Lab. 567 = 58 I.C. 321.

Sec. 26.—As to definition of "offence" *see supra* sub-sec. (37) of Sec. 3, 3 L.B.R. 218 (F B.).

CRIMINAL TRIAL.—No two punishments for the same act. 76 J. C. 689 = 25 Cr. L. J. 225. Where a special enactment deals with an offence similar to the offence which is dealt with by a general enactment it does not follow that the provisions of the general enactment are repealed to that extent. 18 Cr. L. J. 992 = 42 I. C. 608. The prosecution in such a case may lie under either but not both of those enactments. (*Ibid.*) 22 Cal. 131 at 139, dist. Where a person illegally sold a certain quantity of opium and retained possession of the residue after the sale, separate sentences for possession and sale under the Opium Act and the Bihar and Orissa Excise Act do not contravene S. 26 of the Act. 44 I. C. 974 = 3 P. L. J. 433. Where one Act constitutes two offences, separate punishment for each offence can be inflicted only if both offences are against the same law. 1 P. L. J. 373 = 38 I. C. 433.

Sec. 27.—*Cf.* S. 26 of the Interpretation Act, 1889 (52 & 53 Vic., c. 63); *See* 24 I. C. 437 = 16 Bom. L. R. 204.

28. (1) In any Act of the Governor-General in Council or Regulation and in any rule, by-law, instrument or document made under, or with reference to any such Act or Regulation, any enactment may be cited by reference to the title or short title

(if any) conferred thereon or by reference to the number and year thereof, and any provision in an enactment may be cited by reference to the section or sub-section of the enactment in which the provision is contained.

(2) In this Act and in any Act of the Governor-General in Council or Regulation made after the commencement of this Act, a description or citation of a portion of another enactment shall, unless a different intention appears, be construed as including the word, section or other parts mentioned or referred to as forming the beginning and as forming the end of the portion comprised in the description or citation.

29. The provisions of this Act respecting the construction of Acts, Regulations,

Saving for previous enactments, rules and by-laws.

rules or by-laws made after the commencement of this Act shall not affect the construction of any Act, Regulation, rule or by-law made before the commencement of

this Act, although the Act, Regulation, rule or by-law is continued or amended by an Act, Regulation, rule or by-law made after the commencement of this Act.

130. In this Act, the expression "Act of the Governor-General in Council,"

Application of Act to Ordinances.

wherever it occurs, except in section 5, and the word 'Act' in clauses (9), (12), (38), (48) and (50) of section 3 and in section 25 shall be deemed to include an Ordinance

made and promulgated by the Governor-General under section 23 of the Indian Councils Act, 1861, [or section 72 of the Government of India Act, 1915.]²

3[30-A.] In this Act the expression "Act of the

Application of Act to Acts made by the Governor-General.

Governor-General in Council" wherever it occurs includes an Act of the Indian Legislature and except in section 5]⁴ an Act made by the Governor-General under Sec. 67-B of

the Government of India Act.]²

5[31.] In any enactment made by any authority in British India before the date

Construction of references to Local Government of a Province.

on which section 3 of the Government of India Act, 1919, comes into operation, and in any rule, order, notification, scheme, by-law or other document made under or with reference to, any such enactment, any reference by what-

ever form of words to an authority authorized by law, at the time the enactment was made, to administer executive Government in any part of British India shall, where a corresponding new authority has been constituted by the Government of India Act, 1919, be construed for all purposes, after the above-mentioned date, as a reference to such new authority.]

SCHEDULE.

(Repealed by Act I of 1903.)

THE GOVERNMENT BUILDINGS ACT (IV OF 1899).⁶

[Sec. 1 *Rep. in pt. Act X of 1914; Am. Act, XXXVIII of 1920; Declared in force in the Sonthal Parganas Reg. III of 1872, Sec. 3 as amended by Reg. III of 1899, Sec. 3; Declared in force in British Baluchistan Reg. II of 1913, Sec. 3.]*

Sec. 28.—*Cf. S. 35 of the Interpretation Act, 1889 (52 & 53 Vic. 63);* Short title has been conferred on the unrepealed General Acts of the Governor-General in Council which had previously no short title—*see The Indian Short Titles Act (XIV of 1897).*

Sec. 29.—*Cf. S. 40 of the Interpretation Act 1889, (52 & 53 Vic. c 63).*

Sec. 30.—¹This section was inserted by Act XXIV of 1914.

²The words "or Section 72... Act, 1915"

were added by Act XXIV of 1917.

Sec. 30-A.—³Inserted by Act XI of 1923, 1st Schedule.

⁴Substituted by Act XVIII of 1928, Ss. 30 and 30-A—Meaning of "Governor in Council." *See* (1926) M. W. N. 842 = A. I. R. 1927 Mad. 22.

Sec. 31.—⁵Added by Act XXXI of 1920.

⁶For Statement of Objects and Reasons, *see* Gazette of India, 1896, Pt. V, p. 256; for Report of the Select Committee, *see (Ibid.)*, 1899, Pt. V, p. 15; and for Proceedings in Council, *see (Ibid.)*,

PREFATORY NOTE:—The provisions of the various Acts in force regarding the regulation of buildings in municipalities rest in the main on the necessity for controlling buildings and the maintenance of buildings with due regard to enquiring, and salutary exigencies ; and the powers conferred upon Municipal Committees with the object in the several Municipal Acts are wide, and more or less absolute. It has been on several occasions represented to the Government of India that in the case of Government buildings the necessity does not exist, as the requirements in question are secured by departmental regulations and the advice of the experts who are employed by the State for the proper execution and supervision of public works. Moreover, as regards works relating to imperial defence, it is evident that, if direct control is to be effectively exercised by Municipal Committees, the power of inspection must extend to the examination, on demand, of plans and records, which may be of a strictly confidential character, and this examination is inconsistent with the secrecy which, for obvious reasons, is essential in these matters. It will be generally admitted that the Government cannot permit its designs for the improvement of its coast batteries, magazines, or arsenals to become practically public property, merely because such designs have to be carried out within a municipal area in which the local law requires their submission to the municipal authorities and admits of extraneous and it may be, arbitrary interference with them.

The object of this Bill is therefore to exempt from such regulations all buildings which are situate within municipalities or which are to be erected upon land which is the property or in the occupation of the Government. The Government of India have, however, no desire to ignore the international arrangements and general administration of municipalities. On the contrary they consider it incumbent on the administration to frame its projects with full consideration for the general plans of any municipal body concerned : and they consider it reasonable and right that municipal bodies should have opportunities of criticising such projects but the final judgment on objects and suggestions must rest with the Local Government which has undertaken them, and not under a Municipal Board, which is itself under the control of the Local Government. It is proposed in the Bill, therefore, to provide that reasonable notice of any work, which if it is intended by the Government to undertake shall be given to the municipality concerned that the Municipal Committee shall be permitted, subject to suitable safeguards, to inspect the land and the plans ; that any representation such municipal committee may think fit to make with reference thereto shall be received and considered by the Local Government ; that the work shall be executed in strict accordance with the orders passed by the Local Government on such a representation, and that every order so passed shall be liable, in the last resort, to revision, by the Governor-General in Council. (*See Statement of Objects and Reasons*).

THE GOVERNMENT BUILDINGS ACT (IV OF 1899).

[3rd February, 1899.

An Act to provide for the exemption from the operation of municipal building laws of certain buildings and lands which are the property, or in the occupation, of the Government and situate within the limits of a municipality.

WHEREAS it is expedient to provide for the exemption from the operation of municipal building laws of certain buildings and lands which are the property, or in the occupation, of the Government and situate within the limits of a municipality ; it is hereby enacted as follows :—

Short title, extent and commencement.

1. (1) This Act may be called THE GOVERNMENT BUILDINGS ACT, 1899.

(2) It extends to the whole of British India [*]

(3) [* * *] 1

2. In this Act the expression "municipal authority" includes a municipal corporation or a body of municipal commissioners constituted by, or under the provisions of, any law or enactment for the time being in force.

1899, Pt. VI, pp. 2, 15 and 20. The Act has been declared in force in the Sonthal Parganas by the Sonthal Parganas Settlement Regulation III of 1872, as amended by the Sonthal Parganas Justice

and Laws Regulation, III of 1899, Ben. Code. Sec. 1 (2), (3).—¹ Rep. by Act X of 1914, Sch. II.

3. Nothing contained in any law or enactment for the time being in force to

Exemption of certain Government buildings from municipal laws to regulate the erection, etc., of buildings within municipalities.

regulate the erection, re-erection, construction, alteration or maintenance of buildings within the limits of any municipality shall apply to any building used or required for the public service or for any public purpose, which is the property, or in the occupation of the Government, or

which is to be erected on land which is the property, or in the occupation, of the Government :

Provided that, where the erection, re-erection, construction or material structural alteration of any such building as aforesaid (not being a building connected with Imperial defence, or a building the plan or construction of which ought, in the opinion of the Government, to be treated as confidential or secret) is contemplated, reasonable notice of the proposed work shall be given to the municipal authority before it is commenced.

4. (1) In the case of any such building as is mentioned in the last preceding

Objections or suggestions as to erection, etc., of certain Government buildings within municipalities how to be made and dealt with.

section (not being a building connected with Imperial defence or a building the plan or construction of which ought, in the opinion of the Government, to be treated as confidential or secret), the municipal authority, or any person authorized by it in this behalf, may, with the permission of the Local Government previously obtained,

but not otherwise, and subject to any restrictions or conditions which may, by general or special order, be imposed by the Local Government, inspect the land and building and all plans connected with its erection, re-erection, construction or material structural alteration, as the case may be, and may submit to the Local Government a statement in writing of any objections or suggestions which such municipal authority may deem fit to make with reference to such erection, re-erection, construction or material structural alteration.

(2) Every objection or suggestion submitted as aforesaid shall be considered by the Local Government, which shall, after such investigation (if any) as it shall think advisable, pass orders thereon, and the building referred to therein shall be erected, re-erected, constructed or altered, as the case may be, in accordance with such orders :

Provided that, if the Local Government overrules or disregards any such objection or suggestion as aforesaid, it shall give its reasons for so doing in writing.

(3) Every order passed by the Local Government under this section [in regard to any building which is used or required for the administration of a central subject as defined in section 45-A of the Government of India Act or which is the property of the Government of India] shall be subject to revision by the Governor-General in Council, but not otherwise, and the decision of the Governor-General in Council thereon shall be final.

THE GOVERNMENT MANAGEMENT OF PRIVATE ESTATES ACT, (X OF 1892).¹

S. 1 in pt., and S. 9 rep., Act 10 of 1914.

Rep. in pt. (as to Burma), Act 13 of 1898, S. 18.

Declared in force—in the Sonthal Parganas, Reg. 3 of 1872, S. 3, as amended by Reg. 3 of 1899, S. 3; in Upper Burma (except the Shan States), Act 13 of 1898, S. 4.

Sec. 4 (3).—The words "in regard to any building, etc., Government of India" were inserted by Act XXXVIII of 1920.

¹ For Statement of Objects and Reasons, see Gazette of India, 1892, Pt. V, p. 14; for Report of the Select Committee, see *ibid.*, 1892, Pt. V, p. 69 and for Proceedings in Council, see *ibid.*, 1892, Pt. VI, p. 73.

The Act has been declared in force in Upper

Burma (except the Shan States) by the Burma Laws Act, 1898 (13 of 1898), see the First Schedule and S. 4, Bur. Code.

The Act has been declared in force in the Sonthal Parganas by the Sonthal Parganas Settlement Regulation, 1872 (3 of 1872), S. 3, as amended by the Sonthal Parganas Justice and Laws Regulation, 1899 (3 of 1899), Ss. 3, Bengal Code, Vol. I.

THE GOVERNMENT MANAGEMENT OF PRIVATE ESTATES ACT (X OF 1892).

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[25th October, 1892.

An Act to provide for the levy of a rate on private estates under the management of the Government to meet the cost of supervision and management.

WHEREAS it is expedient to provide for the levy of a rate on private estates under the management of the Government to cover the cost of all Government establishments in so far as they are employed in the supervision and management of such estates, other than establishments specially entertained for any particular estate or group of estates, and to meet all contingent expenditure incurred by the Government in connection with such supervision and management; it is hereby enacted as follows :—

Title, extent and commencement.

1. (1) This Act may be called THE GOVERNMENT MANAGEMENT OF PRIVATE ESTATES ACT, 1892 :

(2) It extends to the whole of British India, inclusive of [* * *] 1 British Baluchistan ; and

(3) It shall come into force at once.

Definitions.

2. In this Act, unless there is something repugnant in the subject or context,—

(1) " Immoveable property " includes land, buildings, hereditary allowances, rights to ways, lights, ferries, fisheries or any other benefit to arise out of land, and things attached to the earth or permanently fastened to anything which is attached to the earth but not standing timber, growing crops or grass ;

(2) " Gross income " includes all receipts of every kind in produce or cash, except money borrowed, recoveries of principal and the proceeds of sale of immoveable property or of moveable property properly classed as capital ; and

(3) " Private estates under Government management " include—

(a) estates under the Court of Wards ;

(b) encumbered estates under the Government management ;

(c) estates attached for default of payment of Government revenue ;

(d) minors' estates placed under the guardianship of a revenue-officer of the Government by a Civil Court ;

(e) estates managed by a Collector in pursuance of any order made under the Code of Civil Procedure ; and

(f) all other estates made over to or taken under the management of a revenue-officer of the Government as such under any law for the time being in force or in virtue of any agreement.

Power to levy rate.

3. It shall be lawful for the Local Government²—

(1) to levy on all private estates under Government management a rate, not exceeding five per cent. on the gross income, calculated, as nearly as may be possible, to cover—

(a) the cost of all Government establishments in so far as they may be employed in the supervision or management of such estates other than establishments specially entertained for the supervision or management of any particular estate or group of estates, and

Sec. 1 (2).—¹ The words " Upper Burma and " were repealed by the Burma Laws Act (13 of 1898). Bur. Code.

Sec. 3.—² For instance of notification issued

under the powers conferred by this section fixing a rate to be levied on any estate, see Cent. Prov. R. and O. (List).

(b) all contingent expenditure incurred in consequence of such supervision or management ;

(2) from time to time to vary such rate ; and

(3) to reduce or remit such rate in any special case or cases as may be equitable :

Provided that, in deciding the amount of the rate to be levied under this Act on any particular estate or group of estates, the Local Government shall consider the expenditure incurred on special establishments for such estate or estates.

4. In cases where an officer of the Government is employed to give legal advice or to audit accounts on behalf of any estate, the Local Government, if it considers the services rendered to be of a special nature, may, in its discretion, direct a special charge to be made against that estate on account of such services, irrespective of the rate leviable under the last foregoing section.

5. Nothing in this Act shall apply to the cost of establishments specially entertained or to expenditure of any description specially incurred in respect of any particular estate or estates.

6. All rates for general supervision or management levied by any Local Government before the commencement of this Act shall be deemed to have been levied under this Act.

7. The Local Government may make any rules¹ and issue any orders which may be necessary for carrying this Act into effect, and which are consistent therewith.

8. Where any Government establishment is employed in such supervision as aforesaid, the Local Government shall be the sole judge of the cost attributable to such employment, and its decision thereon shall not be questioned in any Court of Law or otherwise.

9. Section 17 of the Court of Wards Act, 1879, (passed by the Lieutenant-Governor of Bengal in Council), and so much of Act III of 1881 (also passed by the Lieutenant-Governor of Bengal in Council) as relates to section 17 of the said Court of Wards Act, 1879, are hereby repealed.

THE GOVERNMENT OF INDIA ACT.

(5 & 6 Geo. 5, Ch. 61 ; 6 & 7 Geo. 5, Ch. 37 : and 9 & 10 Geo. 5, Ch. 101 and 14 and 15 Geo. 5, Ch. 28).

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THE GOVERNMENT OF INDIA ACT.

(5 & 6 Geo. 5, Ch. 61 ; 6 & 7 Geo. 5, Ch. 37 ; and 9 & 10 Geo. 5, Ch. 101 and 14 & 15 Geo. 5, Ch. 28.)

An Act to consolidate enactments relating to the Government of India.

Be it enacted by the King's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :—

PART I.

HOME GOVERNMENT.

The Crown.

1. The territories for the time being vested in His Majesty in India are governed by and in the name of His Majesty the King-Emperor of India, and all rights which, if the Government of India Act, 1858, had not been passed, might have been exercised by the East India Company in relation to any territories, may be exercised by and in the name of His Majesty as rights incidental to the Government of India.

The Secretary of State.

2. (1) Subject to the provisions of this Act, the Secretary of State has and performs all such or the like powers and duties relating to the government or revenues of India, and has all such or the like powers over all officers appointed or continued under this Act, as if the Government of India Act, 1858, had not been passed, might or should have been exercised or performed by the East India Company, or by the Court of Directors or Court of Proprietors of that Company, either alone or by the direction or with the sanction or approbation of the Commissioners for the affairs of India, in relation to that government or those revenues and the officers and servants of that Company, and also all such powers as might have been exercised by the said Commissioners alone.

(2) In particular, the Secretary of State may, subject to the provisions of this Act [or rules made thereunder],¹ superintend, direct and control all acts, operations and concerns which relate to the government or revenues of India, and all grants of salaries, gratuities and allowances, and all other payments and charges, out of or on the revenues of India.

[(3) The salary of the Secretary of State shall be paid out of moneys provided by Parliament, and the salaries of his under-secretaries and any other expenses of his department may be paid out of the revenues of India or out of moneys provided by Parliament.]²

The Council of India.

3. (1) The Council of India shall consist of such number of members, not less than [eight] and not more than [twelve]³ as the Secretary of State may determine :

[Provided that the Council as constituted at the time of the passing of the Government of India Act, 1919, shall not be affected by this provision, but no fresh appointment or re-appointment thereto shall be made in excess of the maximum prescribed by this provision.]⁴

(2) The right of filling any vacancy in the Council shall be vested in the Secretary of State.

(3) Unless at the time of an appointment to fill a vacancy in the Council [one half]⁵ of the then existing members of the Council are persons who have served or

Sec. 2 (2).—¹ These words were inserted by Part II of Sch. II of the Government of India Act, 1919 (9 & 10 Geo. 5, Ch. 101).

Sec. 2 (3).—² This sub-section was substituted by *Ibid.*

Sec. 3 (1).—³ The words "eight" and "twelve" were substituted for the words "ten" and "four-

teen", respectively, by *Ibid.*

⁴ This proviso was added by *Ibid.*

Sec. 3 (3).—⁵ The word "one-half" was substituted for the word "nine" by Part II of Sch. II of the Government of India Act, 1919 (9 & 10 Geo. 5, Ch. 101).

resided in [*]¹ India for at least ten years, and have not last left [*]² India more than five years before the date of their appointment, the person appointed to fill the vacancy must be so qualified.

(4) Every member of the Council shall hold office except as by this section provided, for a term of [five]³ years :

[Provided that the tenure of office of any person who is a member of the Council at the time of the passing of the Government of India Act, 1919, shall be the same as though that Act had not been passed].⁴

(5) The Secretary of State may, for special reasons of public advantage, re-appoint for a further term of five years any member of the Council whose term of office has expired. In any such case the reasons for the re-appointment shall be set forth in a minute signed by the Secretary of State and laid before both Houses of Parliament. Save as aforesaid, a member of the Council shall not be capable of re-appointment.

(6) Any member of the Council may, by writing signed by him, resign his office. The instrument of resignation shall be recorded in the minutes of the Council.

(7) Any member of the Council may be removed by His Majesty from his office, on an address of both Houses of Parliament.

⁵[(8) There shall be paid to each member of the Council of India the annual salary of twelve hundred pounds :

Provided that any member of the Council who was at the time of his appointment domiciled in India shall receive, in addition to the salary hereby provided, an annual subsistence allowance of six hundred pounds.

Such salaries and allowances may be paid out of the revenues of India or out of moneys provided by Parliament.

(9) Notwithstanding anything in any Act or rule, where any person in the service of the Crown in India is appointed a member of the Council before the completion of the period of such service required to entitle him to a pension or annuity, his service as such member shall, for the purpose of any pension or annuity which would have been payable to him on completion of such period, be reckoned as service under the Crown in India whilst resident in India].

Seat in Council disqualification for Parliament.

4. No member of the Council of India shall be capable of sitting or voting in Parliament.

5. The Council of India shall, under the direction of the Secretary of State, and subject to the provisions of this Act, conduct the business transacted in the United Kingdom in relation to the Government of India and the correspondence with India. [* * *]⁶

Duties of Council.

6. (1) All powers required to be exercised by the Secretary of State in Council, and all powers of the Council of India, shall be exercised at meetings of the Council at which [such number of members are present as may be prescribed by general directions of the Secretary of State].⁷

Powers of Council.

(2) The Council may act notwithstanding any vacancy in their number.

President and vice-president of Council.

7. (1) The Secretary of State shall be the president of the Council of India, with power to vote.

(2) The Secretary of State in Council may appoint any member of the Council to be vice-president thereof, and the Secretary of State may at any time remove any person so appointed.

Sec. 3 (3).—¹ The word "British" was omitted by *Ibid.*

² The word "British" was omitted by Sch. I of the Government of India (Amendment) Act, 1916 (6 & 7 Geo. 5, Ch. 37).

Sec. 3 (4).—³ The word "five" was substituted for "seven" by Part II of Sch. II of the Government of India Act, 1919 (9 & 10 Geo. 5, Ch. 101).

⁴ This proviso was inserted by *Ibid.*

Sec. 3 (8).—⁵ Sub-sections (8) and (9) of section 3 were substituted for old sub-section (8) by Part II of Sch. II of the Government of India Act, 1919 (9 & 10 Geo. 5, Ch. 101).

Sec. 5.—⁶ The remaining words were omitted by *Ibid.*

Sec. 6.—⁷ These words were substituted for "not less than five members are present" by *Ibid.*

(3) At every meeting of the Council the Secretary of State, or, in his absence, the vice president, if present, or, in the absence of both of them, one of the members of the Council, chosen by the members present at the meeting, shall preside.

8. Meetings of the Council of India shall be convened and held as and when the Secretary of State directs, but one such meeting at least shall be held in every [month].¹

9. (1) At any meeting of the Council of India at which the Secretary of State is present, if there is a difference of opinion on any question, except a question with respect to which a majority of votes at a meeting is by this Act declared to be necessary, the determination of the Secretary of State shall be final.

(2) In case of an equality of votes at any meeting of the Council, the person presiding at the meeting shall have a second or casting vote.

(3) All acts done at a meeting of the Council in the absence of the Secretary of State shall require the approval in writing of the Secretary of State.

(4) In case of difference of opinion on any question decided at a meeting of the Council, the Secretary of State may require that his opinion and the reasons for it be entered in the minutes of the proceedings, and any member of the Council, who has been present at the meeting, may require that his opinion, and any reasons for it that he has stated at the meeting, be also entered in like manner.

10. The Secretary of State may constitute committees of the Council of India for the more convenient transaction of business, and direct what departments of business are to be under those committees respectively, and generally direct the manner in which [the business of the Secretary of State in Council or the Council of India shall be transacted, and any order made or act done in accordance with such direction shall, subject to the provisions of this Act, be treated as being an order of the Secretary of State in Council].²

Orders and Communications.

[11. Subject to the provisions of this Act, the procedure for the sending of orders and communications to India and in general for correspondence between the Secretary of State and the Governor-General in Council or any local government shall be such as may be prescribed by order of the Secretary of State in Council.]³

12. }
13. } 3 Omitted.
14. }

15. When any order is sent to India directing the actual commencement of hostilities by His Majesty's forces in India, the fact of the order having been sent shall, unless the order has in the meantime been revoked or suspended, be communicated to both Houses of Parliament within three months after the sending of the order, or, if Parliament is not sitting at the expiration of those three months, then within one month after the next meeting of Parliament.

16. [*Correspondence by Governor-General with Secretary of State.*] Omitted by Part III of Sch. II of 9 & 10 Geo. 5, Ch. 101.

Establishment of Secretary of State.

17. (1) No addition may be made to establishment of the Secretary of State in Council nor to the salaries of the persons on that establishment, except by an order of His Majesty in Council, to be laid before both Houses of Parliament within four-

Sec. 8.—¹ The word "month" was substituted for the word "week" by Part II of Sch. II of the Government of India Act, 1919 (9 & 10 Geo. 5, Ch. 101).

Sec. 10.—² These words were substituted for "all business of the Council or Committees

thereof is to be transacted" by Part II of Schedule II of the Government of India Act, 1919 (9 and 10 Geo. 5, Ch. 101).

Sec. 11.—³ Section 11 was substituted for old sections 11 to 14 by Part I of Schedule II *ibid.*

teen days after the making thereof, or, if Parliament is not then sitting, then within fourteen days after the next meeting of Parliament.

(2) The rules made by His Majesty for examinations, certificates, probation or other tests of fitness, in relation to appointments to junior situations in the civil service, shall apply to such appointments on the said establishment.

(3) The Secretary of State in Council may, subject to the foregoing provisions of this section, make all appointments to and promotions in the said establishment, and may remove any officer or servant belonging to the establishment.

18. His Majesty may, by warrant under the Royal Sign Manual, countersigned by the Chancellor of the Exchequer, grant to any secretary, officer or servant appointed on the establishment of the Secretary of State in Council, such compensation, superannuation or retiring allowance, or to his legal personal representative such gratuity, as may respectively be granted to persons on the establishment of a Secretary of State, or to the personal representatives of such persons, under the laws for the time being in force concerning superannuations and other allowances to persons having held civil offices in the public service or to personal representatives of such persons.

Military Appointments.

19. 1 (1) The Commander-in-chief of His Majesty's forces in India is appointed by His Majesty by warrant under the Royal Sign Manual.

(2) 2[* * *] In the appointment of officers to His Majesty's army the same provision as heretofore, or equal provision, shall be made for the appointment of sons of persons who have served in India in the military or civil service of the Crown or of the East India Company.

Relaxation of Control of Secretary of State.

3 [19-A. The Secretary of State in Council may, notwithstanding anything in this Act, by rule regulate and restrict the exercise of the powers of superintendence, direction and control, vested in the Secretary of State and the Secretary of State in Council by this Act, or otherwise, in such manner as may appear necessary or expedient in order to give effect to the purposes of the Government of India Act, 1919.

Before any rules are made under this section relating to subjects other than transferred subjects, the rules proposed to be made shall be laid in draft before both Houses of Parliament, and such rules shall not be made unless both Houses by resolution approve the draft either without modification or addition, or with modifications or additions to which both Houses agree, but upon such approval being given the Secretary of State in Council may make such rules in the form in which they have been approved, and such rules on being so made shall be of full force and effect.

Any rules relating to transferred subjects made under this section shall be laid before both Houses of Parliament as soon as may be after they are made, and if an address is presented to His Majesty by either House of Parliament within the next thirty days on which that House has sat after the rules are laid before it praying that the rules or any of them may be annulled, His Majesty in Council may annul the rules or any of them, and those rules shall thenceforth be void, but without prejudice to the validity of anything previously done thereunder.]

PART II.

THE REVENUES OF INDIA.

20. (1) The revenues of India shall be received for and in the name of His Majesty, and shall, subject to the provisions of this Act be applied for the purposes of the Government of India alone.

Sec. 19.—¹ Sub-sec. (1) of section 19 was newly inserted by 14 and 15 Geo. 5, Ch. 28.

Sec. 19 (2).—² Certain words were omitted by Part II of Sch. II of the Government of India

Act, 1919 (9 & 10 Geo. 5, Ch. 101).

Sec. 19-A.—³ Section 19-A was inserted by Part I of Sch. II of the Government of India Act, 1919 (9 & 10 Geo. 5, Ch. 101).

(2) There shall be charged on the revenues of India alone—

(a) all the debts of the East India Company ; and

(b) all sums of money, costs, charges and expenses which, if the Government of India Act, 1858, had not been passed, would have been payable by the East India Company out of the revenues of India in respect of any treaties, covenants, contracts, grants or liabilities existing at the commencement of that Act ; and

(c) all expenses, debts, and liabilities lawfully contracted and incurred on account of the Government of India ; and

(d) all payments under this Act ¹[except so far as is otherwise provided under this Act].

(3) The expression "the revenues of India" in this Act shall include all the territorial and other revenues of or arising in British India, and, in particular,—

(i) all tributes and other payments in respect of any territories which would have been receivable by or in the name of the East India Company if the Government of India Act, 1858, had not been passed ; and

(ii) all fines and penalties incurred by the sentence or order of any court of justice in British India, and all forfeitures for crimes of any moveable or immoveable property in British India ; and

(iii) All moveable or immoveable property in British India escheating or lapsing for want of an heir or successor, and all property in British India devolving as *bona vacantia* for want of rightful owner.

(4) All property vested in, or arising or accruing from property or rights vested in, His Majesty under the Government of India Act, 1858, or this Act or to be received or disposed of by the Secretary of State in Council under this Act, shall be applied in aid of the revenues of India.

21. ²[Subject to the provisions of this Act, and rules made thereunder], the expenditure of the revenues of India, both in British India

Control of Secretary of State over expenditure of revenues.

and elsewhere, shall be subject to the control of the Secretary of State in Council, and no grant or appropriation of any part of those revenues, or of any other property coming into the possession of the Secretary of State in Council by virtue of the Government of India Act, 1858, or this Act, shall be made without the concurrence of a majority of votes at a meeting of the Council of India :

³[Provided that a grant or appropriation made in accordance with provisions or restrictions prescribed by the Secretary of State in Council with the concurrence of a majority of votes at a meeting of the Council shall be deemed to be made with the concurrence of a majority of such votes.]

22. Except for preventing or repealing actual invasion of His Majesty's Indian

Application of revenues to military operations beyond the frontier.

possessions or under other sudden and urgent necessity, the revenues of India shall not, without the consent of both Houses of Parliament, be applicable to defraying the expenses of any military operations carried on beyond the

external frontiers of those possessions by His Majesty's forces charged upon those revenues.

23. (1) Such parts of the revenues of India as are remitted to the United Kingdom, and all money arising or accruing in the United

Accounts of Secretary of State with Bank.

Kingdom from any property or rights vested in His Majesty for the purposes of the Government of India, or

from the sale or disposal thereof, shall be paid to the Secretary of State in Council, to be applied for the purposes of this Act.

Sec. 20 (2).—¹ These words were inserted by Part II of Sch. II of the Government of India Act, 1919 (9 & 10 Geo. 5, Ch. 101).

On this section, see 34 Cal. 969 (1021-1022).

Sec. 21.—² These words were inserted by Part II

of Sch. II of the Government of India Act, 1919 (9 & 10 Geo. 5, Ch. 101).

³ These words were added by Sch. I of the Government of India (Amendment) Act, 1916 (6 & 7 Geo. 5, Ch. 37).

(2) All such revenues and money shall, except as by this section is provided, be paid into the Bank of England to the credit of an account entitled "The Account of the Secretary of State in Council of India."

(3) The money placed to the credit of that account shall be paid out on drafts or orders, either signed by two members of the Council of India and countersigned by the Secretary of State or one of his under-secretaries or his assistant under-secretary, or signed by the accountant-general on the establishment of the Secretary of State in Council or by one of the two senior clerks in the department of that accountant-general and countersigned in such manner as the Secretary of State in Council directs; and any draft or order so signed and countersigned shall effectually discharge the Bank of England for all money paid thereon.

(4) The Secretary of State in Council may, for the payment of current demands, keep at the Bank of England such accounts as he deems expedient: and every such account shall be kept in such name and be drawn upon by such person, and in such manner, as the Secretary of State in Council directs.

(5) There shall be raised in the books of the Bank of England such accounts as may be necessary in respect of stock vested in the Secretary of State in Council; and every such account shall be entitled "The Stock Account of the Secretary of State in Council of India."

(6) Every account referred to in this section shall be a public account.

24. The Secretary of State in Council, by power of attorney executed by two members of the Council of India and counter signed by the Secretary of State or one of his under secretaries or his assistant under-secretary, may authorize all or any of the cashiers of the Bank of England—

Powers of attorney for sale or purchase of stock and receipt of dividends.

(a) to sell and transfer all or any part of any stock standing in the books of the Bank to the account of the Secretary of State in Council; and

(b) to purchase and accept stock for any such account; and

(c) to receive dividends on any stock standing to any such account;

and, by any writing signed by two members of the Council of India and countersigned as aforesaid, may direct the application of the money to be received in respect of any such sale or dividend:

Provided that stock shall not be purchased or sold and transferred under the authority of any such general power of attorney, except on an order in writing directed to the chief cashier and chief accountant of the Bank of England, and signed and countersigned as aforesaid.

25. All securities held by or lodged with the Bank of England in trust for or on account or on behalf of the Secretary of State in Council may be disposed of, and the proceeds thereof may be applied, as may be authorized by order in writing signed by two members of the Council of India and countersigned by the Secretary of State or one of his under-secretaries or his assistant under-secretary, and directed to the chief cashier and chief accountant of the Bank of England.

Provision as to securities.

26. (1) The Secretary of State in Council shall, within the first [twenty-eight days]¹ during which Parliament is sitting next after the first day of May in every year, lay before both Houses of Parliament,—

Accounts to be annually laid before Parliament.

(a) an account, for the financial year preceding that last completed, of the annual produce of the revenues of India, distinguishing the same under the respective heads thereof, in each of the several provinces; and of all the annual receipts and disbursements at home and abroad for the purposes of the Government of India, distinguishing the same under the respective heads thereof;

(b) the latest estimate of the same for the financial year last completed;

(c) accounts of all stocks, loans, debts and liabilities chargeable on the revenues of India at home and abroad, at the commencement and close of the financial year

¹ Sec. 26 (1).—¹ These words were substituted for the words "fourteen days" by Sch. I of the Government of India (Amendment) Act, 1916 (6 & 7 Geo. 5, Ch. 37).

preceding that last completed, the loans, debts and liabilities raised or incurred within that year, the amounts paid off or discharged during that year, the rates of interests borne by those loans, debts and liabilities respectively, and the annual amount of that interest ;

(d) 1 [* * * *]

(e) A list of the establishment of the Secretary of State in Council, and the salaries and allowances payable in respect thereof.

(2) If any new or increased salary or pension of fifty pounds a year or upwards has been granted or created within any year in respect of the said establishment, the particulars thereof shall be specially stated and explained at the foot of the account for that year.

(3) The account shall be accompanied by a statement, prepared from detailed reports from each province, in such form as best exhibits the moral and material progress and condition of India.

27. (1) His Majesty may, by warrant under His Royal Sign Manual, countersigned by the Chancellor of the Exchequer, appoint a fit person to be auditor of the accounts of the Secretary of State in Council, and authorize that auditor to appoint and remove such assistants as may be specified in the warrant.

Audit of Indian accounts in United Kingdom.

(2) The auditor shall examine and audit the accounts of the receipt, expenditure and disposal in the United Kingdom of all money, stores and property applicable for the purposes of this Act.

(3) The Secretary of State in Council shall, by the officers and servants of his establishment, produce and lay before the auditor all such accounts, accompanied by proper vouchers for their support, and submit to his inspection all books, papers and writings having relation thereto.

(4) The auditor may examine all such officers and servants of that establishment, being in the United Kingdom, as he thinks fit, in relation to such accounts, and the receipt expenditure or disposal of such money, stores and property, and may for that purpose, by writing signed by him, summon before him any such officer or servant.

(5) The auditor shall report to the Secretary of State in Council his approval or disapproval of the accounts aforesaid, with such remarks and observations in relation thereto, as he thinks fit, specially noting cases (if any) in which it appears to him that any money arising out of the revenues of India has been appropriated to purposes other than those to which they are applicable.

(6) The auditor shall specify in detail in his reports all sums of money, stores and property which ought to be accounted for, and are not brought into account, or have not been appropriated in conformity with the provisions of the law, or which have been expended or disposed of without due authority, and shall also specify any defects, inaccuracies or irregularities which may appear in the accounts, or in the authorities, vouchers or documents having relation thereto.

(7) The auditor shall lay all his reports before both Houses of Parliament, with the accounts of the year to which the reports relate.

(8) The auditor shall hold office during good behaviour.

(9) There shall be paid to the auditor and his assistants, out of the revenues of India [or out of moneys provided by Parliament],² such salaries as His Majesty, by warrant, signed and countersigned as aforesaid, may direct.

(10) The auditor and his assistants (notwithstanding that some of them do not hold certificates from the Civil Service Commissioners) shall, for the purposes of superannuation [or retiring]³ allowance [and their legal personal representatives shall for the purposes of gratuity],³ be in the same position as if [the auditor and his assistants]⁴ were on the establishment of the Secretary of State in Council.

Sec. 26 (d).—¹ Paragraph (d) was repealed by Sch. II of the Government of India (Amendment) Act, 1916 (6 & 7 Geo. 5, Ch. 37).

Sec. 27 (9).—² These words were inserted by Part II of Sch. II of the Government of India Act, 1919 (9 and 10 Geo. 5, Ch. 101).

Sec. 27 (10).—³ These words were inserted by Sch. I of the Government of India (Amendment) Act, 1916 (6 and 7 Geo. 5, Ch. 37).

⁴ These words were substituted for the word "they" by *Ibid.*

PART III.

PROPERTY, CONTRACTS AND LIABILITIES.

28. (1) The Secretary of State in Council may, with the concurrence of a majority of votes at a meeting of the Council of India, sell and dispose of any real or personal estate for the time being vested in His Majesty for the purpose of the Government of India, and raise money on any such real [or personal]¹ estate by way of mortgage, [or otherwise]¹ and make the proper assurances for any of those purposes, and purchase and acquire any property.

(2) Any assurance relating to real estate, made by the authority of the Secretary of State in Council, may be made under the hands and seals of [two]² members of the Council of India.

(3) All property acquired in pursuance of this section shall vest in His Majesty for the purposes of the Government of India.

29. (1) [Subject to the provisions of this Act regarding the appointment of a High Commissioner for India],³ the Secretary of State in Council may, with the concurrence of a majority of votes at a meeting of the Council of India, make any contract for the purposes of this Act.

(2) Any contract so made may be expressed to be made by the Secretary of State in Council.

(3) Any contract so made which, if it were made between private persons, would be by-law required to be under seal, may be made, varied or discharged under the hands and seals of two members of the Council of India.

(4) Any contract so made which, if it were made between private persons, would be by-law required to be signed by the party to be charged therewith may be made, varied or discharged under the hands of two members of the Council of India.

(5) Provided that any contract for or relating to the manufacture, sale, purchase or supply of goods, or for or relating to affreightment or the carriage of goods, or to insurance, may, subject to such rules and restrictions as the Secretary of State in Council prescribes, be made and signed on behalf of the Secretary of State in Council by any person upon the permanent establishment of the Secretary of State in Council who is duly empowered by the Secretary of State in Council in this behalf. Contracts so made and signed shall be as valid and effectual as if made as prescribed by the foregoing provisions of this section. Particulars of all contracts so made and signed shall be laid before the Secretary of State in Council in such manner and form and within such times as the Secretary of State in Council prescribes.

(6) The benefit and liability of every contract made in pursuance of this section shall pass to the Secretary of State in Council for the time being.

Sec. 28.—The concurrence of a majority of votes is necessary for the validity of a security given by the Secretary of State for an appellant. A covenant by the Secretary of State by which the performance of a decree by a private party is guaranteed is not an engagement within Ss. 2 and 40 of the Act, 1898. 38 Cal. 754 = 13 C.L.J. 365 = 9 I. C. 852 = 15 C. W. N. 475.

Sec. 28 (1).—¹ These words were inserted by Sch. I of the Government of India (Amendment) Act, 1916 (6 & 7 Geo. 5, Ch. 37).

Sec. 28 (2).—² This word "two" was substituted for the word "three" by *ibid.*

Sec. 29 (1).—³ These words were inserted by Part II of Sch. II of the Government of India Act, 1919 (9 & 10 Geo. 5, Ch. 101).

Sec. 29 (5).—When a statute lays down certain mandatory provisions in regard to the framing of

contracts between the Secretary of State and a private individual, it is no answer to say that, because the provisions were ignored on particular occasions and payments were made on contracts which were not in conformity with the statute, that should be taken as a precedent which will be binding upon the Secretary of State in every case. Contracts to be binding upon the Secretary of State must be made in strict conformity with the provisions laid down on the statute. If they are not so made, they are not valid as against him. 54 C. 969 (1021 & 1022). A commandeering order is one which no one but Government can make and, being an act of the Sovereign Power, the Secretary of State evidently cannot be sued in respect of it. 54 C. 969 (1020).

1 [29-A.] His Majesty may by Order in Council make provision for the appointment of a High Commissioner for India in the United Kingdom, and for the pay, pension, powers, duties, and conditions of employment of the High Commissioner and of his assistants; and the Order may further provide for delegating to the High Commissioner any of the powers previously exercised by the Secretary of State or the Secretary of State in Council, whether under this Act otherwise, in relation to making contracts, and may prescribe the conditions under which he shall act on behalf of the Governor-General in Council or any local government.]

30. (1) The Governor-General in Council and any local Government may, on behalf and in the name of the Secretary of State in Council, and subject to such provisions or restrictions as the Secretary of State in Council, with the concurrence of a majority of votes at a meeting of the Council of India, prescribes, sell and dispose of any real or personal estate whatsoever in British India, within the limits of their respective governments, for the time being vested in His Majesty for the purposes of the Government of India, or raise money on any such real ²[or personal] estate by way of mortgage, ²[or otherwise,] and make proper assurances for any of those purposes, and purchase or acquire any property in British India within the said respective limits, and make any contract for the purposes of this Act.

³[(1-a)] A local government may on behalf and in the name of the Secretary of State in Council raise money on the security of revenues allocated to it under this Act, and make proper assurances for that purpose, and rules made under this Act may provide for the conditions under which this power shall be exercisable.]

(2) Every assurance and contract made for the purposes of ⁴[sub-section 1 of this section] shall be executed by such person and in such manner as the Governor-General in Council by resolution directs or authorizes, and if so executed may be enforced by or against the Secretary of State in Council for the time being.

(3) All property acquired in pursuance of this section shall vest in His Majesty for the purposes of the Government of India.

31. The Governor-General in Council, and any other person authorized by any Act passed in that behalf by the ⁵[Indian legislature] may make any grant or disposition of any property in British India accruing to His Majesty by forfeiture, escheat or lapse, or by devolution as *bona vacantia*, to or in favour of any relative or connection of the person from whom the property has accrued, or to or in favour of any other person.

32. (1) The Secretary of State in Council may sue and be sued by the name of the Secretary of State in Council as a body corporate.

(2) Every person shall have the same remedies against the Secretary of State in Council as he might have had against the East India Company in the Government of India Act, 1858, and this Act had not been passed.

(3) The property for the time being vested in His Majesty for the purposes of the Government of India shall be liable to the same judgments and executions as it would

Sec. 29-A.—¹ S. 29-A was inserted by Part I of Sch. II of the Government of India Act, 1919 (9 & 10 Geo. 5, Ch. 101.)

Sec. 30.—² These words were inserted by Sch. I of the Government of India (Amendment) Act 1916 (6 & 7 Geo. 5 Ch. 37).

Sec. 30 (1-a).—³ Sub-section (1-a) was inserted by Part II of the Government of India Act, 1919 (9 & 10 Geo. 5, Ch. 101).

Sec. 30. (2).—⁴ These words and figure were substituted for the words "this section" *Ibid.*

Sec. 31.—⁵ These words were substituted for the words "Governor-General in Legis-

lative Council" by Part II of Sch. II of the Government of India Act, 1919 (9 & 10 Geo. 5, Ch. 101).

Sec. 32.—An enactment adding to or taking away from, the liability of the Secretary of State in Council to be sued, as settled by the Government of India Act is *ultra vires* of the Indian Legislature. 37 Mad. 55=24 M. L. J. 429=19 I. C. 353. See also 54 Cal. 969 (1020-1022).

Sec. 32 (3).—Liabilities lawfully incurred do not mean liabilities incurred by acts authorized by law, but must mean liabilities incurred by servants or agents in course of undertakings in which

have been liable to in respect of liabilities lawfully incurred by the East India Company if the Government of India Act, 1858, and this Act had not been passed.

(4) Neither the Secretary of State nor any member of the Council of India shall be personally liable in respect of any assurance or contract made by or on behalf of the Secretary of State in Council, or any other liability incurred by the Secretary of State or the Secretary of State in Council in his or their official capacity, nor in respect of any contract, covenant or engagement of the East India Company : nor shall any person executing any assurance or contract on behalf of the Secretary of State in Council be personally liable in respect thereof ; but all such liabilities, and all costs and damages in respect thereof, shall be borne by the revenues of India.

PART IV.

THE GOVERNOR-GENERAL IN COUNCIL.

General Powers and Duties of Governor-General in Council.

- 33.** 1[Subject to the provisions of this Act and rules made thereunder,] the superintendence, direction and control of the civil and military Government of India is vested in the Governor-General in Council, who is required to pay due obedience to all such orders as he may receive from the Secretary of State

Powers of control of Governor-General in Council.

The Governor-General.

The Governor-General.

- 34.** The Governor-General of India is appointed by His Majesty by warrant under the Royal Sign Manual.

The Governor-General's Executive Council.

- 35.** [Constitution of Governor-General's Executive Council.] Omitted by Part II of Sch. II, 9 and 10 Geo. 5, Ch. 101.

Members of Council.

- 36.** (1) The members² [*] of the Governor-General's Executive Council shall be appointed by His Majesty by warrant under the Royal Sign Manual.

(2) The number of members² [*] of the Council shall be [such as His Majesty thinks fit to appoint.]³

(3) Three at least of them must be persons who 4[* * * *] have been for at least ten years in the service of the Crown in India and one must be a barrister of England or Ireland, or a member of the Faculty of Advocates of Scotland, ⁵ [or a pleader of a High Court] of not less than ⁶ [ten] years' standing.

(4) If any ⁷[member of the Council (other than the Commander-in-Chief for the time being of His Majesty's forces in India)] is at the time of his appointment in the military service of the Crown, he shall not, during his continuance in office as such member hold any military command or be employed in actual military duties.

⁸[(5) Provision may be made by rules under this Act as to the qualifications to be required in respect of the members of the Governor-General's Executive Council in any case where such provision is not made by the foregoing provisions of this section.]

Rank and precedence of Commander-in-Chief.

- ⁹[**37.** If the Commander-in-Chief for the time being of His Majesty's forces in India is a member of the Governor-General's Executive Council he shall, subject to

the Government servants are lawfully engaged. 11 I. C. 58 = 5 S. L. R. 82. On the Section *see also* 40 Cal 391 (P. C.) cited under section 65 *infra*.

Sec. 33.—¹ These words were inserted by Part II of Sch. II of the Government of India Act, 1919 (9 & 10 Geo. 5, Ch. 101).

Sec. 36 (1).—² The word "ordinary" was omitted by Part II of Sch. II of the Government of India Act, 1919 (9 & 10 Geo. 5, Ch. 101).

Sec. 36 (2).—³ These words were substituted for the words "five, or if His Majesty thinks fit to appoint a sixth member, six" by *ibid*.

Sec. 36 (3).—⁴ The words "at the time of their appointment" were omitted by *ibid*.

⁵ These words were inserted by Part II of Sch. II of the Government of India Act, 1919 (9 & 10 Geo. 5, Ch. 101).

⁶ This word 'ten' was substituted for the word "five" by *ibid*.

Sec. 36 (4).—⁷ These words were substituted for the words "person appointed an ordinary member of the council" by *ibid*.

Sec. 36 (5).—⁸ Sub-section (5) was inserted by *ibid*.

⁹ **Sec. 37** was substituted by *ibid*.

the provisions of this Act, have rank and precedence in the Council next after the Governor-General.]

Vice-president of Council.

38. The Governor-General shall appoint a member of his Executive Council to be vice-president thereof.

Meetings.

39. (1) The Governor-General's Executive Council shall assemble at such places in India as the Governor-General in Council appoints.

(2) At any meeting of the Council the Governor-General or other person presiding and [one member of the council (other than the Commander-in-Chief)]¹ may exercise all the functions of the Governor-General in Council.

40. (1) All orders and other proceedings of the Governor-General in Council shall be expressed to be made by the Governor-General in Council, and shall be signed by secretary to the Government of India, or otherwise, as the Governor-General in Council may direct [and when so signed shall not be called into question in any legal proceeding on the ground that they were not duly made by the Governor-General in Council]².

(2) The Governor-General may make rules and orders for the more convenient transaction of business in his Executive Council, and every order made, or act done, in accordance with such rules and orders, shall be treated as being the order of the Act of the Governor-General in Council.

41. (1) If any difference of opinion arises on any question brought before a meeting of the Governor-General's Executive Council, the Governor-General in Council shall be bound by the opinion and decision of the majority of those present, and, if they are equally divided, the Governor-General or other person presiding shall have a second or casting vote.

(2) Provided that whenever any measure is proposed before the Governor-General in Council whereby the safety, tranquility or interests of British India, or of any part thereof, are or may be, in the judgment of the Governor-General, essentially affected, and he is of opinion either that the measure proposed ought to be adopted and carried into execution or that it ought to be suspended or rejected, and the majority present at a meeting of the council dissent from that opinion, the Governor-General may, on his own authority and responsibility, adopt, suspend or reject the measure, in whole or in part.

(3) In every such case any two members of the dissentient majority may require that the adoption, suspension or rejection of the measure, and the fact of their dissent, be reported to the Secretary of State, and the report shall be accompanied by copies of any minutes with the members of the Council have recorded on the subject.

(4) Nothing in this section shall empower the Governor-General to do anything which he could not lawfully have done with the concurrence of his Council.

42. If the Governor-General is obliged to absent himself from any meeting of the Council, by indisposition or any other cause [* *]³ the vice-president, or, if he is absent, the senior⁴ [member (other than the Commander-in-Chief)] present at the meeting, shall preside thereat, with the like powers as the Governor-General would have had if present :

Provided that if the Governor-General is at the time resident at the place where the meeting is assembled, and is not prevented by indisposition from signing any act

Sec. 39 (2).—¹ These words were substituted for the words "one ordinary member of the council" by *ibid.*

Sec. 40 (1).—² These words were inserted by *ibid.*

Sec. 42.—³ The words "and signifies his intend

absence to the council" were omitted by Part III of Sch. II of the Government of India Act, 1919 (9 & 10 Geo. 5, Ch. 101).

⁴ These words were substituted for the words "ordinary member" by Part II of Sch. II of *ibid.*

of council made at the meeting, the act shall require his signature ; but, if he declines or refuses to sign it, the like provisions shall have effect as in cases where the Governor-General, when present, dissents from the majority at a meeting of the Council.

43. (1) Whenever the Governor-General in Council declares that it is expedient that the Governor-General should visit any part of India unaccompanied by his Executive Council, the Governor-General in Council may, by order, authorize the Governor-General alone to exercise, in his discretion, all or any of the powers which might be exercised by the Governor-General in Council at meetings of the Council.

(2) The Governor-General during absence from his Executive Council may, if he thinks it necessary, issue on his own authority and responsibility, any order, which might have been issued by the Governor-General in Council, to any local Government, or to any officers or servants of the Crown acting under the authority of any local Government, without previously communicating the order to the local Government, and any such order shall have the same force as if made by the Governor-General in Council ; but a copy of the order shall be sent forthwith to the Secretary of State and to the local Government, with the reasons for making the order.

(3) The Secretary of State in Council may, by order, suspend until further order all or any of the powers of the Governor-General under the last foregoing subsection ; and those powers shall accordingly be suspended as from the time of the receipt by the Governor-General of the order of the Secretary of State in Council.

1[43-A. (1) The Governor-General may at his discretion appoint from among the members of the Legislative Assembly council secretaries who shall hold office during his pleasure and discharge such duties in assisting the members of his executive council as he may assign to them.

(2) There shall be paid to council secretaries so appointed such salary as may be provided by the Indian legislature.

(3) A council secretary shall cease to hold office if he ceases for more than six months to be a member of the Legislative Assembly.]

War and Treaties.

44. (1) The Governor-General in Council may not, without the express order of the Secretary of State in Council, in any case (except where hostilities have been actually commenced, or preparations for the commencement of hostilities have been actually made against the British Government in India or against any prince or state dependent thereon, or against any prince or state whose territories His Majesty is bound by any subsisting treaty to defend or guarantee), either declare war or commence hostilities or enter into any treaty for making war against any prince or state in India, or enter into any treaty for guaranteeing the possessions of any such prince or state.

(2) In any such excepted case the Governor-General in Council may not declare war, or commence hostilities, or enter into any treaty for making war, against any other prince or state than such as is actually committing hostilities or making preparations as aforesaid, and may not make any treaty for guaranteeing the possession of any prince or state except on the consideration of that prince or state actually engaging to assist His Majesty against such hostilities commenced or preparations made as aforesaid.

(3) When the Governor-General in Council commences any hostilities or makes any treaty, he shall forthwith communicate the same, with the reasons therefor, to the Secretary of State.

PART V.

LOCAL GOVERNMENTS.

General.

45. (1)¹ [Subject to the provisions of this Act and rules made thereunder], every local government shall obey the orders of the Governor-General in Council, and keep him constantly and diligently informed of its proceedings and all matters which ought, in its opinion, to be reported to him, or as to which he requires information, and is under his superintendence, direction and control in all matters relating to the government of its province.

2 (2) [* * *]

(3) The authority of a local government is not superseded by the presence in its province of the Governor-General.

Classification of central and provincial subjects.

3 45-A. (1) Provision may be made by rules under this Act—

(a) for the classification of subjects, in relation to the functions of government, as central and provincial subjects, for the purpose of distinguishing the functions of local governments and local legislatures from the functions of the Governor-General in Council and the Indian legislature ;

(b) for the devolution of authority in respect of provincial subject to local governments, and for the allocation of revenues or other moneys to those governments;

(c) for the use under the authority of the Governor-General in Council of the agency of local governments in relation to central subjects, in so far as such agency may be found convenient, and for determining the financial conditions of such agency ; and

(d) for the transfer from among the provincial subjects of subjects (in this Act referred to as "transferred subjects") to the administration of the governor acting with ministers appointed under this Act, and for the allocation of revenues or moneys for the purpose of such administration.

(2) Without prejudice to the generality of the foregoing power, rules made for the above-mentioned purposes may—

(i) regulate the extent and conditions of such devolution, allocation and transfer;

(ii) provide for fixing the contributions payable by local governments to the Governor-General in Council, and making such contributions a first charge on allocated revenues or moneys ;

(iii) provide for constituting a finance department in any province, and regulating the functions of that department ;

(iv) provide for regulating the exercise of the authority vested in the local government of a province over members of the public services therein ;

(v) provide for the settlement of doubts arising as to whether any matter does or does not relate to a provincial subject or a transferred subject, and for the treatment of matters which affect both a transferred subject and a subject which is not transferred, and

(vi) make such consequential and supplemental provisions as appear necessary or expedient :

Provided that without prejudice to any general power of revoking or altering rules under this Act, the rules shall not authorize the revocation or suspension of the transfer of any subject except with sanction of the Secretary of State in Council.

(3) The powers of superintendence, direction, and control over local governments vested in the Governor-General in Council under this Act shall, in relation to transferred subjects, be exercised only for such purposes as may be specified in rules

Sec. 45 (1).—¹ These words were inserted by Part II of Sch. II of the Government of India Act, 1919 (9 & 10 Geo. 5, Ch. 101).

Sec. 45 (2).—² Sub-s. (2) was omitted by Part

III of Sch. II of the Government of India Act, 1919 (9 & 10 Geo. 5, Ch. 101).

Sec. 45-A.—³ S. 45-A was inserted by Part I of Sch. II of *ibid.*

made under this Act, but the Governor-General in Council shall be the sole judge as to whether the purpose of the exercise of such powers in any particular case comes within the purposes so specified.

(4) The expressions "central subjects" and "provincial subjects" as used in this Act mean subjects so classified under the rules.

Provincial subjects, other than transferred subjects, are in this Act referred to as "reserved subjects."

Governorships.

1 46 [(1) The presidencies of Fort William in Bengal, Fort St. George, and Bombay, and the provinces known as the United Provinces, the Punjab, Bihar and Orissa, the Central Provinces, and Assam, shall each be governed, in relation to reserved subjects, by a governor in council, and in relation to transferred subjects, save as otherwise provided by this Act by governor acting with ministers appointed under this Act.

The said presidencies and provinces are in this Act referred to as "governors' provinces" and the two first named presidencies are in this Act referred to as the presidencies of Bengal and Madras.]

2 [(2) The governors of the said presidencies are appointed by His Majesty by warrant under the Royal Sign Manual, and the governors of the said provinces shall be so appointed after consultation with the Governor-General.]

(3) The Secretary of State may, if he thinks fit, by order revoke or suspend, for such period as he may direct, the appointment of a council for any or all of **3** [the governors' provinces]; and whilst any such order is in force the governor of the **4** [province] to which the order refers shall have all the powers of the governor thereof in Council.

47. (1) The members of a governor's executive council shall be appointed by His Majesty by warrant under the Royal Sign Manual, and shall be of such number, not exceeding four, as the Secretary of State in Council directs.

(2) **5** [One at least of them must be a person who at the time of his appointment has been] for at least twelve years in the service of the Crown in India.

6 [(3) Provision may be made by rules under this Act as to the qualifications to be required in respect of members of the executive council of the governor of a province in any case where such provision is not made by the foregoing provisions of this section.]

48. Every governor of a **7** [province] shall appoint a member of his executive council to be vice-president thereof.

8 **49.** (1) All orders and other proceedings of the government of a governor's province shall be expressed to be made by the government of the province, and shall be authenticated as the governor may by rule direct, so, however, that provision shall be made by rule for distinguishing orders and other proceedings relating to transferred subjects from other orders and proceedings.

Sec. 46 (1).—¹ Sub-section 1 of S. 46 was substituted by Part I of Sch. II of the Government of India Act, 1919 (9 & 10 Geo. 5, Ch. 101). The province of Burma was constituted a Governor's province from January, 1923.

"Governor in Council."—Meaning of. *See* (1926) M. W. N. 842 = 99 L.C. 18 = A. I. R. 1927 Mad. 22.

Sec. 46 (2).—² This sub-section was substituted by Part II of *ibid.*

Sec. 46 (3).—³ These words were substituted for the words "those presidencies" by Part II of Sch. II of the Government of India Act, 1919 (9 & 10 Geo. 5, Ch. 101).

⁴ This word was substituted for the word "pre-

sidency" by *ibid.*

Sec. 47 (2).—⁵ These words were substituted for the words "Two at least of them must be persons who at the time of their appointment have been" by *ibid.*

Sec. 47 (3).—⁶ This sub-section was substituted by *ibid.*

Sec. 48.—⁷ This word was substituted for the word "Presidency" by *ibid.*

Sec. 49.—⁸ Section 49 was substituted by Part I of *ibid.*

A notification under R. 5 of the rules under the Madras City Municipal Act of 1919 should be in accordance with S. 49 of the Government of India Act. The onus of proving validity of the notifica-

Orders and proceedings authenticated as aforesaid shall not be called into question in any legal proceeding on the ground that they were not duly made by the government of the province.

(2) The governor may make rules and orders for the more convenient transaction of business in his executive council and with his ministers, and every order made or act done in accordance with those rules and orders shall be treated as being the order or the act of the government of the province.

The governor may also make rules and orders for regulating the relations between his executive council and his ministers for the purpose of the transaction of the business of the local government :

Provided that any rules or orders made for the purposes specified in this section which are repugnant to the provisions of any other rules made under this Act shall, to the extent of that repugnancy, but not otherwise, be void.]

50. (1) If any difference of opinion arises on any question brought before a meeting of a governor's executive council, the Governor in Council shall be bound by the opinion and decision of the majority of those present, and if they are equally divided the governor or other person presiding shall have a second or casting vote.

(2) Provided that, whenever any measure is proposed before a Governor in Council whereby the safety, tranquillity or interests of his ¹[province], or of any part thereof, are, or may be, in the judgment of the governor, essentially affected, and he is of opinion either that the measure proposed ought to be adopted and carried into execution, or that it ought to be suspended or rejected, and the majority present at a meeting of the council dissent from that opinion, the governor may, on his own, authority and responsibility, by order in writing, adopt, suspend or reject the measure, in whole or in part.

(3) In every such case the governor and the members of the council present at the meeting shall mutually exchange written communications (to be recorded at large in their secret proceedings) stating the grounds of their respective opinions, and the order of the governor shall be signed by the governor and by those members.

(4) Nothing in this section shall empower a governor to do anything which he could not lawfully have done with the concurrence of his council.

51. If a governor is obliged to absent himself from any meeting of his executive council, by indisposition or any other cause, ² [*] the vice-president, or, if he is absent, the senior ³ [*] member present at the meeting, shall preside thereat, with the like powers as the governor would have had if present :

Provided that if the governor is at the time resident at the place where the meeting is assembled, and is not prevented by indisposition from signing any act of council made at the meeting, the act shall require his signature ; but, if he declines or refuses to sign it, the like provisions shall have effect as in cases where the governor, when present, dissents from the majority at a meeting of the council.

tion is on the party alleging it. Where a notification was not proved to have been authenticated and there was on the face of it nothing to show that it was issued by the Governor with the Ministers. *Held*, the notification was invalid. (42 M. 885, ref.) (1926) M. W. N. 842 = 99 I. C. 18 = A. I. R. 1927 Mad. 22 [See On appeal 53 M. L. J. 603.] A Government order was issued signed by the secretary to Government, "By order of the Government, Ministry of Local Self-Government." *Held* it was valid. 49 Mad. 49 = (1926) M. W. N. 467 = 92 I. C. 918 = A. I. R. 1926 Mad. 297. Publication of Government

order and notification in the official Gazette—Presumption that the order was passed by Governor in Council. *See* 26 L. W. 569 = 39 M. L. T. 367 = A. I. R. 1927 Mad. 980 = 53 M. L. J. 603.

Sec. 50 (2).—¹ This word was substituted for the word "presidency" by Pt. II of Sch II of the Government of India Act, 1919 (9 & 10 Geo. 5, Ch. 101)

Sec. 51.—² The words "and signifies his intended absence to the council" were omitted by Part III of Sch II of the Government of India Act, 1919 (9 & 10 Geo. 5, Ch. 101.)

³ The word "civil" was omitted by *ibid*.

1 [52. (1)] The Governor of a Governor's province may, by notification, appoint ministers, not being members of his executive council or other officials, to administer transferred subjects, and any ministers so appointed shall hold office during his pleasure.

Appointment of ministers and council secretaries.

There may be paid to any minister so appointed in any province the same salary as is payable to a member of the Executive Council in that province, unless a smaller salary is provided by vote of the Legislative Council of the province.

(2) No minister shall hold office for a longer period than six months, unless he is or becomes an elected member of the local legislature.

(3) In relation to transferred subjects, the Governor shall be guided by the advice of his ministers, unless he sees sufficient cause to dissent from their opinion, in which case he may require action to be taken otherwise than in accordance with that advice :

Provided that rules may be made under this Act for the temporary administration of a transferred subject were in cases of emergency, owing to a vacancy, there is no minister in charge of the subject, by such authority and in such manner as may be prescribed by the rules.

(4) The Governor of a Governor's province may at his discretion appoint from among the non-official members of the local legislature, council secretaries, who shall hold office during his pleasure and discharge such duties in assisting members of the Executive Council and ministers as he may assign to them.

There shall be paid to council secretaries so appointed such salary as may be provided by vote of the Legislative Council.

A council secretary shall cease to hold office if he ceases for more than six months to be a member of the legislative council.]

2 [52-A. (1)] The Governor-General in Council may, after obtaining an expression of opinion from the local government and the local legislature affected by notification, with the sanction of His Majesty previously signified by the Secretary of State in Council, constitute a new Governor's province,³ or place part of a governor's province under the administration of a deputy-governor to be appointed by the Governor-General, and may in any such case apply, with such modifications as appear necessary or desirable, all or any of the provisions of this Act relating to governors, provinces, or provinces under a Lieutenant-Governor or Chief Commissioner, to any such new province or part of a province.

(2) The Governor-General in Council may declare any territory in British India to be a "backward tract," and may, by notification, with such sanction as aforesaid, direct that this Act shall apply to that territory subject to such exceptions and modifications as may be prescribed in the notification.

Where the Governor-General in Council has, by notification, directed as aforesaid he may, by the same or subsequent notification, direct that any Act of the Indian legislature shall not apply to the territory in question or any part thereof, or shall apply to the territory or any part thereof subject to such exceptions or modifications as the Governor-General thinks fit, or may authorize the Governor-in-Council to give similar directions as respects any act of the local legislature.]

3 [52-B. (1)] The validity of any order made or action taken after the commencement of the Government of India Act, 1919, by the Governor-General-in-Council or by a local Government which would have been within the powers of the Governor-General in Council or of such local government if that Act had not been passed, shall not be open to question in any legal proceedings on the ground that by reason of any provision of that Act, or this Act, or of any rule made by virtue of any such provision, such order or action has ceased to

Sec. 52.—¹ Section 52 was substituted by Part II of *ibid.*

Secs. 52-A & 52-B.—² Sections 52-A and 52-B were inserted by Part I of Sch. II of the Government of India Act, 1919, (9 & 10 Geo. 5, Ch. 101).

³ The province of Burma was constituted a Governor's province with effect from January 2, 1923 by notifications No 225, dated 7th October, 1921 and notification No. 1192, dated 2nd January, 1923.

be within the powers of the Governor-General in Council or of the Government concerned.

(2) The validity of any order made or action taken by a Governor in Council, or by a Governor acting with his ministers, shall not be open to question in any legal proceedings on the ground that such order or action relates or does not relate to a transferred subject, or relates to a transferred subject of which the minister is not in charge.]

53. (1) ¹ [The province of] Burma, is subject to the provisions of this Act, Governed by a Lieutenant-Governor² [* *].

(2) The Governor-General in Council may, by notification with sanction of His Majesty previously signified by the Secretary of State in Council, constitute a new province under a Lieutenant-Governor.

Appointment, etc., of lieutenant-governors. **54.** (1) A lieutenant-governor is appointed by the Governor-General with the approval of His Majesty.

(2) A lieutenant-governor must have been, at the time of his appointment, at least ten years in the service of the Crown in India.

3 [(3) * * *]

55. (1) The Governor-General in Council, with the approval of the Secretary of State in Council, may, by notification, create a council in any province under a lieutenant-governor, for the purpose of assisting the lieutenant-governor in the executive government of the province, and by such notification—

(a) make provision for determining what shall be the number (not exceeding four) and qualifications of the members of the Council; and

(b) make provision for the appointment of temporary or acting members of the council during the absence of any member from illness or otherwise, ⁴ [and for supplying a vacancy until it is permanently filled,] and for the procedure to be adopted in case of a difference of opinion between a lieutenant-governor and his council, and in the case of equality of votes, and in the case of lieutenant-governor being obliged to absent himself from his council by indisposition or any cause:

Provided that, before and such notification is published, a draft thereof shall be laid before each House of Parliament for not less than sixty days during the session of Parliament, and if before the expiration of that time, an address is presented to His Majesty by either House of Parliament against the draft or any part thereof, no further proceeding shall be taken thereon, without prejudice to the making of any new draft.

(2) Every notification under this section shall be laid before both Houses of Parliament as soon as may be after it is made.

(3) Every member of a lieutenant-governor's executive council shall be appointed by the Governor-General with the approval of His Majesty.

56. A lieutenant-governor who has an Executive Council shall appoint a member of the council to be vice-president thereof, and that vice-president shall preside at meetings of the council in the absence of the lieutenant-governor.

57. A lieutenant-governor who has an Executive Council may, with the consent of the Governor-General in Council, make rules and orders for more convenient transaction of business in the Council, and every order made, or act done, in accordance with such rules and orders, shall be treated as being the order for the act of the lieutenant-governor.

Sec. 53 (1).—¹ These words were substituted for the words "Each of the following provinces, namely, those known as Behar, Orissa, the United Provinces of Agra and Oudh, the Punjab and" by Part II of Sch. II of the Government of India Act, 1919 (9 & 10 Geo. 5, Ch. 101).

² The words "with or without an executive

council" were omitted by *ibid.*

Sec. 54 (3).—³ Sub-section (3) was omitted by Part III of *ibid.*

Sec. 55 (1).—⁴ These words inserted by Part III of Sch. II of the Government of India Act 1919 (9 & 10 Geo. 5, Ch. 101).

nor in council. ¹[An order made as aforesaid shall not be called into question in any legal proceedings on the ground that it was not duly made by the lieutenant-governor in council.]

58. Each of the following provinces, namely, those known as ² [* *] the North-West Frontier Province, British Baluchistan, Chief commissioners. Delhi, Ajmer-Merwara, Coorg, and the Andaman and Nicobar Islands is subject to the provisions of this Act, administered by a chief commissioner.

59. The Governor-General in Council may, with the approval of the Secretary of State, and by notification, take any part of British India under the immediate authority and management of the Governor-General in Council, and thereupon give all necessary orders and directions respecting the administration of that part by placing it under a chief commissioner or by otherwise providing for its administration.

Boundaries.

60. The Governor-General in Council may, by notification, declare, appoint or alter the boundaries of any of the provinces into which British India is for the time being divided, and distribute the territories of British India among the several provinces thereof in such manner as may seem expedient, subject to these qualifications, namely :—

(1) an entire district may not be transferred from one province to another without the previous sanction of the Crown, signified by the Secretary of State in Council ; and

(2) any notification under this section may be disallowed by the Secretary of State in Council.

61. An alteration in pursuance of the foregoing provisions of the mode of administration of any part of British India, or of the boundaries of any part of British India, shall not affect the law for the time being in force in that part.

62. The Governor of Bengal in Council, the Governor of Madras in Council and the Governor of Bombay in Council may, with the approval of the Secretary of State in Council, and by notification, extend the limits of the towns of Calcutta, Madras and Bombay, respectively ; and any Act of Parliament, letters patent, charter, law or usage conferring jurisdiction, power or authority within the limits of those towns respectively shall have effect within the limits so extended.

PART VI.

INDIAN LEGISLATION.

The Indian Legislature.

³ **[63.]** Subject to the provisions of this Act, the Indian legislature shall consist of the Governor-General and two chambers, namely, the Council of State and the Legislative Assembly.

Except as otherwise provided by or under this Act, a Bill shall not be deemed to have been passed by the Indian legislature unless it has been agreed to by both

¹ **Sec. 57.**—These words were inserted by Part II of Sch. II of the Government of India Act, 1919 (9 & 10 Geo. 5, Ch. 101)

² **Sec. 58.**—The words " Assam, the Central Provinces " were omitted by *ibid.*

³ **Sec. 60.**—A Government notification, declaring the deep stream of the Ganges as boundary of the two provinces also determines the jurisdiction of the Civil Courts in those places. Alteration in

the jurisdiction of the local Government does not affect the Civil Courts' jurisdiction. 5 Pat. L. J. 451 = 57 I. C. 201

⁴ **Secs. 63, 63-A, 63-B, 63-C, 63-D, 63-E and 64.**—³ Ss 63-A, 63-B, 63-C, 63-D, 63-E and 64 were substituted for Ss. 63 and 64 by Part. I of Sch. II of the Government of India Act, 1919 (9 & 10 Geo. 5, Ch. 101).

chambers, either without amendment or with such amendments only as may be agreed to by both chambers].

3[63-A. (1) The Council of State shall consist of not more than sixty members nominated or elected in accordance with rules made under this Act, of whom not more than twenty shall be official members.

(2) The Governor-General shall have power to appoint, from among the members of the Council of State, a president and other persons to preside in such circumstances as he may direct.

(3) The Governor-General shall have the right of addressing the Council of State, and may for that purpose require the attendance of its members.]

3 [63-B. (1) The Legislative Assembly shall consist of members nominated or elected in accordance with rules made under this Act.

(2) The total number of members of the Legislative Assembly shall be one hundred and forty. The number of non-elected members shall be forty of whom twenty-six shall be official members. The number of elected members shall be one hundred:

Provided that rules made under this Act may provide for increasing the number of the Legislative Assembly as fixed by this section, and may vary the proportion which the classes of members bear one to another, so, however, that at least five-sevenths of the members of the Legislative Assembly shall be elected members, and at least one-third of the other members shall be non-official members.

(3) The Governor-General shall have the right of addressing the Legislative Assembly and may for the purpose require the attendance of its members.]

3[63-C. (1) There shall be president of the Legislative Assembly, who shall, until the expiration of four years from the first meeting thereof, be a person appointed by the Governor-General, and shall thereafter be a member of the Assembly elected by the Assembly and approved by the Governor-General:

Provided that, if at the expiration of such period of four years the Assembly is in Session, the president then in office shall continue in office until the end of the current session, and the first election of a president shall take place at the commencement of the ensuing session.

(2) There shall be a deputy-president of the Legislative Assembly, who shall preside at meetings of the Assembly in the absence of the president, and who shall be a member of the Assembly elected by the Assembly and approved by the Governor-General.

(3) The appointed president shall hold office until the date of the election of a president under this section, but he may resign his office by writing under his hand addressed to the Governor-General, or may be removed from office by order of the Governor-General, and any vacancy occurring before the expiration of his term of office shall be filled by a similar appointment for the remainder of such term.

(4) An elected president and a deputy-president shall cease to hold office if they cease to be members of the Assembly. They may resign office by writing under their hands addressed to the Governor-General, and may be removed from office by a vote of the Assembly with the concurrence of the Governor-General.

(5) A president and a deputy president shall receive such salaries as may be determined, in the case of an appointed president by the Governor-General, and in the case of an elected president and a deputy-president by Act of the Indian legislature].

3[63-D. (1) Every Council of State shall continue for five years, and every Legislative Assembly for three years from its first meeting :

Provided that—

(a) either chamber of the legislature may be sooner dissolved by the Governor-General; and

(b) any such period may be extended by the Governor-General if in special circumstances he so thinks fit, and

(c) after the dissolution of either chamber the Governor-General shall appoint a date not more than six months, or, with the sanction of the Secretary of State not more than nine months, after the date of dissolution for the next session of that chamber.

(2) The Governor-General may appoint such times and places for holding the sessions of either chamber of the Indian legislature as he thinks fit, and may also from time to time, by notification or otherwise, prorogue such sessions.

(3) Any meeting of either chamber of the Indian legislature may be adjourned by the person presiding.

(4) All questions in either chamber shall be determined by a majority of votes of members present other than the presiding member, who shall, however, have and exercise a casting vote in the case of an equality of votes.

(5) The powers of either chamber of the Indian legislature may be exercised notwithstanding any vacancy in the chamber.]

3[63-E. (1) An official shall not be qualified for election as a member of either chamber of the Indian legislature, and if non-official member of either chamber accepts office in the service of the Crown in India, his seat in that chamber shall become vacant.

Membership of both chambers.

(2) If an elected member of either chamber of the Indian legislature becomes a member of the other chamber, his seat in such first-mentioned chamber shall thereupon become vacant.

(3) If any person is elected a member of both chambers of the Indian legislature he shall, before he takes his seat in either chamber, signify in writing the chamber of which he desires to be a member, and thereupon his seat in the other chamber shall become vacant.

(4) Every member of the Governor-General's Executive Council shall be nominated as a member of one chamber of the Indian legislature, and shall have the right of attending in and addressing the other chamber, but shall not be a member of both chambers.]

Supplementary provisions as to composition of Legislative Assembly and Council of State.

3 [64. (1) Subject to the provisions of this Act, provision may be made by rules under this Act as to—

(a) the term of office of nominated members of the Council of State and the Legislative Assembly, and the manner of filling casual vacancies occurring by reason of absence of members from India, inability to attend to duty, death, acceptance of office, or resignation duly accepted, or otherwise; and

(b) the conditions under which and the manner in which persons may be nominated as members of the Council of State or the Legislative Assembly; and

(c) the qualification of electors, the constitution of constituencies, and the method of election for the Council of State and the Legislative Assembly (including the number of members to be elected by communal and other electorates) and any matters incidental or ancillary thereto; and

(d) the qualifications for being or for being nominated or elected as members of the Council of State or the Legislative Assembly; and

(e) the final decision of doubts or disputes as the validity of an election; and

(f) the manner in which the rules are to be carried into effect.

(2) Subject to any such rules, any person who is a ruler or subject of any state in India may be nominated as a member of the Council of State or the Legislative Assembly.]

65. (1) The ¹[Indian legislature] has power to make laws—

Powers of Indian legislature.

Sec. 63-E and 64.—³ See the foot-note on page 1138.

Sec. 65 (1).—¹ These words were substituted for the words "Governor-General in Legislative

Council" by Part II of Sch. II of the Government of India Act, 1919 (9 & 10 Geo. 5, Ch. 101).

(a) for all persons, for all courts, and for all places and things, within British India ; and

(b) for all subjects of His Majesty and servants of the Crown within other parts of India ; and

(c) for all native Indian subjects of His Majesty, without and beyond as well as within British India ; and

(d) for the Government officers, soldiers¹ [airmen] and followers in His Majesty's Indian forces, wherever they are serving, in so far as they are not subject to the Army Act ¹ [or the Air Force Act] ; and

(e) for all persons employed or serving in or belonging to the Royal Indian Marine Service ; and

(f) for repealing or altering any laws which for the time being are in force in any part of British India or apply to persons for whom the ²[Indian legislature] has power to make laws.

(2) Provided that the ² [Indian legislature] has not, unless expressly so authorised by Act of Parliament, power to make any law repealing or affecting—

(i) any Act of Parliament passed after the year one thousand eight hundred and sixty and extending to British India (including the Army Act, ¹ [the Air Force Act] and any Act amending the same) ; or

(ii) any Act of Parliament enabling the Secretary of State in Council to raise money in the United Kingdom for the Government of India ;

and has not power to make any law affecting the authority of Parliament, or any part of the unwritten laws or constitution of the United Kingdom of Great Britain and Ireland whereon may depend in any degree the allegiance of any person to the Crown of the United Kingdom, or affecting the sovereignty or dominion of the Crown over any part of British India.

(3) The ² [Indian legislature] has not power, without the previous approval of the Secretary of State in Council, to make any law empowering any court, other than a High Court, to sentence to the punishment of death any of His Majesty's subjects born in Europe; or the children of such subjects, or abolishing any High Court.

66. (1) A law made under this Act for the Royal Indian Marine Service shall

Laws for the Royal Indian Marine Service.

not apply to any offence unless the vessel to which the offender belongs is at the time of the commission of the offence within the limits of Indian waters, that is to say,

Sec. 65 (1) (d) and (2) (i).—¹These words were inserted by Part. III of Sch. II of the Government of India Act, 1919 (9 & 10 Geo. 5, Ch. 101.)

Sec. 65 (1) (f), (2) and (3).—²These words were substituted for the words "Governor-General in Legislative Council" by Part II of Sch. II of the Government of India Act, 1919 (9 and 10 Geo. 5, Ch. 101).

Sec. 65. POWERS OF THE INDIAN LEGISLATURE.—If the Indian Legislative Council passes an enactment depriving a subject of his remedy in Civil Courts against the Secretary of State for wrongs to property the act is *ultra vires*. 40 Cal. 301 = 40 I. A. 48 = 24 M. L. J. 459 = 18 I. C. 22 (P. C.) (On appeal from. 8 I. C. 1129 = 5 L. B. R. 163) See also 3 Bur. L. T. 93.) Sec 41 (b) of Act IV of 1898 (Burma) which enacts that no Civil Court is to have jurisdiction to determine a claim to any right over land against the Government, is *ultra vires* of the Indian Legislature. (*Ibid.*) An action for damages for trespass on land would have lain against the East India Co. and consequently would also lie against the Secretary of State. (*Ibid.*) (5 B. H. C. R. Ap. I approved) The Indian Government might legislate validly about the formalities of procedure so long as they

preserve the substantial right of the subject to sue the Government in the Civil Courts like any other defendant and do not violate the fundamental principle that the Secretary of State even as representing the Crown is not to be in a position different from that of the East India Co. (*Ibid.*) If a party had a right of action against the East India Company it cannot be taken away by any act of Indian legislature after the company's possession were vested in the Crown. 45 Bom. 1161 = 62 I. C. 673 = 23 Bom. L. R. 492. (40 Cal. 391 (P. C.) Foll.) Powers of the Indian legislature discussed. 6 L. W. 428 = 42 I. C. 724 = 18 Cr. L. J. 996.

Sec. 65 (2) of the Act does not prevent the Government of India from passing a law which may modify or affect a rule of the constitution or of the common law upon the observance of which some person may conceive or allege his allegiance to depend. It only refers to laws which directly affect the allegiance of the subject. 1 Lah. 326 = 47 I. A. 128 = 39 M. L. J. 1 = 24 C. W. N. 650 = 56 I. C. 440 (P. C.). Rights to personal freedom and property are the rights referred to in the phrase 'unwritten laws' in S. 65 (2) 39 Mad. 1085. [40 C. 391, (P. C.), ref. 6 B. L. R. 392, approved].

the high seas between the Cape of Good Hope on the West and the Straits of Magellan on the East, and any territorial waters between those limits.

(2) The punishments imposed by any such law for offences shall be similar in character to, and not in excess of, the punishments which may, at the time of making the law, be imposed for similar offences under the Acts relating to His Majesty's Navy except that, in the case of persons other than Europeans or Americans, imprisonment for any term not exceeding fourteen years, or transportation for life or any less term, may be substituted for penal servitude.

67. ¹ [(1) Provision may be made by rules under this Act for regulating the course of business and the preservation of order in the chambers of the Indian legislature, and as to the persons to preside at the meetings of the Legislative Assembly in the absence of the president and the deputy-president; and the rules may provide for the number of members required to constitute a quorum, and for prohibiting or regulating the asking of questions on, and the discussion of, any subject specified in the rules].

(2) It shall not be lawful, without the previous sanction of the Governor-General, to introduce at any meeting of ²[either chamber of the Indian legislature] any measure affecting—

(a) the public debt or public revenues of India or imposing any charge on the revenues of India; or

(b) the religion or religious rites and usages of any class of British subjects in India; or

(c) the discipline or maintenance of any part of His Majesty's military, ³[naval, or air] forces; or

(d) the relations of the Government with foreign princes or states.

⁴ [or any measure—

(i) regulating any provincial subject, or any part of a provincial subject, which has not been declared by rules under this Act to be subject to legislation by the Indian Legislature; or

(ii) repealing or amending any Act of a local legislature; or

(iii) repealing or amending any Act or ordinance made by the Governor-General.]

⁵ [(2-a) Where in either Chamber of the Indian legislature any Bill has been introduced, or is proposed to be introduced, or any amendment to a Bill is moved, or proposed to be moved, the Governor-General may certify that the Bill, or any clause of it, or the amendment, affects the safety or tranquillity of British India, or any part thereof, and may direct that no proceedings, or that no further proceedings, shall be taken by the chamber in relation to the Bill, clause, or amendment, and effect shall be given to such direction.]

⁶ [(3) If any Bill which has been passed by one chamber is not, within six months after the passage of the Bill by that chamber, passed by the other chamber either without amendments or with such amendments as may be agreed to by the two chambers, the Governor-General may in his discretion refer the matter for decision to a joint sitting of both chambers: Provided that standing orders may under this section may provide for meetings of members of both chambers appointed for the purpose, in order to discuss any difference of opinion which has arisen between the two chambers.]

⁶ [(4) Without prejudice to the powers of the Governor-General under section sixty-eight of this Act the Governor-General may, where a Bill has been passed by

Sec. 67(1).—¹This sub-section was substituted by Part I of Sch. II of the Government of India Act, 1919 (9 & 10 Geo. 5, Ch. 101).

Sec. 67(2).—²These words were substituted for the words "the Council" by Part II of *ibid.*

Sec. 67(2)(c).—³These words were substituted for the words "or naval" by Part III of *ibid.*

Sec. 67(2)(d).—⁴These clauses were inserted

by Part II of *ibid.*

Sec. 67(2-a).—⁵Sub-section (2-a) was inserted by Part II of Sch. II of the Government of India Act, 1919 (9 & 10 Geo. 5, Ch. 101).

Sec. 67(3), (4).—⁶Sub-sections (3), (4) were substituted for sub-section (3) by Part I of *ibid.*

both chambers of the Indian legislature, return the Bill for reconsideration by either chamber.]

¹ [(5) Rules made for the purpose of this section may contain such general and supplemental provisions as appear necessary for the purpose of giving full effect to this section.]

¹ [(6) Standing orders may be made providing for the conduct of business and the procedure to be followed in either chamber, of the Indian legislature in so far as these matters are not provided for by rules made under this Act. The first standing orders shall be made by the Governor-General in Council, but may with the consent of the Governor-General be altered by the chamber to which they relate.

Any standing order made as aforesaid which is repugnant to the provisions of any rules made under this Act shall, to the extent of that repugnancy but not otherwise, be void.]

¹ [(7) Subject to the rules and standing orders affecting the chambers there shall be freedom of speech in both chambers of the Indian legislature. No person shall be liable to any proceedings in any court by reason of his speech or vote in either chamber, or by reason of anything contained in any official report of the proceedings of either chamber.]

² [67-A. (1) The estimated annual expenditure and revenue of the Governor-General in Council shall be laid in the form of a statement before both Chambers of the Indian legislature in each

Indian Budget.

year.

(2) No proposal for the appropriation of any revenue or moneys for any purpose shall be made except on the recommendation of the Governor-General.

(3) The proposals of the Governor-General in Council for the appropriation of revenue or moneys relating to the following heads of expenditure shall not be submitted to the vote of the Legislative Assembly, nor shall they be open to discussion by either chamber at the time when the annual statement is under consideration, unless the Governor-General otherwise directs—

(i) interest and sinking fund charges on loans ; and

(ii) expenditure of which the amount is prescribed by or under any law; and

“(iii) Salaries and pensions payable to or to the dependants of—

(a) persons appointed by or with the approval of His Majesty or by the Secretary of State in Council ;

(b) Chief Commissioners and Judicial Commissioners ;

Persons appointed before the first day of April, nineteen hundred and twenty-four, by the Governor-General in Council or by a local Government to services or posts classified by rules under this Act as superior services or posts ; and

(iv) Sums payable to any person who if or has been in the civil service of the Crown in India under any order of the Secretary of State in Council, of the Governor-General in Council, or of a Governor, made upon an appeal made to him in pursuance of rules made under this Act.]”³

(v) expenditure classified by the order of the Governor-General in Council as—

(a) ecclesiastical;

(b) political;

(c) defence.

(4) If any question arises whether any proposed appropriation of revenue or moneys does or does not relate to the above heads, the decision of the Governor-General on the question shall be final.

(5) The proposals of the Governor-General in Council for the appropriation of revenue or moneys relating to heads of expenditure not specified in the above heads shall be submitted to the vote of the Legislative Assembly in the form of demands for grants.

Sec. 67 (5), (6) and (7).—¹ Sub-sections (5), (6) & (7) were substituted for sub-section (3) by Part I of Sch. II of the Government of India Act, 1919 (9 & 10 Geo. 5, Ch. 101).

Sec. 67-A.—² Section 67-A was inserted by Pt.

I of Sch. II of the Government of India Act, 1919 (9 & 10 Geo. 5, Ch. 101).

Sec. 67-A (3) (iii & iv).—³Substituted by St. of 1926.

(6) The Legislative Assembly may assent or refuse its assent to any demand or may reduce the amount referred to in any demand by a reduction of the whole grant.

(7) The demands as voted by the Legislative Assembly shall be submitted to the Governor-General in Council, who shall, if he declares that he is satisfied that any demand which has been refused by the Legislative Assembly is essential to the discharge of his responsibilities, act as if it had been assented to, notwithstanding the withholding of such assent or the reduction of the amount therein referred to, by the Legislative Assembly.

(8) Notwithstanding anything in this section the Governor-General shall have power, in cases of emergency, to authorise such expenditure as may, in his opinion, be necessary for the safety or tranquillity of British India or any part thereof.]

¹ [67-B. (1) Where either chamber of the Indian legislature refuses leave to introduce, or fails to pass in a form recommended by the Governor-General, any Bill, the Governor-General may certify that the passage of the Bill is essential for the safety, tranquillity, or interests of British India or any part thereof, and thereupon—

(a) If the Bill has already been passed by the other Chamber, the Bill shall, on signature by the Governor-General, notwithstanding that it has not been consented to by both chambers, forthwith become an Act of the Indian legislature in the form of the Bill as originally introduced or proposed to be introduced in the Indian legislature, or (as the case may be) in the form recommended by the Governor-General; and

(b) If the Bill has not already been so passed, the Bill shall be laid before the other chamber, and, if consented to by that Chamber in the form recommended by the Governor-General, shall become an Act as aforesaid on the signification of the Governor-General's assent, or, if not so consented to, shall, on signature by the Governor-General, become an Act as aforesaid.

(2) Every such Act shall be expressed to be made by the Governor-General, and shall, as soon as practicable after being made, be laid before both Houses of Parliament, and shall not have effect until it has received His Majesty's assent, and shall not be presented for His Majesty's assent until copies thereof have been laid before each House of Parliament for not less than eight days on which that House has sat; and upon the signification of such assent by His Majesty in Council, and the notification thereof by the Governor-General, the Act shall have the same force and effect as an Act passed by the Indian legislature and duly assented to:

Provided that where in the opinion of the Governor-General a state of emergency exists which justifies such action, the Governor-General may direct that any such Act shall come into operation forthwith, and thereupon the Act shall have such force and effect as aforesaid, subject, however, to disallowance by His Majesty in Council.]

68. (1) When ² [a Bill] has been passed ³ [by both Chambers of the Indian legislature], the Governor-General, ⁴ [***] may declare that he assents to the ⁵ [Bill], or that he withholds assent from the ⁵ [Bill] or that he reserves the bill ⁵ [Bill] for the signification of His Majesty's pleasure thereon.

(2) ⁶ [A Bill passed by both Chambers of the Indian legislature shall not become an Act until the Governor-General has declared his assent thereto, or, in the case of ² [a Bill] reserved for the signification of His Majesty's pleasure, until His

Sec. 67 B.—¹ Section 67-B was inserted by Part I of Sch. II of the Government of India Act, 1919 (9 & 10 Geo. 5, Ch. 101).

Sec. 68 (1).—² These words were substituted for the words "an Act" by Part II of Sch. II of the Government of India Act, 1919 (9 & 10 Geo. 5, Ch. 101.)

³ These words were substituted for the words "at a meeting of the Indian Legislative Council"

by *ibid.*

⁴ The words "whether he was or was not present in Council at the meeting thereof" were omitted by *ibid.*

⁵ This word was substituted for the word "Act" by *ibid.*

Sec. 68 (2).—⁶ These words were substituted for the words "An Act of the Governor-General in Legislative Council has not validity" by *ibid.*

Majesty [in Council]¹ has signified his assent [* * *],² and that assent has been notified by the Governor-General.

69. (1) When an Act of the [Indian legislature]³ has been assented to by the Governor-General, he shall send to the Secretary of State an authentic copy thereof, and it shall be lawful for His Majesty [in Council]¹ to signify [* * *]⁴ his disallowance of any such Act.

(2) Where the disallowance of any such Act has been so signified, the Governor-General shall forthwith notify the disallowance, and thereupon the Act, as from the date of the notification, shall become void accordingly.

70. [Rules for conduct of legislative business]—Omitted by Part II of Sch. II of 9 & 10 Geo. 5, Ch. 101.

Regulations and Ordinances.

71. (1) The Local Government of any part of British India to which this section for the time being applies may propose to the Governor-General in Council the draft of any regulation for the peace and good government of that part, with the reasons for proposing the regulation.

(2) Thereupon the Governor-General in Council may take any such draft and reasons into consideration; and when any such draft has been approved by the Governor-General in Council and assented to by the Governor-General, it shall be published in the Gazette of India and in the local official gazette, if any, and shall thereupon have the like force of law and be subject to the like disallowance as if it were an Act of the [Indian legislature].³

(3) The Governor-General shall send to the Secretary of State in Council an authentic copy of every regulation to which he has assented under this section.

⁵[(3-a) A regulation made under this section for any territory shall not be invalid by reason only that it confers or delegates power to confer on courts or administrative authorities power to sit or act outside the territory in respect of which they have jurisdiction or functions, or that it confers or delegates power to confer appellate jurisdiction or functions on courts or administrative authorities sitting or acting outside the territory.]

(4) The Secretary of State may, by resolution in Council, apply this section to any part of British India, as from a date to be fixed in the resolution, and withdraw the application of this section from any part to which it has been applied.

72. The Governor-General may, in cases of emergency, make and promulgate ordinances for the peace and good government of British India or any part thereof, and any ordinance so made shall, for the space of not more than six months from its promulgation, have the like force of law as an Act passed by the [Indian legislature]³ but the power of making ordinances under this section is subject to the like restrictions as the power of the [Indian legislature]³ to make laws; and any ordinance made under this section is subject to the like disallowance as an Act passed by the [Indian legislature]³ and may be controlled or superseded by any such Act.

Sec. 68 (2).—¹ These words were inserted by Part II of Sch. II of the Government of India Act, 1919 (9 & 10 Geo. 5, Ch. 101).

² The words "to the Governor-General through the Secretary of State in Council" were omitted by *Ibid*.

Sec. 69 (1).—³ These words were substituted

for the words "Governor-General in Legislative Council" by *Ibid*.

⁴ The words "through the Secretary of State in Council" were omitted by *Ibid*.

Sec. 71 (3-A).—⁵ This subsection was inserted by section 2 (1) of the Government of India (Amendment) Act, 1916 (6 & 7 Geo. 5, Ch. 37).

LOCAL LEGISLATURES.

(a) *Governors' Provinces.*

1[72-A. (1) There shall be a Legislative Council in every Governor's Province, which shall consist of the members of the Executive Council and of the members nominated or elected as provided by this Act.

The Governor shall not be a member of the Legislative Council, but shall have the right of addressing the Council, and may for that purpose require the attendance of its members.

(2) The number of members of the Governors' Legislative Councils shall be in accordance with the table set out in the First Schedule to this Act ; and of the members of each Council not more than twenty per cent. shall be official members, and at least seventy per cent. shall be elected members :

Provided that—

(a) subject to the maintenance of the above proportions, rules under this Act may provide for increasing the number of members of any council, as specified in that schedule ; and

(b) the Governor may, for the purposes of any Bill introduced or proposed to be introduced in this Legislative Council, nominate, in the case of Assam one person, and in the case of other provinces not more than two persons, having special knowledge or experience of the subject-matter of the Bill, and those persons shall, in relation to the Bill, have for the period for which they are nominated all the rights of members of the Council, and shall be in addition to the numbers above referred to ; and

(c) members nominated to the Legislative Council of the Central Provinces by the Governor as the result of elections held in the Assigned Districts of Berar shall be deemed to be elected members of the Legislative Council of the Central Provinces.

(3) The powers of a Governor's Legislative Council may be exercised notwithstanding any vacancy in the Council.

(4) Subject as aforesaid provision may be made by rules under this Act as to—

(a) the term of office of nominated members of Governors' Legislative Councils, and the manner of filling casual vacancies occurring by reason of absence of members from India, inability to attend to duty, death, acceptance of office, resignation duly accepted, or otherwise ; and

(b) the conditions under which and manner in which persons may be nominated as members of Governors' Legislative Councils ; and

(c) the qualification of electors, the constitution of constituencies, and the method of election for Governors' Legislative Councils, including the number of members to be elected by communal and other electorates and any matters incidental or ancillary thereto ; and

(d) the qualifications for being and for being nominated or elected a member of any such council ; and

(e) the final decision of doubts or disputes as to the validity of any election ; and

(f) the manner in which the rules are to be carried into effect :

Provided that rules as to any such matters as aforesaid may provide for delegating to the local Government such power as may be specified in the rules of making subsidiary regulations affecting the same matters.

(5) Subject to any such rules any person who is a ruler or subject of any State in India may be nominated as a member of a Governor's Legislative Council.]

Sessions and duration of
Governors' Legislative Councils.

1[72-B. (1) Every Governor's Legislative Council shall continue for three years from its first meeting :

Provided that—

(a) the council may be sooner dissolved by the Governor ; and

(b) the said period may be extended by the Governor for a period not exceeding one year, by notification in the official gazette of the province, if in special circumstances (to be specified in the notification) he so think fit; and

(c) after the dissolution of the Council the Governor shall appoint a date not more than six months or, with the sanction of the Secretary of State, not more than nine months from the date of dissolution for the next session of the council.

(2) A governor may appoint such times and places for holding the Sessions of his Legislative Council as he thinks fit, and may also, by notification or otherwise, prorogue the Council.

(3) Any meeting of a Governor's Legislative Council may be adjourned by the person presiding.

(4) All questions in a Governor's Legislative Council shall be determined by a majority of votes of the members present other than the person presiding, who shall, however, have and exercise a casting vote in the case of an equality of votes.]

1[72-C. (1) There shall be a president of a Governor's Legislative Council, who shall, until the expiration of a period of four years from the first meeting of the Council as constituted under this Act, be a person appointed by the Governor, and shall thereafter be a member of the Council elected by the Council and approved by the Governor :

Presidents of Governors' Legislative Councils.

Provided that, if at the expiration of such period of four years the Council is in Session the president then in office shall continue in office until the end of the current Session, and the first election of a president shall take place at the commencement of the next ensuing Session.

(2) There shall be a deputy-president of a Governor's Legislative Council who shall preside at meetings of the Council in the absence of the president, and who shall be a member of the Council elected by the Council and approved by the Governor.

(3) The appointed president of a Council shall hold office until the date of the first election of a president by the Council under this section, but he may resign office by writing under his hand addressed to the Governor, or may be removed from office by order of the Governor, and any vacancy occurring before the expiration of the term of office of an appointed president shall be filled by a similar appointment for the remainder of such term.

(4) An elected president and a deputy-president shall cease to hold office on ceasing to be members of the Council. They may resign office by writing under their hands addressed to the Governor, and may be removed from office by a vote of the Council with the concurrence of the Governor.

(5) The president and the deputy-president shall receive such salaries as may be determined, in the case of an appointed president, by the Governor, and in the case of an elected president or deputy-president, by Act of the local legislature.]

Business and procedure in Governors' Legislative Councils.

1[72-D. (1) The provisions contained in this section shall have effect with respect to business and procedure in Governors' Legislative Councils.

(2) The estimated annual expenditure and revenue of the province shall be laid in the form of a statement before the Council in each year, and the proposals of the local government for the appropriation of provincial revenues and other moneys in any year shall be submitted to the vote of the council in the form of demands for grants. The council may assent, or refuse its assent, to a demand, or may reduce the amount therein referred to either by a reduction of the whole grant or by the omission or reduction of any of the items of expenditure of which the grant is composed :

Provided that—

Secs. 72-C and 72-D.—¹ Sections 72-C and 72-D were inserted by Part I of Sch. II of the Government of India Act, 1919 (9 & 10 Geo. 5, Ch. 101).

Sec. 72-D.—Demand for grant—President of

the Legislative Council—Decision, if can be challenged in Civil Court—Injunction, power of High Court to issue. 85 I. C. 14 = 1925 Cal. 373; 40 C. L. J. 515.

(a) the Local Government shall have power, in relation to any such demand, to act as if it had been assented to, notwithstanding the withholding of such assent or the reduction of the amount therein referred to, if the demand relates to a reserved subject, and the Governor certifies that the expenditure provided for by the demand is essential to the discharge of his responsibility for the subject ; and

(b) the Governor shall have power in cases of emergency to authorise such expenditure as may be in his opinion necessary for the safety or tranquillity of the province, or for the carrying on of any department ; and

(c) no proposal for the appropriation of any such revenues or other moneys for any purpose shall be made except on the recommendation of the Governor, communicated to the Council.

(3) Nothing in the foregoing sub-section shall require proposals to be submitted to the Council relating to the following heads of expenditure :—

(i) contributions payable by the Local Government to the Governor-General in Council ; and

(ii) interest and sinking fund charges on loans ; and

(iii) expenditure of which the amount is prescribed by or under any law ; and

(iv) salaries and pensions payable to or to the dependants of—

(a) persons appointed by or with the approval of His Majesty or by the Secretary of State in Council ;

(b) judges of the High Court of the province ;

(c) the Advocate-General ;

(d) persons appointed before the first day of April, nineteen hundred and twenty-four, by the Governor-General in Council or by a local Government to services or posts classified by rules under this Act as superior services or posts ; and

(v) sums payable to any person who is or has been in the civil service of the Crown in India under any order of the Secretary of State in Council of the Governor-General in Council, or of a Governor, made upon an appeal made to him in pursuance of rules made under this Act.]

If any question arises whether any proposed appropriation of moneys does or does not relate to the above heads of expenditure, the decision of the Governor shall be final.

¹ [For the purposes of this sub-section the expression 'salaries and pensions' includes remuneration, allowances, gratuities, any contributions (whether by way of interest or otherwise) out of the revenues of India to any provident fund or family pension fund, and any other payments or emoluments payable to or on account of a person in respect of his office.

(4) Where any Bill has been introduced or is proposed to be introduced, or any amendment to a Bill is moved or proposed to be moved, the Governor may certify that the Bill or any clause of it or the amendment affects the safety or tranquillity of his province or any part of it or of another province, and may direct that no proceedings or no further proceedings shall be taken by the Council in relation to the Bill, clause or amendment, and effect shall be given to any such direction.

(5) Provision may be made by rules under this Act for the purpose of carrying into effect the foregoing provisions of this section and for regulating the course of business in the Council and as to the persons to preside over meetings thereof in the absence of the president, and deputy president, and the preservation of order at meetings ; and the rules may provide for the number of members required to constitute a quorum and for prohibiting or regulating the asking of questions on and the discussion of any subject specified in the rules.

(6) Standing orders may be made providing for the conduct of business and the procedure to be followed in the Council, in so far as these matters are not provided for by rules made under this Act. The first standing orders shall be made by the

Sec. 72-D, cl. (3).—The words "payments or emoluments payable to or on account of a person in respect of his office" include the touring expenses and travelling allowances of the Governor and members of his Council and the Inspector-General

of Police, and so these expenses are non nottable items. 5 Pat. 595 = 7 Pat. L. T. 695 = A.I.R. 1926 Pat. 305. Such a question cannot be raised before High Court. (*Ibid.*)

¹ Substituted by 15 and 16 Geo. 5, Ch. 83, S. 1.

Governor in Council, but may, subject to the assent of the Governor, be altered by the local legislatures. Any standing order made as aforesaid, which is repugnant to the provisions of any rules made under this Act, shall, to the extent of that repugnancy but not otherwise, be void.

(7) Subject to the rules and standing orders affecting the Council, there shall be freedom of speech in the Governors' legislative councils. No person shall be liable to any proceedings in any court by reason of his speech or vote in any such council, or by reason of anything contained in any official report of the proceedings of any such Council.]

¹[72-E. (1) Where a Governor's Legislative Council has refused leave to introduce

Provision for case of failure to pass legislation in Governors' Legislative Councils.

or has failed to pass in a form recommended by the Governor, any Bill relating to a reserved subject, the Governor may certify that the passage of the Bill is essential for the discharge of his responsibility for the subject, and thereupon the Bill shall, notwithstanding that the Council have not consented thereto, be deemed to have passed, and shall on signature by the Governor become an Act of the local legislature in the form of the Bill as originally introduced or proposed to be introduced in the Council or (as the case may be) in the form recommended to the Council by the governor.

(2) Every such Act shall be expressed to be made by the Governor, and the governor shall forthwith send an authentic copy thereof to the Governor-General, who shall reserve the Act for the signification of His Majesty's pleasure, and upon the signification of such assent by His Majesty in Council, and the notification thereof by the Governor-General, the Act shall have the same force and effect as an Act passed by the local legislature and duly assented to :

Provided that where in the opinion of the Governor-General a state of emergency exists which justifies such action, he may, instead of reserving such Act, signify his assent thereto, and thereupon the Act shall have such force and effect as aforesaid, subject, however to disallowance by His Majesty in Council.

(3) An Act made under this section shall as soon as practicable after being made be laid before each House of Parliament, and an Act which is required to be presented for His Majesty's assent shall not be so presented until copies thereof have been laid before each House of Parliament for not less than eight days on which that House has sat.]

(b) *Lieutenant-Governors' and Chief Commissioners' Provinces.*

Legislative Councils of Lieutenant-Governors and Chief Commissioners.

73. (1) For purposes of legislation, the Council of [* * *]² a Lieutenant-Governor having an Executive Council, shall consist of the member of his Executive Council [and of members nominated or elected as hereinafter provided].³

(2) 4[* * * *]

(3) The Legislative Council of a Lieutenant-Governor not having an Executive Council, or of a Chief Commissioner, shall consist of members nominated or elected [as hereinafter provided].⁵

(4) 6[* * * *]

74. [Constitution of Legislative Councils in Bengal, Madras and Bombay.]—Omitted by Part II of Schedule II of 9 and 10 Geo. 5, Ch. 101.

75. [Meetings of Legislature Councils of Bengal, Madras and Bombay.]—Omitted by Part II of Schedule II of 9 and 10 Geo. 5, Ch. 101.

Sec. 72-E.—¹ Section 72-E was inserted by Part I of Sch. II of the Government of India Act, 1919 (9 & 10 Geo. 5, Ch. 101).

Sec. 73.—² The words "a governor, or of" were omitted by Part II of Sch. II of the Government of India Act, 1919 (9 & 10 Geo. 5, Ch. 101).

³ These words were substituted for the words "with the addition of members nominated or elected in accordance with rules made under this

Act" by *Ibid.*

Sec. 73 (2).—⁴ Sub-section (2) was omitted by Part III of *Ibid.*

Sec. 73 (3).—⁵ These words were substituted for the words "in accordance with rules made under this Act" by *Ibid.*

Sec. 73 (4).—⁶ Sub-section (4) was omitted by *Ibid.*

76. (1) The number of members nominated or elected to the Legislative Council of a Lieutenant-Governor or Chief Commissioner, the number of such members required to constitute a quorum, the term of office of such members and the manner of filling casual vacancies occurring by reason of absence from India, inability to attend to duty, death, acceptance of office, or resignation duly accepted, or otherwise shall, in the case of each such council, be such as may be prescribed by rules made under this [section].¹

Constitution of Legislative Councils of Lieutenant-Governors and Chief Commissioners.

² [Provided that the number of members so nominated or elected shall not, in the case of the Legislative Council of a Lieutenant-Governor, exceed one hundred].

(2) At least one third of the persons so nominated or elected to the Legislative Council of a Lieutenant-Governor or Chief Commissioner must be [non-officials].³

(3) The Governor-General in Council may, with the approval of the Secretary of State in Council, make rules as to the conditions under which and manner in which persons resident in India may be nominated or elected members of any of those Legislative Councils, and as to the qualifications for being, and for being nominated or elected, a member of any of those councils, and as to any other matter for which rules are authorised to be made under this section, and as to the manner in which those rules are to be carried into effect.

⁴ [(3-a) Rules made under this section may provide for the final decision of doubts or disputes as to the validity of an election.]

⁴ [(3-b) Subject to any rules made under this section, any person who is a ruler or subject of any state in India shall be eligible to be nominated a member of a Legislative Council.]

(4) All rules made under this section shall be laid before both Houses of Parliament as soon as may be after they are made, and those rules shall not be subject to repeal or alteration by the [Indian legislature or the local legislature].⁵

77. (1) When a new lieutenant-governorship is constituted under this Act, the Governor-General in Council may, by notification, with the sanction of His Majesty previously signified by the Secretary of State in Council, constitute the Lieutenant-Governor in Legislative Council of the province, as from a date specified in the notification, local legislature for that province, and define the limits of the province for which the Lieutenant-Governor in Legislative Council is to exercise legislative powers.

Power to constitute local legislatures in Lieutenant-Governors' and Chief Commissioners' provinces.

(2) The Governor-General in Council may, by notification, extend the provisions of this Act relating to legislative councils of lieutenant-governors, subject to such modifications and adaptations as he may consider necessary, to any province for the time being under a Chief Commissioner.

78. (1) ⁶ [A Lieutenant-Governor or a Chief Commissioner who has a Legislative Council may appoint such times and places for holding the sessions of his Legislative Council as he thinks fit, and may also, by notification or otherwise, prorogue the council, and any meeting of the legislative council of a lieutenant-governor or chief commissioner may be adjourned by the person presiding.] Every lieutenant-governor who has no executive council, and every chief commissioner who has a legislative council, shall appoint a member of his legislative council to be vice president thereof.

Meetings of Legislative Councils of Lieutenant-Governors and Chief Commissioners.

Sec. 76 (1).—¹ This word was substituted for the word "Act" by Part II of Sch. II of the Government of India Act, 1919 (9 & 10 Geo. 5, Ch. 101).

² This proviso was substituted by *Ibid.*

Sec. 76 (2).—³ This word was substituted for the words "persons not in the civil or military service of the Crown in India by *Ibid.*

Sec. 76 (3-a) & (3-b).—⁴ Sub-sections (3-a) and (3-b) were inserted by section 1 (2) of the

Government of India (Amendment) Act, 1926 (6 & 7 Geo. 5, Ch. 37).

Sec. 76 (4).—⁵ These words were substituted for the words "Governor-General in Legislative Council" by Part II of Sch. II of the Government of India Act, 1919 (9 & 10 Geo. 5, Ch. 101).

Sec. 78 (1).—⁶ These words were inserted by *Ibid.*

(2) In the absence of the Lieutenant-Governor or Chief Commissioner from any meeting of his Legislative Council the person to preside thereat shall be the vice-president of the council, or, in his absence, the member of the council who is highest in official rank among those holding office under the Crown who are present at the meeting, or, during the discussion of the annual financial statement or of any matter of general public interest, [or when questions are asked]¹ the vice-president, or the member appointed to preside [* *].²

³[(3) All questions at a meeting of the legislative council of a lieutenant-governor or chief commissioner shall be determined by a majority of votes of the members present other than the lieutenant-governor, chief commissioner, or presiding member, who shall, however, have and exercise a casting vote in case of an equality of votes.]

³ [(4) Subject to rules affecting the council, there shall be freedom of speech in the legislative councils of lieutenant-governors and chief commissioners. No person shall be liable to any proceedings in any court by reason of his speech or vote in those councils, or by reason of anything contained in any official report of the proceedings of those councils.]

79. [*Powers of local legislatures.*].—Omitted by Part II of Sch. II of 9 and 10 Geo. 5, Ch. 101.

80. (1) At a meeting of a local legislative council ⁴[(other than a governor's legislative council)] no motion shall be entertained other than a motion for leave to introduce a measure into the council for the purpose of enactment, or having reference to a measure introduced or proposed to be introduced into the council for that purpose, or having reference to some rule for the conduct of business in the council. and no business shall be transacted other than the consideration of those motions or the alteration of those rules.

(2) 5[* * * * *]

(3) Notwithstanding anything in the foregoing provisions of this section, the local government ⁴[of a province other than a governor's province, may] with the sanction of the Governor-General in Council, make rules authorising, at any meeting of the local legislative council, the discussion of the annual financial statement of the local government, and of any matter of general public interest, and the asking of questions, under such conditions and restrictions as may be prescribed in the rules. Rules made under this sub-section for any council may provide for the appointment of a member of the council to preside at any such discussion ¹[or when questions are asked] in the place of ⁶[*] lieutenant-governor or chief commissioner, as the case may be, and of the vice-president, and shall be laid before both Houses of Parliament as soon as may be after they are made, and shall not be subject to repeal or alteration by the ⁷[Indian legislature] or the local legislature.

⁸[(4) The local government of any province (other than a governor's province) for which a local legislative council is hereafter constituted under this Act shall,

Sec. 78 (2).—¹ These words were inserted by Sch. I of the Government of India (Amendment) Act, 1916 (6 & 7 Geo. 5, Ch. 37).

² The words "in accordance with rules made under this Act" were omitted by Part II of Sch. II of the Government of India Act, 1919 (9 & 10 Geo. 5, Ch. 101).

Sec. 78 (3) and (4).—³ Sub-sections (3) and (4) were substituted for sub-section (3) by *Ibid.*

Sec. 80 (1).—⁴ These words were inserted by *Ibid.*

Sec. 80 (2).—⁵ Sub-section (2) was omitted by *Ibid.*

Sec. 80 (3).—⁶ The "governor" was omitted by *Ibid.*

⁷ These words were substituted for the words

"Governor-General in Legislative Council" by *Ibid.*

Sec. 80 (4).—⁸ Sub-section (4) was inserted by *Ibid.*

Secs. 80 and 80-A.—Legislature of a Province can repeal its own enactment. 23 A. L. J. 373 = 88 I. C. 297 = 1925 All. 542. The ordinances by the Governor-General are deemed to be made by him in Council and remain in force for six months after termination of war. 41 Bom. 390 = 33 I. C. 724. Local legislature can create special tribunals to decide special disputes. See 23 A. L. J. 385 = 87 I. C. 51 = 47 All. 513 = 1925 All. 380 (F.B.). When a proposed acquisition is abandoned on condition of periodical payments by the

before the first meeting of that council, and with the sanction of the Governor-General in Council, make rules for the conduct of legislative business in that council (including rules for prescribing the mode of promulgation and authentication of laws passed by that council).]

1[(5) The local legislature of any such province may, subject to the assent of the lieutenant-governor or chief commissioner, alter the rules for the conduct of legislative business in the local council (including rules prescribing the mode of promulgation and authentication of laws passed by the council), but any alteration so made may be disallowed by the Governor-General in Council, and, if so disallowed shall have no effect.]

(c) *General.*

2 [80-A. (1) The local legislature of any province has power, subject to the provisions of this Act, to make laws for the peace and good government of the territories for the time being constituting that province.

(2) The local legislature of any province may, subject to the provisions of the sub-section next following, repeal or alter as to that province any law made either before or after the commencement of this Act by any authority in British India other than that local legislature.

(3) The local legislature of any province may not, without the previous sanction of the Governor-General, make or take into consideration any law—

(a) imposing or authorising the imposition of any new tax unless the tax is a tax scheduled as exempted from this provision by rules made under this act ; or

(b) affecting the public debt of India, or the customs duties, or any other tax or duty for the time being in force and imposed by the authority of the Governor-General in Council for the general purposes of the government of India, provided that the imposition or alteration of a tax scheduled as aforesaid shall not be deemed to affect any such tax or duty ; or

(c) affecting the discipline or maintenance of any part of His Majesty's naval, military or air forces ; or

(d) affecting the relations of the government with foreign princes or states ; or

(e) regulating any central subject ; or

(f) regulating any provincial subject which has been declared by rules under this Act to be, either in whole or in part, subject to legislation by the Indian legislature, in respect of any matter to which such declaration applies ; or

(g) affecting any power expressly reserved to the Governor-General in Council by any law for the time being in force ; or

(h) altering or repealing the provisions of any law which, having been made before the commencement of the Government of India Act, 1919, by any authority in British India other than that local legislature, is declared by rules under this Act to be a law which cannot be repealed or altered by the local legislature without previous sanction ; or

(i) altering or repealing any provision of an Act of the Indian legislature made after the commencement of the Government of India Act, 1919, which by the provisions of such first mentioned Act may not be repealed or altered by the local legislature without previous sanction :

Provided that an Act or a provision of an Act made by a local legislature, and subsequently assented to by the Governor-General in pursuance of this Act, shall not

owner of a sum fixed in perpetuity or the payment in lump of the capitalised value thereof, a tax is in essence imposed on the land. 44 Cal. 219 = 21 C.W.N. 8 = 36 I.C. 749 = 24 C.L.J. 245.

Such a tax can be validly imposed only with the sanction of the proper authorities duly obtained under Sec. 43 and the statute imposing the

burden must do so in clear and unambiguous language. (*Ibid.*)

Sec. 80 (5).—¹ Sub-section (5) was inserted by Part II of Sch. II of the Government of India Act, 1919 (9 & 10 Geo. 5, Ch. 101).

Sec. 80-A.—² Section 80-A was inserted by Part I of *Ibid.*

be deemed invalid by reason only of its requiring the previous sanction of the Governor-General under this Act.

(4) The local legislature of any province has not power to make any law affecting any Act of Parliament.]

1[80-B. An official shall not be qualified for election as a member of a local legislative council, and if any non-official member of a local legislative council, whether elected or nominated, accepts any office in the service of the Crown in India, his seat on the council shall become vacant :

Provided that for the purposes of this provision a minister shall not be deemed to be an official and a person shall not be deemed to accept office on appointment as a minister.]

1[80-C. It shall not be lawful for any member of any local legislative council to introduce, without the previous sanction of the governor, lieutenant-governor or chief commissioner, any measure affecting the public revenues of a province, or imposing any charge on those revenues.]

81. (1) When 2[a Bill] has been passed 3[by] a local Legislative Council, the Governor, Lieutenant-Governor or Chief Commissioner, 4[* *] may declare that he assents to or withholds his assent from the 5[Bill].

(2) If the Governor, Lieutenant-Governor or Chief Commissioner withholds his assent from any such 5[Bill] the 5[Bill] 6[shall not become an Act].

(3) If the Governor, Lieutenant-Governor or Chief Commissioner assents to any such 5[Bill], he shall forthwith send an authentic copy of the Act to the Governor-General, and the Act shall not have validity until the Governor-General has assented thereto and that assent has been signified by the Governor-General to, and published by, the Governor, Lieutenant-Governor or Chief Commissioner.

(4) Where the Governor-General withholds his assent from any such Act, he shall signify to the governor, lieutenant-governor or chief commissioner in writing his reason for so withholding his assent.

7[81-A. (1) Where a Bill has been passed by a local legislative council, the Governor, Lieutenant-Governor or Chief Commissioner may, instead of declaring that he assents to or withholds his assent from the Bill, return the Bill to the Council for reconsideration, either in whole or in part, together with any amendments which he may recommend, or, in cases prescribed by rules under this Act, may, and if the rules so require, shall, reserve the Bill for the consideration of the Governor-General.

(2) Where a Bill is reserved for the consideration of the Governor-General, the following provisions shall apply :—

(a) The Governor, Lieutenant-Governor or Chief Commissioner may, at any time within six months from the date of the reservation of the Bill, with the consent of the Governor-General, return the Bill for further consideration by the Council with a recommendation that the council shall consider amendments thereto ;

(b) After any Bills so returned has been further considered by the council, together with any recommendations made by the Governor, Lieutenant-Governor, or Chief Commissioner relating thereto, the bill, if re-affirmed with or without amendment, may be again presented to the Governor, Lieutenant-Governor or Chief Commissioner :

Sec. 80-A, cl. (4).—Bengal Criminal Law Amendment, whether opposed to this sub-section, see 31 C. W. N. 593.

Secs. 80-B and 80-C.—¹ Sections 80-B and 80-C were inserted by Part I of Sch. II of the Government of India Act, 1919 (9 & 10 Geo. 5, Ch. 101).

Sec. 81 (1).—² These words were substituted for the words " an Act " by Part II of *Ibid.*

³ This word was substituted for the words " at a meeting of " by *Ibid.*

⁴ The words " whether he was or was not present in council at the passing of the Act " were omitted by Part III of *Ibid.*

⁵ This word was substituted for the word " Act " by Part II of *Ibid.*

⁶ These words were substituted for the words " has no effect " by Part II of *Ibid.*

Sec. 81-A.—⁷ Sec. 81-A was inserted by Part I of *Ibid.*

(c) Any Bill reserved for the consideration of the Governor-General shall, if assented to by the Governor-General within a period of six months from the date of such reservation become law on the publication of such assent, in the same way as a Bill assented to by the Governor, Lieutenant-Governor or Chief Commissioner, but if not assented to by the Governor-General within such period of six months, shall lapse and be of no effect unless before the expiration of that period either—

(i) the Bill has been returned by the Governor, Lieutenant-Governor or Chief Commissioner for further consideration by the Council; or

(ii) in the case of the Council not being in session, a notification has been published of an intention so to return the Bill at the commencement of the next session.

(3) The Governor-General may (except where the Bill has been reserved for his consideration), instead of assenting to or withholding his assent from any Act passed by a local legislature, declare that he reserves the Act for the signification of His Majesty's pleasure thereon, and in such a case the Act shall not have validity until His Majesty in Council has signified his assent and his assent has been notified by the Governor-General.]

82. (1) when ¹[an Act] has been assented to by the Governor-General, he shall send to the Secretary of State an authentic copy thereof, and it shall be lawful for His Majesty ²[in Council] to signify ³[* * *] his disallowance of ¹[the Act].

Power of Crown to disallow Acts of local legislatures.

(2) Where the disallowance of ¹[an Act] has been so signified, the Governor, Lieutenant Governor or Chief Commissioner shall forthwith notify the disallowance, and thereupon the Act, as from the date of the notification, shall become void accordingly.

83. [*Rules for conduct of legislative business*].—Omitted by Part II of Schedule II of 9 and 10 Geo. 5, Ch. 101.

Validity of Indian Laws.

Removal of doubts as to validity of certain Indian Laws.

84. (1) A law made by any authority in British India shall not be deemed invalid solely on account of any one or more of the following reasons:—

(a) in the case of ⁴[an Act of the Indian legislature], ⁵[or a local legislature] because it affects the prerogative of the Crown; or

(b) in the case of any law, because the requisite proportion of ⁶[non-official members] was not complete at the date of its introduction into the council or its enactment; or

(c) in the case of ⁷[an Act of] a local legislature, because it confers on magistrates, being justices of the peace, the same jurisdiction over European British subjects as that legislature, by Acts duly made, could lawfully confer on magistrates in the exercise of authority over other British subjects in the like cases.

⁸[A law made by any authority in British India and repugnant to any provision of this or any other Act of Parliament shall, to the extent of that repugnancy, but not otherwise, be void.]

⁹(2) Nothing in the Government of India Act, 1919, or this Act, or in any rule made thereunder, shall be construed as diminishing in any respect the powers of the Indian legislature as laid down in section sixty-five of this Act, and the validity of any Act of the Indian legislature or any local legislature shall not be open to question

Sec. 82.—¹ These words were substituted for the words "any such Act" by Part II of Sch. II of the Government of India Act, 1919 (9 and 10 Geo. 5, Ch. 101).

² These words were inserted by *Ibid.*

³ The words "through the Secretary of State in Council" were omitted by *Ibid.*

Sec. 84.—⁴ These words were substituted for the words "a law made by the Governor-General in Legislative Council" by *Ibid.*

⁵ These words were inserted by section 2 (2) of the Government of India (Amendment) Act,

1916 (6 and 7 Geo. 5, Ch. 37).

⁶ These words were substituted for the words "members not holding office under the Crown in India" by Part II of Sch. II of the Government of India Act, 1919 (9 and 10 Geo. 5, Ch. 101).

⁷ These words were substituted for the words "a law made by" by *Ibid.*

⁸ These words were inserted by section 2 (2) of the Government of India (Amendment) Act, 1916 (6 and 7 Geo. 5, Ch. 37).

⁹ This sub-section was inserted by Part I of *Ibid.*

in any legal proceedings on the ground that the Act affects a provincial subject or a central subject, as the case may be, and the validity of any Act made by the Governor of a province shall not be so open to question on the ground that it does not relate to a reserved subject.]

PART VI-A.

STATUTORY COMMISSION.

1[84-A. (1) At the expiration of ten years after the passing of the Government of India Act, 1919, the Secretary of State with the concurrence of both Houses of Parliament shall submit for

Statutory commission.

the approval of His Majesty the names of persons to act as a commission for the purposes of this section.

(2) The persons whose names are so submitted, if approved by His Majesty, shall be a commission for the purpose of inquiring into the working of the system of Government, the growth of education and the development of representative institutions, in British India, and matters connected therewith, and the commission shall report as to whether and to what extent it is desirable to establish the principle of responsible Government, or to extend, modify or restrict the degree of responsible Government than existing therein, including the question whether the establishment of second chambers of the local legislature is or is not desirable.

(3) The commission shall also inquire into and report on any other matter affecting British India and the province, which may be referred to the commission by His Majesty.]

PART VII.

SALARIES, LEAVE OF ABSENCE, VACATION OF OFFICE, APPOINTMENTS, ETC.

85. (1) There shall be paid to the Governor-General of India, and to the other persons mentioned in the Second Schedule to this Act,

Salaries and allowances of Governor-General and certain other officials in India.

out of the revenues of the India, such salaries, not exceeding in any case the maximum specified in that behalf in that Schedule, and such allowances (if any) for equipment

and voyage, as the Secretary of State in Council may by order fix in that behalf, and subject to or in default of any such order, as are payable at the commencement of this Act :

(2) Provided as follows :—

(a) an order affecting salaries of members of the Governor-General's Executive Council may not be made without the concurrence of a majority of votes at a meeting of the Council of India ;

(b) if any person to whom this section applies, holds or enjoys any pension or salary, or any office of profit under the Crown or under any public office, his salary under this section shall be reduced by the amount of the pension, salary or profits of office so held or enjoyed by him ;

(c) nothing in the provisions of this section with respect to allowances shall authorize the imposition of any additional charge on the revenues of India.

(3) The remuneration payable to a person under this section shall commence on his taking upon himself the execution of his office, and shall be the whole profit or advantage which he shall enjoy from his office during his continuance therein :

2[Provided that nothing in this sub-section shall apply to the allowances or other forms of profit and advantage which may have been sanctioned for such persons by the Secretary of State in Council.]

3 [86. (1) The Secretary of State in Council may grant to the Governor-General and, on the recommendation of the Governor-General in Council to the Commander-in-Chief, leave of absence for urgent reasons of public interest, or of health or of private affairs.

Powers to grant leave of absence to Governor-General, etc.

Sec. 84-A.—¹ Section 84-A was inserted by 1919 (9 & 10 Geo. 5, Ch. 101).
Part I of *Ibid.*

Sec. 86.—² This proviso was inserted by Part III of Sch. II of the Government of India Act, 1924 (14 and 15 Geo. 5, Ch. 28).

Sec. 86.—³ Section 86 was substituted by S. 1 of the Government of India (Leave of Absence) Act, 1924 (14 and 15 Geo. 5, Ch. 28).

(2) The Secretary of State in Council may, on the recommendation of the Governor-General in Council, grant to a Governor and the Governor-General in Council or a Governor in Council, or a Lieutenant-Governor in Council, as the case may be, may grant to any member of his Executive Council (other than the Commander-in-Chief) leave of absence for urgent reasons of health or of private affairs.

(3) Leave of absence shall not be granted to any person in pursuance of this section for any period exceeding four months nor more than once during his tenure of office :

Provided that the Secretary of State in Council may, if he thinks fit, extend any period of leave so granted, but in any such case the reasons for the extension shall be set forth in a minute signed by the Secretary of State and laid before both Houses of Parliament.

(4) Where leave of absence is granted to any person in pursuance of this section, he shall retain his office during the period of leave as originally granted, or, if that period is extended by the Secretary of State in Council, during the period as so extended, but, if his absence exceed that period, his office shall be deemed to have become vacant in the case of a person granted leave for urgent reasons of public interest as from the termination of that period and in any other case as from the commencement of his absence.

(5) Where a person obtains leave of absence in pursuance of this section, he shall be entitled to receive during his absence such leave-allowances as may be prescribed by rules made by the Secretary of State in Council, but, if he does not resume his duties upon the termination of the period of the leave, he shall, unless the Secretary of State in Council otherwise directs, re-pay, in such manner as may be so prescribed as aforesaid, any leave-allowances received under this sub-section.

(6) If the Governor-General or the Commander-in-Chief is granted leave for urgent reasons of public interests the Secretary of State in Council may, in addition to the leave-allowances to which he is entitled under this section, grant to him such further allowances in respect of travelling expenses as the Secretary of State in Council may think fit.

(7) Rules made under this section shall be laid before both Houses of Parliament as soon as may be after they are made.]

1 [87. (1) Where leave is granted in pursuance of the foregoing section to the Governor-General, or the Commander-in-Chief, or to a Governor, a person shall be appointed to act in his place during his absence, and the appointment shall be made by His Majesty by warrant under the Royal Sign Manual.

The person so appointed during the absence of the Commander-in-Chief, may, if the Commander-in-Chief, was a member of the Executive Council of the Governor-General, be also appointed by the Governor-General in Council to be a temporary member of that Council.

(2) The person so appointed shall, until the return to duty of the permanent holder of the office or, if he does not return, until a successor arrives, hold and execute the office to which he has been appointed and shall have and may exercise all the rights and powers thereof and shall be entitled to receive the emoluments and advantages appertaining to the office, foregoing the emoluments and advantages (if any) to which he was entitled at the time of his being appointed to that office.

(3) When during the absence on leave of the Governor-General, a Governor is appointed to act in his place, the provisions of this section relating to the appointment of a person to act in the place of a Governor to whom leave of absence has been granted in pursuance of the foregoing section shall apply in the same manner as if leave of absence had been so granted to the Governor.]

88. [Conditional appointment].—Omitted by Pt. III of Sch. II of 9 and 10 Geo. 5, Ch. 101.

89. (1) If any person 1[* * *] appointed 2[*] to 3[the office of Governor-General], is in India on or after the event on which he is to succeed, and thinks it necessary to exercise the powers of Governor-General before he takes his seat in Council, he may make known by notification his appointment and his intention to assume the office of Governor-General.

(2) After the notification, and thenceforth until he repairs to the place where the Council may assemble, he may exercise alone all or any of the powers which might be exercised by the Governor-General in Council.

(3) All acts done in the Council after the date of the notification, but before the communication thereof to the Council, shall be valid, subject, nevertheless, to revocation or alteration by the person who has so assumed the office of Governor-General.

(4) When the office of Governor-General is assumed under the foregoing provision, the vice-president, or, if he is absent, the senior 4[member of the council (other than the Commander-in-Chief)] then present, shall preside therein, with the same powers as the Governor-General would have had if present.

90. (1) If a vacancy occurs in the office of Governor-General when there is no 5[* * *] successor in India to supply the vacancy, the governor 6[of a presidency] who was first appointed to the office of governor 6[of a presidency] by His Majesty shall hold and execute the office of Governor-General until a successor arrives or until some person in India is duly appointed thereto.

(2) Every such acting Governor-General, while acting as such, shall have and may exercise all the rights and powers of the office of Governor-General and shall be entitled to receive the emoluments and advantages appertaining to the office, foregoing the salary and allowances appertaining to his office of Governor; and his office of Governor shall be supplied, for the time during which he acts as Governor-General, in the manner directed by this Act with respect to vacancies in the office of Governor.

(3) If, on the vacancy occurring, it appears to the Governor, who by virtue of this section holds and executes the office of Governor-General, necessary to exercise the powers thereof before he takes his seat in Council, he may make known by notification his appointment, and his intention to assume the office of Governor-General, and thereupon the provisions of 7[section eighty-nine of this Act] 8[* * *] shall apply.

(4) Until such a Governor has assumed the office of Governor-General, if no 5[* * *] successor is on the spot to supply such vacancy, the vice-president, or, if he is absent, the senior 9[*] member of the Executive Council 10[(other than the Commander-in-Chief)] shall hold and execute the office of Governor-General until the vacancy is filled in accordance with the provisions of this Act.

(5) Every vice-president or other member of Council so acting as Governor-General, while so acting, shall have and may exercise all the rights and powers of the office of Governor-General and shall be entitled to receive the emoluments and advantages appertaining to the office, foregoing his salary and allowances as member of council for that period.

Sec. 89.—¹ The words "entitled under a conditional appointment to succeed to the office of Governor-General or" were omitted by Part III of Sch. II of the Government of India Act, 1919 (9 and 10 Geo. 5, Ch. 101).

² The word "absolutely" was omitted by Part III of *Ibid.*

³ These words were substituted for the words "that office" by Part III of *Ibid.*

⁴ These words were substituted for the words "ordinary member of the Council" by Part II of the Government of India Act, 1919 (9 and 10 Geo. 5, Ch. 101).

Sec. 90.—⁵ The words "conditional or other"

were omitted by Part III of *Ibid.*

⁶ These words were inserted by Part II of *Ibid.*

⁷ These words were substituted for the words "this Act" by Part III of Sch. II of the Government of India Act, 1919 (9 and 10 Geo. 5, Ch. 101).

⁸ The words "respecting the assumption of the office by a person conditionally appointed to succeed thereto" were omitted by Part III of *Ibid.*

⁹ The word "ordinary" was omitted by Part II of *Ibid.*

¹⁰ These words were inserted by *Ibid.*

91. (1) If a vacancy occurs in the office of Governor when no 1[* * *] successor is on the spot to supply the vacancy, the vice-president, or, if he is absent, the senior member of the Governor's Executive Council, or, if there is no Council, the Chief Secretary to the local Government, shall hold and execute the office of governor until a successor arrives, or until some other person on the spot is duly appointed thereto.

(2) Every such acting Governor shall, while acting as such, be entitled to receive the emoluments and advantages appertaining to the office of Governor, foregoing the salary and allowances appertaining to his office of member of council or secretary.

92. (1) If a vacancy occurs in the office of 2[a member] of the Executive Council of the Governor-General 3[other than the Commander-in-Chief], or a member of the Executive Council of a Governor, and there is no 1[* * *] successor present on the spot, the Governor-General in Council, or Governor in Council, as the case may be, shall supply the vacancy by appointing a temporary member of Council.

(2) Until a successor arrives, the person so appointed shall hold and execute the office to which he has been appointed, and shall have and may exercise all the rights and powers thereof, and shall be entitled to receive the emoluments and advantages appertaining to the office, foregoing all emoluments, and advantages to which he was entitled at the time of his being appointed to that office.

(3) If 1[a member] of the Executive Council of the Governor-General 2[other than the Commander-in-Chief], or any member of the Executive Council of a Governor is, by infirmity or otherwise, rendered incapable of acting or of attending to act as such or is absent on leave, 4[or special duty] 5[*] the Governor-General in Council or Governor in Council, as the case may be, shall appoint some person to be a temporary member of Council.

6 [(4) Until the return to duty of the member so incapable or absent, the person temporarily appointed shall hold and execute the office to which he has been appointed, and shall have and may exercise all the rights and powers thereof, and shall be entitled to receive the emoluments and advantages appertaining to the office, foregoing the emoluments and advantages (if any) to which he was entitled at the time of his being appointed to that office]

[(4-a) When a member of an Executive Council is by infirmity or otherwise rendered incapable of acting or attending to act as such and a temporary member of Council is appointed in his place, the absent member shall be entitled to receive half his salary for the period of his absence.]

(5) Provided as follows :—

(a) no person may be appointed a temporary member of Council who might not have been appointed 7[* * *] to fill the vacancy supplied by the temporary appointment ; and

(b) if the Secretary of State informs the Governor-General that it is not the intention of His Majesty to fill a vacancy in the Governor-General's Executive Council, no temporary appointment may be made under this section to fill the vacancy, and if any such temporary appointment has been made before the date of the receipt of the information by the Governor-General, the tenure of the person temporarily appointed shall cease from that date.

Sec. 91 (1)—¹ The words "conditional or other" were omitted by Part III, *Ibid.*

Sec. 92.—² These words were substituted for the words "an ordinary member" by Part II of Sch. II of the Government of India Act, 1919 (9 and 10 Geo. 5, Ch. 101).

³ These words were inserted by *Ibid.*

⁴ These words were inserted by Sch. I of the Government of India (Amendment) Act, 1916 (6

& 7 Geo. 5, Ch. 37).

⁵ Certain words were omitted by Part III of *Ibid.*

⁶ Sub-secs. (4) and (4-a) were substituted for sub-sec. (4) by 14 and 15 Geo. 5, Ch. 28.

⁷ The words "under this Act" were omitted by Part II of Sch. II of the Government of India Act, 1919 (9 & 10 Geo. 5, Ch. 101).

93. (1) A nominated or elected member of ¹[either Chamber of the Indian legislature] or of a local Legislative Council may resign his office to the Governor-General or to the Governor, Lieutenant-Governor or Chief Commissioner, as the case may be, and on the acceptance of the resignation the office shall become vacant.

(2) If for a period of two consecutive months any such member is absent from India or unable to attend to the duties of his office, the Governor-General, Governor, Lieutenant-Governor or Chief Commissioner, as the case may be, may, by notification published in the government gazette, declare that the seat in council of that member has become vacant.

94. Subject to the provisions of this Act, the Secretary of State in Council may, with the concurrence of a majority of votes at a meeting of the Council of India, make rules as to the absence on leave ²[or special duty] of persons in the service of the Crown in India, and the terms as to continuance, variation or cessation of pay, salary and allowances on which any such ³[absence may be permitted].

95. (1) The Secretary of State in Council, with the concurrence of a majority of votes at a meeting of the Council of India, may make rules for distributing between the several authorities in India the power of making appointments to and promotions in [military]⁴ offices under the Crown in India, and may reinstate [military]⁴ officers and servants suspended or removed by any of those authorities.

(2) Subject to such rules, all appointments [military]⁴ offices and commands in India and all [military]⁴ promotions, which, by law, or under any regulations, usage or custom, are, at the commencement of this Act, made by any authority in India, shall, subject to the qualifications, conditions and restrictions then affecting such appointments and promotions, respectively, continue to be made in India by the like authority.

96. No native of British India nor any subject of His Majesty resident therein, shall, by reason only of his religion, place of birth, descent, colour, or any of them, be disabled from holding any office under the Crown in India.

⁵[**96-A.** Notwithstanding anything in any other enactment, the Governor-General in Council, with the approval of the Secretary of State in Council, may, by notification, declare that, subject to any conditions or restrictions prescribed in the notification, any named ruler or subject of any state in India shall be eligible for appointment to any civil or military office under the Crown to which a native of British India may be appointed, or any named subject of any state, or any named member of any independent race or tribe, in territory adjacent to India, shall be eligible for appointment to any such military office.]

PART VII-A.

THE CIVIL SERVICES IN INDIA.

6[**96-B.** (1) Subject to the provisions of this Act and of rules made thereunder, every person in the civil service of the Crown in India holds office during His Majesty's pleasure, and may be

Sec. 93.—¹ These words were substituted for the words "the Indian Legislative Council" by *ibid.*

Sec. 94.—² These words were inserted by Sch. I of the Government of India (Amendment) Act, 1916 (6 & 7 Geo. 5, Ch. 37).

³ These words were substituted for the words "leave may be granted" by Sch. I of *ibid.*

Sec. 95.—⁴ This word was inserted by Part II of Sch. II of the Government of India Act,

1919 (9 & 10 Geo. 5, Ch. 101).

Sec. 96-A.—⁵ Section 96-A was inserted by section 3 of the Government of India (Amendment) Act, 1916 (6 and 7 Geo. 5, Ch. 37).

Sec. 96-B.—⁶ Sec. 96-B was inserted by Part I of Sch. II of the Government of India Act, 1919 (9 and 10 Geo. 5, Ch. 101).

Rules passed thereunder—R. 14—Dismissal of police officer—Procedure prescribed by R. 14,

employed in any manner required by a proper authority within the scope of his duty, but no person in that service may be dismissed by any authority subordinate to that by which he was appointed, and the Secretary of State in Council may (except so far as he may provide by rules to the contrary) reinstate any person in that service who has been dismissed.

If any such person appointed by the Secretary of State in Council thinks himself wronged by an order of an official superior in a governor's province, and on due application made to that superior does not receive the redress to which he may consider himself entitled, he may, without prejudice to any other right of redress, complain to the governor of the province in order to obtain justice, and the governor is hereby directed to examine such complaint and require such action to be taken thereon as may appear to him to be just and equitable.

(2) The Secretary of State in Council may make rules for regulating the classification of the civil services in India, the methods of their recruitment, their conditions of service, pay and allowances, and discipline and conduct. Such rules may, to such extent and in respect of such matters as may be prescribed, delegate the power of making rules to the Governor-General in Council or to local Governments or authorize the Indian legislature or local legislatures to make laws regulating the public services :

Provided that every person appointed before the commencement of the Government of India Act, 1919, by the Secretary of State in Council to the civil service of the Crown in India shall retain all his existing or accruing rights, or shall receive such compensation for the loss of any of them as the Secretary of State in Council may consider just and equitable.

(3) The right to pensions and the scale and conditions of pensions of all persons in the civil service of the Crown in India appointed by the Secretary of State in Council shall be regulated in accordance with the rules in force at the time of the passing of the Government of India Act, 1919. Any such rules may be varied or added to by the Secretary of State in Council and shall have effect as so varied or added to, but any such variation or addition shall not adversely affect the pension of any member of the service appointed before the date thereof.

Nothing in this section or in any rule thereunder shall prejudice the rights to which any person may, or may have, become entitled under the provisions in relation to pension contained in the East India Annuity Funds Act, 1874.

(4) For the removal of doubts it is hereby declared that all rules or other provisions in operation at the time of the passing of the Government of India Act, 1919, whether made by the Secretary of State in Council or by any other authority relating to the civil service of the Crown in India, were duly made in accordance with the powers in that behalf, and are confirmed, but any such rules or provisions may be revoked, varied or added to by rules or laws made under this section.]

¹ [(5) No rules or other provisions made or confirmed under this section shall be construed to limit or abridge the power of the Secretary of State in Council to deal with the case of any person in the civil service of the Crown in India in such manner as may appear to him to be just and equitable, and any rules made by the Secretary of State in Council under sub-section (2) of this section delegating the power of making rules may provide for dispensing with or relaxing the requirements of such rules to such extent and in such manner as may be prescribed :

Provided that where any such rule or provision is applicable to the case of any person, the case shall not be dealt with in any manner less favourable to him than that provided by the rule or provision.]

2[96-C. (1) There shall be established in India a public service commission,

Public service commission. consisting of not more than five members, of whom one shall be chairman, appointed by the Secretary of State in

whether has to be complied with—Plaint as disclosing a cause of action. 54 C. 44 = 101 I.C. 581 = A.I.R. 1927 Cal. 311.

Sec. 96-B (5).—¹ Added by 15 & 16 Geo. 5,

Ch. 83, S. 2.

Sec. 96-C.—² Section 96-C was inserted by Part I of Sch. II of the Government of India Act, 1919 (9 & 10 Geo. 5, Ch. 101).

Council. Each member shall hold office for five years and may be re-appointed. No member shall be removed before the expiry of his term of office, except by order of the Secretary of State in Council. The qualifications for appointment, and the pay and pension (if any) attaching to the office of chairman and member, shall be prescribed by rules made by the Secretary of State in Council.

(2) The public service commission shall discharge, in regard to recruitment and control of the public services in India, such functions as may be assigned thereto by rules made by the Secretary of State in Council].

¹[96-D. An auditor-general in India shall be appointed by the Secretary of State in

Financial control.

Council, and shall hold office during His Majesty's pleasure. The Secretary of State in Council shall, by rules,

make provision for his pay, powers, duties, and conditions of employment, or for the discharge of his duties in the case of a temporary vacancy or absence from duty.

(2) Subject to any rules made by the Secretary of State in Council, no office may be added to or withdrawn from the public service, and the emoluments of no post may be varied, except after consultation with such finance authority as may be designated in the rules, being an authority of the province or of the Government of India, according as the post is or is not under the control of a local Government.]

¹[96-E. Rules made under this Part of this Act shall not be made except with

Rules under Part VII-A.

the concurrence of the majority of votes at a meeting of the Council of India.]

PART VIII.

THE INDIAN CIVIL SERVICE.

97. (1) The Secretary of State in Council may, with the advice and assistance

Rules for admission to the
Indian Civil Service.

of the Civil Service Commissioners, make rules for the examination, under the superintendence of those Commissioners, of British subjects ²[and of persons] in respect of whom a declaration has been made under ³[section 96-A of this Act,] who are desirous of becoming candidates for appointment to the Indian Civil Service.

(2) The rules shall prescribe the age and qualifications of the candidates and the subjects of examination.

⁴[(2-a) The admission to the Indian Civil Service of a British subject who or whose father or mother was not born within His Majesty's dominions shall be subject to such restrictions as the Secretary of State in Council, with the advice and assistance of the Civil Service Commissioners, may think fit to prescribe, and all such restrictions shall be included in the rules.]

(3) All rules made in pursuance of this section shall be laid before Parliament within fourteen days after the making thereof, or, if Parliament is not then sitting, then within fourteen days after the next meeting of Parliament.

(4) The candidates certified to be entitled under the rules shall be recommended for appointment according to the order of their proficiency as shown by their examination.

(5) Such persons only as are so certified may be appointed or admitted to the Indian Civil Service by the Secretary of State in Council.

⁵[(6) Notwithstanding anything in this section, the Secretary of State ⁶[in Council] may make appointments to the Indian Civil Service of persons domiciled in India, in accordance with such rules as may be prescribed by the Secretary of State in Council with the concurrence of the majority of votes at a meeting of the Council of India.

¹ Secs. 96 D & E.—Sections 96-D & E were inserted by Part I of Sch. II of the Government of India Act, 1919 (9 & 10 Geo. 5, Ch. 101).

Sec. 97.—² These words were inserted by section 4 of the Government of India (Amendment) Act, 1916 (6 & 7 Geo. 5, Ch. 37).

³ These words were substituted for "the last foregoing section" by Part II of Sch. II of the Government of India Act, 1919 (9 & 10 Geo. 5,

Ch. 101).

⁴ This sub-section was inserted by section 4 of the Government of India (Amendment) Act, 1916 (6 and 7 Geo. 5, Ch. 37).

⁵ This sub-section was inserted by Part I of Sch. II of the Government of India Act, 1919 (9 and 10 Geo. 5, Ch. 101).

⁶ See 97 (6) as inserted by 15 & 16 Geo. 5, Ch. 83, S. 3.

Any rules made under this sub-section shall not have force until they have been laid for thirty days before both Houses of Parliament.]

98. Subject to the provisions of this Act, all vacancies happening in any of the offices specified or referred to in the third schedule to this Act, and all such offices which may be created hereafter, shall be filled from amongst the members of the Indian Civil Service.

99. (1) The authorities in India, by whom appointments are made to offices in the Indian Civil Service, may appoint to any such office any person of proved merit and ability domiciled in British India and born ¹ [] of parents habitually resident in India and not established there for temporary purposes only, although the person so appointed has not been admitted to that service in accordance with the foregoing provisions of this Act.

(2) Every such appointment shall be made subject to such rules as may be prescribed by the Governor-General in Council and sanctioned by the Secretary of State in Council with the concurrence of a majority of votes at a meeting of the Council of India.

(3) The Governor-General in Council may, by resolution, define and limit the qualification of persons who may be appointed under this section, but every resolution made for that purpose shall be subject to the sanction of the Secretary of State in Council, and shall not have force until it has been laid for thirty days before both Houses of Parliament.

100. (1) Where it appears to the authority in India by whom an appointment is to be made to any office reserved to members of the Indian Civil Service, that a person not being a member of that service ought under the special circumstances of the case, to be appointed thereto, the authority may appoint thereto any person who has resided for at least seven years in India and who has, before his appointment, fulfilled all the tests (if any) which would be imposed in the like case on a member of that service.

(2) Every such appointment shall be provisional only, and shall forthwith be reported to the Secretary of State, with the special reasons for making it, and, unless the Secretary of State in Council approves the appointment, with the concurrence of a majority of votes at a meeting of the Council of India, and within twelve months from the date of the appointment intimates such approval to the authority by whom the appointment was made the appointment shall be cancelled.

PART IX.

THE INDIAN HIGH COURTS.

Constitution.

101. (1) The high courts referred to in this Act are the high courts of judicature for the time being established in British India by letters patent.

(2) Each high court shall consist of a chief justice and as many other judges as His Majesty may think fit to appoint ;

Provided as follows :—

(i) the Governor-General in Council may appoint persons to act as additional judges of any high court, for such period, not exceeding two years, as may be required; and the judges so appointed shall, whilst so acting, have all the powers of a judge of the high court appointed by His Majesty under this Act ;

Sec. 99.—¹The words " in British India " were repealed by Sch. I of the Government of India (Amendment) Act, 1916 (6 and 7 Geo. 5, Ch. 37)

Sec. 101 Proviso.—The proviso to Sec. 101 does not mean that, as regards each High Court, appointment of temporary judges can only be made for periods not exceeding two years in all.

33 M. L. J. 787=43 I. C. 850. The proviso must be read as meaning that appointments may be made from time to time for such period, not exceeding two years, as may be required from time to time on each occasion when the power is exercised (*Ibid.*).

(ii) the maximum number of judges of a high court including the chief justice and additional judges, shall be twenty.

(3) A judge of a high court must be—

(a) a barrister of England or Ireland, or a member of the Faculty of Advocates in Scotland, of not less than five years' standing ; or

(b) a member of the Indian Civil Service of not less than ten years' standing, and having for at least three years served as, or exercised the powers of, a district judge ; or

(c) a person having held judicial office, not inferior to that of a subordinate judge or a judge of a small cause court, for a period of not less than five years ; or

[(d) a person who has been a pleader of one of the high courts referred to in this Act, or of any court which is a high court within the meaning of clause 24 of section 3 of the Act of the Indian legislature known as the General Clauses Act, 1897, for an aggregate period of not less than ten years.]¹

(4) Provided that not less than one-third of the judges, of a high court, including the chief justice but excluding additional judges, must be such barristers or advocates as aforesaid, and that not less than one-third must be members of the Indian Civil Service.

(5) The high court for the North-Western Provinces may be styled the high court of judicature at Allahabad, and the high court at Fort William in Bengal is in this Act referred to as the high court at Calcutta.

Tenure of office of judges of high courts.

102. (1) Every judge of a high court shall hold his office during His Majesty's pleasure.

(2) Any such judge may resign his office ; in the case of the high court at Calcutta, to the Governor-General in Council, and in other cases to the local Government.

Precedence of judges of high courts.

103. (1) The chief justice of a high court shall have rank and precedence before the other judges of the same court.

(2) All the other judges of a high court shall have rank and precedence according to the seniority of their appointments, unless otherwise provided in their patents.

104. (1) The Secretary of State in Council may fix the salaries, allowances furloughs, retiring pensions and (where necessary) expenses for equipment and voyage, of the chief justices and other judges of the several high courts, and may alter them, but any such alteration shall not affect the salary of any judge appointed before the date thereof.

(2) The remuneration fixed for a judge under this section shall commence on his taking upon himself the execution of his office, and shall be the whole profit or advantage which he shall enjoy from his office during his continuance therein.

(3) If a judge of a high court dies during his voyage to India, or within six months after his arrival there, for the purpose of taking upon himself the execution of his office, the Secretary of State shall pay to his legal personal representatives out of the revenues of India, such sum of money as will, with the amount received by or due to him at the time of his death on account of salary, make up the amount of one year's salary.

(4) If a judge of a high court dies while in possession of his office and after the expiration of six months from his arrival in India for the purpose of taking upon himself the execution of his office, the Secretary of State shall pay to his legal personal representatives, out of the revenues of India, over and above the sum due to him at the time of his death, a sum equal to six months' salary.

Sec. 101 (3) (d).—The usual strength of a High Court consisted of a Chief Justice and six puisne Judges. Owing to the retirement of one of them, the Court consisted of an Acting Chief Justice and five puisne Judges, of whom two were barristers and two were members of the Civil Service. *Held*

that the constitution of the High Court was in accordance with Sec. 101 (d). 51 I.C. 66 *See also* 9 All. 625 (F. B.)

¹ This clause was substituted by the Indian High Courts Act, 1922 (12 and 13 Geo. 5, Ch. 20).

105. (1) On the occurrence of a vacancy in the office of chief justice of a high court, and during any absence of such a chief justice the

Provision for vacancy in the office of chief justice or other judge.

Governor-General in Council, in the case of the high court at Calcutta, and the local Government in other cases, shall appoint one of the other judges of the same high court to perform the duties of chief justice of the court, until some person has been appointed by His Majesty to the office of chief justice of the court, and has entered on the discharge of the duties of that office, or until the chief justice has returned from his absence, as the case requires.

(2) On the occurrence of a vacancy in the office of any other judge of a high court, and during any absence of any such judge, or on the appointment of any such judge to act as chief justice, the Governor-General in Council in the case of the high court at Calcutta, and the local Government in other cases, may appoint a person, with such qualifications as are required in persons to be appointed to the high court, to act as a judge of the court; and the person so appointed may sit and perform the duties of a judge of the court, until some person has been appointed by His Majesty to the office of judge of the court, and has entered on the discharge of the duties of the office, or until the absent judge has returned from his absence, or until the Governor-General in Council or the local Government, as the case may be, sees cause to cancel the appointment of the acting judge.

Jurisdiction.

106. (1) The several high courts are courts of record and have such jurisdiction, original and appellate, including admiralty jurisdiction in

Jurisdiction of high courts. respect of offences committed on the high seas, and all such powers and authority over or in relation to the administration of justice, including power to appoint clerks and other ministerial officers of the court, and power to make rules for regulating the practice of the court, as are vested in them by letters patent, and, subject to the provisions of any such letters patent, all such jurisdictions, powers and authority as are vested in those courts respectively at the commencement of this Act.

¹ [(1-a) The letters patent establishing or vesting jurisdiction, powers or authority in a high court may be amended from time to time by His Majesty by further letters patent.]

(2) The high courts have not and may not exercise any original jurisdiction in any matter concerning the revenue, or concerning any act ordered or done in the collection thereof according to the usage and practice of the country or the law for the time being in force.

107. Each of the high courts has superintendence over all courts for the time being subject to its appellate jurisdiction, and may do any of the following things, that

Powers of high court with respect to subordinate courts.

is to say :—

Sec. 106 (1-a).—¹ This sub-section was inserted by Sch. I of the Government of India (Amendment) Act, 1916 (6 & 7 Geo. 5, Ch. 37).

Sec. 106 (2).—The order of a High Court to a revenue officer to do his statutory duty would not be the exercise of "original jurisdiction in any matter concerning the revenue" within the meaning of S. 106. 47 Bom. 742 = 45 M.L.J. 592 = 21 A.L.J. 689 = 50 I.A. 227 = 1923 P.C. 138 (P.C.). S. 106 (2) and S. 52 of the Income Tax Act prohibits the High Court from entertaining any application under S. 45 of the Specific Relief Act for compelling the Revenue Board to refer the matter to the High Court under S. 51 of the Income Tax Act. 44 Mad. 718 = 41 M.L.J. 177. Issuing an order under S. 45 of the Specific Relief Act is an exercise of original jurisdiction under S. 106 (2) (*Ibid.*) A suit for declaration

that an agreement for composition of income-tax entered into between the plaintiffs and the Collector of Madras was in force and that the latter was not entitled to re-assess the plaintiffs in repudiation of the agreement, is not cognizable by the High Court in its original jurisdiction. 35 M.L.J. 23 = 48 I.C. 790.

Sec. 107. SCOPE OF SECTION.—There is extension of the jurisdiction of the High Court under S. 107 in the matter of the right of superintendence over the proceedings of the subordinate courts beyond that under S. 15 of Charter Act. 39 All. 612 = 15 A.L.J. 576. See also 1923 Mad. 595 = 44 M.L.J. 642; 16 I.C. 963 = 16 C.L.J. 375; 1924 All. 69. "Jurisdiction" meaning of 51 Bom. 416 = 100 I.C. 582 = 29 Bom. L.R. 361 = A.I.R. 1927 Bom. 272; 7 Lah. 161 = A.I.R. 1926 Lah. 379. Where there has been a denial

(a) call for returns ;

of a fair trial to the applicant the High Court has power to set aside the decision of the Lower Court. 4 Pat. L.J. 371=49 I.C. 389. *See also* 1 Pat. L.T. 467=56 I.C. 155; (1920) Pat. 56=89 I.C. 863 (application to set aside *ex parte* decree). 53 Cal. 827 (Dismissal of appeal for default—interference by High Court in revision). A High Court is entitled to exercise its power of superintendence under S. 107 to correct and supervise Subordinate Courts whenever they appear to have wrongly exercised their inherent powers. 4 P.L.J. 20=47 I.C. 719=(1918) Pat. 337. Although the High Court is vested with very wide powers of superintendence over Subordinate Courts, these are not to be exercised for the purpose of interfering with the order of a Subordinate Court merely on the ground of error in law or error in fact. 26 C.W.N. 1016=36 C.L.J. 265=1923 Cal. 45. Powers to be exercised only on rare occasions. 97 I.C. 390. The High Court's power of superintendence over inferior Courts is not confined to questions of jurisdiction alone but also applies where the inferior Courts commit an illegality or material irregularity. 31 C.L.J. 183=54 I.C. 169=24 C.W.N. 97. Administrative as well as judicial acts of Subordinate Courts are subject to the High Court's jurisdiction to interfere. 2 P.L.J. 130=37 I.C. 872. The exercise of power of High Court under the Charter Act is justifiable only in case of irreparable injury otherwise resulting to the parties by a judge exceeding or refusing to exercise jurisdiction vested in him by law. 20 C.W.N. 1080=1 P.L.J. 465=37 I.C. 129. *See also* 8 Lah. L.J. 578=27 Punj. L.R. 831=A.I.R. 1927 Lah. 14. The powers conferred by this section are not merely administrative, but judicial also and they can be called in aid when the order is so bad on the face of it as to be in a sense a denial of justice. 105 I.C. 131. The word 'superintendence' in Sec. 107 (2) should be construed very narrowly and does not justify the interference of the High Court so as to evade the provisions of S. 115 or C. P. Code and to result in entertaining an appeal on revision where no such right is given by statute. 27 C. L. J. 418=44 I. C. 763=22 C. W. N. 627.

RENT COURT.—The Court of the Rent Controller appointed under the Calcutta Rent Act is a Court of civil jurisdiction subject to the powers of superintendence under S. 107 and the High Court can interfere in revision with its decision. 1923 Cal. 311. *See also* 29 I. C. 177 ; 40 Cal. 150; 26 C. W. N. 78=49 Cal. 528=1922 Cal. 427 ; 26 C. W. N. 845.

REVENUE COURT AND COLLECTOR.—A criminal bench of the High Court cannot revise an action taken by a Civil or Revenue Court under S. 476, Cr. P. C. unless authorized by the Chief Justice, 40 Cal. 417=17 C. L. J. 215=17 C.W.N. 647 (F. B.). High Court has power over a Collector, when he reverses an order of Subordinate Revenue Officer refusing to direct prosecution for an offence under S. 471 and 197, Penal Code. 90 I. C. 445=26 Cr. L. J. 1565.

AGENCY COMMISSIONER.—The Court of the Agency Commissioner is subject to the Appellate jurisdiction of the High Court. *See* 46 Mad. 726

=45 M. L. J. 8.

INSOLVENCY COURT.—Power of superintendence over moffussil Courts, if can be exercised by Judge of High Court sitting in insolvency. *See* 31 C. W. N. 847.

SMALL CAUSE COURT.—Decision of Chief Judge of Rangoon Small Cause Court, under S. 14 of the City of Rangoon Municipal Act, if can be interfered with under this Sec. *See* 4 Bur. L. J. 202. *See also* 3 Rang. 560=91 I.C. 550=A.I.R. 1926 Rang. 25. The District Court is not a Court equal or superior to that of an Agency Commissioner and the transfer of a case from his file must be to the High Court. (*Ibid.*) An order of the lower Court refusing leave to sue a receiver without reasons is liable to be set aside. 4 P.L.J. 20=47 I. C. 719=(1918) Pat. 337.

ORDER OF ELECTION COMMISSIONER directing prosecution of petitioner for offence under S. 465 Penal Code—No revision to High Court. 22 A.L.J. 497. A High Court can interfere with interlocutory orders when they might lead to failure of justice or irreparable injury. 27 I.C. 917=42 Cal. 926. If the ends of justice so requires, the High Court will interfere in revision in a pending proceeding. 39 Mad. 561=28 M.L.J. 505=29 I.C. 109. Direction for taking accounts in a pending suit will not be interfered with in revision unless irreparable injury will otherwise result. 3 Pat. L.T. 638. It is open to the High Court to interfere in a proper case with an order of refusal of the lower Court to add a person as party defendant in a pending suit. 47 I. C. 725. Powers of superintendence are not applicable where the only question is whether the decision of the lower Court was against the weight of evidence. 26 C.W.N. 1016=36 C.L.J. 265=1923 Cal. 45. In entertaining or refusing to entertain an election petition the subordinate judge is merely a *persona designata* and not a court within the meaning of S. 107; 41 M.L.J. 39=70 I.C. 780. *But see* 46 M. L. J. 201; 45 A. 676=21 A. L. J. 671. High Court has power to transfer a case from the Court of an Agency Commissioner to an equal or superior court. 46 Mad. 726=45 M. L. J. 8=1923 Mad. 604. Transfer refused under S. 24, C.P.C.—High Court can interfere. 87 I. C. 170. *See also* A.I.R. 1926 Cal 326. Trial indefinitely postponed—Loss of evidence to partiss almost certain—High Court can interfere. 1925 P. H. C. C. 294=89 I. C. 814=1925 Pat. 674. Under this section the High Court has power to direct a Sessions Judge to re-hear an appeal after obtaining additional evidence. 47 I. C. 274=19 Cr. L.J. 902=3 P. L. J. 632. The High Court has jurisdiction to interfere in revision with an order of a Munsiff punishing a party for contempt. If on an application for restoration of a case being dismissed for default, the plaintiff states that the order was against rules and law no contempt of court is meant. 42 All. 26=52 I.C. 279=17 A. L. J. 898. Where a complaint is dismissed under S. 203, Cr. P. Code without reasons, the High Court can set aside the order and direct enquiry. 38 Mad. 512=21 I. C. 681=25 M. L. J. 510. Proceedings under Chapter XII of the Cr P. Code are not proceedings which could be called up under S. 435 of the Code and under S. 107, the

(b) direct the transfer of any suit or appeal from any such court to any other court of equal or superior jurisdiction ;

(c) make and issue general rules and prescribe forms for regulating the practice and proceedings of such courts ;

(d) prescribe forms in which books, entries and accounts shall be kept by the officers of any such courts ; and

(e) settle tables of fees to be allowed to the sheriff, attorneys, and all clerks and officers by courts :

Provided that such rules, forms and tables shall not be inconsistent with the provisions of any ¹[law] for the time being in force, and shall require the previous approval, in the case of the High Court at Calcutta, of the Governor-General in Council, and in other cases of the local Government.

High Court has no general powers of superintendence over the inferior courts in respect of proceedings taken under Chapter XIII of the Cr. P. Code. 41 All 302 = 51 I. C. 337 ; (19 Cal. 127 and 16 A. L. J. 189, ref.) ; also 40 All. 364 = 44 I. C. 673. If proceedings are totally without legal foundation or legislative authority is taken by a Magistrate under colour of Chapter XII there is a clear case for interference. 40 A. 364. The section empowers the High Court to prevent the evasion by the Magistrate of the law laid down in S. 144, Cr. P. C. by issuing a permanent injunction under the guise of successive renewal of temporary orders, under the section. 21 I. C. 381 = 25 M. L. J. 370. See also 1 Pat. L.R. 223 = 1924 P. 145 ; 1922 P. 435. Where proceedings are taken under S. 145 of the Cr. P. Code, which amount to an abuse of the process of court and the object of which is to harass or annoy a successful party in prior possession proceedings, the High Court will interfere under S. 107. 27 C. W. N. 171 = 37 C.L.J. 39 = 1923 Cal. 95 ; 60 I.C. 125 = 32 C.L.J. 270. But see also 36 Mad. 275 = 23 M.L.J. 499. High Court has power to stay criminal proceedings in a Magistrate's Court till the decision of a civil suit between the parties. 44 M. L. J. 642 = 1923 Mad. 595 ; 76 I. C. 872. Where however the decision of the civil suit would not conclusively determine the question of possession of the property which was the only material point for the decision of the Criminal Court, the High Court refused to stay the trial of the Criminal Proceedings. (*Ibid.*) The High Court has no powers under S. 115, C.P.C. or S. 107, Government of India Act to revise the order of a collector acting under the provisions of the Land Acquisition Act refusing to refer an application under S. 18 of the Land Acquisition Act, 47 M. 357 = 46 M.L.J. 209 (F.B.) (overruling 42 M. 231 = 36 M.L.J. 95). See also 47 B. 693 = 25 Bom. L.R. 699 and 32 C. 605 (P.C.). An order passed by a District Munsiff under S. 73 of the Madras Village Courts Act can be revised by the High Court. 34 I. C. 503. Where an order under S. 73 C. P. C. is hopelessly inadequate and does not refer to the claims of parties arguments advanced and reasons for the conclusions arrived at, the High Court can interfere under S. 107, 74 I. C. 140. An order returning a plaint is open a revision in cases where there is no appeal. 49 I. C. 442 = 4 P. L. J. 57. Where a Court dismisses a suit on plaintiff's failure to amend the plaint without giving him an opportunity to continue the trial with the plaint as it was, it refuses to

exercise a jurisdiction and its order is open to revision. 51 I. C. 189 = 4 P. L. J. 277. Where a suit has been allowed to be withdrawn by a Small Cause Court and no reasons have been recorded for permitting such withdrawal, the High Court will set aside the order. 43 I. C. 455 = 2 P. L. J. 682. S. 107 empowers the High Court to delete irrelevant remarks from the judgments of inferior Criminal Court. 3 Pat. L. T. 239 (15 C. W. N. 593 ; 16 C. W. N. 1105 ; 17 C. W. N. 238, ref.). The powers of the superintendence of the High Court are of an extremely wide character and include the power to expunge matters from judgment to prevent circulation and publication to the prejudice of persons not concerned in the suit either as a party or as a witness. The High Court will only interfere in exceptional cases and with great caution in the exercise of such jurisdiction. 47 I. C. 981 = 35 M. L. J. 368 ; see also 78 I. C. 6 ; 97 I. C. 390. Power of High Court to interfere in revision with order of Chief Presidency Magistrate under Maintenance Order Enforcement Act, 1921. 30 Bom. L. R. 350.

PRACTICE AND PROCEDURE.—On a difference of opinion among two judges exercising revisional powers, the decision of the Senior Judge prevails on the principle of cl. 36 of the Letters Patent. 31 C. L. J. 183 = 54 I. C. 169. See also 59 I.C. 403 = 32 C. L. J. 54.

RULES framed by High Court for its own business need not be sanctioned by Local Government A. I. R. 1928 Mad. 472.

DISCIPLINARY JURISDICTION.—Where proceedings were instituted under the Legal Practitioners Act before the District Munsif and an application was made to transfer the same to another Court, the procedure under the Legal Practitioners Act is neither Criminal nor Civil, but purely designed for the purposes of discipline. 1 P. L. J. 576 = 37 I. C. 484. The enquiry under S. 14 of the Legal Practitioners Act cannot be delegated to officer of the Court in which the malpractices complained of were committed (*Ibid.*). Applicability of this section of the Government of India Act, 1915 to proceedings under S. 14 of the Legal Practitioners Act discussed. (*Ibid.*) See also 27 Punj. L. R. 225 = 93 I. C. 700 = A. I. R. 1926 Lah. 199.

Sec. 107.—¹This word was substituted for the word "Act" by Sch. I of the Government of India (Amendment) Act, 1916 (6 & 7 Geo. 5, Ch. 37). The Bombay High Court has the power by virtue of S. 107 (b) to transfer a suit pending before the Court of the Mewas Agent to a District Court which is subordinate to it and which has equal jurisdiction as the Court of the Mewas Agent.

108. (1) Each high court may, by its own rules, provide as it thinks fit for the exercise, by one or more judges, or by division courts constituted by two or more judges, of the high court, of the original and appellate jurisdiction vested in the court.

Exercise of jurisdiction by single judges or division courts.

(2) The chief justice of each high court shall determine what judge in each case is to sit alone, and what judges of the court, whether with or without the chief justice, are to constitute the several division courts.

109. (1) The Governor-General in Council may, by order, transfer any territory or place from the jurisdiction of one to the jurisdiction of

Power for Governor-General in Council to alter local limits of jurisdiction of high courts.

any other of the high courts, and authorise any high court to exercise all or any portion of its jurisdiction in any part of British India not included within the limits for which the high court was established, and also to exercise any such jurisdiction in respect of [any British subject for the time being within] any part of India outside British India.

(2) The Governor-General in Council shall transmit to the Secretary of State an authentic copy of every order made under this section.

(3) His Majesty may signify, through the Secretary of State in Council, his disallowance of any such order, and such disallowance shall make void and annul the order as from the day on which the Governor-General notifies that he has received intimation of the disallowance, but no act done by any High Court before such notification shall be deemed invalid by reason only of such disallowance.

110. (1) The Governor-General, each Governor, ²[Lieutenant-Governor and Chief Commissioner] and each of the members of ³[the executive council of the Governor-General or of a Governor or Lieutenant-Governor,] ⁴[and a minister appointed under

Exemption from jurisdiction of High Courts

this Act], shall not—

(a) be subject to the original jurisdiction of any High Court by reason of anything counselled, ordered or done by any of them in his public capacity only; nor

(b) be liable to be arrested or imprisoned in any suit or proceeding in any high court acting in the exercise of its original jurisdiction; nor

(c) be subject to the original criminal jurisdiction of any High Court in respect of any offence not being treason or felony.

(2) The exemption under this section from liability to arrest and imprisonment shall extend also to the chief justices and other judges of the several high courts.

111. The order in writing of the Governor-General in Council for any act shall,

Written order by Governor-General justification for act in any court in India.

in any proceeding, civil or criminal, in any High Court acting in the exercise of its original jurisdiction, be a full justification of the act, except so far as the order extends to any European British subject; but nothing in this section shall exempt the Governor-General, or any member of his executive council, or any person acting under their orders, from any proceedings in respect of any such act before any competent court in England.

(23 M. 329, Rel. on) 51 Bom. 416 = 101 I.C. 582 = 29 Bom. L. R. 361 = A. I. R. 1927 Bom. 272.

Sec. 108.—Under S. 108 a Division Court must consist of at least two judges. 1 P. 384 = 3 P.L.T. 194 = 1922 Pat. 88 = 1922 P. 17.

The Chief Justice has power under S. 108 of the Government of India Act to determine what Judge is to sit in each case. Thus where after a Sessions case was opened, the presiding judge was taken ill and the Chief Justice directed some other Judge to preside in the Sessions case. *Held*, that the procedure was in accordance with law. 29 Bom. L. R. 204 = 101 I. C. 178 = 28 Cr. L. J. 402 = 8 A. I. C. R. 29 = A. I. R. 1927 Bom. 161.

Sec. 109 (1).—¹ These words were substituted for the words "Christian subjects of His Majesty resident in" by Sch. I of the Government of India (Amendment) Act, 1916 (6 & 7 Geo 5 Ch. 37).

Sec. 110.—² These words were inserted by Schedule I of the Government of India (Amendment) Act, 1916 (6 & 7 Geo 5, Ch. 37).

³ These words were substituted for the words "their respective executives councils" by *Ibid*.

⁴ These words were inserted by Part II of Sch. II of the Government of India Act, 1919 (9 & 10 Geo. 5, Ch. 101).

Law to be administered.

112. The High Courts at Calcutta, Madras and Bombay, in the exercise of their original jurisdiction in suits against inhabitants of Calcutta, Madras or Bombay, as the case may be, shall, in matters of inheritance and succession to lands, rents and goods, and in matters of contract and dealing between party and party, when both parties are subject to the same personal law or custom having the force of law, decide according to that personal law or custom, and when the parties are subject to different personal laws or customs having the force of law, decide according to the law or custom to which the defendant is subject.

Additional High Courts.

113. His Majesty may, if he sees fit, by letters patent, establish a high court of judicature in any territory in British India, whether or not included within the limits of the local jurisdiction of another High Court, and confer on any high court so established any such jurisdiction, powers and authority as are vested in or may be conferred on any high court existing at the commencement of this Act; and, where a high court is so established in any area included within the limits of the local jurisdiction of another high court, His Majesty may, by letters patent, after those limits, and make such incidental, consequential and supplemental provisions as may appear to be necessary by reason of the alteration.

Advocate-General.

114. (1) His Majesty may, by warrant under His Royal Sign Manual, appoint an advocate-general for each of the presidencies of Bengal, Madras and Bombay.

(2) The advocate-general for each of those presidencies may take on behalf of His Majesty such proceedings as may be taken by His Majesty's Attorney-General in England.

¹ [(3) On the occurrence of a vacancy in the office of advocate-general or during any absence or deputation of an advocate-general, the Governor-General in Council, in the case of Bengal, and the local Government in other cases, may appoint a person to act as advocate-general; and the person so appointed may exercise powers of an advocate-general until some person has been appointed by His Majesty to the office and has entered on the discharge of his duties, or until the advocate-general has returned from his absence or deputation, as the case may be, or until the Governor-General in Council or the local Government, as the case may be, cancels the acting appointment.]

PART X.

ECCLESIASTICAL ESTABLISHMENT.

115. (1) The bishops of Calcutta, Madras and Bombay have and may exercise within their respective dioceses such episcopal functions, and such ecclesiastical jurisdiction for the superintendence and good government of the ministers of the Church of England therein, as His Majesty may, by letters patent, direct. ² [His Majesty may also, by letters patent, make such provision as may be deemed expedient for the exercise of the episcopal functions and ecclesiastical jurisdiction of the bishop during a vacancy of any of the said sees or the absence of the bishop thereof.]

(2) The Bishop of Calcutta is the Metropolitan Bishop in India, Subject nevertheless to the general superintendence and revision of the Archbishop of Canterbury; ² [and as Metropolitan shall have, enjoy and exercise such ecclesiastical jurisdiction and functions as His Majesty may, by letters patent, direct. His Majesty may also, by letters patent, make such provision as may be deemed expedient for the exercise of

Sec. 114.—¹ This sub-section was added by Sch. I of the Government of India (Amendment) Act, 1916 (6 & 7 Geo. 5, Ch. 37).

Sec. 115 —² These words were inserted by Part III of Sch. II of the Government of India Act, 1919 (9 & 10 Geo. 5, Ch. 101.)

such jurisdiction and functions during a vacancy of the see of Calcutta or the absence of the bishop.]

(3) Each of the bishops of Madras and Bombay is subject to the Bishop of Calcutta as such Metropolitan, and must at the time of his appointment to his bishopric, or at the time of his consecration as bishop, take an oath of obedience to the Bishop of Calcutta, in such manner as His Majesty, by letters patent, may be pleased to direct.

(4) His Majesty may, by letters patent, vary the limits of the dioceses of Calcutta, Madras and Bombay.

(5) Nothing in this Act or in any such letters patent as aforesaid shall prevent any person who is or has been bishop of any diocese in India from performing episcopal functions, not extending to the Exercise of jurisdiction, in any diocese or reputed diocese at the request of the bishop thereof.

116. [*Power to admit to holy orders.*].—Rep. by Sch. II of 6 & 7 Geo. 5, Ch. 37.

117. If any person under the degree of Bishop is appointed to the bishopric of Calcutta, Madras or Bombay, being at the time of his appointment resident in India, the Archbishop of Canterbury, if so required to do by His Majesty by letters patents may issue a commission under his hand and seal, directed to the two remaining bishops, authorising and charging them to perform all requisite ceremonies for the consecration of the person so to be appointed.

118. (1) The bishops ¹[* *] of Calcutta, Madras and Bombay are appointed by His Majesty by letters patent ²[and the archdeacons of those dioceses by their respective diocesan bishops], and there may be paid to them, or to any of them, out of the revenues of India such salaries and allowances as may be fixed by the Secretary of State in Council; but any power of alteration under this enactment shall not be exercised so as to impose any additional charge on the revenues of India.

(2) The remuneration fixed for a bishop or archdeacon under this section shall commence on his taking upon himself the execution of his office, and be the whole profit or advantage which he shall enjoy from his office during his continuance therein, and continue so long as he exercises the functions of his office.

(3) There shall be paid out of the revenues of India the expenses of visitations of the said bishops, but no greater sum may be issued on account of those expenses than is allowed by the Secretary of State in Council.

119. (1) If the Bishop of Calcutta dies during his voyage to India for the purpose of taking upon himself the execution of his office, or if the Bishop of Calcutta, Madras or Bombay dies within six months after his arrival there for that purpose, the Secretary of State shall pay to his legal personal representatives, out of the revenues of India, such a sum of money as will, with the amount received by or due to him at the time of his death on account of salary, make up the amount of one year's salary.

(2) If the Bishop of Calcutta, Madras or Bombay dies while in possession of his office and after the expiration of six months from his arrival in India for the purposes of taking upon himself the execution of his office, the Secretary of State shall pay to his legal personal representatives, out of the revenues of India, over and above the sum due to him at the time of his death, a sum equal to six months' salary.

120. His Majesty may, by warrant under the Royal Sign Manual, countersigned by the ³[Secretary of State], grant, out of the revenues of India, to any Bishop of Calcutta, a pension not exceeding fifteen hundred pounds per annum if he has resided in India as Bishop of Calcutta,

Sec. 118.—¹ The words "and archdeacons" were omitted by Part III of Sch. II of the Government of India Act, 1919 (9 & 10 Geo. 5, Ch. 101).

² These words were inserted by *ibid.*

Sec. 120.—³ These words were substituted for the words "Chancellor of the Exchequer" by Sch. I of the Government of India (Amendment) Act 1916 (6 & 7 Geo. 5, Ch. 37).

Madras or Bombay or archdeacon for ten years, or one thousand pounds per annum if he has resided in India as Bishop of Calcutta¹ [Madras or Bombay] for seven years, or seven hundred and fifty pounds per annum if he has resided in India as Bishop of Calcutta,¹ [Madras or Bombay] for five years, or to any Bishop of Madras or Bombay, a pension not exceeding eight hundred pounds per annum ²[³] if he has resided in ³[²] India as such bishop for fifteen years.

121. His Majesty may make such rules as to the leave of absence of the Bishops of Calcutta, Madras and Bombay on furlough or medical certificate as seems to His Majesty expedient.

Furlough rules.

122. (1) Two members of the establishment of Chaplains maintained in each of the presidencies of Bengal, Madras and Bombay must always be ministers of the Church of Scotland, and shall be entitled to have, out of the revenues of India, such salary as is from time to time allotted to the military chaplain in the several presidencies.

Establishment of chaplains of Church of Scotland.

(2) The ministers so appointed chaplains must be ordained and inducted by the presbytery of Edinburgh according to the forms and solemnities used in the Church of Scotland and shall be subject to the spiritual and ecclesiastical jurisdiction in all things of the presbytery of Edinburgh, whose judgments shall be subject to dissent, protest and appeal to the Provincial Synod of Lothian and Tweeddale and to the General Assembly of the Church of Scotland.

123. Nothing in this Act shall prevent the Governor-General in Council from granting, with the sanction of the Secretary of State in Council, to any sect, persuasion or community of Christians, not being of the Church of England or Church of Scotland, such sums of money as may be expedient for the purposes of instruction or for the maintenance of places of worship.

Saving as to grants to Christians.

PART XI.

OFFENCES, PROCEDURE AND PENALTIES.

Certain acts to be misdemeanours.

124. If any person holding office under the Crown in India does any of the following things, that is to say,—

(1) if he oppresses any British subject within his jurisdiction or in the exercise of his authority ; or

Oppression.

(2) if (except in case of necessity, the burden of proving which shall be on him) he wilfully disobeys, or wilfully omits, forbears or neglects to execute, any orders or instructions of the

Wilful disobedience.

Secretary of State ;

Breach of duty.

(3) if he is guilty of any wilful breach of the trust and duty of his office ; or

(4) if, being the Governor-General, or a Governor, Lieutenant-Governor or Chief Commissioner, or a member of the Executive Council of the the Governor-General or of a Governor or Lieutenant-Governor ⁴[or being a Minister appointed under this Act] or being a person employed or concerned in the collection of revenue or the administration of justice, he is concerned in, or has any dealings or transactions by way of trade or business in any part of India, for the benefit either of himself or of any other person, otherwise than as a shareholder in any joint stock company or trading corporation ; or

Trading.

(5) if he demands, accepts or receives, by himself or another, in the discharge of his office, any gift, gratuity or reward pecuniary or otherwise, or any promise of the same, except in accordance with such rules as may be made by the Secretary of State as to the receipt of

Receiving presents.

¹ Sec. 120.—¹ These words were inserted by *ibid.*

² The words "to be paid quarterly" were repealed by *ibid.*

³ The word "British" was repealed by *ibid.*

⁴ Sec. 124 (4).—⁴ These words were inserted by Part II of Sch. II of the Government of India Act, 1919 (9 & 10 Geo. 5, Ch. 101).

presents, and except in the case of fees paid or payable to barristers, physicians, surgeons and chaplains in the way of their respective professions ;

he shall be guilty of a misdemeanour ; and if he is convicted of having demanded, accepted or received any such gift, gratuity or reward, the same, or the full value thereof shall be forfeited to the Crown, and the Court may order that the gift, gratuity or reward, or any part thereof, be restored to the person who gave it, or be given to the prosecutor or informer and that the whole or any part of any fine imposed on the offender be paid or given to the prosecutor or informer, as the Court may direct :

¹[Provided that notwithstanding anything in this Act, if any member of the Governor-General's Executive Council or any member of any local Government was at the time of his appointment concerned or engaged in any trade or business, he may, during the term of his office with the sanction in writing of the Governor-General, or, in the case of Ministers, of the Governor of the province, and in any case subject to such general conditions and restrictions as the Governor-General in Council may prescribe, retain his concern of interest in that trade or business, but shall not, during that term, take part in the direction or management of that trade or business.]

125. (1) If any European British subject, without the previous consent in writing of the Secretary of State in Council or of the Governor-General in Council or of a local Government, by himself or another,—

Loans to princes or chiefs.

(a) lends any money or other valuable thing to any prince or chief in India ; or
(b) is concerned in lending money to, or raising or procuring money for, any such prince or chief or becomes security for the repayment of any such money ; or

(c) lends any money or other valuable thing to any other persons for the purpose of being lent to any such prince or chief ; or

(d) takes, holds, or is concerned in any bond, note or other security granted by any such prince or chief for the repayment of any loan or money hereinbefore referred to.

he shall be guilty of a misdemeanour.

(2) Every bond, note or security for money, of what kind or nature soever, taken, held or enjoyed, either directly or indirectly for the use and benefit of any European British subject, contrary to the intent of this section, shall be void.

126. (1) If any person carries on, mediately, or immediately, any illicit correspondence, dangerous to the peace or safety of any part of British India, with any prince, chief, land-holder or other person having authority in India, or with the Commander, Governor, or president of any foreign European settlement in India, or any correspondence, contrary to the rules and orders of the Secretary of State or of the Governor-General in Council or a Governor in Council, he shall be guilty of a misdemeanour ; and the Governor-General or Governor may issue a warrant for securing and detaining in custody any person suspected of carrying on any such correspondence.

(2) If on examination taken on oath in writing any credible witness before the Governor-General in Council or the Governor in Council, there appear reasonable grounds for the charge, the Governor-General or Governor may commit the person suspected or accused to safe custody, and shall within a reasonable time, not exceeding five days, cause to be delivered to him a copy of the charge on which he is committed.

(3) The person charged may deliver his defence in writing, with a list of such witnesses as he may desire to be examined in support thereof.

(4) The witnesses in support of the charge and of the defence shall be examined and cross-examined on oath in the presence of the person charged, and their deposition and examination shall be taken down in writing.

(5) If, notwithstanding the defence, there appear to the Governor-General in Council or Governor in Council reasonable grounds for the charge and for continuing the confinement, the person charged shall remain in custody until he is brought to trial in India or sent to England for trial.

(6) All such examinations and proceedings, or attested copies thereof under the seal of the High Court, shall be sent to the Secretary of State as soon as may be, in order to their being produced in evidence on the trial of the person charged in the event of his being sent for trial to England.

(7) If any such person is to be sent to England, the Governor-General or Governor, as the case may be, shall cause him to be so sent at the first convenient opportunity, unless he is disabled by illness from undertaking the voyage in which case he shall be so sent as soon as his state of health will safely admit hereof.

(8) The examinations and proceedings transmitted in pursuance of this section shall be received as evidence in all courts of law, subject to any just exceptions as to the competency of the witnesses.

127. (1) If any person holding office under the Crown in India commits any offence under this Act, or any offence against any person within his jurisdiction or subject to his authority, the offence may, without prejudice to any other jurisdiction, be inquired of, heard, tried and determined before His Majesty's High Court of Justice, and be dealt with as if committed in the County of Middlesex.

(2) Every British subject shall be amenable to all courts of justice in the United Kingdom, of competent jurisdiction to try offences committed in India, for any offence committed within India and outside British India, as if the offence had been committed within British India.

128. Every prosecution before a High Court in British India in respect of any offence referred to in the last foregoing section must be commenced within six years after the commission of the offence.

129. If any person commits any offence referred to in this Act he shall be liable to such fine or imprisonment or both as the Court thinks fit, and shall be liable, at the discretion of the Court, to be adjudged to be incapable of serving the Crown in India in any office, civil or military; and, if he is convicted in British India by a high court, the Court may order that he be sent to Great Britain.

PART XII.

SUPPLEMENTAL.

1[129-A.] (1) Where any matter is required to be prescribed or regulated by rules under this Act and no special provision is made as to the authority by whom the rules are to be made, the rules shall be made by the Governor-General in Council, with the sanction of the Secretary of State in Council, and shall not be subject to repeal or alteration by the Indian legislature or by any local legislature.

(2) Any rules made under this Act may be so framed as to make different provisions for different provinces.

(3) Any rules to which sub-section (1) of this section applies shall be laid before both Houses of Parliament as soon as may be after they are made, and if an address is presented to His Majesty by either House of Parliament within the next thirty days on which that House has sat after the rules are laid before it praying that the rules or any of them may be annulled, His Majesty in Council may annul the rules or any of them, and those rules shall thenceforth be void, but without prejudice to the validity of anything previously done thereunder:

Provided that the Secretary of State may direct that any rules to which this section applies shall be laid in draft before both Houses of Parliament, and in such case the rules shall not be made unless both Houses by resolution approve the draft either without modification or addition, or with modifications and additions to which both Houses agree, but upon such approval being given, the rules may be made in the

form in which they have been approved, and such rules on being so made shall be of full force and effect, and shall not require to be further laid before Parliament.]

130. The Acts specified in the Fourth Schedule to this Act are hereby repealed, to the extent mentioned in the third column of that Schedule :

Repeal.

Provided that this repeal shall not affect—

(a) the validity of any law, charter, letters patent, Order in Council, warrant, proclamation, notification, rule, resolution, order, regulation, direction or contract made, or form prescribed, or table settled, under any enactment hereby repealed and in force at the commencement of this Act ; or

(b) the validity of any appointment, or any grant or appropriation of money or property made under any enactment hereby repealed ; or

(c) the tenure of office, conditions of service, terms of remuneration or right to pension of any officer appointed before the commencement of this Act.

¹ [Any reference in any enactment, whether an Act of Parliament or made by any authority in British India, or in any rules, regulations or orders made under any such enactment, or in any letters patent or other document, to any enactment, repealed by this Act, shall for all purposes be construed as references to this Act, or to the corresponding provision thereof.]

¹ [Any reference in any enactment in force in India, whether an Act of Parliament or made by any authority in British India, or in any rules, regulations, or orders made under any such enactment, or in any letters patent or other document, to any Indian legislative authority, shall for all purposes be construed as references to the corresponding authority, constituted by this Act.]

Savings.

131. (1) Nothing in this Act shall derogate from any rights vested in His Majesty, or any powers of the Secretary of State in Council, in relation to the Government of India.

Saving as to certain rights and powers.

(2) Nothing in this Act shall affect the power of Parliament to control the proceedings of the Governor-General in Council, or to repeal or alter any law made by any authority in British India, or to legislate for British India and the inhabitants thereof.

(3) Nothing in this Act shall affect the power of the ²[Indian legislature] to repeal or alter any of the provisions mentioned in the Fifth Schedule to this Act, or the validity of any previous exercise of this power.

132. All treaties made by the East India Company, so far as they are in force at the commencement of this Act, are binding on His Majesty, and all contracts made and liabilities incurred by the East India Company may, so far as they are outstanding at the commencement of this Act, be enforced by and against the Secretary of State in Council.

Treaties, contracts and liabilities of East India Company.

133. All orders, regulations and directions lawfully made or given by the Court of Directors of the East India Company, or by the Commissioners for the Affairs of India are so far as they are in force at the commencement of this Act, deemed to be orders, rules and directions made or given by the Secretary of State under this Act.

Orders of East India Company.

Definitions.

134. In this Act, unless the context otherwise requires,—

(1) " Governor-General in Council " means the Governor-General in Executive Council ;

(2) " Governor in Council " means a Governor in Executive Council ;

¹ See 130 (c).—¹ These paragraphs were inserted by Part I of Sch. II of the Government of India Act, 1919 (9 & 10 Geo. 5, Ch. 101).

² See 131 (3).—² These words were substituted

for the words " Governor-General in Legislative Council " by Part II of the Government of India Act, 1919 (9 & 10 Geo. 5, Ch. 101).

(3) "Lieutenant-Governor in Council" means a Lieutenant-Governor in Executive Council;

(4) "local government" means, in the case of a governor's province, the governor in council or the governor acting with ministers (as the cause may require), and, in the case of a province other than a governor's province, a lieutenant-governor in council, lieutenant-governor or chief commissioner;

"local legislative council" includes the legislative council in any governor's province, and any other legislative council constituted in accordance with this Act;

"local legislature" means, in the case of a governor's province, the governor and the legislative council of the province, and, in the case of any other province, the lieutenant-governor or chief commissioner in legislative council;

(5) "office" includes place and employment;

(6) "province" includes a presidency; and

(7) references to rules made under this Act include rules or regulations made under any enactment, hereby repealed, until they are altered under this Act.

2 [The expressions "official" and "non-official," where used in relation to any person, mean respectively a person who is or is not in the civil and military service of the Crown in India:

Provided that rules under this Act may provide for the holders of such offices as may be specified in the rules not being treated for the purposes of this Act, or any of them, as officials.]

3 [135. This Act may be cited as the Government of India Act.]

SCHEDULES.

4 FIRST SCHEDULE.

(Section 72-A.)

NUMBER OF MEMBERS OF LEGISLATIVE COUNCILS. LEGISLATIVE COUNCIL.

				NUMBER OF MEMBERS.
Madras	..	..	..	118
Bombay	..	..	..	111
Bengal	..	..	..	125
United Provinces	..	..	..	118
Punjab	..	..	..	83
Bihar and Orissa	..	..	..	98
Central Provinces	..	..	..	70
Assam	..	..	..	53

5 SECOND SCHEDULE.

OFFICIAL SALARIES, ETC.

OFFICER.	MAXIMUM ANNUAL SALARY.
Governor-General of India ..	Two hundred and fifty-six thousand rupees.
Governor of Bengal, Madras, Bombay and the United Provinces ..	One hundred and twenty eight thousand rupees.
Commander-in-Chief of His Majesty's forces in India ..	One hundred thousand rupees.
Governor of the Punjab, and Behar and Orissa ..	One hundred thousand rupees.
Governor of the Central Provinces ..	Seventy-two thousand rupees.
Governor of Assam ..	Sixty-six thousand rupees.
Lieutenant-Governor ..	One-hundred thousand rupees.
Member of the Governor-General's Executive Council (other than the Commander-in-Chief).	Eighty thousand rupees.
Member of the executive council of the Governor of Bengal, Madras, Bombay and the United Provinces ..	Sixty-four thousand rupees.

Sec. 134 (4).—¹ Paragraph (4) was substituted by Part II of Sch. II of the Government of India Act, 1919 (9 & 10 Geo. 5, Ch. 101).

² This paragraph was inserted by Part I of Sch. II of the Government of India Act, 1919 (9 & 10 Geo 5, Ch. 101).

Sec. 135.—³ Sec. 135 was substituted by Part

II of *Ibid.*

Sch. I.—⁴ This Schedule was substituted by Part I of Sch. II of the Government of India Act, 1919.

Sch. II.—⁵ This Schedule was substituted by Part III of *Ibid.*

OFFICER.	MAXIMUM ANNUAL SALARY.
Member of the executive council of the Governor of the Punjab, and Behar and Orissa ..	Sixty-thousand rupees.
Member of the executive council of the Governor of the Central Provinces ..	Forty eight thousand rupees.
Member of the executive council of the Governor of Assam ..	Forty-two thousand rupees.

1 THIRD SCHEDULE.

OFFICES RESERVED TO THE INDIAN CIVIL SERVICE.

A.—Offices under the Governor General in Council.

1. The offices of Secretary, Joint Secretary, and Deputy Secretary in every department, except the Army, Marine, Education, Foreign, Political and Public Works Departments: Provided that if the office of Secretary or Deputy Secretary in the Legislative Department is filled from among the members of the Indian Civil Service, then the office of Deputy Secretary or Secretary in that department, as the case may be, need not be so filled.

2. Three offices of Accountants-General.

B.—Offices in the provinces which were known in the year 1861 as "Regulation Provinces"

The following offices, namely:—

1. Member of the Board of Revenue.
2. Financial Commissioner
3. Commissioner of Revenue.
4. Commissioner of Customs.
5. Opium Agent.
6. Secretary in every department except the Public Works or Marine Departments.
7. Secretary to the Board of Revenue.
8. District or Sessions Judge.
9. Additional District or Sessions Judge.
10. District Magistrate
11. Collector of Revenue or Chief Revenue Officer of a District.

FOURTH SCHEDULE.

(Section 130.)

ACTS REPEALED.

Session and Chapter.	Short Title.	Extent of Repeal.
10 Geo. 3, c. 47	The East India Company Act, 1770	.. The whole Act.
13 Geo. 3, c. 63 ..	The East India Company Act, 1772	.. The whole Act, except sections forty-two, forty-three and forty-five.
21 Geo. 3, c. 70 ..	The East India Company Act, 1780	.. The whole Act, except section eighteen.
26 Geo. 3, c. 57 ..	The East India Company Act, 1786	.. Section thirty-eight.
33 Geo. 3, c. 52 ..	The East India Company Act, 1793	.. The whole Act.
37 Geo. 3, c. 142 ..	The East India Act, 1797	.. The whole Act, except section twelve.
39 & 40 Geo. 3, c. 79 ..	The Government of India Act, 1800	.. The whole Act.
53 Geo. 3, c. 155 ..	The East India Company Act, 1813	.. Do
55 Geo. 3, c. 84 ..	The Indian Presidency Towns Act, 1815	.. Do.
4 Geo. 4, c. 71 ..	The Indian Bishops and Courts Act, 1823	.. Do.
6 Geo. 4, c. 85 ..	The Indian Salaries and Pensions Act, 1825	.. Do.
7 Geo. 4, c. 56 ..	The East India Officers' Act, 1826	.. Do.
3 & 4 Will. 4, c. 85 ..	The Government of India Act, 1833	.. The whole Act, except section one hundred and twelve.
5 & 6 Will. 4, c. 52 ..	The India (North-West Provinces) Act, 1835..	.. The whole Act.
7 Will. 4, and 1 Vict. c. 47 ..	The India Officers' Salaries Act, 1837	.. Do.
5 & 6 Vict., c. 119 ..	The Indian Bishops Act, 1842	.. Do.
16 & 17 Vict., c. 95 ..	The Government of India Act, 1853	.. Do.

Session and Chapter.	Short Title.	Extent of Repeal.
17 & 18 Vict., c. 77 ..	The Government of India Act, 1854 ..	The whole Act.
21 & 22 Vict., c. 106 ..	The Government of India Act, 1858 ..	The whole Act, except section four.
22 & 23 Vict., c. 41 ..	The Government of India Act, 1859 ..	The whole Act.
23 & 24 Vict., c. 100 ..	The European Forces (India) Act, 1860 ..	Do.
23 & 24 Vict., c. 102 ..	The East India Stock Act, 1860 ..	The whole Act except section six.
24 & 25 Vict., c. 54 ..	The Indian Civil Service Act, 1861 ..	The whole Act.
24 & 25 Vict., c. 67 ..	The Indian Councils Act, 1861 ..	Do.
24 & 25 Vict., c. 104 ..	The Indian High Courts Act, 1861 ..	Do.
28 & 29 Vict., c. 15 ..	The Indian High Courts Act, 1865 ..	Do.
28 & 29 Vict., c. 17 ..	The Government of India Act, 1865 ..	Do.
32 & 33 Vict., c. 97 ..	The Government of India Act, 1869 ..	Do.
32 & 33 Vict., c. 98 ..	The Indian Councils Act, 1869 ..	Do.
33 & 34 Vict., c. 3 ..	The Government of India Act, 1870 ..	Do.
33 & 34 Vict., c. 59 ..	The East India Contracts Act, 1870 ..	Do.
34 & 35 Vict., c. 34 ..	The Indian Councils Act, 1871 ..	Do.
34 & 35 Vict., c. 62 ..	The Indian Bishops Act, 1871 ..	Do.
37 & 38 Vict., c. 3 ..	The East India Loan Act, 1874 ..	Section fifteen.
37 & 38 Vict., c. 77 ..	The Colonial Clergy Act, 1874 ..	Section thirteen.
37 & 38 Vict., c. 91 ..	The Indian Councils Act, 1874 ..	The whole Act.
43 Vict., c. 3 ..	The Indian Salaries and Allowances Act, 1880 ..	Do.
44 & 45 Vict., c. 63 ..	The India Office Auditor Act, 1881 ..	Do.
47 & 48 Vict., c. 38 ..	The Indian Marine Service Act, 1884 ..	Sections two, three, four and five.
55 & 56 Vict., c. 14 ..	The Indian Councils Act, 1892 ..	The whole Act.
3 Edw. 7, c. 11 ..	The Contracts (India Office) Act, 1903 ..	Do.
4 Edw. 7, c. 26 ..	The Indian Councils Act, 1904 ..	Do.
7 Edw. 7, c. 35 ..	The Council of India Act, 1907 ..	Do.
9 Edw. 7, c. 4 ..	The Indian Councils Act, 1909 ..	Do.
1 & 2 Geo. 5, c. 18 ..	The Indian High Courts Act, 1911 ..	Do.
1 & 2 Geo. 5, c. 25 ..	The Government of India Act Amendment Act, 1911 ..	Do.
2 & 3 Geo. 5, c. 6 ..	The Government of India Act, 1912 ..	Do.

1 FIFTH SCHEDULE.

[Section 131 (3)].

PROVISIONS OF THIS ACT WHICH MAY BE REPEALED OR ALTERED BY THE 2[INDIAN LEGISLATURE].

Section.	Subject
62	Power to extend limits of presidency towns.
106	Jurisdiction, powers and authority of High Courts.
108 (1)	Exercise of jurisdiction of High Court by single judges or division courts.
109	Power for Governor General in Council to alter local limits of jurisdiction of High Courts, etc.
110	Exemption from jurisdiction of High Courts.
111	Written order by Governor-General in Council a justification for act in High Court.
112	Law to be administered in cases of inheritance, succession, contract and dealing between party and party.
114 (2)	Powers of advocate-general.
124 (1)	Oppression.
124 (4)—so far as it relates to persons employed or concerned in the collection of revenue or the administration of justice.	Trading.

Sch. v.—¹ This schedule was substituted by Sch. I of the Government of India (Amendment) Act, 1916 (6 & 7 Geo. 5, Ch. 37).

² These words were substituted for the words

" Governor-General in Legislative Council " by Part II of Sch. II of the Government of India Act, 1919 (9 & 10 Geo. 5, Ch. 101).

Section.	Subject.
124 (5)—So far as it relates to persons other than the Governor-General, a Governor, or a member of the Executive Council of the Governor General or of a Governor.	Receiving presents.
125	 Loans to princes or chiefs.
126	 Carrying on dangerous correspondence.
128	 Limitation for prosecutions in British India.
129	 Penalties.

THE GOVERNMENT OF INDIA ACT, 1919. ¹

(9 & 10 Geo. 5, Ch. 101.)

[23rd December, 1919.

An Act to make further provision with respect to the Government of India.

WHEREAS it is the declared policy of Parliament to provide for the increasing association of Indians in every branch of Indian administration, and for the gradual development of self-governing institutions, with a view to the progressive realization of responsible government in British India as an integral part of the empire :

AND WHEREAS progress in giving effect to this policy can only be achieved by successive stages, and it is expedient that substantial steps in this direction should now be taken :

AND WHEREAS the time and manner of each advance can be determined only by Parliament, upon whom responsibility lies for the welfare and advancement of the Indian peoples :

AND WHEREAS the action of Parliament in such matters must be guided by the co-operation received from those on whom new opportunities of service will be conferred, and by the extent to which it is found that confidence can be reposed in their sense of responsibility :

AND WHEREAS concurrently with the gradual development of self-governing institutions in the Provinces of India it is expedient to give to those Provinces in provincial matters the largest measure of independence of the Government of India, which is compatible with the due discharge by the latter of its own responsibilities :

Be it therefore enacted by the King's Most Excellent Majesty by and with the advice and consent of the Lords Spiritual and Temporal and Commons, in this present Parliament assembled, and by the authority of the same, as follows :—

PART I.

LOCAL GOVERNMENTS.

1. [* * * *]

2. (1) The provision in sub-section (1) of section 30 of the principal Act, which gives power to Local Governments to raise money on real or personal estate within the limits of their respective governments by way of mortgage or otherwise, shall have effect as though that provision conferred a power on local governments to raise money on the security of their allocated revenues, and to make proper assurances for that purpose.

(2) Provision may be made by rules under the principal Act as to the conditions under which the power to raise loans on the security of allocated revenues shall be exercised.

(3) The provision in sub-section (1) of section 30 of the principal Act, which enables the Secretary of State in Council with the concurrence of majority of votes at a meeting of the Council of India to prescribe provisions or conditions limiting the

¹ Such portions of this Act as could be incorporated in the principal Act (5 & 6 Geo. 5, Ch. 61) have been so incorporated. Only the pre-

amble to this Act and a few sections which could not be so incorporated with the principal Act are to be found here.

power to raise money, shall cease to have effect as regards the power to raise money on the security of allocated revenues.

Revised system of local government in certain provinces.

3. (1) [* * * *]

(2) The provisions of sections 46 to 51 of the principal Act, as amended by this Act, shall apply to the United Provinces, the Punjab, Bihar and Orissa, the Central Provinces, and Assam, as they apply to the presidencies of Bengal, Madras and Bombay provided that the Governors of the said provinces shall be appointed after consultation with the Governor-General.

4. [* * * *]

5. (1) The provision in section 47 of the principal Act, that two of the members of the Executive Council of the Governor of a province must have been for at least twelve years in the service of the Crown in India, shall have effect as though 'one' were substituted for 'two' and the provision in that section that the Commander-in-Chief of His Majesty's forces in India, if resident at Calcutta, Madras, or Bombay, shall, during his continuance there, be a member of the governor's council, shall cease to have effect.

(2) Provision may be made by rules under the principal Act as to the qualifications to be required in respect of members of the Executive Council of the Governor of a province in any case where such provision is not made by section 47 of the principal Act as amended by this section.

6 to 22. [* * * *]

Supplementary provisions as to composition of Legislative Assembly and Council of State.

23. (1) Subject to the provisions of this Act, provision may be made by rules under the principal Act as to—

(a) the term of office of nominated members of the Council of State and the Legislative Assembly, and the manner of filling casual vacancies occurring by reason of absence of members from India, liability to attend to duty, death, acceptance of office, or resignation duly accepted, or otherwise; and

(b) the conditions under which and the manner in which persons may be nominated as members of the Council of State or the Legislative Assembly; and

(c) the qualification of electors, the constitution of constituencies, and the method of election for the Council of State and the Legislative Assembly (including the number of members to be elected by communal and other electorates) and any matters incidental or ancillary thereto; and

(d) the qualifications for being or for being nominated or elected as members of the Council of State or the Legislative Assembly; and

(e) the final decision of doubts or disputes as to the validity of an election; and

(f) the manner in which the rules are to be carried into effect.

(2) Subject to any such rules, any person who is a ruler or subject of any State in India may be nominated as a member of the Council of State or the Legislative Assembly.

24. (1) Sub-sections (1) and (3) of section 67 of the principal Act (which relate to the classes of business which may be transacted by the Indian Legislative Council) shall cease to have effect.

Business and proceedings in Indian legislature.

* * * *

25 and 26. [* * * *]

27. (1) In addition to the measures referred to in sub-section (2) of section 67 of the principal Act, as requiring the previous sanction of the Governor-General, it shall not be lawful without such previous sanction to introduce at any meeting of either chamber of the Indian legislature any measure—

Supplemental provisions as to powers of Indian legislature.

(a) regulating any provincial subject, or any part of a provincial subject, which has not been declared by rules under the principal Act to be subject to legislation by the Indian legislature ;

(b) repealing or amending any Act of a local legislature ;

(c) repealing or amending any Act or ordinance made by the Governor-General.

(2) Where in either chamber of the Indian legislature any Bill has been introduced or is proposed to be introduced, or any amendment to a bill is moved, or proposed to be moved, the Governor-General may certify that the Bill, or any clause of it, or the amendment, affects the safety or tranquillity of British India, or any part thereof, and may direct that no proceedings, or that no further proceedings, shall be taken by the chamber in relation to the Bill, clause, or amendment, and effect shall be given to such direction.

28. (1) The provision in section 36 of the principal Act, imposing a limit on the number of members of the Governor-General's executive council, shall cease to have effect.

(2) The provision in section 36 of the principal Act as to the qualification of members of the council shall have effect as though the words "at the time of their appointment" were omitted and as though after the word "Scotland" there were inserted the words "or a pleader to the High Court" and as though "ten years" were substituted for "five years".

(3) Provision may be made by rules under the principal Act as to the qualifications to be required in respect of members of the Governor-General's executive council, in any case where such provision is not made by section 36 of the principal Act as amended by this section.

(4) Sub-section (2) of section 67 of the principal Act (which provides that, when and so long as the Governor-General's executive council assembles in a province having a Governor, the Governor shall be an extraordinary member of the council) shall cease to have effect.

29. [* * * *]

PART III.

SECRETARY OF STATE IN COUNCIL.

30. The salary of the Secretary of State, the salaries of his under-secretaries, and any other expenses of his department, may, notwithstanding anything in the principal Act, instead of being paid out of the revenues of India, be paid out of moneys provided by Parliament, and the salary of the Secretary of State shall be so paid.

Payment of salary of Secretary of State, etc., out of moneys provided by Parliament.

31. The following amendments shall be made in section 3 of the principal Act in relation to the composition of the Council of India, the qualification, term of office, and remuneration of its members :—

(1) The provisions of sub-section (1) shall have effect as though "eight" and "twelve" were substituted for "ten" and "fourteen," respectively, as the minimum and maximum number of members, provided that the council as constituted at the time of the passing of this Act shall not be affected by this provision, but no fresh appointment or re-appointment thereto shall be made in excess of the maximum prescribed by this provision.

(2) The provision of sub-section (3) shall have effect as if "one half" were substituted for "nine" and "India" were substituted for "British India."

(3) In sub-section (4) "five years" shall be substituted for "seven years" as the terms of office of the members of the council provided that the tenure of office of any person who is a member of the council at the time of passing of this Act shall not be affected by this provision.

(4) The provisions of sub-section (8) shall cease to have effect and in lieu thereof the following provisions shall be inserted :

" There shall be paid to each member of the Council of India the annual salary of twelve hundred pounds: Provided that any member of council who was at the time of his appointment domiciled in India shall receive, in addition to the salary hereby provided, an annual subsistence allowance of six-hundred pounds.

Such salaries and allowances may be paid out of the revenues of India or out of moneys provided by Parliament."

(5) Notwithstanding anything in any Act or rules, where any person in the service of the Crown in India is appointed a member of the council before completion of the period of such service required to entitle him to a pension or annuity, his service as such member shall, for the purpose of any pension or annuity which would be payable to him on completion of such period, be reckoned as service under the Crown in India whilst resident in India.

32. (1) The provision in section 6 of the principal Act which prescribes the quorum for meetings of the Council of India shall cease to have effect, and the Secretary of State shall provide for quorum by directions to be issued in this behalf.

(2) The provision in section 8 of the principal Act relating to meetings of the Council of India shall have effect, as though "month" were substituted for "week."

(3) Section 10 of the principal Act shall have effect as though the words "all business of the council or committees thereof is to be transacted" were omitted, and the words "the business of the Secretary of State in Council or the Council of India shall be transacted, and any order made or act done in accordance with such direction shall, subject to the provisions of this Act, be treated as being an order of the Secretary of State in Council" were inserted in lieu thereof.

PART IV.

THE CIVIL SERVICES IN INDIA.

33 to 36. [* * * * *]

Appointments to the Indian Civil Service

37. (1) [* * * * *]

(2) The Indian Civil Service (Temporary Provisions) Act, 1915, which confers power during the war and for a period of two years thereafter to make appointments to the Indian Civil Service (without examination), shall have effect as though "three years" were substituted for "two years".

* * * * *

PART VI.

GENERAL.

43. Any assent or disallowance by His Majesty, which under the principal Act is required to be signified through the Secretary of State in Council, shall as from the passing of this Act be signified by His Majesty in Council.

Signification of Royal Assent.

44. [* * * * *]

45. (1) The amendments set out in Parts I and II of the Second Schedule to this Act being amendments to incorporate the provisions of this Act in the principal Act, and further amendments consequential on or arising out of those provisions, shall be made in the principal Act, and any question of interpretation shall be settled by reference to the principal Act as so amended. The provisions of the principal Act specified in Part III of that schedule, being provisions which are obsolete or unnecessary, or which require amendment in detail, are hereby repealed or modified, and shall be dealt with, in the manner shown in the second column of that schedule.

Amendments of principal Act to carry Act into effect, etc.

(2) Every enactment and word which is directed by the Government of India (Amendment) Act, 1916, or by this section and the Second Schedule to this Act, to be substituted for or added to any portion of the Government of India Act, 1915, shall form part of the Government of India Act, 1915, in the place assigned

to it by the Government of India (Amendment) Act, 1916, or that schedule; and the Government of India Act, 1915, and all Acts, including this Act, which refer thereto, shall, after the commencement of this Act, be construed as if the said enactment or word had been enacted in the Government of India Act, 1915, in the place so assigned, and, where it is substituted for another enactment or word, had been so enacted in lieu of that enactment or word.

A copy of the Government of India Act, 1915, with the amendments, whether by way of substitution, addition, or omission, required by the Government of India (Amendment) Act, 1916, and by this section and the Second Schedule to this Act, shall be prepared and certified by the clerk of the parliaments, and deposited with the rolls of parliament, and His Majesty's printer shall print, in accordance with the copy so certified, all copies of the Government of India Act, 1915, which are printed after the passing of this Act, and the Government of India Act, 1915, as so amended, may be cited as "The Government of India Act."

Sub-section (3) of section 8 of the Government of India (Amendment) Act, 1916, is hereby repealed.

46. [* * * * *]

Short title, commencement, interpretation and transitory provisions.

47. (1) This Act may be cited as THE GOVERNMENT OF INDIA ACT, 1919, and the principal Act, as amended by any Act for the time being in force, may be cited as the Government of India Act.

(2) This Act shall come into operation on such date or dates as the Governor-General in Council, with the approval of the Secretary of State in Council, may appoint, and different dates may be appointed for different provisions of this Act, and for different parts of India.

On the dates appointed for the coming into operation of the provisions of this Act as respects any executive or legislative council all the members of the council, then in office shall go out of office, but may, if otherwise qualified, be re-appointed, renominated, or re-elected as the case may be, in accordance with the provisions of the principal Act as amended by this Act.

(3) & (4) [* * * * *]

(5) If any difficulty arises as to the first establishment of the Indian Legislature or any legislative Council after the commencement of this Act or otherwise in first giving effect to the provisions of this Act, the Secretary of State in Council or the Governor General in Council, as occasion may require, may by order do anything which appears to them necessary for the purpose of removing the difficulty.

SCHEDULE I.

[* * * * *]

SCHEDULE II.

PART I.

The provisions of this Act set out in the first column of the following table shall be incorporated in the principal Act in the manner shown in the second column of that table, subject to the modifications specified in the third column of that table.

[N.B.—Omitted as these provisions have been incorporated in the principal Act.]

PART II.

The provisions of the principal Act specified in the first column of this table shall be amended in the manner shown in the second column.

[N.B.—Omitted as these provisions have been incorporated in the principal Act.]

THE GOVERNMENT SAVINGS BANKS ACT (V OF 1873).¹

Rep. in pt., Act 12 of 1873; Act 16 of 1874; Act 12 of 1891.

Am., Act 13 of 1916; Act 17 of 1917; Act 16 of 1923.

Declared in force—in the Sonthal Parganas, Reg. 3 of 1872, S. 3, as amended by Reg. 3 of 1899, S. 3; in the Arakan Hill District, Reg. 1 of 1916, S. 2; in Upper Burma (except the Shan States), Act 13 of 1898, S. 4.

¹ For the Statement of Objects and Reasons to the Bill, which was based upon the Trustee Savings Banks Act, 1863 (26 & 27 Vict., c. 87), S. 30, see Gazette of India, 1872, Pt. V, p. 575 for

Proceedings in Council, see *ibid.* 1872, Supplement, pp. 727, 743; *ibid.*, 1873, Supplement, pp. 150 and 221.

PREFATORY NOTE.—"Savings Banks are institutions for the purpose of receiving small deposits of money and investing them for the benefit of the depositors at compound interest. They are generally managed by benevolent persons, who seek no remuneration for their services. In India these banks are managed by the State. They originated in the latter part of the 18th century—a period marked by a great advance in the organization of provident habits in general. Such banks are now almost universally established throughout the civilized world.

THE GOVERNMENT SAVINGS BANKS ACT (V OF 1873).

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[28th January, 1873.

An Act to amend the Law relating to Government Savings Banks.

WHEREAS it is expedient to amend the law relating to the payment of deposits in Government Savings Banks; it is hereby enacted as follows:—

Preamble.

Preliminary.

Short title.

1. This Act may be called THE GOVERNMENT SAVINGS BANKS ACT, 1873.

Local extent.

It extends to the whole of British India.

[*Commencement.*] *Rep. by the Repealing Act, 1874 (XVI of 1874).*

2. [*Repeal of Act XXVI of 1855.*] *Rep. by the Repealing Act, 1873 (XII of 1873).*

Interpretation-clause.

3. In this Act—

"depositor" means a person by whom, or on whose behalf, money has been heretofore, or shall be hereafter, deposited in a Government Savings Bank; and "deposit" means money so deposited:

["Secretary" means in the case of a Post Office Savings Bank, the Post Master General appointed for the area in which the Savings Bank is situate.]¹

["minor" means a person who is not deemed to have attained his majority under the Indian Majority Act, 1875.]²

Sec. 3.—¹ Substituted by Act XVI of 1923 for the original definition "Secretary" includes every person empowered to manage a Government Savings Bank.

² Substituted by Act XIII of 1916 for the original definition "minor" means a person who has not completed the age of eighteen years.

Deposits belonging to the Estates of deceased Persons.

[4. If a depositor dies and probate of his will or letters of administration of his estate or a certificate granted under the Succession Certificate Act, 1889, is not within three months of the death of the depositor produced to the Secretary of the Government Savings Bank in which the deposit is, then—

(a) if the deposit does not exceed three thousand rupees, the Secretary may pay the same to any person appearing to him to be entitled to receive it or to administer the estate of the deceased, or

(b) if the deposit does not exceed one-hundred rupees, any officer employed in the management of a Government Savings Bank, who is empowered in this behalf by a general or special order of the Governor General in Council, may, subject to any general or special orders of the Secretary in this behalf, pay the deposit to any person appearing to him to be entitled to receive it or to administer the estate.]¹

5. Such payment shall be a full discharge from all further liability in respect of the money so paid :

But nothing herein contained precludes any executor or administrator, or other representative of the deceased, from recovering from the person receiving the same the amount remaining in his hands after deducting the amount of all debts or other demands lawfully paid or discharged by him in due course of administration.

And any creditor or claimant against the estate of the deceased may recover his debt or claim out of the money paid under this Act or [* * *]² [Act No. XXVI of 1855],³ to any person, and remaining in his hands unadministered, in the same manner and to the same extent as if the latter had obtained letters of administration of the estate of the deceased.

6. The Secretary of any such Bank [or any officer empowered under section 4]⁴ may take such security as he thinks necessary from any person to whom he pays any money under section 4 for the due administration of the money so paid,

and he may assign the said security to any person interested in such administration.

7. For the purpose of ascertaining the right of the person claiming to be entitled as aforesaid, the Secretary of any such Bank [or any officer empowered under section 4]⁴ may take evidence on oath or affirmation according to the law for the time being relating to oaths and affirmations.

Any person who, upon such oath or affirmation, makes any statement which is false, and which he either knows or believes to be false or does not believe to be true, shall be deemed guilty of an offence under section 193 of the Indian Penal Code.

8. Where the amount of the deposit belonging to the estate of a deceased depositor does not exceed [three thousand rupees]⁵ such amount shall be excluded in computing the fee chargeable, under the Court-fees Act, 1870, on the probate, or letters of administration, or certificate (if any), granted in respect of his property :

Provided that the person claiming such probate or letters or certificate shall exhibit to the Court authorised to grant the same, a certificate of the amount of the deposit in any Government Savings Bank belonging to the estate of the deceased. Such

Sec. 4.—¹ Section 4 was substituted by Act XVI of 1923, S. 2.

Sec. 5.—² The words "the said" were repealed by the Repealing and Amending Act (XII of 1891).

³ Act XXVI of 1855 was repealed by S. 2 of this Act.

Secs. 6 and 7.—⁴ The words "or any officer empowered under section 4" were inserted by Act XVI of 1923, S. 3.

Sec. 8.—⁵ The words "three thousand rupees" were substituted for the words "one thousand rupees" by Act XVII of 1917.

certificate shall be signed by the Secretary of such Bank, and the Court shall receive it as evidence of the said amount.

9. Nothing hereinbefore contained applies to money belonging to the estate of any European officer, non-commissioned officer or soldier dying in Her Majesty's service in India, or of any European who, at the time of his death, was a deserter from the said service.

Act not to apply to deposits belonging to estates of European soldiers or deserters.

Deposits belonging to Minors.

10. Any deposit made by, or on behalf of, any minor may be paid to him personally if he made the deposit, or to his guardian for his use if the deposit was made by any person other than the minor, together with the interest accrued thereon.

Payment of deposits to minor or guardian.

The receipt of any minor or guardian for money paid to him under this section shall be a sufficient discharge therefor.

11. All payments of deposits heretofore made to minors or their guardians by any Secretary of a Government Savings Bank shall be deemed to have been made in accordance with law.

Legalization of like payments heretofore made.

Deposits belonging to Lunatics.

12. If any depositor becomes insane or otherwise incapable of managing his affairs,

and if such insanity or incapacity is proved to the satisfaction of the Secretary of the Bank in which his deposit may be, such Secretary may, from time to time, make payments out of the deposit to any proper person,

and the receipt of such person, for money paid under this section, shall be a sufficient discharge therefor.

Where a committee or manager of the depositor's estate has been duly appointed, nothing in this section authorizes payments to any person other than such committee or manager.

Deposits made by Married Women.

13. Any deposit made by or on behalf of a married woman, or by or on behalf of a woman who afterwards marries, may be paid to her, whether or not the Indian Succession Act, 1865, section 4, applies to her marriage; and her receipt for money paid to her under this section shall be a sufficient discharge therefor.

Payment of married women's deposits.

Rules.

14. All certificates under section 8, and all payments under section 10, section 12 or section 13, shall be respectively granted and made by the Secretary of the Bank, subject to such rules consistent with this Act as the Governor-General in Council may, from time to time, prescribe.

Rules regulating certificates under section 8, and payments under section 10, 12 or 13.

THE GOVERNMENT SEAL ACT (III OF 1862).¹

Short title given, Act 14 of 1897.

Declared in force throughout British India except as regards the Scheduled Districts Act 15 of 1874, S. 3.

[28th February, 1862.]

An Act to amend the law relating to the use of a Government Seal.

WHEREAS it is expedient to adapt the law relating to the use of a Government seal to the present form of the Government in India; it is enacted as follows:—

Preamble.

¹ Short title, "The Government Seal Act, 1862." See the Indian Short Titles Act, 1897 (XIV of 1897).

For Statement of Objects and Reasons of the

Bill which became Act III of 1862, see Calcutta Gazette, 1862, p. 466. For proceedings in Council relating to the Bill, see *Ibid.*, Supplement, pp. 28 and 71.

WHENEVER it is required by any Regulation of a Local Government, or by any Act of the Governor-General of India in Council, that the Seal to be used instead of seal of the East India Company. or by the authority of the Government to any instrument or document, it shall be lawful, if the seal is to be affixed on behalf or by the authority of a Local Government, to affix in lieu of the seal of the East India Company a seal bearing the designation of such Local Government, or, if the seal is to be affixed on behalf or by the authority of the Government of India, a seal bearing the inscription "Government of India"; and such instrument or document so sealed shall to all intents and purposes be as valid and effectual as if the seal so used had been that of the East India Company.¹

THE GOVERNMENT SECURITIES ACT (X OF 1920).

See UNDER INDIAN SECURITIES ACT (X OF 1920).

THE GOVERNMENT TRADING TAXATION ACT (III OF 1926).

PREFATORY NOTE.—One of the resolutions of the Imperial Economic Conference, 1923, was to the effect that the several Parliaments of Great Britain, the Dominions and India should be invited to enact at the earliest opportunity a declaration that the general and particular provisions of its acts or ordinances imposing taxation shall be deemed to apply to any commercial or industrial enterprise carried on by or on behalf of any other such Governments in the same manner in all respects as if it were carried on by or on behalf of a subject of the British Crown. This resolution has been accepted by the Government of India and the present Act has been enacted in order to give effect to it. The Act follows, with suitable modifications, the wording of section 25 of the British Finance Act, 1925 (15 and 16 Geo. V, Chap. 36).

[24th February, 1926.

An Act to determine the liability of certain Governments to taxation in British India in respect of trading operations.

WHEREAS it is expedient to determine the liability to taxation for the time being in force in British India of the Government of any part of His Majesty's Dominions, exclusive of British India, in respect of any trade or business carried on by or on behalf of such Government; it is hereby enacted as follows:—

Short title and commencement. 1. (1) This Act may be called THE GOVERNMENT TRADING TAXATION ACT, 1926.

(2) It shall come into force on such date as the Governor-General in Council may, by notification in the *Gazette of India*, appoint.

2. (1) Where a trade or business of any kind is carried on by or on behalf of the Government of any part of His Majesty's Dominions, exclusive of British India, that Government shall, in respect of the trade or business and of all operations connected therewith, all property occupied in British India and all goods owned in British India for the purposes thereof, and all income arising in connection therewith, be liable—

(a) to taxation under the Indian Income-tax Act, 1922, in the same manner and to the same extent as in the like case a company would be liable;

(b) to all other taxation for the time being in force in British India in the same manner as in the like case any other person would be liable.

(2) For the purposes of the levy and collection of income-tax under the Indian Income-tax Act, 1922, in accordance with the provisions of sub-section (1), any Govern-

¹ "Legislation on this subject was originally suggested in order to meet a difficulty respecting the seal to be used under Act XIX of 1838 (for the registration of coasting-vessels in the Bombay Presidency). S. 8 of that Act requires that certificates of registry shall be sealed with the seal of the East India Company,' and the Government of Bombay were advised by their law officers that no other seal could properly be used for such certificates until some Act should be passed 'prescribing the seal to be used in lieu of the seal of the East India Company'."

ment to which that sub-section applies shall be deemed to be a company within the meaning of that Act, and the provisions of that Act shall apply accordingly.

(3) In this section the expression "His Majesty's Dominions" includes any territory which is under His Majesty's protection or in respect of which a mandate is being exercised by the Government of any part of His Majesty's Dominions.

THE GUARDIANS AND WARDS ACT (VIII OF 1890).

Rep. in pt. (as to Burma), Act 13 of 1898, S. 18; Act 5 of 1900, S. 48.

Rep. in pt. (in the Central Provinces and the Sambalpur District), Act 24 of 1899.

S. 53 rep., Act 5 of 1908

Declared in force—in the Sonthal Parganas Reg. 3 of 1872, S. 3, as amended by Reg. 3 of 1899, S. 3; in the Angul District, Reg. 3 of 1913, S. 3; in Upper Burma (except the Shan States), Act 13 of 1898, S. 4.

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THE GUARDIANS AND WARDS ACT (VIII OF 1890).¹

[21st March, 1890.

An Act to consolidate and amend the law relating to Guardian and Ward.

WHEREAS it is expedient to consolidate and amend the law relating to guardian and ward ; it is hereby enacted as follows :—

CHAPTER I.

PRELIMINARY.

Title, extent and commencement.

1. (1) This Act may be called THE GUARDIANS AND WARDS ACT, 1890.

¹ For Statement of Objects and Reasons, see Gazette of India, 1886, Pt V, p. 77 ; for Report of the Select Committee, see *ibid.*, 1890, Pt. V, p. 77 and for Debates in Council, see *ibid.*, 1886, Supplement, pp. 419 and 666 and *ibid.*, 1890, Pt. VI, pp. 33 and 45.

For Civil Rules of Practice made by the High Court, Madras, under the Code of Civil Procedure and certain other Acts, for observance by the subordinate Civil Courts of the Presidency except the Madras Small Cause Courts, see Fort St. George Gazette, 1905, Supplement, p. 1.

Sec. 1. GENERAL.—Difference between the old Act (Act XL of 1858) and the present Act. 19 Cal. 301. Act is exhaustive. 30 Mad. 807 = 24 I. C. 290 (P. C.). The provisions of the Code will apply to proceedings under this Act unless the contrary is expressly declared therein 7 P. R. 1898. Nature of proceedings under the Act. See 137 I. C. 606. Proceedings under the Act cannot be attacked for lack of formality and precision of procedure which the C.P. Code exacts from a Court in India in suit properly so called. 44 A. 587 = 20 A. L. J. 468 = 1922 All. 338. The exercise of parental jurisdiction in guardianship matters by a District Judge cannot be guided by hard and fast rules, and if the order passed is on the whole a reasonable one, it will not be interfered with on appeal. (*Ibid.*) A guardian cannot be appointed to the property of the minor member of an undivided Hindu family possessed of no separate property. A guardian of the person of such a minor may be appointed. 19 B. 309 (F. B.). See also 43 P. R. 1909 = 1 I. C. 745 ; 25 All. 407, 30 Bom. 152.

POWERS OF HIGH COURT.—The High Court has the power to appoint a guardian for an infant or his estate, irrespective of the Act. 16 B. 634 (R., 19 B. 96, 10 P. R. 1904) See also (1913) M. W. N. 906 - 21 I. C. 545. The powers and the jurisdiction of the Court, vested in it cannot be ousted by any agreement of the parties. 4 Bom. L. R. 963. Jurisdiction of District Court in regard to minors is confined only to the powers expressly conferred on it by the Guardians and Wards Act. 40 Bom. 600 = 18 Bom. L. R. 582. The powers conferred upon the District Court are totally dissimilar to its powers as a Court of Ordinary Civil Jurisdiction and so an order purporting to be made under the Act which is not warranted by its provisions cannot be considered as a decree in a suit. 36 Mad. 39 = 13 I. C. 251 = 22 M. L. J. 193 (36 Cal. 193 ; 24 W. R. 193 ; 9 All. 191, Dist.). There is nothing in the Act to prevent the Court from making a declaration that a person appointed by will is the guardian of a minor. 3 M. L. J. 182.

NATURE OF JURISDICTION.—In dealing with the custody of illegitimate children, the Courts in England are governed by equitable rules and exercise equitable jurisdiction. One of these rules is that the desire of the mother of an illegitimate child as to its custody is primarily to be considered. 5 Bur. L. T. 164 = 17 Ind. Cas. 926. This equitable rule should be adopted in the case of parties in this country, neither the father nor the mother has any absolute right to the custody of their illegitimate child. (*Ibid.*) The District Court should not assume direct responsibility under the Act for the marriage of minors for whom a personal guardian has been appointed. 98 P. R. 1914 = 27 Ind. Cas. 381 (22 B. 509, F.) There is no provision in the Act authorizing the court to compel a person in possession of a minor's property to hand it over to the person appointed guardian. 13 Ind. Cas. 386. The scheme of the Act is to entrust the District Court, with the duty of looking after the welfare of the minor's person and property and for this purpose, gives it power to appoint a guardian. The guardian is really the hand of the District Court and is to act under its advice (control and constant supervision). The enforcement of rights or claims of the ward or against the ward is left to be regulated by ordinary proceedings by suits and the Act does not provide any machinery for decisions upon or enforcing any such claims though so far as the guardian is concerned, the District Court is vested with very wide disciplinary powers over him in order that it may enforce the orders passed against him under the Act. 36 M. 39 = 22 M. L. J. 193 = 13 Ind. Cas. 251. Agency tract—*Ex parte* order of agent appointing guardian of infant—Appeal lies to High Court. 18 M. 227. A mandatory order directing the defendant to take possession of the persons of infants and bring them back to India, should not be made, as, if the minor resisted the defendant, it would expose him to a proceeding under a writ of *habeas corpus*. 38 Mad. 807 = 41 I. A. 314 = 27 M. L. J. 30 = 18 C. W. N. 1089 = 24 I. C. 290 (P. C.). Unauthorized alienation by a certificated guardian in excess of the powers is void. 18 C. 250 (doubted in 24 C. 265 = 1 C. W. N. 453). Orders apparently under this Act made without jurisdiction—Proceedings not had *bona fide*, orders in—Consent obtained by judicial pressure—Judge, no arbitrator, see 16 C. W. N. 444. Courts have a discretion to appoint a person other than the one who on the ground of relationship may have a prior claim. 5 M. L. T. 208 = 4 Ind. Cas. 1117. Effect of Act on inherent jurisdiction of Court. 19 C. W. N. 84. In enquiry under the Act interest of minor to be the pre-

(2) It extends to the whole of British India, inclusive of [* * * *]1 British Baluchistan ; and

(3) It shall come into force on the first day of July, 1890.

2. (1) On and from that day the enactments mentioned in the schedule shall be repealed to the extent specified in the third column thereof.

(2) But all proceedings had, certificates granted, allowances assigned, obligations imposed, and applications, appointments, orders and rules made under any of those enactments shall, so far as may be, be deemed to have been respectively had, granted, assigned, imposed and made under this Act ; and

(3) Any enactment or document referring to any of those enactments shall, so far as may be, be construed to refer to this Act or to the corresponding portion thereof.

3. This Act shall be read subject to every enactment heretofore or hereafter passed relating to any Court of Wards by the Governor-General in Council or by a Governor or Lieutenant-Governor in Council ; and nothing in this Act shall be construed to affect, or in any way derogate from, the jurisdiction or authority of any Court of Wards, or to take away any power possessed by any High Court established under the Statute 24 and 25 Victoria, Chapter 104 (*an Act for establishing High Courts of Judicature in India*).

Definitions.

4. In this Act, unless there is something repugnant in the subject or context,—

(1) "minor" means a person who, under the provisions of the Indian Majority Act, 1875, is to be deemed not to have attained his majority :

(2) "guardian" means a person having the care of the person of a minor or of his property, or of both his person and property :

(3) "ward" means a minor for whose person or property, or both, there is a guardian :

(4) "District Court" has the meaning assigned to that expression in the Code of Civil Procedure, and includes, a High Court in the exercise of its ordinary original civil jurisdiction :

² [(5) "the Court" means—

(a) the District Court having jurisdiction to entertain an application under this Act for an order appointing or declaring a person to be a guardian : or

(b) where a guardian has been appointed or declared in pursuance of any such application—

dominant consideration in making the order—
Protracted enquiry unnecessary. 249 P.L.R. 1914.

WHO CAN APPLY, AND FOR WHAT PURPOSE.
—Any friend of the minor can invoke the protection of the court in case of a minor being ill-treated, but a stranger must satisfy the Court that welfare of the minor would be better secured by removing the father from the lawful custody. 64 I.C. 576 = 23 Bom. L.R. 1225. Thus in castes not permitting widow-remarriage where infant girls are married, a stranger cannot successfully deprive the father of the custody of the infant daughter who is about to be given in marriage. (*Ibid.*) There is no machinery under the Act to work out the right of the mother, under Muhammadan Law, to visit her child in the custody of the father as guardian. 59 I.C. 562 = 13 Bur. L.T. 86. The provisions of the Act should not be put in force in order to enable a husband to get possession of the person of his wife. 67 I.C. 882 = 3 P.L.J. 293.

Sec. 1 (2).—¹ The words "Upper Burma, and" were repealed by the Fifth Schedule to the Burma Laws Act (13 of 1898).

Sec. 3.—Appellate Court, power of, to make *ad interim* order appointing guardian. 3 C. I. J. 29 (28 C. 734, R.) Fol. in 38 C. 927 = 3 C.L.J. 67. A minor cannot sue through a next friend for possession of the property from the defendant, which the latter claims to hold as *de jure* guardian. The proper remedy is to apply for appointment of guardian or property under this Act. 21 Nag. L.R. 75 = 89 I.C. 55 = 1925 Nag. 328.

Sec. 4 (2).—A *de facto* guardian is a guardian within S. 4 (2) and is removed from guardianship under S. 7 (2) by the Court's order appointing guardian. 51 I.C. 235 = 36 M.L.J. 19.

Sec. 4 (5).—Minors who had left before the institution of the suit for England and were living there, were not "ordinarily resident" in the district and hence were beyond the jurisdiction of the District Court. 38 Mad. 807 = 41 I.A. 314 = 27 M.L.J. 30 = 24 I.C. 290 (P.C.). Under the Act a suit *inter partes* is not the form of procedure prescribed for proceedings in a District Court. (*Ibid.*)

² Inserted by Act IV of 1926 S. 2.

(i) the Court which, or the Court of the officer who, appointed or declared the guardian or is under this Act deemed to have appointed or declared the guardian; or

(ii) in any matter relating to the person of the ward the District Court having jurisdiction in the place where the ward for the time being ordinarily resides; or

(c) in respect of any proceeding transferred under S. 4-A, the Court of the officer to whom such proceeding has been transferred.]

(6) "Collector" means the chief officer in charge of the revenue-administration of a district,¹ and includes any officer whom the Local Government, by notification in the official Gazette, may, by name or in virtue of his office, appoint to be a Collector in any local area, or with respect to any class of persons, for all or any of the purposes of this Act:

(7) "European British subject" means an European British subject as defined in the Code of Criminal Procedure, 1882, and includes any Christian of European descent; and

(8) "prescribed" means prescribed by rules made by the High Court under this Act.

2[4-A. (1) The High Court may, by general or special order, empower any officer exercising original civil jurisdiction subordinate to a District Court, or authorize the Judge of any District Court to empower any such officer subordinate to him, to dispose of any proceedings under this Act transferred to such officer under the provisions of this section.

Power to confer jurisdiction on subordinate judicial officers and to transfer proceedings to such officers.

(2) The Judge of a District Court may, by order in writing, transfer at any stage any proceeding under this Act pending in his Court for disposal to any officer subordinate to him empowered under sub-section (1).

(3) The Judge of a District Court may at any stage transfer to his own Court or to any officer subordinate to him empowered under sub-section (1) any proceeding under this Act pending in the Court of any other such officer.

(4) When any proceedings are transferred under this section in any case in which a guardian has been appointed or declared, the Judge of the District Court may, by order in writing, declare that the Court of the Judge or officer to whom they are transferred shall, for all or any of the purposes of this Act, be deemed to be the Court which appointed or declared the guardian.]

CHAPTER II.

APPOINTMENT AND DECLARATION OF GUARDIANS.

Power of parents to appoint in case of European British subjects.

5. (1) Where a minor is an European British subject, a guardian or guardians of his person or property, or both, may be appointed by will or other instrument to take effect on the death of the person appointing,—

(a) by the father of the minor, or

(b) if the father is dead or incapable of acting, by the mother.

(2) Where guardians have been appointed under sub-section (1) by both parents, they shall act jointly.

6. In the case of a minor who is not a European British subject, nothing in this Act shall be construed to take away or derogate from any power to appoint a guardian of his person or property, or both, which is valid by the law to which the minor is subject.

Saving of power to appoint in other cases.

Sec. 4, Cl. 6.—¹ For appointments of Collectors under this sub-section in —

(1) the Presidency of Bombay, *see* the Bom. R. & O., Vol. I.

(2) the United Provinces of Agra and Oudh, *see* U.P. List of Local R. & O., Vol. I.

The powers of the Local Government under this sub-section have been delegated to the Commissioner in Sind, *vide* notification No. 3453, dated 17th May, 1899, Bom. Govt. Gazette, 1899, Pt. 1, p. 686.

Sec. 4-A.—² Inserted by Act IV of 1926, S. 3.

Power of the Court to make order as to guardianship.

7. (1) Where the Court is satisfied that it is for the welfare of a minor that an order should be made—

Sec. 7. APPOINTMENT OF GUARDIAN.—Under the Act, it is open to a Court to appoint a guardian of the properties of a minor even though the minor is not entitled to present possession of these properties. 70 I. C. 360=14 L. W. 706. Such appointment will not interfere, with the right of the persons to possession of the properties as executor or trustee or otherwise. (*Ibid.*) Where owing to disputes between rival claimants there is likelihood of the property being lost, a guardian should immediately be appointed. 96 I. C. 283. Appointment of person who has not applied as guardian not proper. 107 I. C. 397. An order appointing a husband as guardian of his minor wife cannot be passed in disregard of the Civil Court's decree that he cannot have the custody of her person until she attained majority. 2 Lah. L. J. 509. The provisions of the Act should not be enforced to enable a husband to get possession of his wife which he has failed to do by execution of the decree obtained by him for restitution of conjugal rights. 57 I. C. 382 (2)=3 L. L. J. 293. Once the power of the Court is invoked it is its duty as soon as any dispute about the guardianship of the minor's property or any allegation of detriment to the minor's interests resulting from such dispute is properly brought to its notice to set right the matters in the interests of the minor and appoint a proper person as his guardian. 64 I. C. 433.

CONSIDERATIONS FOR THE COURT IN APPOINTING GUARDIANS.—The law does not make it incumbent upon the Court to grant every application for guardianship. The welfare of the minor is the sole criterion in deciding whether a guardian should be appointed or not. 42 I. C. 191=95 P. L. R. 1917; 60 P. W. R. 1913=19 I. C. 783=118 P. L. R. 1913; 101 P. L. R. 1915=28 I. C. 507=36 P. W. R. 1915. *See also* 33 I. C. 77=19 M. L. T. 294 (Personal law of the minor should also be considered). A person can apply for the appointment of another guardian under S. 7, though an order of removal under S. 39 is not obtained. 104 I. C. 562=A. I. R. 1927 Oudh. 516. Where the dispute is as to the validity of the marriage of the minor and the matter is not free from difficulty, the court should refer them to a regular suit. (*Ibid.*) An order of appointment of a guardian to a minor can only be made on the sole ground of welfare of the minor; the court cannot go against the will of the minor especially when he is old enough to form an intelligent opinion. 11 I. C. 478=196 P. W. R. 1911. A Court should not entertain an application for a guardian to be appointed for a minor where the previous arrangements are quite satisfactory. 101 I. C. 259. Where there is nothing established against a father except that he and his wife are on bad terms and living apart, he is entitled to the custody of his child. 18 L. W. 173=(1923) M. W. N. 668=1924 Mad. 45. As to the nature of the father's right, *see also* 6 L. J. 597=83 I. C. 308=26 Punj L. R. 12=1925 Lah. 250. The fact that he at one time agreed to allow the child to remain with the mother is immaterial as it is a revocable agreement. (*Ibid.*) So also leaving child even with a mere friend. 96 I. C. 617=A. I. R. 1926 All. 687. A mother should be left undisturbed as regards the guardianship of

her minor girl, where there is no property to be administered by the court and a statutory guardian is unnecessary. 84 P. R. 1915=31 I. C. 237=176 P. W. R. 1915. The re-marriage of a mother is not a sufficient reason to deprive her of the custody of her children. 28 I. C. 507=36 P. W. R. 1915. The question in cases of guardianship always is, whether it is for the welfare of the minor to appoint a guardian. (*Ibid.*) When the mother of a minor is managing the affairs of her son properly, no guardian need be appointed. 60 P. W. R. 1913=19 I. C. 783. A mother is the proper guardian for the person and property of a minor, until the contrary is proved. 19 I. C. 428=12 P. W. R. 1913. Where no charge of waste or mismanagement had been proved, the mere desire of the relatives of the minor is not a sufficient reason for depriving the widowed mother of her recognized claim to be the guardian of her minor child's property. 68 I. C. 474. The appointment of the minor's paternal aunt as guardian is proper when it is proved that the mother is living in open adultery and has borne children of such connection. 30 P. W. R. 1914=23 I. C. 938. An uncle should not be preferred specially when he is separate and was not on good terms with the minor's father during his lifetime. 62 P. L. R. 1913=19 I. C. 428=12 P. W. R. 1913. The fact that one seeks the assistance of her relatives in the management of the property is not objectionable. (*Ibid.*)

INTERFERENCE WITH LEGAL RIGHTS OF GUARDIANSHIP.—A Court can both in equity and under the Act interfere with the legal rights of guardianship of the parents. 41 I. C. 571=11 S. L. R. 17. The welfare of the children should primarily be considered. The court should ascertain what would be for the welfare of the minors, whether any of them was sufficiently advanced to make an intelligent preference, what means were at the disposal of such parents to provide for them in future, and whether the father would under altered circumstances be able to provide a fit home for his children. (*Ibid.*) If the father is not able to provide a fit home he should be held to be not fit to be the guardian. The provisions of the Act are in no way limited by the English practice. English decisions cannot be considered to have any authority in India when dealing with a conflict between Hinduism and Islam. Change of religion by itself does not necessarily render a father unfit to be the guardian of his minor children. (*Ibid.*) Whether the general rule that a child should follow the religion of the father could apply without qualification to a case where the religion has been newly adopted by the father and is not that in which the child was born or reared (*Ibid.*)

EFFECT OF ORDER.—An order appointing a guardian is final (subject to any other order passed in appeal) even if it was made under a misapprehension of the case. 52 I. C. 831=73 P. R. 1919. Appointment of guardian of person and property of a minor under the Act means removal of natural guardian. 50 I. C. 580; 42 I. C. 505=6 L. W. 760. When a guardian is appointed by Court for minor's property no other person not even the *de facto* guardian can legally

(a) appointing a guardian of his person or property, or both, or
 (b) declaring a person to be such a guardian, the Court may make an order accordingly.

(2) An order under this section shall imply the removal of any guardian who has not been appointed by will or other instrument or appointed or declared by the Court.

(3) Where a guardian has been appointed by will or other instrument or appointed or declared by the Court, an order under this section appointing or declaring another person to be guardian in his stead shall not be made until the powers of the guardian appointed or declared as aforesaid have ceased under the provisions of this Act.

Persons entitled to apply for order.

8. An order shall not be made under the last foregoing section except on the application of—

bind the minor's estate. 37 Mad. 38=21 M. L. J. 1077=12 I. C. 568.

ANCESTRAL PROPERTY.—No guardian can be appointed in respect of a Hindu minor's undivided ancestral property. 46 I. C. 815 [25 All. 407 (P. C.) Foll.].

TRUST PROPERTY.—No guardian in respect of trust properties can be appointed under S. 7; nor can sanction be granted under S. 29 to sell the properties. Such a sale is invalid. 23 M. L. J. 267=42 I. C. 273. A right to a portion of the income of the trust properties does not vest the properties in the beneficiary so as to attract the provisions of Ss. 7 and 29 of the Act (*Ibid.*)

SECURITY.—A conditional order "that upon petitioner furnishing security he is appointed guardian of minor's property" is *ultra vires* and had *ab initio*. 49 M. 809=24 L. W. 707=A. I. R. 1927 Mad. 36=51 M. L. J. 726 (F. B.). (30 M. L. J. 508, Foll.; 40 Mad. 775=37 I. C. 892, Overruled). The practice of issuing suspensory orders of guardianship deprecated. (*Ibid.*) The Act does not require two orders, viz., interim order of approval and a "final order" of appointment of the guardian of property nor does it postpone the appointment till security is furnished. 30 M. L. J. 508=34 I. C. 432. In case of a conditional order of appointment of a guardian the minor's natural guardian's act done in good faith prior to the furnishing of security by the guardian appointed are valid. 40 Mad. 775=37 I. C. 892. An order of appointment of a guardian of property of an infant on condition that he furnishes security is an order under S. 7 (1) and not under S. 34 and is appealable under S. 47 (4). 24 I. C. 202. See also 49 Mad. 809.

PRACTICE AND PROCEDURE.—The proceedings under S. 7 are summary. 65 I. C. 888=15 S. L. R. 175. Section contemplates only a summary inquiry followed by an order for the welfare of the minor. 40 Bom. 513=35 I. C. 16. When a minor is to attain majority shortly, the Courts cannot prolong the age of minority by appointing a guardian under S. 7. 38 Mad. 807=27 M. L. J. 30=18 C. W. N. 1089=24 I. C. 290=41 I. A. 314 (P. C.). Ss. 7 and 8 do not necessarily require that when proceedings have been instituted on a proper application, application should be taken from the person whom the Court appoints, though certainly in practice it is more usual to take one. 73 I. C. 256. A Court dealing with an application under the Act should not dispose of the matter in the absence of the applicant by making an order in favour of his opponent as though the absent person were a defaulter in a

civil suit. 19 A. L. J. 489=63 I. C. 567. In determining whether a person is a minor the Court should take an independent view of its own and not adopt a finding in some civil suit that that person is a minor. (*Ibid.*) When an application is made on the footing and with the claim that the minor is entitled to separate property, the court should appoint a proper person as guardian of his property leaving it to the guardian to institute suits for the recovery of the property claimed. 40 Bom. 513=35 I. C. 16=18 Bom. L. R. 343.

MALA FIDE APPLICATION.—Where no guardian for the person or property of a minor was necessary, and a master instigated his servant who was the grandfather of the minor to make an application for appointing himself as the guardian so that the minor may be married to his son, it was held that it was not a *bona fide* judicial proceeding and orders made thereon were wholly without jurisdiction. 15 C. L. J. 142=16 C. W. N. 444.

TESTAMENTARY GUARDIANS, CL. (3).—Under Hindu Law, a man cannot appoint a testamentary guardian for his minor nephew. 12 I. C. 452=220 P. W. R. 1911. It is only where there is a written will appointing a guardian that a testamentary guardian stands in the way of the appointment of a statutory guardian by the Court. 16 L. W. 415=(1922) M. W. N. 167=1922 M. 70 (1); see also 40 Mad. 672=34 I. C. 766=30 M. L. J. 504. In an application for the appointment of a guardian of a minor, the Court has jurisdiction and is bound to consider the fact, that there is a will although no probate had been granted in respect of the same. 42 Cal. 953=28 I. C. 972=19 C. W. N. 513. Where there is a testamentary guardian for a minor an order appointing another person to be his guardian shall not be made unless the court has ordered under S. 39 or S. 41, the removal of the testamentary guardian. 29 Bom. L. R. 1577. See also 100 I. C. 738=28 Punj. L. R. 127. If the validity of the will is in question, it is discretionary with the court to defer decision of the question of guardianship until the question of probate has been determined. (*Ibid.*) (17 Pom. 560; 16 Mad. 780; 20 Bom. 832, Ref.) European British subject.—Whether mother can be preferred to testamentary guardian. 31 C. W. N. 394=101 I. C. 609=A. I. R. 1927 Cal. 389.

Sec. 8.—A court has no power to make an order appointing a guardian of minors except on a substantial application. 38 Cal. 226=15 C. W. N. 676=10 I. C. 334. The mere fact that the

- (a) the person desirous of being, or claiming to be, the guardian of the minor, or
- (b) any relative or friend of the minor, or
- (c) the Collector of the district or other local area within which the minor ordinarily resides or in which he has property, or
- (d) the Collector having authority with respect to the class to which the minor belongs.

Court having jurisdiction to entertain application. **9.** (1) If the application is with respect to the guardianship of the person of the minor, it shall be made to the District Court having jurisdiction in the place where the minor ordinarily resides.

(2) If the application is with respect to the guardianship of the property of the minor, it may be made either to the District Court having jurisdiction in the place where the minor ordinarily resides or to a District Court having jurisdiction in a place where he has property.

(3) If an application with respect to the guardianship of the property of a minor is made to a District Court other than that having jurisdiction in the place where the minor ordinarily resides, the Court may return the application if in its opinion the application would be disposed of more justly or conveniently by any other District Court having jurisdiction.

10. (1) If the application is not made by the Collector, it shall be by petition signed and verified in manner prescribed by the Code of Civil Procedure for the signing and verification of a complaint, and stating, so far as can be ascertained,—

- (a) the name, sex, religion, date of birth and ordinary residence of the minor ;
- (b) where the minor is a female, whether she is married, and, if so, the name and age of her husband ;
- (c) the nature, situation and approximate value of the property, if any, of the minor ;
- (d) the name and residence of the person having the custody or possession of the person or property of the minor ;
- (e) what near relations the minor has, and where they reside ;
- (f) whether a guardian of the person or property, or both, of the minor has been appointed by any person entitled or claiming to be entitled by the law to which the minor is subject to make such an appointment ;
- (g) whether an application has at any time been made to the Court or to any other Court with respect to the guardianship of the person or property, or both, of the minor, and if so, when, to what Court and with what result ;

mother of a minor is a *pardanashin* lady is no obstacle to her being appointed guardian of the minor son. (*Ibid.*) The jurisdiction of the District Court is limited by S. 9 to infants ordinarily resident within the district and minors who have left India months prior to the proceedings are not ordinarily resident in the district. 38 Mad. 807=41 I. A. 314=27 M. L. J. 30=24 I. C. 290 (P. C.). Failure to serve notice under S. 11, if fatal. 18 C. W. N. 160=16 I. C. 900=17 C. L. J. 405.

Sec. 9—According to the Act, the applicant for guardianship of minor must be residing within the jurisdiction of the Court to which the application is made. 36 A. 280=24 I. C. 59. A *Mufassal* Court other than the District Court has no jurisdiction to entertain proceedings by a father for the custody of his minor child. A suit will not lie for the purpose in the Civil Court. 42 Mad. 647=37 M. L. J. 93=53 I. C. 399 (F.B.). [38 Mad. 807, Foll.; 40 Bom. 660, Diss.; 4 Beng. L. R. (App.) 36; 8 Cal. 266; 9 Mad. 34; 26 All. 594; and 25 Bom. 574, Ref.]. A suit by a father for custody of his child is maintainable especially as no remedy exists under the Guardians and

Wards Act. 44 I. C. 753=10 Bur. L. T. 186. See also 8 L.B.R. 211=29 I.C. 768=8 Bur. L.T. 128. But see 38 Mad. 807 (P. C.).

Cl. (3).—The words 'ordinarily resides' mean more than a temporary residence even though the period of such temporary residence may be considerable. 53 P. L. R. 1902. See also 38 M. 807=24 Ind. Cas. 290 (P. C.); In determining the jurisdiction of the Court the question of domicile is relevant for fixing the ordinary residence of the minor. 34 Bom. 121=4 Ind. Cas. 262; see also 8 Bur. L. T. 73=29 Ind. Cas. 890.

Sec. 10.—A suit *inter partes* is not the form of procedure prescribed by S. 10 for proceedings touching the guardianship of infants. See 38 Mad. 807 (P. C.). Illness of a child in the custody of the adoptive father is no reason to make over the child to the natural father. 1923 Lah. 376. Application stating age and date of birth of minor is no evidence to prove age of minor. 4 I.C. 744. On this section, see also 15 C. W. N. 457=7 I. C. 702; 6 I.C. 645=58 P.W.R. 1910=74 P. L. R. 1910; 2 A. L. J. 81; 26 All. 594; A. W. N. (1905) 104.

(h) whether the application is for the appointment or declaration of a guardian of the person of the minor, or of his property or of both ;

(i) where the application is to appoint a guardian, the qualifications of the proposed guardian ;

(j) where the application is to declare a person to be a guardian, the grounds on which that person claims ;

(k) the causes which have led to the making of the application ; and

(l) such other particulars, if any, as may be prescribed or as the nature of the application renders it necessary to state.

(2) If the application is made by the Collector, it shall be by letter addressed to the Court and forwarded by post or in such other manner as may be found convenient, and shall state as far as possible the particulars mentioned in sub-section (1).

(3) The application must be accompanied by a declaration of the willingness of the proposed guardian to act and the declaration must be signed by him and attested by at least two witnesses.

11. (1) If the Court is satisfied that there is ground for proceeding on the application, it shall fix a day for the hearing thereof and cause notice of the application and of the date fixed for the hearing—

Procedure on admission of application.

(a) to be served in the manner directed in the Code of Civil Procedure on

(i) the parents of the minor if they are residing in British India,

(ii) the person, if any, named in the petition or letter as having the custody or possession of the person or property of the minor,

(iii) the person proposed in the application or letter to be appointed or declared guardian, unless that person is himself the applicant, and

(iv) any other person to whom, in the opinion of the Court, special notice of the application should be given ; and

(b) to be posted on some conspicuous part of the court-house, and of the residence of the minor, and otherwise published in such manner as the Court, subject to any rules made by the High Court under this Act, thinks fit.

(2) The Local Government may, by general or special order,¹ require that, when any part of the property described in a petition under section 10, sub-section (1), is land of which a Court of Wards could assume the superintendence, the court shall also cause a notice as aforesaid to be served on the Collector in whose district the minor ordinarily resides, and on every Collector in whose district any portion of the land is situate, and the Collector may cause the notice to be published in any manner he deems fit.

(3) No charge shall be made by the Court or the Collector for the service or publication of any notice served or published under sub-section (2).

12. (1) The Court may direct that the person, if any, having the custody of the minor shall produce him or cause him to be produced at such place and time and before such person as it appoints and may make such order for the temporary custody and protection of the person or property of the minor as it thinks proper.

Power to take interlocutory order for production of minor and interim protection of person and property.

Sec. 11. APPEAL.—A person who is not made a party in an application under S. 10 but to whom notice ought to have been given under S. 11 (a) as a person interested in the result of the application, cannot under S. 47 (a) file an appeal from the order passed on the application. 27 I.C. 121 = 18 O. C. 65.

EVIDENCE.—In an application for appointment of guardian, Court should give applicant an opportunity to let in evidence regarding his allegations. See 29 Punj. L. R. 255 = 1923 Lah. 8.

SECOND APPLICATION.—Where a person's application to be appointed as guardian of a minor is rejected and there is no appeal from that order

a subsequent application for the same purpose by the same person is not competent. 1923 Nag. 36.

Sec. 11 (2).—¹ For instance of such order.—See Ben. Stat. R. & O., Vol. II; U.P. List of Local R. & O., Vol. I.

Sec. 12.—“The recognised principle is that a father is not only the natural guardian but has an inalienable right to the custody of his minor son unless there are overwhelming circumstances to the contrary.” 49 A. 332 = 25 A. L. J. 248 = 101 I. C. 529 = A. I. R. 1927 All. 458. Court's power to put minor in possession of guardians. 37 All. 515 = 29 I. C. 416. High Court has power to make interlocutory orders issuing injunction to

(2) If the minor is a female who ought not to be compelled to appear in public, the direction under sub-section (1) for her production shall require her to be produced in accordance with the customs and manners of the country.

(3) Nothing in this section shall authorise—

(a) the Court to place a female minor in the temporary custody of a person, claiming to be her guardian on the ground of his being her husband, unless she is already in his custody with the consent of her parents, if any, or

(b) any person to whom the temporary custody and protection of the property of a minor is entrusted to dispossess otherwise than by due course of law any person in possession of any of the property.

13. On the day fixed for the hearing of the application, or as soon afterwards as

Hearing of evidence before
making of order.

may be, the Court shall hear such evidence as may be adduced in support of or in opposition to the application.

14. (1) If proceedings for the appointment or declaration of a guardian of a minor,

Simultaneous proceedings in
different Courts.

are taken in more Courts than one, each of those Courts shall, on being apprised of the proceedings in the other Court or Courts, stay the proceedings before itself.

(2) If the Courts are both or all subordinate to the same High Court, they shall report the case to the High Court and the High Court shall determine in which of the Courts the proceedings with respect to the appointment or declaration of a guardian of the minor shall be had.

(3) In any other case in which proceedings are stayed under sub-section (1), the Courts shall report the case through the Local Government to the Governor-General in Council, and the Governor-General in Council shall determine in which of the Courts the proceedings with respect to the appointment or declaration of a guardian of the minor shall be had.

15. (1) If the law to which the minor is subject admits of his having two or

Appointment or declaration
of several guardians.

more joint guardians of his person or property, or both, the Court may, if it thinks fit, appoint or declare them.

stop the marriage of minors, for the protection of their persons and property. 7 Lah. L. J. 30 = 86 I. C. 220 = 88 I. C. 576 = 1925 Lah. 358. District Judge has no power to direct any party to proceedings to deposit in Court any sum due to minor—Jurisdiction. 24 I. C. 518 = 12 A. L. J. 788. See also 13 Bur. L. R. 487 = 11 I. C. 554. On an application under S. 12 the Court has power to direct payment of the minor's money into Court or to appoint a Receiver of his property. 36 Bom. 20 = 11 I. C. 654 = 13 Bom. L. R. 487; see also 7 L. L. J. 281 = 90 I. C. 611 = 26 Punj. L. R. 576 = 1925 Lah. 489. Order so appointing receiver is one under C. P. C., O. 40, R. 1 and not under this section. *Ibid.* Minor claiming as adopted son—Widow denying adoption, in possession of property—No jurisdiction in Court to order widow to file inventory of deceased's property and to furnish security—see 3 S. L. R. 52 = 2 Ind. Cas. 369. An order of a Court rejecting an application by a guardian for the custody of a minor, on the ground that the proper course was to bring a Civil Suit, is not appealable, but can be revised. 13 P. R. 1897. The Custody of the Munsiff under an order of the Court for the temporary custody and protection of minor's property is the custody of the Court, and is not contrary to S. 12 (3). 10 P. R. 1898. From the date of order appointing guardian of the minor, the latter becomes a ward of the Court, and the Court could and should take action and

assist the guardian. 37 A. 515 = 29 Ind. Cas. 416.

Sec. 13.—The procedure under S. 13 is not intended to be summary. 44 I. C. 976 = 134 P. W. R. 1917; 105 I. C. 616. See also 83 I. C. 320 = 1925 Nag. 213; 89 I. C. 865; 26 Punj. L. R. 164. A. I. R. 1926 Lah. 117. But an order made without proper inquiry is bad and ought to be set aside. 15 I. C. 195 = 71 P. W. R. 1912; See also 63 P. L. R. 1917 = 44 I. C. 976 = 134 P. W. R. 1917. On this Sec. see also 23 Bom. 698; 15 I. C. 195; 27 I. C. 121; 4 I. C. 603; 17 Bom. 560. Ss. 13 and 17 are wide enough to cover an enquiry into any of the matters which can legitimately form the subject of opposition to the grant of a certificate of guardianship to a particular individual. 27 I. C. 121 = 18 O. C. 66. See also 105 I. C. 616. Whether preliminary enquiry as to whether the minor is possessed of property is not necessary before action is taken under the Sec. See 99 I. C. 222 = A. I. R. 1927 Oudh 68 = 3 O. W. N. 985 (3 All. 403 dist.)

Sec. 15.—A Hindu mother who remarries loses her natural right to be a preferential guardian of the person of her minor children. She can however be appointed guardian by the Court. 48 Ind. Cas. 75. There is nothing in the Hindu Law which prevents the Court from appointing more persons than one as guardian of the person of a minor (*Ibid.*).

(2) On the death of a father, being an European British subject, who has, by will or other instrument to take effect on his death, appointed a guardian of his minor child, the Court may appoint the mother to be guardian of the child jointly with the guardian appointed by the father.

(3) On the death of a mother, being an European British subject, who during the incapacity of the father of her minor child has, by will or other instrument to take effect on her death, appointed a guardian of the child, the Court may, if the father becomes capable of acting, appoint him to be sole guardian of the child or guardian of the child jointly with the guardian appointed by the mother, as it thinks fit.

(4) Separate guardians may be appointed or declared of the person and of the property of a minor.

(5) If a minor has several properties, the Court may, if it thinks fit, appoint or declare a separate guardian for any one or more of the properties.

16. If the Court appoints or declares a guardian for any property situate beyond the local limits of its jurisdiction, the Court having jurisdiction in the place where the property is situate shall, on production of a certified copy of the order appointing or declaring the guardian, accept him as duly appointed or declared and give effect to the order.

Appointment or declaration of guardian for property beyond jurisdiction of the Court.

17. (1) In appointing or declaring the guardian of a minor, the Court shall subject to the provisions of this section, be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor.

Matters to be considered by the Court in appointing guardian.

Sec. 15. (2).—Among European British subjects whether mother can be preferred to testamentary guardian. *See* 31 C. W. N. 394=101 I. C. 609=A. I. R. 1927 Cal. 389. As to appointment of joint guardians, *see Ibid.*

Sec. 16.—Where a person had been appointed under the Act as guardian of the property and person of a minor, he becomes the guardian of the property of the minor, in whichever district or districts the property may be situated. The effect of the appointment is that he becomes the certificated guardian for all purposes until he is discharged and cannot lay aside his status as such and pose as a natural guardian. A. W. N. (1905) 122=2 A. L. J. 460. The section is directory and does not in any way affect or prejudice the status of a certificated guardian when appointed generally over the property of a minor *Ibid.* Under S. 3 a minor of whose person or property a guardian has been appointed by any court of justice, shall be deemed to have attained his majority when he has completed his age of 21 years and not before. Such a minor can be major in one district and a minor in another *Ibid.* Decree for the specific performance of a contract of sale made by a guardian of minor's property should not be decreed except on proof of certain benefit to minor. 45 I. C. 192.

Sec. 17. SCOPE OF SECTION.—The words of S. 17 so far from being subject to the provisions of S. 17 expressly override them. 19 N. L. R. 45=1923 Nag. 199. (38 M. 807, followed.). *See also* 47 I. C. 817=12 S. L. R. 14.

CONSIDERATIONS FOR THE COURT—PERSONS ENTITLED TO BE GUARDIANS.—The welfare of the minor is the paramount consideration in an application for the appointment of a guardian for the person of a minor through the rights of guardianship under law must also be considered

but the qualification or otherwise of the proposed guardian is only secondary to that of the minor's welfare. 22 M. L. J. 68=13 I. C. 10=10 M. L. T. 477. [32 Bom. 50, 20 All. 210; 33 All. 222; 10 I. C. 283; 21 M. L. J. 195; 16 M. L. J. 357 foll.]. *See also* 11 M. L. T. 53=13 I. C. 453=22 M. L. J. 247, 4 Pat. 109=1925 Pat. 444. *See also* 13 C. L. J. 735. Matters to be considered by the Court in appointing a guardian under this section viz., the legal right to be appointed a guardian the preference of the minors and the existing previous relationship are very minor considerations as compared with the main question, what order would be for the welfare of the minor. 9 Bom. L. R. 923=32 Bom. 50. The interest, well-being and happiness of the minor ought to be the main and paramount consideration for the court in selecting the guardian of the person of a minor. 9 Bom. L. R. 923=32 B. 50; *see also* 13 O. C. 140=6 Ind. Cas. 1001; 192 P. L. R. 1913=19 I. C. 609; 33 A. 222=7 A. L. J. 1149=8 Ind. Cas. 785; 26 I. C. 300. Consistently with the welfare of the minor the Court should also have regard to the wishes of the deceased parents of the minor and also to the minor's wishes when he is of years of discretion. 25 I. C. 112=18 C. W. N. 1198; (32 Bom. 50; 29 All. 210 foll.). Personal law of the minor can be disregarded if the minor's welfare leaves no alternative. 28 O. C. 172=85 I. C. 624=1925 Oudh 623. A boy aged 14 years and a girl aged 16 years, are old enough to form an intelligent preference; such preference is strongly entitled to consideration under S. 17 (3). 12 N. L. R. 35=32 I. C. 977 [9 M. 391, diss.; 16 Bom. 307; 12 All. 213; 25 Cal. 881; 23 Cal. 290; 22 M. L. J. 247, foll.]. Being litigious is in itself no disqualification for guardianship. 12 O. L. J. 281=2 O. W. N. 246=87 I. C. 902=1925 Oudh

(2) In considering what will be for the welfare of the minor, the Court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property.

(3) If the minor is old enough to form an intelligent preference, the Court may consider that preference.

(4) As between parents who are European British subjects adversely claiming the guardianship of the person, neither parent is entitled to it as of right, but, other things being equal, if the minor is a male of tender years or a female, the minor should be given to the mother, and if the minor is a male of an age to require education and preparation for labour and business, then to the father.

(5) The Court shall not appoint or declare any person to be a guardian against his will.

18. Where a Collector is appointed or declared by the Court in virtue of his office

Appointment or declaration
of Collector in virtue of office.

to be guardian of the person or property, or both, of a
minor, the order appointing or declaring him shall be
deemed to authorize and require the person for the time

398. S. 19 precludes from appointing any one other than the father of the minor as guardian of the minor unless the minor's father is found to be unfit to be guardian of the minor's person. 19 N. L. R. 45=1923 Nag. 199; But see also 83 I. C. 308=26 Punj. L. R. 12=1925 Lah. 250; 1925 Oudh 282; 2 O. W. N. 242=87 I. C. 1024=1925 Oudh 421; 86 I. C. 957=1925 Mad. 1085. The District Court is justified in superseding a guardian who does not furnish security within the fixed time. 192 P. L. R. 1913=19 I. C. 609. Discretion under the sec. is very wide—No interference by High Court. 13 O. C. 103=11 Ind. Cas. 340. If it thinks it would be injurious to the minor to give effect to the father's wishes it can interfere even in his lifetime. 22 M. L. J. 247=11 M. L. T. 53=13 Ind. Cas. 453. Father marrying a second wife—Not valid ground of disqualification. 28 M. L. J. 442=17 M. L. J. 389=29 I. C. 4. On the death of Hindu adoptive father, whether natural father or remote adoptive relations should be preferred. See 4 Pat. 109=1925 Pat. 444. See also 15 C. W. N. 558; 7 I. C. 234. Simple illiteracy is no disqualification for the appointment of a mother as guardian of her sons. 33 I. C. 918=20 C. W. N. 663. The fact that the mother of a Muhammadan minor is divorced is no ground to refuse guardianship if she is of good character. 89 I. C. 865. Shia minor girl married to Sunni—Girl repudiating marriage on attaining majority—Husband, whether a fit person to be appointed guardian. See 13 O. L. J. 735=1926 Oudh 521. The mere fact of unchastity is not enough to deprive a mother of her rights of guardianship. 74 I. C. 53=1923 Nag. 305. Re-marriage of a minor's mother is no disqualification. 40 I. C. 107=32 P. W. R. 1917. See also 26 Punj. L. R. 251. Right of guardianship—Competition between outcasted mother and paternal grandfather in caste—Hindu Law. See A. W. N. (1905) 205=2 A. L. J. 663=28 A. 233; U. B. R. 1892=1896 Vol. II 418 (4 W. R. Mis. 3; 9 W. R. 334; 19 C. 301; 13 W. R. 454 F.) The mere fact that an applicant is a pardanashin lady is no ground for rejecting her claim to be appointed guardian of the property of a minor. 1922 Nag. 232; 15 C. W. N. 676. Paternal uncle, see 43 I. C. 849. Paternal aunt. 67 P. L. R. 1914. Husband who

failed to get restitution is not a good guardian. 67 I. C. 882=3 Lah. L. J. 293. That the first wife was not properly treated is not a ground for presuming that the children will not be properly looked after. 39 Mad. 473=28 M. L. J. 442=17 M. L. T. 389=29 I. C. 4. The legislature advisedly draws a distinction between the legal rights of husband and parents on the one side and those of the other near relations on the other. *Ibid.* See also 86 I. C. 957=(1925) Mad. 1085. Where the applicant was a distant relation of the husband of a childless widow who was living happily with her father. *Held* that the father of the minor widow was her proper guardian. 7 A. L. J. 1149=8 Ind. Cas. 785 (16 C. 584 R.). The presumptive heir to the property of a minor is not a suitable person to be appointed guardian of his person as such a person stands to gain by the minor's death. 44 M. L. J. 62=(1923) M. W. N. 12=1923 Mad. 359. (16 M. L. J. 357=2 C. L. R. 581; 10 I. C. 289, *ref.*). Muhammadan Law—Guardianship for marriage. 38 I. C. 787=25 C. L. J. 551.

RELIGION OF MINOR—A child in India must under ordinary circumstances be presumed to have his father's religion and his corresponding civil and social status, and it is therefore ordinarily the duty of a guardian to train his infant ward in such religion. 32 I. C. 897=46 P. W. R. 1916; (11 W. R. 77 P. C. *follow.*) Effect of change of religion on right of guardianship. See 167 P. L. R. 1901; 60 P. R. 1901. See also 13 O. C. 140=6 I. C. 1001. The father of an infant *prima facie* entitled to say in what religion his infant child should be brought up, but, at the same time in a proper case (*e.g.* when the father has abdicated his right) there is undoubted jurisdiction in the Court to disregard those wishes. 25 Cal. 881=2 D. W. N. 379 (C. 60 P. R. 1901=167 P. L. R. 1901.) See also 22 M. L. J. 247=11 M. L. T. 53. The scope of the enactment is merely to remove legislative prohibition, to confer expressly a certain jurisdiction and to define exactly the position of those, who avail themselves of or are brought under, the Act, leaving persons to whom any existing rules of law apply, unaffected. 4 C. 929=4 C. L. R. 247 (F.B.). The Act contains no provisions enabling the Court to act of its own motion. *Ibid.*

being holding the office to act as guardian of the minor with respect to his person or property, or both, as the case may be.

Guardian not to be appointed by the Court in certain cases.

19. Nothing in this Chapter shall authorize the Court to appoint or declare a guardian of the property of a minor whose property is under the superintendence of a Court of Wards, or to appoint and declare a guardian of the person—

(a) of a minor who is a married female and whose husband is not, in the opinion of the Court, unfit to be guardian of her person, or,

(b) subject to the provisions of this Act with respect to European British subjects, of a minor whose father is living and is not, in the opinion of the Court, unfit to be guardian of the person of the minor, or

(c) of a minor whose property is under the superintendence of a Court of Wards competent to appoint a guardian of the person of the minor.

CHAPTER III.

DUTIES, RIGHTS AND LIABILITIES OF GUARDIANS.

General.

20. (1) A guardian stands in a fiduciary relation to his ward, and, save as provided by the will or other instrument, if any, by which he was appointed, or by this Act, he must not make any profit out of his office.

Fiduciary relation of guardian to ward.

(2) The fiduciary relation of a guardian to his ward extends to and affects purchases by the guardian of the property of the ward, and by the ward of the property of the guardian, immediately or soon after the ward has ceased to be a minor, and generally all transactions between them while the influence of the guardian still lasts or is recent.

21. A minor is incompetent to act as guardian of any minor except his own wife or child or, where he is the managing member of an undivided Hindu family, the wife or child of another minor member of that family.

Capacity of minors to act as guardians.

22. (1) A guardian appointed or declared by the Court shall be entitled to such allowance, if any, as the Court thinks fit for his care and pains in the execution of his duties.

Remuneration of guardian.

(2) When an officer of the Government, as such officer, is so appointed or declared to be guardian, such fees shall be paid to the Government out of the property of ward as the Local Government, by general¹ or special order, directs.

See. 19. [See also notes under S. 17 *supra*] S. 19 recognizes the natural right of the father and is controlled by S. 17 according to which the paramount consideration is the welfare of the minor. 47 I. C. 817 = 12 S. L. R. 14. But see 23 L. W. 213 = A. I. R. 1925 Mad. 1085, which lays down that the prohibition contained in this section applies also to a husband or father. An application by a Hindu father under S. 19 is not competent. 24 Bom. L. R. 779 = 1922 Bom. 405. Father being a natural guardian, he cannot be appointed or declared guardian under this section. See 83 I. C. 308 = 1925 Lah. 250; 1925 Oudh 282; 12 O. L. J. 441 = 2 O. W. N. 242 = 87 I. C. 1024 = 1925 Oudh 421; 86 I. C. 957 = 1925 Mad. 1085. But see also 86 I. C. 640 = 21 L. W. 244 = 1925 Mad. 398 = 48 M. L. J. 179. During the natural guardian's life, a Court cannot appoint another guardian unless in its opinion, the natural guardian is unfit. 38 Mad. 807 = 41 I. A. 314 = 27 M. L. J. 30 = 18 C. W. N. 1089 (P.C.) See also 2 L. W. 531 = 29 I. C. 740; 5 U. B. R. (1892-1896) Vol. II 413 (415). "Father" in S. 19 (b) means father

of a child born in wedlock. 9 Bur. L. T. 205 = 36 I. C. 646 = 8 L. B. R. 415. A Hindu father's conversion does not operate to deprive him of the guardianship of his children by reason of Act, (XXI) of 1850. 47 I. C. 817 = 12 S. L. R. 14. Guardianship of illegitimate child—Adoption by Mahomedan see U. B. R. 1852 1896, Vol. II, 415 (10 A. 289, 21 C. 149 ref.) Court if can delegate duty of enquiry duty see 21 O. C. 194 = 5 O. L. J. 616 = 48 I. C. 60. Minor girl—Husband not a proper guardian before puberty. 43 Ind. Cas. 849; see also 7 S. L. R. 199 = 24 I. C. 944.

Sec. 20.—Guardian dealing with ward's money — Investment — Duty to account for profits — Breach of trust. 54 I. C. 926 = 157 P. R. 1919.

Sec. 21.—A minor step-mother is competent to act as guardian of the person of her infant step-son. 18 C. W. N. 160 = 16 I. C. 900 = 17 C. L. J. 405 (5 Bom. L. R. 542; 3 Bom. 2, rel.).

Sec. 22.—See 24 Bom. 95 = 1 Bom. L. R. 547; 1925 Oudh 260.

¹ For instance of such order, See Ben. Stat. R. & O., Vol. II.

23. A Collector appointed or declared by the Court to be guardian of the person or property, or both, of a minor shall, in all matters connected with the guardianship of his ward, be subject to the control of the Local Government or of such authority as that Government, by notification in the official Gazette, appoints in this behalf.

Guardian of the Person.

24. A guardian of the person of a ward is charged with the custody of the ward and must look to his support, health and education, and such other matters as the law to which the ward is subject requires.

25. (1) If a ward leaves or is removed from the custody of a guardian, of his person, the Court, if it is of opinion that it will be for the welfare of the ward to return, to the custody of his guardian, may make an order for his return, and for the purpose of enforcing the order may cause the ward to be arrested and to be delivered into the custody of the guardian.

(2) For the purpose of arresting the ward, the Court may exercise the power conferred on a Magistrate of the first class by section 100 of the Code of Criminal Procedure, 1882.²

(3) The residence of a ward against the will of his guardian with a person who is not his guardian does not of itself terminate the guardianship.

Sec. 23.—See 3 C. L. J. 165

CASE LAW.—Power of collector appointed as guardian to sell minor's property. See 96 I. C. 17 = 28 Bom. L. R. 628.

¹ For notification appointing authorities to whose control Collectors appointed under the Act shall be subject, in—

(1) Bengal, see Ben. Stat. R. & O., Vol. II; (2) Bombay, see Bom. R. & O., Vol. I; (3) U. P. of Agra and Oudh, see U.P. and Oudh List of Local R. & O., Vol I; (4) Punjab. see Notification No. 632, dated 28th June, 1901, in *Punjab Gazette*, 1901, Pt. I, p. 756.

Sec. 24. RELIGION.—The father of an infant is *prima facie* entitled to say in what religion his child should be brought up. 22 M. L. J. 247 = 25 C. 881. But where the court thinks, it would be injurious to the child's interest it will interfere. 22 M. L. J. 247. Where the parents are not of the same religion, the mother after the death of the father should bring up the child in his father's religion. (*Ibid.*) The Court may restrain a marriage if it is unsuitable even though the guardian has given his consent. 10 I. C. 136. See also 98 P. R. 1914 = 27 I. C. 381. A ward of court cannot marry without the consent of the court. 42 C. 351. See also 32 Bom. 52; 57 I. C. 651; 39 M. 473. On this section, see also 3 C. W. N. 37; 36 Mad. 39 = 13 I. C. 251 = 22 M. L. J. 193; (1911) 2 M. W. N. 519. A District Judge is competent to sanction the marriage of a minor girl under the guardianship of one appointed by the court with a particular bridegroom. 52 I. C. 998. Order not warranted by Act—Revision lies. See 36 Mad. 39.

Sec. 23 (2).—² See now Act V of 1898.

Matters to be considered in passing order under the section. See 107 I. C. 759. The father has a right to custody of a minor child. 47 A. 706; 18 L. W. 173 = 1924 Mad. 45. But see (as to conflict of rulings) 1925 Oudh 282; 1925 Oudh 257; 6 L. L. J. 597 = 83 I. C. 308 = 1925 Lah.

250; 86 I. C. 957 = 1925 Mad. 1085; 86 I. C. 640 = 1925 Mad. 398; On this section see also 27 I. C. 257; 13 A. L. J. 712; 29 I. C. 768; 28 I. C. 597 = 17 Bom. L. R. 332. 25 A. L. J. 585 (Rights of Mahomedan father and mother over minor child). The word 'custody' in S. 25 includes both actual and constructive custody. 39 Mad. 668 = 30 M. L. J. 21; 25 A. L. J. 585. About mother's right to custody see 56 I. C. 242 = 24 C. W. N. 711; 31 C. L. J. 365 = 57 I. C. 13. But where she by her conduct precludes herself from demanding the custody, see 1 M. L. T. 347; 23 C. 290. Where immoral conduct is proved against her she is not entitled to. 14 M. L. A. 309. A court is not justified in refusing relief to the guardian under S. 25 of the Act on the ground that the guardian is too weak to keep the minor. A. I. R. 1927 Lah. 266. It is the duty of the Court to protect the weak against the high handed acts of the strong and this duty had to be performed with greater vigilance when the aggrieved party is a duly constituted guardian appointed by the Court itself and the victims are minors under its charge. 100 I. C. 807 = A. I. R. 1927 Lah. 266. In order to take action under S. 25, it is immaterial whether the minor left the guardian's custody of his own accord or was forcibly removed by the respondent. 100 I. C. 807 = A. I. R. 1927 Lah. 266. Father leading an immoral life—Children living with maternal uncle—Power delegated by the father whether can be revoked. 103 I. C. 361 = A. I. R. 1927 Nag. 314. *Ex parte* order directing production of minor in Court—Application to cancel the order dismissed—Order of dismissal not appealable—Proper remedy of the party is to apply to set aside *ex parte* order. 92 I. C. 36 = A. I. R. 1926 Nag. 251.

RIGHT OF SUIT.—A guardian appointed under the Act is only entitled to apply under the Act for the custody of the minor and cannot bring a separate suit. 39 M. 608 = 33 M. L. J. 21; 42 M. 647 (F. B.); 38 M. 807 (P. C.).

26. (1) A guardian of the person appointed or declared by the Court, unless he is the Collector or is a guardian appointed by will or other instrument, shall not, without the leave of the Court by which he was appointed or declared, remove the ward from

Removal of ward from jurisdiction.

the limits of its jurisdiction except for such purposes as may be prescribed.

(2) The leave granted by the Court under sub-section (1) may be special or general, and may be defined by the order granting it.

Guardian of property.

27. A guardian of the property of a ward is bound to deal therewith as carefully as a man of ordinary prudence would deal with it if it were

Duties of guardian of property.

his own and, subject to the provisions of the Chapter, he may do all acts which are reasonable and proper for the

realisation, protection or benefit of the property.

28. Where a guardian has been appointed by will or other instrument, his power to

Powers of testamentary guardian.

mortgage or charge, or transfer by sale, gift, exchange or otherwise, immoveable property belonging to his ward is subject to any restriction which may be imposed by the

instrument, unless he has under this Act been declared guardian and the Court which made the declaration permits him by an order in writing, notwithstanding the restriction, to dispose of any immoveable property specified in the order in a manner permitted by the order.

29. Where a person other than a Collector, or than a guardian appointed by will or other instrument, has been appointed or declared

Limitation of powers of guardian of property appointed or declared by the Court.

by the Court to be guardian of the property of a ward, he shall not, without the previous permission of the Court,—

Sec. 26.—*See* 19 I. C. 655 = 11 A. L. J. 209, A. W. N. (1899) 204 = 8 M. H. C. R. 94

Sec. 27.—A guardian appointed under Act cannot ratify the unauthorized acts of a former guardian. 54 I. C. 311. It is unwise on the part of the guardian to admit that his wards were liable for the debt when the debt could not be legally recovered owing to the lapse of time. 56 I. C. 328 = 23 O. C. 27. Where a guardian acting in the interests of the minor enter into a compromise of a doubtful right, it is binding on the minor. 14 M. L. J. 442. A guardian has a discretion under S. 27 to allow a remission of rent on failure of rain or other source of irrigation. 28 I. C. 5 = 8 S. L. R. 222. On this section, *see also* 83 I. C. 24 = 1924 All 622. The mere fact that the guardian has filed abstract statement of assets and liabilities does not release him from liability to account unless he gets a discharge from such liability from the Court. 15 C. L. J. 57 = 7 I. C. 214 (34 C. 211, rel.). Liability of guardian for his failure to invest his ward's money for interest—Liability not outside the Act. 33 B. 419 = 11 Bom. L. R. 512 = 3 I. C. 172.

Sec. 28.—*See* 11 O. C. 29. Guardian appointed by court cannot avoid the duties imposed by the Act, by purporting to act as natural guardian. 87 I. C. 235 = 1925 Oudh 633. *See also* 61 P. R. 1918 = 162 P. W. R. 1918 = 47 I. C. 353. Testamentary guardian, powers of. *See* 9 Lah. L. J. 488.

Secs. 29 and 30.—S. 29 does not apply to transfers of property made on behalf of minors by their guardians *ad item* and no sanction of the Court is necessary. 44 I. C. 564 = 61 P. W. R. 1918. As regards raising of loans on the security of property of the minor, *see* A. W. N. (1908) 75

= 5 A. L. J. 260 = 30 A. 188 (11 C. 379, fol.). As to effect of sanction of Court. *See* 50 Mad. 217 = 25 L. W. 25 = A. I. R. 1927 Mad. 233. Surrender of an ex proprietary holding is not a transfer within the meaning of S. 29 and that consequently the previous permission of the District Judge was not necessary in such a case. 101 I. C. 804 = A. I. R. 1927 All. 546. The Karta of a joint Hindu family who is appointed guardian of minor member of the family under the Act comes under the control of the Court and cannot mortgage the minor's share as karta. 62 I. C. 616 = 23 C. W. N. 634. Sale of minor's property by guardian without permission of the Court is voidable, though the sale was for the minor's benefit and was a perfectly honest transaction. 13 I. C. 594; *see also* 6 A. L. J. 491 = 31 A. 378; 25 A. 59 = A. W. N. (1902) 102 (18 A. 373, D. 22 M. 249, F.). Sale of Ward's property—Power of Court to stop sale, if injurious to ward. 109 P. R. 1915 = 29 I. C. 804. A mortgage executed by a guardian appointed under the Act without the permission of the Court is not absolutely void. It is only voidable. 16 C. W. N. 716 = 16 C. L. J. 537 = 14 I. C. 515. To avoid the mortgage. It is not necessary for the minor to bring an action to set aside the transaction. (*Ibid.*) This section only enables the Judge to give permission to the guardian to sell such portion of the properties as may be necessary, on an application properly framed by the guardians for that purpose. It confers no power whatever on the Judge to deal with the minor's property on his own motion in any way. 12 C. L. J. 322 = 7 I. C. 46. Contract by guardian to sell—Liability of ward. 40 I. C. 490 = 22 C. W. N. 477. Mortgage in excess of sanction voidable. 19 I. C. 624. *See* 22 M. 289; 11 I. C.

(a) mortgage or charge, or transfer by sale, gift, exchange or otherwise any part of the immoveable property of his ward, or

(b) lease any part of that property for a term exceeding five years or for any term extending more than one year beyond the date on which the ward will cease to be a minor.

Voidability of transfers made in contravention of section 28 or section 29.

Practice with respect to permitting transfers under section 2.

30. A disposal of immoveable property by a guardian in contravention of either of the two last foregoing sections is voidable at the instance of any other person affected thereby.

31. (1) Permission to the guardian to do any of the acts mentioned in section 29 shall not be granted by the Court except in case of necessity or for an evident advantage to the ward.

(2) The order granting the permission shall recite the necessity or advantage, as the case may be, describe the property with respect to which the act permitted is to be done, and specify such conditions, if any, as the Court may see fit to attach to the permission; and it shall be recorded, dated and signed by the Judge of the Court with

764; 8 A. L. J. 754. Permission to mortgage minor's property—Guardian has no power to confer power of sale on mortgagee. 10 I. C. 872. Sale without permission of Court is voidable. 13 I. C. 504. Alienation by guardian by way of sale or mortgage—Distinction between 50 Mad. 217=2 I. W. 25=A. I. R. 1927 Mad. 233. See also 51 M. L. J. 869. Contract for sale with permission of court by certificated guardian is a valid contract and so a suit for damages for its breach lies. 35 All. 499=11 A. L. J. 783. See also 19 I. C. 624. A transfer 15 years after the sanction granted by the Dist. Judge cannot be held to be in pursuance of the sanction. 35 All. 150=11 A. L. J. 107. Under S. 30 disposal of immoveable property by a guardian in contravention of Ss. 28 and 29 is voidable and could be set aside in a proper proceeding. 49 C. 911=28 C. W. N. 57=1922 Cal. 150. The scope of an enquiry under S. 29 is entirely distinct from the scope of an enquiry under O. 21, R. 83, C. P. Code. (*Ibid.*) Order 21, Rule 83, C. P. Code, does not render unnecessary the fulfilment of the requirements of S. 29 in a case which falls within the scope of both these provisions of the law. (*Ibid.*) Lease by Court guardian for 7 years—Sanction of Court not obtained—Lease in accordance with compromise sanctioned by Court—Validity 68 I. C. 997=35 C. L. J. 206. Power of Collector appointed as guardian to sell minor's property. See 96 I. C. 17=28 Bom. L. R. 628.

APPEAL.—Orders under Ss. 29 and 30 are not appealable. 87 I. C. 251=1923 All. 14.

PRACTICE AND PROCEDURE.—Absence of recital of necessity for alienation in order sanctioning alienation, effect of. See 50 Mad. 217=25 L. W. 25=A. I. R. 1927 Mad. 233. Sale by guardian on behalf of minor—Condition subsequent not complied with, effect of. 25 A. L. J. 725=102 I. C. 804=A. I. R. 1927 All. 631. As to the necessity of restoring the benefit taken in case of avoidance of transaction entered into by guardian, see 25 A. L. J. 1017.

Sec. 30. MEANING OF WORDS.—The words "any other person affected thereby" in S. 30 do not include a creditor whom a transfer of property might injuriously affect. 75 P. R. 1914=22 I. C. 829. Transfer of minor's interest in decree—Judgment-debtor cannot impugn. 41 I. C. 269=27

C. L. J. 110. On this section see also 54 Cal. 687.

APPEAL.—An order under S. 30 is not appealable. 44 A. 458=1923 All. 54 (1)=37 I. C. 251.

Sec. 31, CL. (2). GENERAL.—S. 31 (2) is mandatory and not merely directory. 23 O. C. 72=7 O. L. J. 207=56 I. C. 328. See also 27 Bom. L. R. 483=87 I. C. 712=(1025) Bom. 320; 98 I. C. 500; 103 I. C. 698=A. I. R. 1927 Lah. 665. A sale by the certificated guardian of a minor without the sanction of the Judge is not void *in toto* but is only voidable. If the minor have been benefited by the sale they cannot avoid the sale without restoring the benefit to the purchasers. 98 I. C. 500. See also 1926 Oudh 88; 95 I. C. 421. 95 I. C. 680=A. I. R. 1926 Oudh 169. In considering validity of a transaction entered into on minor's behalf the tests to be applied are (1) to see whether a man of ordinary prudence would have entered into such a transaction in respect of his own property, (2) and whether the circumstances were such that had the guardian applied to the court for sanction, the court would have given the sanction. 1925 Mad. 215=47 M. L. J. 628. What amounts to sanction by court, see 12 O. L. J. 453=89 I. C. 64=2 O. W. N. 601. Permission to a guardian to do any of the acts mentioned in S. 29 shall be granted only in case of necessity or advantage to the ward. 38 C. L. J. 213=1924 C. 420. A District Judge giving an unconditional sanction to a sale of a minor's property by a guardian cannot after its execution and registration order a re-sale thereof. 46 I. C. 542. Non-observance of some rules prescribing particular forms of procedure does not make the order a nullity, but non-observance of rules creating jurisdiction renders the order null and void. 87 I. C. 238=(1925) Oudh 633. See also 25 A. L. J. 725=102 I. C. 804=A. I. R. 1927 All. 631. Sanction cannot cure inherent defects—Suit by minor to set aside the sale—Ours 45 Mad. 429=42 M. L. J. 333=1922 Mad. 135. Permission to sell—Necessity not mentioned—Effect. 23 O. C. 72=7 O. L. J. 207=56 I. C. 328=2 U. P. L. R. (J. C.) 82. Judgment against minor is binding unless guardian is guilty of fraud. 87 I. C. 238=1925 Oudh 633.

APPEAL AND REVISION.—Order of District Judge fixing expenses of minor's marriage is not open to appeal or revision. 48 All. 300=92 I. C. 482=A. I. R. 1926 All. 301.

own hand, or when from any cause he is prevented from recording the order with his own hand, shall be taken down in writing from his dictation and be dated and signed by him.

(3) The Court may in its discretion attach to the permission the following among other conditions, namely:—

(a) that a sale shall not be completed without the sanction of the Court;

(b) that a sale shall be made to the highest bidder by public auction, before the Court or some person specially appointed by the Court for that purpose, at a time and place to be specified by the Court, after such proclamation of the intended sale as the Court, subject to any rules made under this Act by the High Court, directs;

(c) that a lease shall not be made in consideration of a premium or shall be made for such term of years and subject to such rents and covenants as the Court directs;

(d) that the whole or any part of the proceeds of the act permitted shall be paid into the Court by the guardian, to be disbursed therefrom or to be invested by the Court on prescribed securities or to be otherwise disposed of as the Court directs.

(4) Before granting permission to a guardian to do an act mentioned in S. 29, the Court may cause notice of the application for the permission to be given to any relative or friend of the ward who should, in its opinion, receive notice thereof, and shall hear and record the statement of any person who appears in opposition to the application.

32. Where a guardian of the property of a ward has been appointed or declared by the Court and such guardian is not the Collector, the Court may, from time to time, by order, define, restrict or extend his powers with respect to the property of the ward

Variation of powers of guardian of property appointed or declared by the Court.

in such manner and to such extent as it may consider to

be for the advantage of the ward and consistent with the law to which the ward is subject.

Right of guardian so appointed or declared to apply to the Court for opinion in management of property of ward.

33. (1) A guardian appointed or declared by the Court may apply by petition to the Court which appointed or declared him for its opinion, advice or direction on any present question respecting the management or administration of the property of his ward.

(2) If the Court considers the question to be proper for summary disposal, it shall cause a copy of the petition to be served on, and the hearing thereof may be attended by, such of the persons interested in the application as the Court thinks fit.

(3) The guardian stating in good faith¹ the facts in the petition and acting upon the opinion, advice or direction given by the Court shall be deemed, so far as regards his own responsibility, to have performed his duty as guardian in the subject-matter of the application.

Obligations on guardian of property appointed or declared by the Court.

34. ² Where a guardian of the property of a ward has been appointed or declared by the Court and such guardian is not the Collector, he shall,—

(a) if so required by the Court, give a bond as nearly as may be in the prescribed form, to the Judge of the Court to enure for the benefit of the Judge for the time being, with or without sureties, as may be prescribed, engaging duly to account for what he may receive in respect of the property of the ward;

(b) if so required by the Court, deliver to the Court, within six months from the date of his appointment or declaration by the Court or within such other time as the

Sec. 31, Cl. (4).—The words “any person” means any person interested in an application made on behalf of a minor not merely his friends or relatives. 35 Mad. 743 = 11 I.C. 946 = 21 M.L.J. 685.

Sec. 32.—A minor's interest in a trust can be protected, and the benefits thereof secured to the minor, by the appointment of a guardian of the property of the minor in respect of such interest. 39 All. 238 = 37 I. C. 885. As to jurisdiction to

dispossess third person in possession of the estate, see 47 All. 313 = 23 A.L.J. 28 = 1925 All. 277. An order of suspension of the guardian can be passed by the Judge under S. 32 40 I.C. 397.

Sec. 33 (3).—¹ See S. 3 (20) of the General Clauses Act (X of 1897). See 26 A. L. J. 290 = A.I.R. 1928 All. 259.

Sec. 34.—² For instance of notifications issued under this section, see Bom. R. & O., Vol. III.

Court directs, a statement of the immoveable property belonging to the ward, of the money and other moveable property which he has received on behalf of the ward up to the date of delivering the statement, and of the debts due on that date to or from the ward ;

(c) if so required by the Court, exhibit his accounts in the Court at such times and in such form as the Court from time to time directs ;

(d) if so required by the Court, pay into the Court at such time as the Court directs the balance due from him on those accounts, or so much thereof as the Court directs ; and

(e) apply for the maintenance, education and advancement of the ward and of such persons as are dependent on him, and for the celebration of ceremonies to which the ward or any of those persons may be a party, such portion of the income of the property of the ward as the Court from time to time directs, and, if the Court so directs the whole or any part of that property.

35. Where a guardian appointed or declared by the Court has given a bond duly

Suit against guardian where administration-bond was taken.

to account for what he may receive in respect of the property of his ward, the Court may, on application made by petition and on being satisfied that the engagement of the

bond has not been kept, and upon such terms as to security, or providing that any money received be paid into the Court, or otherwise as the Court thinks fit, assign the bond to some proper person, who shall thereupon be entitled to sue on the bond in his own name as if the bond had been originally given to him instead of to the Judge of the Court and shall be entitled to recover thereon as trustee for the ward in respect of any breach thereof.

36. (1) Where a guardian appointed as declared by the Court has not given a bond as aforesaid, any person, with the leave of the Court

Suit against guardian where administration-bond was not taken.

may, as next friend, at any time during the continuance of the minority of the ward, and upon such terms as aforesaid, institute a suit against the guardian, or, in case of

Sec. 34, Cls. (c) and (d).—For scrutiny of guardian's accounts, regular suit is the proper remedy. 26 L. W. 44=100 I. C. 600=38 M. L. T. 115 (H. C.). See also 23 L. W. 420=(1926) M. W. N. 359=A. I. R. 1926 Mad. 478=50 M. L. J. 273 ; 107 I. C. 152=7 Pat. 144.

Sec. 34, Cl. (d). SCOPE OF SECTION.—34 I. C. 79=A. I. R. 1926 Mad. 1825 ; 50 M. L. J. 273.

Secs. 34 and 35. SCOPE.—This section does not deprive the Court of its general power to impose conditions on guardians and so the appointment of a guardian conditional on his furnishing security is not *ultra vires* 40 Mad. 775=37 I. C. 892. See also 49 Mad. 809=51 M. L. J. 726 (F. B.). Court can ask guardian to apply income for maintenance. 34 P. R. 1912=14 I. C. 789. An order under S. 34, cl. (c) directing the guardian of a ward to pay a certain sum of money to another is not an order under S. 2 (14), C. P. C., and is therefore not executable as a decree. 41 Mad. 241=41 I. C. 341 (36 Mad. 39, Foll.). Attachment of property of guardian is improper. 1923 Lah. 506 (1).

SECURITY.—Appointment of guardian does not become effective until security is furnished. 71 I. C. 572. The Court is the obligee under a Bond executed by sureties under S. 34 (a) and can alone sue on the bond in the absence of an assignment in due form of law. 42 Mad. 302=36 M. L. J. 114=49 I. C. 587. Limitation is that prescribed by Art. 68 of the Lim. Act except where the bond charges immoveable property. (*Ibid.*) The District Court can supersede a guardian if he fails to furnish security within the fixed time. 19 I. C. 609=192 P. L. R. 1913. Order

appointing a person guardian subject to his furnishing security within a time—Failure to furnish—Penalty. 51 I. C. 88=17 A. L. J. 377.

APPEAL.—Direction to guardian to deposit money due to minor—Not appealable 57 I. C. 309. No appeal lies from an order fixing the amount to be applied for the maintenance, education and advancement of the ward and the persons depending on him. 27 I. C. 921=28 M. L. J. 96.

Secs. 35 and 36.—A suit for accounts by a ward against his late guardian or his representatives if it is proved that his property had gone into their hands, is maintainable. 22 Bom. L. R. 633=44 B. 852. See also 18 I. C. 876=17 C. W. N. 605. Ward should not be compelled to file regular suit for satisfying court that engagement has not been kept up. (1928) M. W. N. 423=A. I. R. 1928 Mad. 545=54 M. L. J. 671. S. 35 is perfectly general and can apply to a case where the ward was a minor or to a case where the ward has ceased to be a minor. The section is intended to cover both the cases. There is nothing in S. 35 making it inapplicable to the case of a ward attaining majority and applying for an assignment of the bond. 42 M. 302 and A. I. R. 1926 Mad. 977, Diss. from ; (1928) M. W. N. 423=A. I. R. 1928 Mad. 545=54 M. L. J. 671.

APPEAL.—See 30 Bom. 164=7 Bom. L. R. 803. A suit brought against the guardian of the property of a minor under S. 36 is maintainable though the leave of the Court is obtained subsequent to filing. 22 Bom. L. R. 787=44 B. 602.

his death against his representative, for an account of what the guardian has received in respect of the property of the ward, and may recover in the suit, as trustee for the ward, such amount as may be found to be payable by the guardian or his representative as the case may be.

(2) The provisions of sub-section (1) shall, so far as they relate to a suit against a guardian, be subject to the provisions of S. 440 of the Code of Civil Procedure as amended by this Act.¹

37. Nothing in either of the two last foregoing sections shall be construed to deprive a ward or his representative of any remedy against his guardian, or the representative of the guardian, which, not being expressly provided in either of those sections, any other beneficiary or his representative would have against his trustee or the representative of the trustee.

Termination of Guardianship.

Right of survivorship among joint guardians.

38. On the death of one of two or more joint guardians, the guardianship continues to the survivor or survivors until a further appointment is made by the Court.

39. The Court may, on the application of any person interested, or of its own motion, remove a guardian appointed or declared by the Court, or a guardian appointed by will or other instrument, for any of the following causes, namely :—

- (a) for abuse of his trust ;
- (b) for continued failure to perform the duties of his trust ;
- (c) for incapacity to perform the duties of his trust ;
- (d) for ill-treatment, or neglect to take proper care of his ward ;
- (e) for contumacious disregard of any provisions of this Act or of any order of the Court ;
- (f) for conviction of an offence implying, in the opinion of the Court, a defect of character which unfits him to be the guardian of his ward ;
- (g) for having an interest adverse to the faithful performance of his duties ;
- (h) for ceasing to reside within the local limits of the jurisdiction of the Court ;
- (i) in the case of a guardian of the property, for bankruptcy or insolvency ;
- (j) by reason of the guardianship of the guardian ceasing or being liable to cease, under the law to which the minor is subject :

Sec. 36 (2).—¹ See now Order XXXII, rules 1 and 4 (2) in the First Schedule to the Code of Civil Procedure (Act V of 1908).

Secs. 36 and 37.—A minor can sue the legal representative of his deceased guardian for accounts where the guardian had died without rendering accounts, and S. 41 (3) is no bar to it. 55 P. R. 1918 = 46 I. C. 457.

Sec. 39.—The provisions of the Act apply to guardians appointed by will and action can be taken in regard to them under Ss. 39, 41 & 45. 8 Lah. 366 = 28 Punj. L. R. 367 = 103 I. C. 470 = 9 Lah. L. J. 231 = A. I. R. 1927 Lah. 344.

SCOPE OF SECTIONS.—The Court cannot appoint a guardian of the person of a Hindu minor of a joint family. 57 I. C. 678 = 11 L. W. 596. As to power to remove even testamentary guardians, see 28 Punj. L. R. 127. Appointment of sister's husband as guardian of Mahomedan minor—Effect of the personal law of the minor. See 85 I. C. 624 = 28 O. C. 172 = (1925) Oudh 623. The word 'instrument' in S. 39 must be confined to instruments *ejusdem generis* with a will, and does not cover a compromise decree. 42 I. C. 505 = 6 L. W. 760 (18 Bom. 375, Foll.). A will need not and could not be set aside when the

testator had no legal power to appoint a guardian for the property. 40 Mad. 672 = 34 I. C. 766 = 30 M. L. J. 504. Guardian not validly appointed if trespasser, if could be removed. 21 I. C. 848. Guardian may be removed, if there exists bitter relationship between him and his ward. 7 Lah. L. J. 141 = (1925) Lah. 375 ; 8 L. J. 201. Wishes of minors in a position to exercise their discretion to be consulted (*Ibid.*) Failure by a guardian to comply with the terms of his appointment justifies his removal by the Court. 20 I. C. 1 = 164 P. L. R. 1913. See also 2 O. W. N. 796 (F. B.).

Cl. (e).—Guardian disobeying order under S. 34 (e)—Imposition of fine *ultra vires*. 34 P. R. 1912 = 14 I. C. 789 ; 2 O. W. N. 706 (F. B.).

Cl. (h).—An applicant for guardianship must reside within the jurisdiction of the Court to which he makes the application. 36 All. 280 = 24 I. C. 59. But see also 1924 Nag 224. This is an enabling clause. Person outside jurisdiction can also be appointed in a fit and proper case. (*Ibid.*)

Cl. (j).—A widow appointed as testamentary guardian does not become legally disqualified by

Provided that a guardian appointed by will or other instrument, whether he has been declared under this Act or not, shall not be removed—

(a) for the cause mentioned in clause (g) unless the adverse interest accrued after the death of the person who appointed him, or it is shown that that person made and maintained the appointment in ignorance of the existence of the adverse interest, or

(b) for the cause mentioned in clause (h) unless such guardian has taken up such a residence as, in the opinion of the Court, renders it impracticable for him to discharge the functions of guardian.

Discharge of guardian.

40. (1) If a guardian appointed or declared by the Court desires to resign his office, he may apply to the Court to be discharged.

(2) If the Court finds that there is sufficient reason for the application, it shall discharge him, and if the guardian making the application is the Collector and the Local Government approves of his applying to be discharged, the Court shall in any case discharge him.

Cessation of authority of guardian.

41. (1) The powers of a guardian of the person cease—

(a) by his death, removal or discharge ;

(b) by the Court of Wards assuming superintendence of the person of the ward ;

(c) by the ward ceasing to be a minor ;

(d) in the case of a female ward by her marriage to a husband who is not unfit to be guardian of her person or, if the guardian was appointed or declared by the Court, by her marriage to a husband who is not, in the opinion of the Court, so unfit ; or

(e) in the case of a ward whose father was unfit to be guardian of the person of the ward, by the father ceasing to be so or, if the father was deemed by the Court to be so unfit, by his ceasing to be so in the opinion of the Court.

(2) The powers of a guardian of the property cease—

(a) by his death, removal or discharge ;

(b) by the Court of Wards assuming superintendence of the property of the ward ; or

(c) by the ward ceasing to be a minor.

(3) When for any cause the powers of a guardian cease, the Court may require him or, if he is dead, his representative to deliver as it directs any property in his

re-marriage to continue to be guardian. 18 I.C. 133=32 P. W. R. 1913.

NOTICE.—Removal of guardian—Notice to show cause essential before removal. 27 I. C. 25 =20 C. L. J. 298.

APPEAL.—There is no appeal from an order made by the District Judge refusing to remove a guardian. 14 I. C. 56=195 P. W. R. 1912 '19 Cal. 487 ; 23 Cal. 201 ; 20 Bom. 667=20 All. 433, Foll.) Order removing guardian is appealable. 1925 Oudh 260.

Sec. 40.—Application for removal of guardian dismissed—Subsequent application is barred. 20 A. L. J. 959=45 A. 196=1922 A. 540

Sec. 41, cl. (3).—On an application for the discharge of guardian, the Court has power to direct an investigation into his accounts filed in Court. See 92 I. C. 98=A. I. R. 1926 Mad. 419. But see 50 Mad 80. Sec. 41 does not authorise a court to order accounts to be rendered after the termination of the guardianship. 49 I. C. 132=29 C. L. J. 44. See also 18 S.L.R. 85=(1925) Sind 269. S. 41 has no application to guardians whose powers had ceased by reason of their wards having attained majority or otherwise before the passing of the Act. 17 Bom. 566. The

guardian must without prejudice to his title or to anything he could establish by suit be compelled to give up possession on ceasing to be guardian. 14 I. C. 674 (2)=112 P. W. R. 1912. The Court has power to require a *de facto* guardian to deliver the infant's properties to the guardian appointed under the Act. 51 I. C. 230=36 M. L. J. 189. A ward cannot maintain a suit against the widow and minor sons of his deceased guardian. 9 I. C. 591=74 P. W. R. 1911 (22 All. 332, Foll. ; 11 Bom. L. R. 190 ; 7 I. C. 214, Dist.). Meaning of 'property belonging to the ward' in S. 41 (3). 51 I. C. 529=(1918) M.W.N. 440. "Any cause" includes death of the minor which terminates the guardian-ship. (*Ibid.*) Death of ward—Power to direct guardian to hand over properties to heir. 51 I. C. 529=(1918) M. W. N. 440. See also 42 All. 1=52 I. C. 167=17 A. L. J. 851 ; 92 I. C. 196=A. I. R. 1925 Sind 269. Death of ward—Succession disputed—Court should not order guardian to hand over properties to one of the claimants. See (1926) M. W. N. 68=22 L.W. 642=92 I. C. 570. If the guardian is incompetent or is otherwise an improper person to be allowed to continue as such, proper proceedings must be taken under Sec. 39 for his removal and

possession or control belonging to the ward or any accounts in his possession or control relating to any past or present property of the ward.

(4) When he has delivered the property or accounts as required by the Court, the Court may declare him to be discharged from his liabilities save as regards any fraud which may subsequently be discovered.

42. When a guardian appointed or declared by the Court is discharged or under the law to which the ward is subject, ceases to be entitled to act, or when any such guardian or a guardian appointed by will or other instrument is removed or dies, the Court, of its own motion or on application under Chapter II, may, if the ward is still a minor, appoint or declare another guardian of his person or property, or both, as the case may be.

Appointment of successor to guardian dead, discharged or removed.

CHAPTER IV.

SUPPLEMENTAL PROVISIONS.

Orders for regulating conduct or proceedings of guardians, and enforcement of those orders.

43. (1) The Court may, on the application of any person interested or of its own motion, make an order regulating the conduct or proceedings of any guardian appointed or declared by the Court.

(2) Where there are more guardians than one of a ward, and they are unable to agree upon a question affecting his welfare, any of them may apply to the Court for its direction, and the Court may make such order respecting the matter in difference as it thinks fit.

(3) Except where it appears that the object of making an order under sub-section (1) or sub-section (2) would be defeated by the delay, the Court shall, before making the order, direct notice of the application therefor or of the intention of the Court to make it, as the case may be, to be given, in a case under sub-section (1), to the guardian or, in a case under sub-section (2), to the guardian who has not made the application.

(4) In case of disobedience to an order made under sub-section (1) or sub-section (2) the order may be enforced in the same manner as an injunction granted under S. 492 or S. 493¹ of the Code of Civil Procedure, in a case under sub-section (1), as if the ward were the plaintiff and the guardian were the defendant or, in a case under sub-section (2), as if the guardian who made the application were the plaintiff and the other guardian were the defendant.

the appointment of another guardian. But until this is done, it is the duty of the Court to render all assistance to the guardian in the discharge of his duties and to see that the minors remain in his custody. 100 I. C. 807 = A. I. R. 1927 Lah. 266.

Sec. 41, cl. (4).—A suit will lie against the guardian's son and a surety to render accounts in the absence of an order of discharge of the guardian. 67 I. C. 935 = 3 Lah. L. J. 364. Even after discharge of guardian his liability continues for mistakes discovered subsequently. 23 A. L. J. 428 = 88 I. C. 165 = 1925 All. 457. To bar a suit by a ward on attaining majority against a guardian for rendition of accounts, the order of discharge under S. 41 (4) must be in express terms. 25 P. R. 1918 = 41 I. C. 344 (34 Cal. 211; 15 C. L. J. 57, Foll.). Order of discharge of guardian must be express—Guardian cannot set up title of third person. 2 Pat. L. T. 556 = 61 I. C. 807 = 6 Pat. L. J. 273. Minor attaining majority—Discharge of guardian—Filing accounts in Court—Court has no power to inquire into correctness of accounts—Separate suit is remedy of minor. 50 Mad. 80 = 24 L. W. 525 = 97 I. C. 578 = A. I. R. 1926 Mad. 977 = 51 M. L. J. 241 (Case-law

reviewed). On this section, *see also* 26 A. L. J. 290 = A. I. R. 1928 All. 259.

Sec. 42. SCOPE.—This section comes into operation only where a guardian is properly removed. 27 I. C. 28 = 20 C. L. J. 298. Object of the section. *See* 4 I. C. 603. Court has power to appoint a person who has not made an application himself and whose name is not mentioned in an application under this section as guardian. (*Ibid.*) An order appointing a guardian under S. 42 is appealable under S. 47. 23 I. C. 776 = 7 S. L. R. 50.

Sec. 43.—A guardian disobeying an order of the District Court under the act can be ordered to give security for his own appearance but cannot be compelled to cause the production of another person. 18 I. C. 922 = 24 M. L. J. 231. Sec. 43 (4) limits the exercise of the powers to punish a disobedience of orders passed under Clauses 1 & 2. 103 I. C. 493. On this section, *see also* 15 C. L. J. 147; 23 I. C. 351; 10 M. L. J. 305; 6 I. C. 862; 16 Bom. 307.

¹ See now Order XXXIX, rules 1 and 2 in the First Schedule to the Code of Civil Procedure (Act V of 1908).

(5) Except in a case under sub-section (2), nothing in this section shall apply to a Collector who is, as such, a guardian.

44. If, for the purpose or with the effect of preventing the Court from exercising its authority with respect to a ward, a guardian appointed or declared by the Court removes the ward from the limits of the jurisdiction of the Court in contravention of the provisions of S. 26, he shall be liable, by order of the Court, to fine not exceeding one thousand rupees, or to imprisonment in the civil jail for a term which may extend to six months.

Penalty for removal of ward from jurisdiction.

45. (1) In the following cases, namely:—

(a) if a person having the custody of a minor fails to produce him or cause him to be produced in compliance with a direction under S. 12, sub-section (1), or to do his utmost to compel the minor to return to the custody of his guardian in obedience to an order under S. 25, sub-section (1), or

(b) if a guardian appointed or declared by the Court fails to deliver to the Court, within the time allowed by or under clause (b) of S. 34, a statement required under that clause, or to exhibit accounts in compliance with a requisition under clause (c) of that section, or to pay into the Court the balance due from him on those accounts in compliance with a requisition under clause (d) of that section, or

(c) if a person who has ceased to be a guardian, or the representative of such a person, fails to deliver any property or accounts in compliance with a requisition under S. 41, sub-section (3),

the person, guardian or representative, as the case may be, shall be liable, by order of the Court, to fine not exceeding one hundred rupees, and in case of recusancy to further fine not exceeding ten rupees for each day after the first during which the default continues, and not exceeding five hundred rupees in the aggregate, and to detention in the civil jail until he undertakes to produce the minor or cause him to be produced, or to compel his return, or to deliver the statement or to exhibit the accounts, or to pay the balance, or to deliver the property or accounts, as the case may be.

(2) If a person who has been released from detention on giving an undertaking under sub-section (1) fails to carry out the undertaking within the time allowed by the Court, the Court may cause him to be arrested and re-committed to the civil jail.

46. (1) The Court may call upon the Collector, or upon any Court subordinate to the Court, for a report on any matter arising in any proceeding under this Act and treat the report as evidence.

(2) For the purpose of preparing the report the Collector or the Judge of the subordinate Court, as the case may be, shall make such inquiry as he deems necessary, and may for the purposes of the inquiry exercise any power of compelling the attendance of a witness to give evidence or produce a document which is conferred on a Court by the Code of Civil Procedure.

Reports by Collectors and Subordinate Courts.

47. An appeal shall lie to the High Court from an order made by a [* *] Court,—

Sec. 45—The word “recusancy” in S. 45 means something more than mere disobedience of an order under Cl. (d) in S. 34. 49 I.C. 624; 17 A.L.J. 377. On this section, see also 16 M. L. J. 286; 1 I. C. 338=11 Bom. L. R. 190. Failure to deposit moneys alleged to be misappropriated—Imposition of fine, if and when legal. 25 C. L. J. 149=36 I. C. 286=21 C. W. N. 688. See also 4 Pat. 264=1925 Pat. 477; 23 A. L. J. 736=88 I. C. 444=1925 All. 785; 7 Pat. L. T. 473. An order by Court directing a guardian to pay unrealised purchase-money from his vendee—Order to pay unrealised money in Court or pay a daily fine—Whether *ultra vires*. 33 I. C. 918=20 C. W. N. 663. Appeal against order of fine. See 23 A. L. J. 736=88 I. C. 444=1925 All. 785.

As to scrutiny by Court of guardian's accounts, see 107 I. C. 152=7 Pat. 144.

Sec. 46.—It is only when the District Court calls upon the Collector to report under S. 46 that it is open to the Court to treat it as evidence. 25 Bom. L. R. 1232=1924 Bom. 157. On this section, see also 26 Bom. 716; 7 A. L. J. 321; 23 Bom. 698.

Sec. 47.—¹ The word “District” was omitted by Act IV of 1926, S. 4. [Repealed by Act XII of 1927.]

Secs. 47 and 48. GENERAL.—Orders under the Act are final except where they are challenged in appeal or revision. See 85 I. C. 667=1925 Cal. 1160; 1925 Oudh 260.

- (a) under S. 7, appointing or declaring or refusing to appoint or declare a guardian ; or
- (b) under S. 9, sub-section (3), returning an application ; or
- (c) under S. 25, making or refusing to make an order for the return of a ward to the custody of his guardian ; or
- (d) under S. 26, refusing leave for the removal of a ward from the limits of the jurisdiction of the Court, or imposing conditions with respect thereto ; or
- (e) under S. 28 or S. 29, refusing permission to a guardian to do an act referred to in the section ; or
- (f) under section 32, defining, restricting or extending the powers of a guardian ; or
- (g) under section 39, removing a guardian ; or
- (h) under section 40, refusing to discharge a guardian ; or
- (i) under section 43, regulating the conduct or proceedings of a guardian or settling a matter in difference between joint guardians, or enforcing the order ; or
- (j) under section 44 or section 45, imposing a penalty.

48. Save as provided by the last foregoing section and by section 622¹ of the Code of Civil Procedure, an order made under this Act shall be final and shall not be liable to be contested by suit or otherwise.

49. The costs of any proceeding under this Act, including the costs of maintaining a guardian or other person in the civil jail, shall, subject to any rules made by the High Court under this Act, be in the discretion of the Court in which the proceeding is had.

50. (1) In addition to any other power to make rules conferred expressly or impliedly by this Act, the High Court may from time to time make rules² consistent with this Act—

CASES WHERE APPEAL LIES.—An appeal lies only against an order appointing a person, guardian of the property of a minor. 30 M. L. J. 508 = 34 I. C. 432. But an order approving the security furnished by him and ratifying the original appointment is not appealable. (*Ibid.*) (27 I. C. 921, Foll.). Order sanctioning sale of minor's property is appealable. 1924 Nag. 269.

CASES WHERE NO APPEAL LIES.—An order refusing to remove a guardian is final and no appeal lies against it. 18 A. L. J. 624 = 56 I. C. 208 ; 1924 Mad. 327. See also 78 I. C. 138 (Order fixing remuneration of guardian). See also 45 Mad. 873 = 45 M. L. J. 481. There is no appeal against an order of the District Judge refusing to order the person in possession of a minor's property to hand over the property to an appointed guardian and referring the guardian to a separate suit. 40 P. L. R. 1012 = 13 I. C. 326 = 115 P. W. R. 1912. An order returning an application for guardianship for presentation for the Court having territorial jurisdiction, is not appealable. 53 I. C. 563 = 107 P. R. 1919. An order of the District Judge sanctioning a marriage of minor girl while an application for appointing a guardian for her is pending is not appealable. 44 Bom. 690 = 57 I. C. 79. Order fixing expense of maintenance and education of minor is not appealable. 1925 Nag. 141. Application dismissed for non-appearance—Second application if lies—Order dismissing the latter application—Appeal. 18 I. C. 985 = 17 C. W. N. 429. Third party in possession of minor's property—If he can be compelled to hand it over to the guardian—Order refusing to compel—Not appealable. 40

P. L. R. 1912 = 13 I. C. 326. No appeal is allowed against an order calling upon a guardian to pay into Court the balance due from him on settlement of his accounts. 55 I. C. 587.

REVISION.—Orders under S. 34 are open to examination by the High Court on the revision side. 55 I. C. 587. See also 78 I. C. 138.

REVIEW.—An order for appointing a guardian of a minor under S. 7 is not open to review. 4 Lah. I. J. 274 = 1922 Lah. 395 (143 P. R. 1906, Foll.). See also 1924 Nag. 269 (Order sanctioning sale of minor's property).

Sec. 48.—¹ See now S. 115 of the Code of Civil Procedure (Act V of 1908).

RIGHT OF SUIT.—[See also under S. 47, *supra*.] An order dismissing an application for guardianship cannot be contested by a regular suit. 33 I. C. 987 = 24 P. W. R. 1916. S. 48 does not cover the case of a requisition under S. 41 (3) and a separate suit will lie to contest the propriety of the requisition under S. 41 (3). 51 I. C. 236 = 36 M. L. J. 189. Order of District Judge fixing amount for marriage expenses is not open to revision. 92 I. C. 482 = A. I. R. 1926 All 301. Whether a valid sanction under S. 31 by a judge could be assailed in any legal proceeding. See 27 O. C. 284 = (1925) Oudh 237.

Sec. 60.—Rules and forms made by the High Court requiring the appointment of guardian to be postponed to the furnishing and approval of security, if *ultra vires*. 34 I. C. 432 = 30 M. L. J. 508.

² For rules made by the Judicial Commissioner, Central Provinces, see Central Provinces Gazette, 1908, Pt. I, p. 765.

(a) as to the matters respecting which, and the time at which, reports should be called for from Collectors and subordinate Courts ;

(b) as to the allowances to be granted to, and the security to be required from guardians, and the cases in which such allowances should be granted ;

(c) as to the procedure to be followed with respect to applications of guardians for permission to do acts referred to in sections 28 and 29 ;

(d) as to the circumstances in which such requisitions as are mentioned in clauses (a), (b), (c) and (d) of section 34 should be made ;

(e) as to the preservation of statements and accounts delivered and exhibited by guardians ;

(f) as to the inspection of those statements and accounts by persons interested ;

(g) as to the custody of money, and securities for money, belonging to wards ;

(h) as to the securities on which money belonging to wards may be invested ;

(i) as to the education of wards for whom guardians, not being Collectors, have been appointed or declared by the Court ; and

(j) generally, for the guidance of the Courts in carrying out the purposes of this Act.

(2) Rules under clauses (a) and (i) of sub-section (1) shall not have effect until they have been approved by the Local Government, nor shall any rule under this section have effect until it has been published in the official Gazette.

51. A guardian appointed by or holding a certificate of administration from a

Applicability of Act to
guardians already appointed by
Court.

Civil Court under any enactment repealed by this Act shall, save as may be prescribed, be subject to the provisions of this Act, and of the rules made under it, as if he had been appointed or declared by the Court under

Chapter II.

52. In section 3 of the Indian Majority Act, 1875, for the words "every minor

Amendment of Indian
Majority Act.

of whose person or property a guardian has been or shall be appointed by any Court of Justice, and every minor under the jurisdiction of any Court of Wards" the following

shall be substituted, namely :—

"every minor of whose person or property, or both, a guardian, other than a guardian for a suit within the meaning of Chapter XXXI¹ of the Code of Civil Procedure, has been or shall be appointed or declared by any Court of Justice before the minor has attained the age of eighteen years, and every minor of whose property the superintendence has been or shall be assumed by any Court of Wards before the minor has attained that age."

53. [*Amendment of Chapter XXXI of the Code of Civil Procedure.*] Repealed by Act V of 1908.

THE SCHEDULE.

ENACTMENTS REPEALED.

(See Section 2.)

Number and year.	Title or subject.	Extent of repeal.
<i>Acts of the Governor-General in Council.</i>		
XIV of 1858 ..	Minors (Madras) ..	The whole.
XL of 1858 ..	Minors (Bengal) ..	So much as has not been repealed.
IX of 1861 ..	Minors ..	The whole.

For rules made by the Chief Commissioner, North-West Frontier Province, see Gazette of India, 1906, Pt. II, p. 446

Sec. 52.—See 29 All. 672 = 4 A. L. J. 597 ; 6

I, C. 6.

¹ See now Order XXXII in the First Schedule to the Code of Civil Procedure (Act V of 1908).

Number and year.	Title or subject.	Extent of repeal.
<i>Acts of the Governor-General in Council—(Contd.).</i>		
XX of 1864 ..	Minors (Bombay) ..	The whole.
XIV of 1869 ..	Bombay Civil Courts Act, 1869 ..	So much of the last paragraph of section 16 as has not been repealed.
VII of 1870 ..	Court-fees Act, 1870 ..	Section 19-H, and article 10 of Schedule I.
IV of 1872 ..	Punjab Laws Act, 1872 ..	So far as it relates to Act XL of 1858.
[* * *] ¹		
XIII of 1874 ..	European British Minors Act, 1874 ..	The whole.
XV of 1874 ..	Laws Local Extent Act, 1874 ..	So far as it relates to any enactment repealed by this Act.
XX of 1875 ..	Central Provinces Laws Act, 1875 ..	So far as it relates to Act XI. of 1858.
XVIII of 1876 ..	Oudh Laws Act, 1876 ..	So far as it relates to Act XL of 1858.
XIII of 1879 ..	Oudh Civil Courts Act, 1879 ..	Clause (1) of section 25 relating to proceedings under Acts XL of 1858 and IX of 1861.
[* * *] ²		
XVIII of 1884 ..	Punjab Courts Act, 1884 ..	So much of section 29 as has not been repealed.
[* * *] ³		
XII of 1887 ..	Bengal, North-Western Provinces and Assam Civil Courts Act, 1887.	Clause (b) of section 23, sub-section (2).
[* * *] ⁴		
<i>Madras Regulations.</i>		
[* * *] ⁵		
X of 1831 ..	Minors' Estates	Section 3.
<i>Regulations under the Statute 37 Victoria, Chapter 3.</i>		
IX of 1874 ..	Arakan Hill District Laws ..	So far as it relates to Acts XL of 1858 and IX of 1861.

HINDU DISPOSITION OF PROPERTY ACT (XV OF 1916).

PREFATORY NOTE.—*Statement of Objects and Reasons.*—The object of the present Bill is to enable Hindus and Mussalmans to dispose of property by transfer *inter vivos* and by will for the benefit of unborn persons within certain limits. According to the Hindu Law as now administered in British India, a gift in favour of a person not in existence at the date of the gift is void; and so also a bequest in favour of a person not in existence at the time of the testator's death. The same is the rule of Mahomedan Law, except that, under the provisions of the Mussalmans Wakf Validating Act, 1913, it is competent to a Mahomedan to settle property for the benefit of unborn persons even in perpetuity, provided the ultimate disposition is for the benefit of charity.

2. Every lawyer familiar with the Indian Courts must have come across a large number of settlements and wills made by Hindus and Mahomedans for the benefit of their children and grand-children. The paramount object of the settlor in all these cases has been to provide not only for his children and grandchildren then in existence, but also for those to be born hereafter. Instead, however, of giving effect to the settlor's intention, the law as now administered completely defeats it. Even where a donor has only one child in existence at the date of the gift, and the gift is made in express terms for the benefit of all his children including those to be born hereafter, the law excludes from the benefit of all gift all children born subsequently to the date of the gift, to the entire subversion of the donor's intention. Similarly, the intention of testators to benefit by their wills their children and grandchildren not in existence at the death of the testators is also defeated. It is to remedy these evils, and to give effect to the settlor's or testator's intention, that the present Bill is proposed. The sole object of the Bill is to enable the Court to carry out the settlor's or testator's intention, which, under the present state of the law, they are

¹ Act XIX of 1873 since entirely repealed by the U.P. Land-Revenue Act, 1901 (U.P. Act III of 1901).

² Act XIV of 1882 since entirely repealed by Act V of 1908.

³ Act XVII of 1885 was repealed by the Cen-

tral Provinces Court of Wards Act (XXIV of 1899).

⁴ Act XI of 1839 was repealed by the Lower Burma Courts Act (VI of 1900).

⁵ Act V of 1804 since entirely repealed by the Mad. Court of Wards Act (Mad. Act II of 1902).

precluded from doing. At the same time, it is recognised that this can only be done within the limits allowed by the rule against perpetuity, and these limits are prescribed in clauses 4 and 5. The effect of the Bill, if passed into law, will be to enable Hindus and Mahomedans to make dispositions of their property to the same extent, and subject to the same limitations as other communities in British India.

Notes on Clauses.—*Clause (4).*—This clause is a reproduction of section 100 of Act I of 1865, and section 13 of Act IV of 1882.

Clause (5).—This clause is a reproduction of section 101 of Act X of 1865, and section 14 of Act IV of 1882. It refers to the rule against perpetuity.

Clause (6).—The effect of this clause is to supersede the decision in L. R. 11 I.A. 64, and other cases following it.

Clause (7).—This clause is a reproduction of section 103 of Act X of 1865, and section 15 of Act IV of 1882. It is also in conformity with the rule of construction laid down by the Privy Council in the Tagore Case.

Clause (8).—The enactments referred to in this clause are the Hindu Wills Act, 1870, the Transfer of Property Act, 1882 and the Indian Trusts Act, 1882.

Select Committee's Report:—The following report of the Select Committee on the Bill to enable Hindus and Mussalmans to make disposition of property by transfer *inter vivos* or by will for the benefit of unborn persons was presented to the Indian Legislative Council on the 19th September, 1916 :—

1. We, the undersigned Members of the Select Committee to which the Bill to enable Hindus and Mussalmans to make dispositions of property by transfer *inter vivos* or by will for the benefit of unborn persons was referred, have considered the Bill and have now the honour to submit this our Report, with the Bill as recast by us annexed thereto.

2. In obedience to the instructions contained in the order of reference, we have so amended the Bill as to confine its operation to Hindus, save that, in the exercise of the discretion vested in us, we have inserted an enabling clause permitting the Governor-General

Council to extend its provisions to the Khoja community in the whole or any part of India where he is satisfied that the community in question desires the extension. Having regard to the existence of the Hindu Transfers and Bequest Act, 1914 (Madras Act 1 of 14), we have limited the extent clause of the Bill so as to exclude the Province of Madras from its operation, but we have inserted a power allowing the Governor-General in Council to extend the Act to that province should this course at any time be considered necessary and desirable.

3. The most important clause in the Bill was clause (3) and this clause, now clause (4), we have re-cast so as to provide that no disposition of property by a Hindu, whether by transfer *inter vivos* or by will, shall be invalid by reason only that any person for whose benefit it may have been made was not in existence at the date of such disposition. We consider that the clause as drawn in this form avoids many of the difficulties which would arise if we had retained the positive form in which it appeared in the Bill as referred to us.

4. Clauses (4) and (5) of the Bill, as referred to us, endeavour to combine the provisions of the relevant sections of the Indian Succession Act, 1865, and the Transfer of Property Act, 1882. The language of the two Acts differs in slight respects, and we think it in every way desirable not to attempt to combine their provisions in a composite clause, and we have preferred in section 3 of the Bill, as revised by us, to incorporate the provisions of the Acts in question by reference. We are well aware that referential legislation of this kind is open to objection, but, in the circumstances, we feel that the practical advantages of reference to a well-known Code, and the incorporation of all the decisions on these provisions outweigh any such objection. In this connection, we have thought well to include the provisions of section 20 of the Transfer of Property Act, 1882, as the wording of the Transfer of Property Act, differing in that respect from the Indian Succession Act, does not without this section, make it clear that the property is vested.

5. The only other change of substance is the omission of clause (6) of the Bill as referred to us. A perusal of the opinions recorded on the Bill leads us to the conclusion that there is no clear manifestation of opinion in favour of the retention of the English rule laid down by the clause in question, and we think, in the absence of any consensus of opinion in favour of the rule, that the clause should be omitted. The remaining alterations are mere alterations of form consequent upon the manner in which the Bill has been recast.

THE HINDU DISPOSITION OF PROPERTY ACT (XV OF 1916).

[28th September, 1916.]

Act to remove certain existing disabilities in respect of the power of disposition of property by Hindus for the benefit of persons not in existence at the date of such disposition.

WHEREAS it is expedient to remove certain existing disabilities in respect of the power of disposition of property by Hindus for the benefit of persons not in existence at the date of such disposition ; it is hereby enacted as follows :—

Short title and extent. 1. (1) This Act may be called THE HINDU DISPOSITION OF PROPERTY ACT, 1916.

(2) It extends, in the first instance, to the whole of British India, except the Province of Madras : Provided that the Governor-General in Council may, by notification in the *Gazette of India*, extend this Act to the Province of Madras.

2. Subject to the limitations and provisions specified in this Act, no disposition of property by a Hindu, whether by transfer *inter vivos* or by will, shall be invalid by reason only that any person for whose benefit it may have been made was not in existence at the date of such disposition.

Dispositions for the benefit of persons not in existence. 3. The limitations and provisions referred to in section 2 shall be the following, namely:—

(a) in respect of dispositions by transfer *inter vivos*, those contained in sections 13, 14 and 20 of the Transfer of Property Act, 1882, and

(b) in respect of dispositions by will, those contained in sections 100 and 101 of the Indian Succession Act, 1865.

4. Where a disposition of property fails by reason of any of the limitations referred to in section 3, any disposition intended to take effect after or upon failure of such prior disposition also fails.

5. Where the Governor-General in Council is of opinion that the Khoja community in British India or any part thereof desire that the provisions of this Act should be extended to such community, he may, by notification in the *Gazette of India*, declare that the provisions of this Act, with the substitution of the word "Khojas" or "Khoja," as the case may be, for the word "Hindus" or "Hindu" wherever those words occur, shall apply to that community in such area as may be specified in the notification, and this Act shall thereupon have effect accordingly.

THE HINDU INHERITANCE (REMOVAL OF DISABILITIES) ACT (XII OF 1928).

An Act to amend the Hindu Law relating to exclusion from inheritance of certain classes of heirs, and to remove certain doubts.

WHEREAS it is expedient to amend the Hindu Law relating to exclusion from inheritance of certain classes of heirs, and to remove certain doubts ; It is hereby enacted as follows:—

Short title, extent and application. 1. (1) This Act may be called THE HINDU INHERITANCE (REMOVAL OF DISABILITIES) ACT, 1928.

(2) It extends to the whole of British India, including British Baluchistan and Sonthal Parganas.

(3) It shall not apply to any person governed by the Dayabhaga School of Hindu Law.

2. Notwithstanding any rule of Hindu Law or custom to the contrary, no person governed by the Hindu Law, other than a person who is and has been from birth a lunatic or idiot, shall be excluded from inheritance or from any right or share in joint family property by reason only of any disease, deformity, or physical or mental defect.

3. Nothing contained in this Act shall affect any right which has accrued or any liability which has been incurred before the commencement thereof, or shall be deemed to confer upon any person any right in respect of any religious office or service or of the management of

Saving and exception.

any religious or charitable trust which he would not have had if this Act had not been passed.

THE HINDU WIDOWS' RE-MARRIAGE ACT (XV OF 1856).

Short title given, Act XIV of 1897.

Declared in force—

Throughout British India, except as regards the Scheduled districts, Act XV of 1874, S. 3 ;

In the Sonthal Parganas, Reg. III of 1872, S. 3, as amended by Reg. III of 1899, S. 3 ;
In the Angul District, Reg. III of 1913, S. 3.

PREFATORY NOTE :—"Our Legislature has on principle been slow to interfere with the marriage laws of India; and in the legalizing of widow marriage, its interference was not gratuitous, but was sought by the Hindus themselves. Pandit Iswar Chandra Vidyasagar pointed out in his celebrated tract, that the re-marriage of widows was not unauthorised by the sastras; and his opinion was accepted by a considerable body of his educated countrymen; and it was to meet their wishes that the Legislature felt induced to pass Act XV of 1856. This we learn from the preamble to this Act." (*See Gooroodas Banerjee's Marriage, and Stridhana, Tagore Law lectures for 1878, 2nd Ed., 1896, p. 256.*)

The following remarks on the provisions of the Act by Justice Gooroodas Banerjee may well be noted.

The Act does not give any rules for determining the eligibility of parties for marriage. It is clearly its intention that this matter should be governed by the ordinary rules of Hindu Law. But these rules are not sufficient to meet every point which might arise in connection with the re-marriage of widows. Thus, one of these rules of selection requires that the parties to marriage should be of different *gotras*; but what is to be regarded as the *gotra* of a widow—the *gotra* of her father, in which she was born or that of her deceased husband, to which she has been transferred by marriage? *Vidyasagara* maintains that her father's *gotra* is to be deemed the *gotra* of a widow for the purposes of her re-marriage, and, considering that her father or some other paternal relation is still her guardian in marriage, I think that view is in accordance with the intention of the Act. Again, the ordinary rules about prohibited degrees do not prohibit the marriage of a man with the mother of his wife, however repugnant to our feelings it may be. No express rule for the prohibition of such marriage is, however, necessary in the Hindu Law, as it prohibits widow marriage altogether. But now that widow marriage has been legalised, the want of such prohibition may be deemed a defect in the law in theory, though, in practice, the universal feeling of repugnance to such improper unions would be sufficient to supply the place of prohibitory rules." (*Ibid.*, pp. 259—263.)

It is the general rule of the Hindu Law, as stated by the Privy Council in *Moniram Kolita v. Keri Kolitani*, 5 C. 776 (788) "that an estate once vested by succession or inheritance is not divested by any act or incapacity which, before succession, would have formed a ground for exclusion from inheritance," and it was held not to have been established that the estate of a widow formed an exception to the rule. But it is equally clear that there were grounds, which, under the Hindu Law, caused a forfeiture of a vested estate. Change of religion did so before Act XXI of 1850 and the Regulations that preceded it. Degradation from caste had the same effect as was pointed out by the Privy Council in the case above referred to at page 792. It is an important question whether a second marriage is a circumstance, like those just mentioned, which determines a widow's estate.

We cannot expect to find express texts on this point in the usual authorities on Hindu Law, because second marriage was a thing they did not contemplate; we cannot expect more than an indication of the view they took of the nature of a widow's estate.

The view is clearly expressed in the text of *Vrihaspathi* which *Jimutavahana* makes the basis of his reasoning on this subject of a widow's estate (*Dayabhaga* XI, 1) "of him whose wife is not deceased half the body survives. How then should another take his property while half his person is alive?" This is difficult to reconcile with a right in a widow who ceases to be the wife or half of the body of her late husband, and becomes the wife and half of the body of another man, to keep the estate of her late husband. The view that on principle a second marriage determines a widow's estate is strengthened by the fact that where second marriages were sanctioned by custom, the further rule seems almost always to have followed, that such re-marriage entailed a forfeiture of the first husband's estate. (*See the cases cited in Mayne's Hindu Law, section 512, and in West and Buhler, Bk. I., ch. 2, S. 72-a, 3rd ed., p. 429*); and again the adoption of the rule of forfeiture on second marriage in the Hindu Widow's Re-marriage Act (XV of 1856) seems to be an indication that the Legislature considered that rule to be in accordance with the principles of Hindu Law. If, therefore, we had to decide this point upon the principles of Hindu Law, and without reference to express legislative enactments, we should be disposed to hold that the widows' estate was determined by her marrying a second time and we do not think this would be in any way inconsistent with what was held in *Moniram Kolita v. Keri Kolitani*,

5 C. 766, namely, that a widow's estate is not forfeited by unchastity during widowhood; for there seems to be a very broad distinction between misconduct on the part of a widow, as a widow, and her ceasing to be a widow." 19 C. 289 (292)—(Per *Wilson, J.*)

THE HINDU WIDOWS' RE-MARRIAGE ACT (XV OF 1856).¹

CONTENTS.

SECTIONS.	PREAMBLE.	SECTIONS.
1. Marriage of Hindu widows legalised.		6. Ceremonies constituting a valid marriage to have the same effect on the marriage of a widow.
2. Rights of widow in deceased husband's property to cease on her re-marriage.		7. Consent to re marriage of a widow who is a minor.
3. Guardianship of children of deceased husband on the re-marriage of his widow.		Punishment for abetting marriage made contrary to this section.
4. Nothing in this Act to render any childless widow capable of inheriting.		Effect of such marriage.
5. Saving of rights of widow marrying, except as provided in Secs. 2 and 4.		Proviso
		Consent to re-marriage of major widow

[25th July, 1856.

An Act to remove all legal obstacles to the marriage of Hindu Widows.

WHEREAS it is known that, by the law as administered in the Civil Courts established in the territories in the possession and under the Government of the East India Company, Hindu widows with certain exceptions are held to be, by reason of their having been once married, incapable of contracting a second valid marriage, and the offspring of such widows by any second marriage are held to be illegitimate and incapable of inheriting property ; and

Whereas many Hindus believe that this imputed legal incapacity, although it is in accordance with established custom, is not in accordance with a true interpretation of the precepts of their religion, and desire that the civil law administered by the Courts of Justice shall no longer prevent those Hindu who may be so minded from adopting a different custom, in accordance with the dictates of their own conscience ; and

Whereas it is just to relieve all such Hindus from this legal incapacity of which they complain, and the removal of all legal obstacles to the marriage of Hindu widows will tend to the promotion of good morals and to the public welfare ; It is enacted as follows :—

1. No marriage contracted between Hindus shall be invalid, and the issue of no such marriage shall be illegitimate, by reason of the woman having been previously married or betrothed to another person who was dead at the time of such marriage, any custom and any interpretation of Hindu law to the contrary notwithstanding.

Marriage of Hindu widows legalised.

¹ Short title, "The Hindu Widows' Re-marriage Act, 1856". See the Indian Short Titles Act, (XIV of 1897).

Sec. 1. SCOPE AND APPLICATION OF ACT.—Act is not retrospective in its operation. 28 Bom. L. R. 431 = 94 I. C. 704 = A.I.R. 1926 Bom. 381. All cases of re-marriage of Hindu widows are governed by Act (XV of 1856). Custom can only take effect within the four walls of that Act, 12 I. C. 623 = 247 P. W. R. 1911. But see also 65 I. C. 117 = 24 I. C. 297. The Act applies to all Hindu widows irrespective of caste regulations concerning re-marriage. 17 I. C. 133 = 8 N. L. R. 128.

Neither the conversion of a widow into Mahomedanism nor her marriage with a Mahomedan husband after conversion could divest her of her interest in her deceased Hindu husband's estate.

35 All. 466 = 20 I. C. 335 = 11 A. L. J. 678.

CUSTOM.—Act does not apply where by custom a widow is permitted to re-marry and does not forfeit the property inherited by her from her former husband. 65 I. C. 117 = 24 O. C. 297. See also 19 Cal. 289 ; 11 All. 330 ; 11 Bom. 119 ; 31 All. 101 ; 15 C. W.N. 579 ; 32 All. 489 ; 11 A. L. J. 693 ; 12 I. C. 623 ; 9 P.L.R. 1912. Act does not override the customs prevailing in Punjab as regards non forfeiture of widow's rights over her deceased husband's property by virtue of S.7 of Act IV of 1872. (Punjab Laws Act 1924) S. 17.

OBJECT OF THE ACT.—It is not the object of the Act to deprive a Hindu widow upon her re-marriage of any right or interest which she had at the time of her re-marriage. 1 Pat. L. R. 390 = 4 P. L. T. 650.

2. All rights and interests which any widow may have in her deceased husband's

Rights of widow in deceased husband's property to cease on her re-marriage.

property by way of maintenance, or by inheritance to her husband or to his lineal successors, or by virtue of any will or testamentary disposition conferring upon her, without express permission to re-marry, only a limited interest in such property, with no power of alienating the same, shall upon her re-marriage cease and determine as if she had then died; and the next heirs of her deceased husband, or other persons entitled to the property on her death, shall thereupon succeed to the same.

3. On the re-marriage of a Hindu widow, if neither the widow nor any other

Guardianship of children of deceased husband on the re-marriage of his widow.

person has been expressly constituted by the will or testamentary disposition of the deceased husband the guardian of his children the father or paternal grandfather or the mother or paternal grandmother, of the deceased husband, or any male relative of the deceased husband, may petition the highest Court having original jurisdiction in civil cases in the place where the deceased husband was domi-

RIGHT OF INHERITANCE.—When after the re-marriage of a widow her son dies and the question is of her right of succeeding to him, the Act must be held not to affect her rights. 1 P. L. T. 650=1924 Pat. 233. A Hindu widow can inherit from her son by a former marriage, though she had re-married at the date of her son's death. 26 C. W. N. 925=1922 Cal. 140. (11 W. R. 82 Rel. 29 Bom. 91 ref.) A re-married Hindu widow succeeds to the property of her son by her first husband, whether or not the Act applies. 79 I.C. 1048=39 C. L. J. 88. (11 W. R. 82 foll.)

Sec. 2.—S. 2 applies not only to widows who could not re-marry before the passing of the Act, but also to those who were not so precluded from re-marrying either by law or custom. In either case, the widow forfeits the estate inherited by her from her former husband. 50 Cal. 727=27 C. W. N. 669=1924 Cal. 98. A Hindu widow of the Jat community, among whom the custom of re-marriage has existed even before 1856, does not forfeit her right in her husband's estate on her re-marriage by virtue of S. 2 of the Act. 49 A. 203=100 I. C. 734=25 A. I. J. 151=A. I. R. 1927 A. 523. A Hindu widow's right to retain property inherited from her husband ceases on her re-marriage, and the reversioners have a right to immediate possession of the properties on her re-marriage. 15 I. C. 6=12 M. L. T. 158=(1 Mad. 226; 22 Cal. 589; 22 Bom. 321; 24 Bom. 89 foll.; 31 All. 161; 1 I. C. 761; 32 All. 489, not foll.) 29 I. C. 612=11 N. L. R. 86. Apart from the Act, under the Hindu law a widow's right to succession is based on the ground that she is half of the body of her deceased husband and that she is capable of conferring spiritual benefits on him. When she re-marries she ceases to be half of the body of her late husband or to be able to confer spiritual benefits on him and she becomes the wife and half of the body of her new husband. 3 P. L. T. 551. (11 A. 330; 31 A. 161; 32 A. 489, diss. 1 M. 226; 41 M. 1078; 21 C. W. N. 906; 22 C. 589; 14 C. W. N. 346; 8 C. L. J. 542, rel.) An outcaste Hindu widow does not cease to be a Hindu and if she re-marries the provisions of the Act would apply. An alienation by her of her first husband's property after her re-marriage would be invalid. 54 I. C. 820. A Hindu widow loses all rights in the property of her first husband even if she is converted

and married to a person of another religion. 41 Mad. 1078=35 M. L. J. 317=48 I. C. 50 (F. B.) (Overruling 44 I. C. 299). 7 I. W. 411=(1918) M. W. N. 274 is not now good law. See also 35 All. 466=20 I. C. 335=11 A. L. J. 678. Even a Hindu widow who becomes a Mahomedan and re-marries loses her right to her husband's property. 3 P. L. T. 551. Where a Hindu woman becomes a widow and afterwards embraces Mahammadanism and marries a Mahomedan, and where afterwards, her Hindu sister devises property to her by will, the right of the devisee to the property is not affected. Similarly, when the devisee dies leaving a sister who has also embraced Islam after her widowhood and married a Mahomedan the latter sister can succeed to her property. 21 I. W. 415=(1925) M. W. N. 285=87 I. C. 621=A. I. R. 1025 Mad. 861. Gift by father-in-law to widowed daughter-in-law—Re-marriage—Effect on gift. (1924) M. W. N. 456=1924 Mad. 600=47 M. L. J. 1. This Act applies even to widows among whom there is a caste custom permitting re-marriage. This Act operates as a forfeiture not only of property inherited from her former husband but of all existing rights at the time of re-marriage. 31 I. C. 290=11 N. L. R. 116. But see *contra* 61 I. C. 303=24 O. C. 11; 32 I. C. 338; 40 I. C. 783=21 C. W. N. 900. She will also forfeit her right to maintenance out of the deceased husband's property. 40 I. C. 783=21 C. W. N. 906. Act merely enables widows of those castes to re-marry, who by their custom are prevented from doing so and declares the consequences entailed thereon; it does not alter any customs relating to re-marriage or its legal incidents. 61 I. C. 303=24 O. C. 11. S. 2 of the Act does not apply to a case where a Hindu widow re-marries according to a custom and such custom allows her to retain the property inherited from her first husband. (*Ibid.*)

Sec. 3.—There is nothing in the provisions of the Act that renders obligatory for the court to remove a re-married widow from the guardianship of her minor sons. 38 Cal. 862=15 C. W. N. 579. See also 32 P. W. R. 1913; 4 All. 195 (as to meaning of "children"); 24 Bom. 89. A widow does not cease to be a testamentary guardian of a minor son by re-marriage. 47 P. L. R. 1913=18 I. C. 133. On this Sec. see also 15 C. W. N. 579; 11 W. R. 82; 24 Bom. 89; 33 Bom. 107.

ciled at the time of his death for the appointment of some proper person to be guardian of the said children, and thereupon it shall be lawful for the said Court, if it shall think fit, to appoint such guardian, who when appointed shall be entitled to have the care and custody of the said children, or of any of them during their minority, in the place of their mother; and in making such appointment the Court shall be guided, so far as may be by the laws and rules in force touching the guardianship of children who have neither father nor mother:

Provided that, when the said children have not property of their own sufficient for their support and proper education whilst minors, no such appointment shall be made otherwise than with the consent of the mother unless the proposed guardian shall have given security for the support and proper education of the children whilst minors.

Nothing in this Act to render any childless widow capable of inheriting.

before the passing of this Act, she would have been incapable of inheriting the same by reason of her being a childless widow.

5. Except as in the three preceding sections is provided, a widow shall not, by reason of her re-marriage forfeit any property or any right to which she would otherwise be entitled; and every widow who has re-married shall have the same rights of inheritance as she would have had, had such marriage been her first marriage.

Saving of rights of widow marrying, except as provided in sections 2 and 4.

6. Whatever words spoken, ceremonies performed or engagements made on the marriage of a Hindu female who has not been previously married, are sufficient to constitute a valid marriage, shall have the same effect if spoken, performed or made on the marriage of a Hindu widow; and no marriage shall be declared invalid on the ground that such words, ceremonies or engagements are inapplicable to the case of a widow.

Ceremonies constituting valid marriage to have same effect on widow's marriage.

7. If the widow re-marrying is a minor whose marriage has not been consummated, she shall not re-marry without the consent of her father, or if she has no father, of her paternal grandfather, or if she has no such grandfather, of her mother, or, failing all these, of her elder brother, or failing also brothers, of her next male relative.

Consent to re-marriage of minor widow.

Punishment for abetting marriage made contrary to this section.

All persons knowingly abetting a marriage made contrary to the provisions of this section shall be liable to imprisonment for any term not exceeding one year or to fine or to both.

And all marriages made contrary to the provisions of this section may be declared void by a Court of law: Provided, that in any question regarding the validity of a marriage made contrary to the provisions of this section, such consent as is aforesaid shall be presumed until the contrary is proved, and that no such marriage shall be declared void after it has been consummated.

Effect of such marriage. Proviso.

Consent to re-marriage of major widow.

In the case of a widow who is of full age, or whose marriage has been consummated, her own consent shall be sufficient consent to constitute her re-marriage lawful and valid.

Sec. 5. [See also notes under Ss. 1, 2 and 3 *supra*.] The object of the Act is to remove all legal obstacles to Hindu widow re-marriages. S. 5 was never intended to lay down any proposition regarding the inheritance by a Hindu widow. 45 Bom. 1247 = 63 I. C. 947. A re-married Hindu widow is not entitled to inherit as a gotraja sapin-

da to the relations of her first husband. (*Ibid.*)

Sec. 7.—The marriage of a minor widow is not valid unless consented to by the persons enumerated in S. 7. But if the first marriage has been consummated, the consent of the minor widow herself is enough. 9 P. L. R. 1912 = 12 I. C. 623. See also 8 All. 143.

THE ILLUSORY APPOINTMENTS AND INFANTS' PROPERTY ACT (XXIV OF 1841).¹

Short title given, Act XIV of 1897 ;

Rep. in pt., Act XXVII of 1866 ; Act VIII of 1868 ; Act XVI of 1874 ; Act XII of 1897.

PREFATORY NOTE.—ENGLISH LAW AS TO ILLUSORY APPOINTMENTS.—The first statutory alteration of the law relating to illusory appointments was made in 1830 by the Act 11 Geo. IV and 1 Will. IV, c. 43. It is entitled “an Act to amend the law relating to illusory appointments.” It enacted that no appointment which from and after the passing of the Act should be made in exercise of a power should be impeached in equity or at law as illusory by reason of giving only an unsubstantial or nominal share to any object of the power. It provided, however, that nothing in the Act should prejudice or affect any provisions in any deed, will, or other instrument creating the power which declared the amount of the share from which no object of the power should be excluded; nor, on the other hand, should anything in the Act contained be deemed to give any other validity, force, or effect to any appointment than such appointment would have had if a substantial share of the property affected by the power had been thereby appointed to, or left unappointed to devolve upon any object of the power. The enactments are retrospective and apply to powers in *esse* at the time of, but executed after, the passing of the Act (*Reid v. Reid*, 1858, 25 Beav. 469; 53 E. R. 716).

According to the old law, where a power of appointment was given to A to appoint among a class in such shares as A should direct, the presumed intention of the donor of the power was to give an actual and substantial share to each of the objects of the power. A the appointer, could not in exercising the power, exclude any one of the class this would be an exclusive appointment and bad (*see Buller v. Plummer*, 1870 L. R. 6 Ch. 160.) The whole theory is tersely stated by Jessel M. R., in his Judgment in *Gainsford v. Dunn*, 1874, L. R. 17 Eq. 405. Speaking of this interpretation of the intention, he says : “ That was not according to the literal wording of the power, but it made sense of it; because if the appointment of a farthing would do, then on the principle of *de minimis non curat lex* it would make every non-exclusive power an exclusive power. However, that doctrine was found inconvenient....” The inconvenience arose from the obvious reason that it was impossible to determine without litigation what precise amount was or was not a substantial sum in accordance with the presumed intention of the donor of the power. The Act therefore put the question aside by making any share, though purely nominal, sufficient to make the exercise of the power non-exclusive. The process of reasoning that inspired this statutory change seems to have been that the practical exclusion of an object could not, like the total exclusion, owe its origin to an oversight or omission on the part of the appointer, and therefore it was not a proper case for any interference by a Court of equity. “ One would have imagined,” says Jessel, M. R. in the case quoted, “ that the reasonable mode of altering the law would have been to make every power of appointment exclusive, unless the author of the settlement had pointed out the minimum share which every object was to get,” instead of allowing an appointment to be impeached because the appointer omitted to appoint the necessary farthing. In the same year, 1874, the Statute 37 and 38 Vict. c. 37, rectified the anomaly by enacting that no appointment which, from and after the passing of the Act, shall be made in exercise of a power of appointment, shall be invalid at law or equity on the ground that any object of such power has been altogether excluded, but every such appointment shall be valid and effectual, notwithstanding that any one or more of the objects shall not thereby, or in default of appointment take a share or shares of the property subject to the power. But the provisions of the Act are not to prejudice or affect any declaration in a deed, will or other instrument fixing the amount or the share or shares from which no object of the power shall be excluded, or some one or more object or object of it shall not be excluded. See Title “Powers” and “Illusory Appointments” in Ency. of the Laws of England, 2nd Ed., Vol. VII, pp. 24-25.

CONTENTS.**SECTIONS.**

1. [*Repealed.*]
2. Extension of 11 Geo. IV and 1 Wm. IV. c. 43, ss. 10 and 11.
3. [*Repealed.*]

SECTIONS

4. Extension of 11 Geo. IV and 1 Wm. IV, c. 47, ss. 10 and 11.
5. Saving of certain cases and proceedings.

An Act for the greater uniformity of the Law administered by Her Majesty's Supreme Courts with that administered in England, in regard to the undis-

¹ Short title, “ The Illusory Appointments and Infants' Property Act, 1841 ” See the Indian Short Titles Act (XIV of 1897).

The whole Act, except so far as it relates to illusory appointments and infants, and except

posed residue of the effects of Testators, *Illusory Appointments, the transfer of Estates by persons under disabilities pursuant to the direction of Courts and the better management of the property of such persons and other like matters.*

[16th July, 1830.

1. [Extension of 11 Geo. 4 and 1 Will. 4, c. 46.] Repealed by the *Repealing Act (VIII of 1868).*

2. [* * * *] 1 The Statute 11 George IV and 1 William IV, Chapter

STATUTE 11 GEO. IV & 1 WM. IV, Ch. 46.

PREAMBLE.—WHEREAS, by deeds, wills, and other instruments, powers are frequently given to appoint real and personal property amongst several objects, in such manner that none of the objects can be excluded by the donee of the power from a share of such property; and whereas appointments in exercise of such powers whereby an unsubstantial, illusory, or nominal share of the property affected thereby is appointed to or left unappointed to devolve upon any one or more of the objects thereof are invalid in equity, although the like appointments are good and binding at law: And whereas considerable inconvenience hath arisen from the rule of equity relative to such appointments, and it is expedient that such appointments should be as valid in equity as at law; Be it therefore enacted, etc.

ILLUSORY APPOINTMENTS SHALL BE VALID IN EQUITY AS WELL AS AT LAW.—That no appointment which from and after the passing of this Act shall be made in exercise of any power or authority to appoint any property, real or personal, amongst several objects, shall be invalid or impeached in equity, on the ground that an unsubstantial, illusory, or nominal share only shall be thereby appointed to or left unappointed to devolve upon any one or more of the objects of such power; but that every such appointment shall be valid and effectual in equity as well as at law, notwithstanding that any one or more of the objects shall not thereunder, or in default of such appointment, take more than an unsubstantial, illusory, or nominal share of the property subjected to such power.

2. NOT TO AFFECT ANY DEED WHICH DECLARES THE AMOUNT OF THE SHARE; NOR TO GIVE ANY OTHER FORCE TO ANY APPOINTMENT THAN THE SAME WOULD HAVE HAD.—Provided always, and be it further enacted that nothing in this Act contained shall prejudice or affect any provision in any deed, will, or other instrument creating any such power as aforesaid which shall declare the amount of the share or shares from which no object of the power shall be excluded.

3. Provided also, and be it further enacted, and declared, that nothing in this Act contained shall be construed, deemed or taken, at law or in equity, to give any other validity, force, or effect to any appointment, than such appointment would have had if a substantial share of the property affected by the power had been thereby appointed to or left unappointed to devolve upon any object of such power.

STATUTE 11 GEO. IV & 1 WM. IV, Ch. 65.²

An Act for consolidating and amending the Law relating to Property belonging to Infants, Feme-Coverts, Idiots, Lunatics, and Persons of unsound mind.

[23rd July, 1830.

12. GUARDIANS OF MINORS, ETC., IN ORDER TO THE SURRENDER AND RENEWAL OF LEASES MAY APPLY TO THE COURT OF CHANCERY, ETC., AND BY ORDER MAY SURRENDER SUCH LEASES AND RENEW THE SAME, ETC.—And be it further enacted, that in all cases where any person, being under the age of twenty-one years..... is or shall, become entitled to any lease or leases made or granted or to be made or granted for the life or lives of one or more person or persons, or for any term of years, either absolute or determinable upon the death of one or more person or persons, or otherwise, it shall be lawful for such person under the age of twenty-one years, or for his or her guardian or other person on his behalf..... to apply to the Court of Chancery in England, the Courts of Equity of the Counties Palatine of Chester, Lancaster and Durham, or the Courts of Great Session of the Principality of Wales respectively, as to land within their respective jurisdiction, by petition or motion in a summary way; and by the order and direction of the said Courts respectively such infant or his guardian, or any person appointed in the place of such infant.....

S. 5. was repealed by the Repealing Act (VIII of 1868).

Sec. 2.—1 The words "And it is hereby enacted that" at the beginning of S. 2 and the words "from the first day of January next" after the word "shall" in the same section were repealed by the Repealing Act (XVI of 1874).

² Short title. "The Infants' Property Act, 1830." See the Short Titles Act, 1890 (56 & 60 Vict. c. 14).

As to the repeal of parts of the Act in England see the Statute Law Revision Act 1873 (36 & 37 Vict. c. 91).

46, entitled "An Act to alter and amend the Law relating to Illusory Appointments," and the Statute 11 George IV and 1 William IV, chapter 65, entitled "An Act for

.....by the said Courts respectively, shall and may be enabled from time to time, by deed or deeds to surrender such lease or leases, and accept and take, in the place and for the benefit of such person under the age of twenty-one years,.....one or more new lease or leases of the premises comprised in such lease surrendered by virtue of this Act, for and during such number of lives, or for such term or terms of years determinable upon such number of lives, or for such term or terms of years absolute, as was or were mentioned or contained in the lease or leases so surrendered at the making thereof respectively, or otherwise as the said Courts shall respectively direct.

1* * * * *

14. CHARGES ATTENDING RENEWAL TO BE CHARGED ON THE ESTATES AS THE COURT SHALL DIRECT.—And be it further enacted, that every sum of money and other consideration paid by any guardian,.....or other person as a fine, premium, or income, or in the nature of a fine, premium, or income, for the renewal of any such lease, and all reasonable charges incident thereto, shall be paid out of the estate or effects of the infant for whose benefit the lease shall be renewed, or shall be a charge upon the leasehold premises, together with interest for the same, as the said Courts and Lord Chancellor, intrusted as aforesaid respectively shall direct and determine; and as to leases to be made upon surrenders by females covert, unless the fine or consideration of such lease and the reasonable charges shall be otherwise paid or secured, the same, together with interest, shall be a charge upon such leasehold premises for the benefit of the person who shall advance the same.

15. NOW LEASES SHALL BE TO THE SAME USES.—And be it further enacted, that every lease to be renewed as aforesaid shall operate and be to the same uses, and be liable to the same trusts, charges, incumbrances, dispositions, devises, and conditions, as the lease to be from time to time surrendered as aforesaid was or would have been subject to in case such surrender had not been made.

16. INFANTS EMPOWERED TO GRANT RENEWALS OF LEASES.—And be it further enacted, that where any person, being under the age of twenty-one years.... might in pursuance of any covenant or agreement, if not under disability be compelled to renew any lease made or to be made for the life or lives of one or more person or persons, or of any term or number of years absolute or determinable on the death of one or more person or persons, it shall be lawful to and for such infant, or his guardian in the name of such infant by the direction of the Court of Chancery, to be signified by an order to be made in a summary way upon the petition of such infant or his guardian.....or of any person entitled to such renewal, from time to time to accept of a surrender of such lease, and to make and execute a new lease of the premises comprised in such lease, for and during such number of lives, or for such term or terms determinable upon such number of lives, or for such term or terms of years absolute, as was or were mentioned in the lease so surrendered at the making thereof, or otherwise, as the Court by such order shall direct.

17. COURT OF CHANCERY MAY AUTHORIZE LEASES TO BE MADE OF LANDS BELONGING TO INFANTS WHEN IT IS TO THE BENEFIT OF THE ESTATE.—And be it further enacted, that where any person, being an infant under the age of twenty-one years, is or shall be seized or possessed of or entitled to any land in fee or in tail, or to any leasehold land for an absolute interest, and it shall appear to the Court of Chancery to be for the benefit of such person that a lease or under-lease should be made of such estates for terms of years, for encouraging the erection of buildings thereon, or for repairing buildings actually being thereon, or the working of mines, or otherwise improving the same, or for farming or other purposes, it shall be lawful for such infant, or his guardian in the name of such infant, by the direction of the Court of Chancery, to be signified by an order to be made in a summary way upon the petition of such infant or his guardian, to make such lease of the land of such persons respectively, or any part thereof, according to his or her interest therein respectively, and to the nature of the tenure of such estates respectively, for such term or terms of years, and subject to such rents and covenants as the said Court of Chancery shall direct; but in no such case shall any fine or premium be taken, and in every such case the best rent that can be obtained, regard being had to the nature of the lease shall be reserved upon such lease; and the leases, and covenants and provisions therein, shall be settled and approved of by a Master of the said Court, and a counterpart of every such lease shall be executed by the lessee or lessees therein to be named, and such counterparts shall be deposited for safe custody in the Master's office until such infant shall attain twenty-one, but with liberty to proper parties to have the use thereof, if required, in the meantime, for the purpose of enforcing any of the covenants therein contained; provided that no lease be made of the capital mansion house and the park and grounds respectively held therewith for any period exceeding the minority of any such infant.

consolidating and amending the Law relating to property belonging to infants, feme-coverts, idiots, lunatics and persons of unsound mind," shall [* * * *] be extended to the territories of the East India Company, as far as it is applicable to the same.

3. [Extension of 11 Geo. IV and 1 Wm. IV c. 60.] Rep. by the Indian Trustee Act (XXVII of 1866).

* * * * *
25. SO MUCH OF 1 GEO. I., c. 10, s. 9, AS ENACTS THAT AGREEMENTS OF GUARDIANS SHALL BIND INFANTS, REPEALED.—And whereas by an Act passed in the first year of the reign of King George the First intituled *An Act for making more effectual Her late Majesty's gracious Intentions for augmenting the Maintenance of the poor Clergy*,³ it was enacted that the agreements of guardians for and on behalf of infants or idiots under their guardianship should be as good and effectual to all intents and purposes as if the said infants or idiots had been of full age and of sound mind, and had themselves entered into such agreements: And whereas it is desirable that the said powers should be exercised under proper control, and that the same should be extended to all persons against whom a commission of lunacy shall have issued; Be it further enacted, that so much of the said Act of the first year of the reign of King George the First, as is hereinbefore recited, shall be and the same is hereby repealed.

26. SUCH AGREEMENTS MAY BE MADE BY GUARDIANS WITH THE APPROBATION OF THE COURT.—And be it further enacted, that the guardian of any infant, with the approbation of the Court of Chancery, to be signified by an order to be made on the petition of such guardian in a summary way, may enter into any agreement for or on behalf of such infant which such guardian might have entered into by virtue of the said last recited Act, if the same had not been repealed.

* * * * *
32. COURT OF CHANCERY OR EXCHEQUER MAY ORDER DIVIDENDS OF STOCK BELONGING TO INFANTS TO BE APPLIED FOR MAINTENANCE.—And be it further enacted that it shall be lawful for the Court of Chancery, by an order to be made on the petition of the guardian of any infant in whose name any stock shall be standing, or any sum of money, by virtue of any Act for paying off any stock, and who shall be beneficially entitled thereto, or if there shall be no guardian, by an order to be made in any cause depending in the said Court, to direct all or any part of the dividends due or to become due in respect of such stocks or any such sum of money, to be paid to any guardian of such infant, or to any other person according to the discretion of such Court, for the maintenance and education or otherwise for the benefit of such infant, such guardian or other person to whom such payment shall be directed to be made being named in the order directing such payment; and the receipt of such guardian or other person for such dividends or sum of money, or any part thereof, shall be as effectual as if such infant had attained the age of twenty-one years and had signed and given the same.

* * * * *
11 GEO. IV and 1 WM. IV, CHAP. XLVII.

An Act for consolidating and amending the Laws for facilitating the payment of debts out of real Estate.

[16th July, 1830.

XI. INFANTS TO MAKE CONVEYANCES UNDER ORDER OF THE COURT.—⁵And be it further enacted, that where any suit hath been or shall be instituted in any Court of Equity, for the payment of any debts of any person or persons deceased, to which their heir or heirs, devisees, may be subject or liable, and such Court of Equity shall decree the estates liable to such debts or any of them, to be sold for satisfaction of such debt or debts, and by reason of the infancy of any such heir or heirs, devisee or devisees, an immediate conveyance thereof cannot, as the law at present stands, be compelled, in every such case such Court shall direct, and, if necessary, compel such infant or infants to convey such estates so to be sold (by all proper assurances in the law) to the purchaser or purchasers thereof, and in such manner as the said Court shall think proper and direct; and every such infant shall make such conveyance accordingly; and every such conveyance

¹ Repealed by Act XVI of 1874.

² This section has been repealed in England by the Statute Law Revision Act, 1875 (36 & 37 Vict., c. 91), Schedule.

³ "The Queen Anne's Bounty Act, 1716." See the Short Titles Act (59 & 60 Vict., c. 14).

⁴ Short title, "The Debts Recovery Act, 1830"

See the Short Titles Act, 1896 (59 & 60 Vict., c. 14).

⁵ The initial words "And be it further enacted that" were repealed in England by the Statute Law Revision Act, 1888 (51 and 52 Vict., c. 57), Schedule.

4. [* * *

Extension of II Geo. IV
and I Wm. IV, c. 47, ss. 10
and 11.

] 1 Section [* *] 2 11 of the 11 George IV and
I William IV, chapter 47, entitled " an Act for consolidat-
ing and amending the laws for facilitating the payment of
debts out of real Estate, " shall [* * *] 1 be ex-
tended to the territories of the East India Company, as
far as it is applicable in the same.

5. [* * *

Saving of certain cases and
proceedings.

*] 1 This Act shall not be construed to affect any case
which would not have been governed by English law as
administered by Her Majesty's Supreme Courts previous
to the passing thereof [* * *] 3

THE IMMIGRATION INTO INDIA ACT (III OF 1924).

The following is the Statement of Objects and Reasons annexed to the Bill :—

" The Imperial Conference have decided in favour of reciprocity of treatment of British subjects resident in various parts of His Majesty's dominions. The present Bill is intended to give effect to that decision. The Union Government of South Africa have recently assented to all the ordinances imposing galling restrictions on Indians, and they have promised legislation next year with a view to segregate them. In the circumstances it is necessary, that the Indian Legislature should arm the Government of India with the power to enforce the principle of reciprocity. (See Fort St. George Gazette, part III, p. 433, dated 14th August, 1923.)

[1st March, 1924.

An Act to regulate the entry into and residence in British India of persons domiciled in other British Possessions.

WHEREAS it is expedient to make provision for regulating the entry into and residence in British India of persons domiciled in the British Possessions on a basis of reciprocity; It is hereby enacted as follows :—

Short title, commencement
and extent.

1. (1) This Act may be called THE IMMIGRATION
INTO INDIA ACT, 1924.

(2) It shall come into force on such date as the Governor-General in Council may notify in the Gazette of India.

(3) It shall extend to the whole of British India, including British Baluchistan.

Definitions

2. In this Act, unless there is anything repugnant in
the subject or context,—

(a) " British Possession " means any Part of His Majesty's Dominions other than British India, the United Kingdom and Ireland, and includes Protectorates and territories which are or may be administered by Dominion as a mandatory on behalf of the League of Nations;

(b) " entry " includes landing at any port in British India during the period the ship's stay on her way to a destination outside British India.

3. The Governor-General in Council may make rules for the purpose of securing that persons not being of Indian origin, domiciled in any British Possession, shall have no greater rights and privileges, as regards entry into and residence in British India,

Rules as regards entry into
and residence in British India.

shall be as valid and effectual to all intents and purposes as if such person or persons being an infant or infants, was or were at the time of executing the same of the full age of twenty-one years.

* * * * *

¹ The words " And whereis it is expedient to adopt the amendments of the English Law touching the delay of action, suits, or other proceedings, by reason of the parol demurring; and touching conveyances made by infants under order of Courts; it is hereby enacted that " the words " from the first day of January next " in S. 4, and the words " And it is hereby provid-

ed, that " in section 5 were repealed by the Repealing Act (XVI of 1874).

² The figures and word, " 10 and " were repealed by the Repealing and Amending Act (XII of 1891).

³ Certain words were repealed by Act XII of 1891.

than are accorded by the law and administration of such Possession to persons of Indian domicile.

4. The Governor-General in Council may, without prejudice to the generality of the powers contained in section 3 of this Act make rules—

Power to make rules

(a) to provide for the establishment of a suitable agency to administer the rules and to define its functions and powers ;

(b) to provide suitable penalties for the contravention of such rules or attempt to contravene them, or the abetment of such contravention ; and

(c) to authorize the arrest of any person contravening or reasonably suspected of contravening any such rule, and to prescribe the duties of public servants and others in regard to such arrests.

5. If any person alleged to be domiciled in any British Possession and to be subject to the provisions of this Act raises the plea that

Person claiming exemption to establish case.

he is not so domiciled or that the provisions of the said Act do not apply to him, the onus of proving the truth of

such plea shall lie on the aforesaid person.

THE IMPERIAL BANK OF INDIA ACT (XLVII OF 1920).

S. 13-A inserted by Act XVII of 1924.

PREFATORY NOTE :—The following are extracts from the Statement of Objects and Reasons.

“ For constituting and regulating the Government Banks, *i.e.*, those banks which had dealings with the Government of the country, Statutory aid had been invoked as is instanced by Statute 47 George III, Sec. 2, Chap. 68 in the days of the East India Company.

Prior to 1862, Acts VI of 1839, III of 1840, IX of 1843, XXI of 1854, and Act XXVII of 1855—Acts of the Governor-General as well as of the Governors-in-Council of Madras and Bombay—constituted and regulated the Banks of Bengal, the Bank of Bombay and the Bank of Madras. In the eight years up to 1870, the Governor-General-in-Council passed 5 Acts to the same end. The Governor of Bombay in Council passed 3 Acts in the same period, and to the Governor of Fort St. George in Council, Acts VI of 1866 and I of 1871 owe their promulgation. The Presidency Banks Act, 1876, consolidated the scattered legislation amplifying and modernising it in accordance with the company law then prevailing. The Act was amended by Acts V of 1879, XX of 1899, I of 1907 and by Act VIII of 1916.

To foster and promote the growth of improved banking facilities in the country, and to render the money resources of India more accessible to the trade and industry, the fusion of the above named Presidency Banks into a single strong unified Bank in close relation with Government had long been considered necessary by the thoughtful public and the Government. After mature deliberation, Act XLVII of 1920, was passed creating a great national institution—The Imperial Bank of India—having ample resources for the assistance of trade, constituting itself an example of sound banking to other banks, an institution which will assist not only the State, but the public, and all sections of the public. The proposal, the terms of the consolidation and the advantages to accrue were approved by the share-holders and proprietors of the 3 Presidency Banks, by the Government of India and by the Secretary of State.

The Act came into effect on the 27th January 1921 ‘the day appointed’ (*vide*) Sec. 1, cl. (2) by the Governor-General in Council and the Bank of Bengal, the Bank of Bombay and the Bank of Madras as constituted by Act XI of 1876, stood dissolved on that date.

The Act provides for a large initial increase of the capital of the Bank when compared with the total capital of the 3 defunct banks. The Bank is empowered to transact the same class of business with considerable extensions to the same, but it is restricted in its activities in London. It is not permitted to do exchange business but can only keep accounts and deposits for its Indian customers. The Bank can enter into an agreement with the Secretary of State in Council but the instructions of the Governor-General in Council (*vide* S. 10) are to be carried out in matters vitally affecting his financial policy. In addition to the branches at present existing 63 in number, one hundred branches are to be opened before the 26th January, 1926.

The General control of the Bank vests in a Central Board constituted by the Board of Governors. This Board includes, besides the chief officials of the Bank, the Controller of Currency who represents Government interests on the Board, and Non-official Governors—not to exceed 4 in number,—nominated by the Governor-General in Council. And the object of this provision is to give representation to the general tax-payer in view of the

use of the Government balances which the Bank will obtain on the conclusion of the above-mentioned agreement with the Secretary of State in Council.

The provisions regulating this statutory corporation have been recast and revised in the light of the further development of company law."

THE IMPERIAL BANK OF INDIA ACT (XLVII OF 1920).

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[19th September, 1920.]

An Act constitute on Imperial Bank of India and for other purposes.

WHEREAS it is expedient to constitute an Imperial Bank of India and to transfer to the Bank so constituted the undertaking of each of the Presidency Banks and to dissolve those Banks and to make provision for the regulation and management of the Imperial Bank of India ; It is hereby enacted as follows:—

Short title and commencement.

1. (1) This Act may be called THE IMPERIAL BANK OF INDIA ACT, 1920.

(2) It shall come into force on such date as the Governor-General in Council may, by notification in the *Gazette of India*, appoint.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or contest,—

(a) "appointed day" means such day as the Governor-General in Council may appoint for the commencement of this Act ;

(b) "the Bank of Bengal" "the Bank of Madras" and "the Bank of Bombay" mean, respectively, those Banks as constituted by the Presidency Banks Act, 1876 ;

(c) "dividend" includes bonus ;

(d) "general meeting" means the annual meeting of the shareholders of the Bank ;

(e) "goods" includes also bullion, wares and merchandise ;

(f) "local meeting" means the annual meeting of the shareholders whose names are registered in a branch register ;

(g) "meeting" includes an adjourned holding of a meeting ;

(h) "prescribed" means prescribed by by-laws made under this Act ;

(i) "Presidency Banks" means the Bank of Bengal, the Bank of Madras, and the Bank of Bombay as constituted by the Presidency Banks Act, 1876, and a "Presidency Bank" means any one of these Banks ;

(j) "special local meeting" means a meeting of the shareholders whose names are registered in a branch register, convened for the transaction of some particular business specified in the notice convening the meeting ;

(k) "special local resolution" means a resolution passed at a special local meeting ;

(l) "special meeting" means a meeting of shareholders convened for the transaction of some particular business specified in the notice convening the meeting ; and

(m) "special resolution" means a resolution passed at a special meeting.

CHAPTER I.

ESTABLISHMENT AND INCORPORATION OF THE IMPERIAL BANK OF INDIA.

3. (1) A Bank to be called the Imperial Bank of India and in this Act referred to as "the Bank" shall be constituted for the purpose of taking over the undertakings of the Presidency Banks and to carry on the business of banking in accordance with the provisions of this Act.

(2) Every person who, immediately before the appointed day, was registered as a shareholder or as a holder of stock in any of the Presidency Banks, together with such other persons as may from time to time become shareholders in the Bank in accordance with the provisions of this Act, shall, as long as they are shareholders in the Bank constitute a body corporate with perpetual succession and a common seal under the name of the Imperial Bank of India and shall sue and be sued in that name.

(3) Subject to the provisions of this Act, the capital of the Bank shall consist of one hundred and twelve millions and five hundred thousand rupees divided into shares of five hundred rupees each.

(4) The liability of the shareholders of the Bank shall be limited to the amount not fully paid on their shares.

CHAPTER II.

TRANSFER OF THE UNDERTAKINGS OF PRESIDENCY BANKS TO THE IMPERIAL BANK.

4. (1) Subject to the provisions of this Act, as from the appointed day, the undertakings of each of the Presidency Banks shall be transferred to and shall vest in the Bank.

(2) The undertaking of a Presidency Bank shall be deemed to include all rights powers, authorities and privileges and all property, moveable or immoveable, including cash balances, reserve funds, investments and all other interests and rights in or arising out of such property as may be in the possession of that Bank immediately before the appointed day, and all books, accounts and documents relating thereto, and shall also be deemed to include all debts, liabilities and obligations of whatever kind then existing of that bank.

(3) If, on the appointed day, any suit, appeal or legal proceeding of whatever nature is pending by or against any Presidency Bank, the same shall not abate, be discontinued or be in any way prejudicially affected by reason of the transfer to the Bank of the undertaking of such Presidency Bank or of anything in this Act, but the suit, appeal or proceeding may be continued, prosecuted and enforced by or against the Bank.

(4) All contracts, deeds, bonds, agreements and other instruments of whatever nature subsisting or having effect immediately before the appointed day and to which any Presidency Bank is a party shall be of as full force and effect against or in favour

of the Bank, as the case may be, and may be enforced as fully and effectually as if instead of the Presidency Bank the Bank had been a party thereto.

5. (1) The name of every person who immediately before the appointed day was registered as a shareholder in any of the Presidency Banks shall be registered in accordance with the provisions of this Act hereinafter appearing as holding the same number of shares in the Bank as stood in his name in the register of such Presidency Bank :

Provided that, for the purposes of this section two half-shares standing in the name of any such person in the register of any Presidency Bank shall be taken as the equivalent of one share, and odd half-shares shall be dealt with as hereinafter provided.

(2) The name of every person who immediately before the appointed day was registered as a holder of stock in any of the Presidency Banks shall be registered in accordance with the provisions of this Act hereinafter appearing as holding one share in the Bank for every rupees five hundred of stock of which he was the registered holder in such Presidency Bank, and odd amounts of stock not amounting to rupees five hundred shall be dealt with as hereinafter provided.

(3) The Bank shall issue fractional certificates to the holders of odd half-shares and of odd amounts of stock, not amounting to rupees five hundred certifying, as the case may be, that the holder is entitled to one-half of one fully paid share or such fraction of a share as the odd amount or stock is of rupees five-hundred.

(4) Holders of fractional certificates shall, if resident in India within three months and in any other case within six months from the date of the certificate either—

(i) surrender their fractional certificate with other similar fractional certificates representing in all one fully paid share, in which case the surrenderer shall be entitled to be registered as a shareholder and to have a fresh certificate for a fully paid share in the Bank issued to him and be entitled to an allotment of new shares in the same way as if he had been the holder of one fully paid share, or

(ii) at their option surrender the fractional certificates to the Bank, in which case the Bank shall be entitled to sell the shares represented by the fractions so surrendered from time to time in such manner as the Bank deems expedient, and the aggregate net sale-proceeds realized by such sale or sales shall be divided proportionately and paid by the Bank to the holders of fractional certificates for whose account the shares may have been so sold.

(5) Every shareholder of the Bank whose name has been registered in accordance with the provisions of this section shall be entitled in respect of every share of which he is so registered as the holder to an allotment to himself or to his nominee (provided that such nominee is approved by the Bank) of two shares in the Bank with the sum of rupees one hundred and twenty-five credited as paid up on payment in respect of each share in the case of a former shareholder or stockholder of the Bank of Bengal or the Bank of Bombay of rupees one hundred and twenty-five, and of the Bank of Madras of rupees two hundred and twenty-five.

(6) The Bank shall cause notice to be published in the *Gazette of India* and in two daily papers in each Presidency, and shall also send by post to every person whose name immediately before the appointed day was entered in the register of shareholders or stockholders of any of the Presidency Banks a notice giving particulars of the terms hereinbefore set out as to the allotment of new shares and the surrender of fractional certificates, and as to the manner and form in which application for the allotment of new shares and the surrender of fractional certificates is to be made.

(7) If within a period of three months from the date of publication in the *Gazette of India* of the notice referred to in sub-section (6), any shareholder has not made an application for the allotment of new shares to which he is entitled, the Bank may offer such shares for public subscription and allot them to any person applying therefor :

Provided that the Bank in the case of shareholders whose addresses are out of British India may, either generally or in any particular instance, fix an extended period

for the admission of applications, but in no case shall that period be later than six months from the date of the publication of the notice in the *Gazette of India*.

6. (1) Subject to the provisions of this Act every officer and servant employed immediately before the appointed day by a Presidency Bank shall, from the appointed day, become an officer or servants of the Bank, and shall hold his office or service therein by the same tenure and upon the same terms and conditions and with the same rights and privileges as to pension or gratuity as he would have held the same under the Presidency Bank if this Act had not been passed.

(2) Any person who, on the appointed day has been granted or is in receipt of a pension or other superannuation or compassionate allowance from a Presidency Bank shall be entitled to be paid by, and to receive from, the Bank the same pension or allowance so long as he observes the conditions on which the pension or allowance was granted. Any question whether he has so observed such conditions shall, in case of any difference arising, be determined by the Governor-General in Council.

(3) For the Directors and officers of the Banks of Bombay and Madras who are at the commencement of this Act the respective trustees of the following funds, that is to say,—

(a) the Bank of Bombay Officers' Pension and Guarantee Fund, and

(b) the Bank of Madras Pension and Gratuity Fund and the Bank of Madras Officers' Provident and Mutual Guarantee Fund, there shall be substituted as trustees of those funds respectively, the members for the time being and the corresponding officers of the Local Boards of the Bank at Bombay and Madras; and if any doubt arises as to who are the corresponding officers to the officers who are trustees at the commencement of this Act, the decision of the Central Board shall be final.

7. As from the appointed day the Presidency Banks shall be dissolved, and thereafter no person shall make assert or take any claims demands or proceedings against any of the said Banks of against a director or officer thereof, in his capacity as such director or officer except in so far as may be necessary for enforcing the provisions of this Act.

CHAPTER III.

BUSINESS OF THE BANK.

8. Subject to the provisions of this Act, the business which the Bank is authorized to carry on and transact shall be the several kinds of business specified in Schedule I subject to the limitations therein mentioned.

9. Notwithstanding anything contained in Schedule I, the Bank shall not, at its London office, open cash credits or keep cash accounts for or receive deposits from any person who is not or has not been, within the three years last preceding, a customer of the Bank or of any Presidency Banks at any of its or their branches in India or Ceylon.

10. (1) It shall also be lawful for the Bank under any agreement with the Secretary of State for India in Council—

(i) to act as banker for, and to pay, receive, collect and remit money, bullion and securities on behalf of the Government;

(ii) to undertake and transact any other business which the Government may from time to time entrust to the Bank.

(2) Every such agreement shall provide—

(a) that the Governor-General in Council shall have power to issue instructions to the Bank in respect of any matter which, in his opinion, vitally affects his financial policy or the safety of Government balances, and that in the event of the Bank disregarding such instructions the Governor-General in Council may declare such agreement to be terminated; and

(b) that within five years from the commencement of this Act, the Bank shall establish and maintain not less than one hundred not branches of which at least one-fourth shall be established at such places as the Governor-General in Council may direct.

Acquisition of business premises. 11. For the purpose of providing buildings and places in and at which to carry on and manage the business of the Bank and proper residences for its officers and servants, the Bank may—

(a) acquire any interest in immoveable property, and

(b) sell, buy, re-sell, exchange, let, furnish, repair, insure against fire and other risks or deal with all or any part of the same as it may consider most conducive to the interest of the Bank.

Establishment of branches and agencies. 12. Subject to the provisions of this Act the Bank may—

(a) maintain, as branches or agencies of the Bank, any branches or agencies of the Presidency Banks which were in existence immediately before the appointed day, and may establish branches or agencies at such places as it deems advantageous for the interests of the Bank, and

(b) discontinue any branch or agency maintained or established under this section.

13. (1) With the sanction of the Governor-General in Council, the Bank may enter into negotiations for and purchase and take over the business, including the capital, assets and liabilities, of any banking company carrying on business in India of which the capital is divided into shares, and may pay the consideration for such purchase either in cash or by the allotment of shares in the capital of the Bank, or partly in one and partly in the other of these ways, and may (subject to the provisions of this Act relating to the increase of capital) for the purpose of any such allotment of shares, increase the capital of the Bank by the issue of such number of shares as may be determined on by the Bank.

(2) Any business so purchased shall after the purchase be carried on by the Bank subject to the provisions of this Act.

Explanation—For the purposes of this section “banking company” means any company formed for the purpose of carrying on the business of banking and registered under the Indian Companies Act, 1913, or the law relating to companies for the time being in force in British India.

13-A. Notwithstanding anything contained in Schedule I, the Bank may, either alone, or conjointly with other persons for the purpose of Power of Bank to take over business of certain other Banks and for that purpose to increase its capital. of adverting the winding up of any company as defined in section 13 having a share capital which is expressed in rupees in its memorandum of association or of any society registered under the Co-operative Societies Act, 1912, or where any such company or society is being wound up, of facilitating the winding up, advance or lend money to, or open a cash credit in favour of such company or society or the liquidators thereof, as the case may be, for any period upon the security of all or any of the assets whatsoever of such Company or Society.]

CHAPTER IV.

SHARES.

14. (1) The shares of the Bank shall be moveable property.

(2) Each share in the Bank shall be distinguished by its appropriate number.

15. A certificate under the common or official seal of the Bank specifying the shares held by any shareholder shall be *prima facie* evidence of the title of the shareholder to the shares therein specified.

16. The Bank shall keep in one or more books a register of its shareholders (in this Act referred to as the principal register), and shall enter therein the following particulars so far as they may be available :

Principal register of shareholders.

(i) the names and addresses and occupations, if any, of the shareholders and a statement of the shares held by each shareholder, distinguishing each share by its number, and of the amount paid on the shares of each shareholder :

(ii) the date on which each person is so entered as a shareholder; and

(iii) the date on which any person ceases to be a shareholder.

17. (1) The Bank shall cause to be kept at the local head offices of the Bank in Calcutta, Madras and Bombay branch registers which shall be deemed to be part of the principal register, and may do so at any other local head office which may hereafter be established under this Act.

Branch registers.

(2) There shall be entered in the branch register to be kept in Calcutta the name of every person who having been registered as a shareholder or stockholder in the Bank of Bengal is entitled under the provisions of section 5 to be registered as a shareholder in the Bank, with the same particulars appended thereto as are required in the case of the principal register, and the same provisions shall apply *mutatis mutandis* to the branch registers to be kept in Madras and Bombay.

(3) Any shareholder may apply to the Bank to have his name transferred from one branch register to another in respect of either the whole or any part of the shares standing in his name, and the Bank shall, subject to such conditions as may be prescribed, cause the registers to be amended accordingly.

(4) Subject to the provisions of sub-section (3) no transaction with respect to any share registered in one branch register shall be registered in any other branch register.

18. No notice of any trust, express, implied or constructive, shall be entered on the principal or any branch register or be receivable by the Bank.

Trusts not to be entered on the register.

19. The Bank may close the principal register or any branch register for any time or times, not exceeding in the whole thirty days in each year.

Power to close register.

20. (1) The principal register of shareholders shall be kept at such places as the bank, by notification in the Gazette of India, may appoint and, except when closed under the provisions of this Act, that register or any branch register shall during business hours (subject to such reasonable restrictions as the bank may impose, so that not less than two hours in each day be allowed for inspection) be open to the inspection of any shareholder gratis.

Inspection of register of shareholders.

(2) Any shareholder may require a copy of any such register, or of any part thereof, on prepayment therefor at the rate of six annas for every hundred words or fractional part thereof required to be copied.

CONTRACTS.

21. (1) Contracts on behalf of the Bank may be made as follows :—

Form of contracts.

(i) any contract, which, if made between private persons, would be by law required to be in writing, signed by the parties to be charged therewith, may be made on behalf of the Bank in writing signed by any person acting under its authority, express or implied, and may in the same manner be varied or discharged ;

(ii) any contract which, if made between private persons would by law be valid although made by parol only, and not reduced to writing, may be made by parol on behalf of the Bank by any person acting under its authority, express or implied, and may in the same manner be varied or discharged.

(2) All contracts made according to the provisions of this section shall be effectual in law, and shall bind the Bank and all other parties thereto and their legal representatives.

REGULATIONS OF BANK.

Regulations of the Bank. **22.** The provisions contained in Schedule II shall be the regulations of the Bank in regard to the matters to which they relate.

CHAPTER V.

MANAGEMENT.

23. The Bank shall have local head offices in Calcutta, Madras and Bombay, and at such other places in British India as the Bank, with the previous sanction of the Governor-General in Council, may determine. The Bank may also, subject to the provisions of this Act as to the business to be transacted there, establish an office in London.

24. The general superintendence of the affairs and business of the Bank shall be entrusted to Central Board of Governors (hereinafter in this Act referred to as the "Central Board"), who may exercise all powers and do all such acts and things as may be exercised or done by the Bank and are not by this Act expressly directed or required to be done by the Bank in general meeting.

25. Local Boards shall be established at Calcutta, Madras and Bombay, and may be established at such other places in British India as the Central Board, with the previous sanction of the Governor-General in Council, may determine.

26. Without prejudice to the powers conferred by S. 24, the Local Boards, established at Calcutta, Madras and Bombay, shall have power generally to transact all the usual business of the Bank, and shall have power as regards entries in the branch registers, respectively kept at those places to examine and pass or refuse to pass transfers and transmissions and to approve or refuse to approve transferees of shares and to give certificates of shares.

LOCAL BOARDS AT CALCUTTA, MADRAS AND BOMBAY.

27. The several persons who were, immediately before the appointed day, respectively the directors of the Presidency Banks shall constitute the first Local Boards of the Bank at Calcutta, Madras and Bombay respectively, and the persons who were then president, vice-president and secretary, respectively, of the said bank shall fill the same offices in the respective Local Boards until they vacate office in accordance with the provisions of this Act.

CENTRAL BOARD.

Constitution and meetings of Central Board. **28.** (1) The Central Board shall consist of the following Governors, namely—

(i) the presidents and vice-presidents of the Local Boards established by this Act;

(ii) the Controller of the Currency for the time being or such other officer of Government as may be nominated by the Governor-General in Council to be a Governor;

(iii) such number of persons not exceeding four and not being officers of Government as may be nominated by the Governor-General in Council. Such persons shall hold office for one year but may be re-nominated;

(iv) the Secretaries of the Local Boards established by this Act;

(v) such number of managing Governors not exceeding two as may be appointed by the Governor-General in Council after consideration of the recommendations of the Central Board. Such Governors shall hold office for such period as the Governor-General in Council may direct; and

(vi) if any Local Board is hereafter established under this Act, such number of persons to represent it as the Central Board may prescribe.

(2) The Governors specified in clauses (ii) and (iv) and any Governors appointed under clause (vi) of sub-section (1) shall be at liberty to attend all meetings of the Central Board and to take part in its deliberations but shall not be entitled to vote on any question arising at any meeting.

29. (1) Where the Central Board establishes any additional local head office of the Bank in British India, a Local Board shall be constituted to manage the local business of the Bank.

(2) The number of the members of any such Local Board shall be such number, not less than three, as may be prescribed and shall be appointed in such manner as may be prescribed.

30. (1) If any difficulty arises with respect to the establishment of the Central Board, or of a Local Board or with respect to the appointment of the first Governors or members or to the first meeting of the Central Board or of a Local Board, the Governor-General in Council may by order make any appointment or do anything which appears to him necessary or expedient for the proper establishment of the Board and for the appointment of the first Governors and members and for the first meeting thereof.

(2) Any such order may modify the provisions of this Act so far as may appear to the Governor-General in Council to be necessary or expedient for carrying the order into effect.

CHAPTER VI

MISCELLANEOUS.

31. (1) The Central Board shall, with the previous approval of the Governor-General in Council, make by-laws consistent with this Act regulating the following matters, namely :—

(a) the maximum amounts which may be advanced, or lent to or for which bills may be discounted for any individual or partnership, without the security mentioned in sub-clauses (i) to (iv) of clause (a) of Part I of Schedule I, the conditions under which advances may be made on the said security and the extent of the sums to which accounts may be overdrawn without security ;

(b) the conditions subject to which alone advances may be made to Governors, members of Local Boards, or officers of the Bank, or the relatives of such Governors, members or officers or to companies, firms or individuals with which or with whom such Governors, members, officers or relatives are connected as partners, directors managers, servants, shareholders or otherwise ;

Provided that the by-laws shall provide that no advance without security shall be made to any officer of the Bank without the specific sanction of the Local Board under which he is serving ;

(c) the particulars to be contained in the half-yearly balance sheet ; and

(d) any matter which by this Act is directed to be prescribed.

(2) The Central Board may, with the previous approval of the Governor-General in Council, make by-laws consistent with this Act regulating the following matters or any of them, namely :—

(a) the keeping of the register and branch registers of share holders ;

(b) the distribution of business amongst the Governors and their remuneration, if any ;

(c) the distribution of business among the members of a Local Board and their remuneration, if any ;

(d) the delegation of any powers of the Central Board or of a Local Board to committees consisting of Governors or members, as the case may be ;

(e) the procedure to be followed at the meetings of the Central or Local Boards or of any committees thereof ;

(f) the first appointment and the appointment of members of a Local Board established under this Act ;

(g) the powers of Local Boards established by or under this Act ;

(h) the localities in, and with respect to which such Local Boards shall exercise their powers :

(i) the books and accounts to be kept at the local head offices of the Bank ;

(j) the renewal of certificates of shares which have been worn out or lost ;

(k) the conduct and defence of legal proceedings and the manner of signing pleadings ;

(l) the constitutions and management of pension and provident funds for the officers and servants of the Bank ;

(m) all matters which are by this Act permitted to be prescribed ; and

(n) generally, the conduct of the business of the Bank.

32. (1) The references in sections 188, 189 and 289 of the Indian Companies Act, 1913, and references in any other enactments to the Presidency Banks or any of them shall be deemed to references to the Bank.

(2) Where by any instrument power is given to invest in, to hold or to exercise any rights in regard to shares or stock in a Presidency Bank, then that power may be exercised as if the same power were given by such instrument in regard to shares in the Bank.

(3) A power of attorney in favour of a Presidency Bank or in favour of a Presidency Bank and its officers shall be deemed, as the case may be, to be a power of attorney in favour of the Bank or of the Bank and its officers.

33. In section 11, sub-section (3) of the Indian Companies Act, 1913, after the word "Royal" the word "Bank of Bengal," "Bank of Madras" "Bank of Bombay" shall be inserted.

Repeals

34. The enactments specified in Schedule III are hereby repealed.¹

SCHEDULE I.

(See section 8.)

PART I.

BUSINESS WHICH THE BANK IS AUTHORIZED TO CARRY ON AND TRANSACT.

The Bank is authorized to carry on and transact the several kinds of business herein-after specified, namely :—

(a) the advancing and lending money, and opening cash-credits upon the security of—

(i) stocks, funds and securities (other than immoveable property) in which a trustee is authorized to invest trust money by any Act of Parliament or by any Act of the Governor-General in Council and any securities of a Local Government or the Government of Ceylon ;

(ii) such securities issued by State-aided railways as have been notified by the Governor-General in Council under section 36 of the Presidency Banks Act, 1876, or may be notified by him under this Act in that behalf ;

(iii) debentures or other securities for money issued under the authority of any Act of a legislature established in British India by, or on behalf of, a district board ;

(iv) goods which, or the documents of title to which, are deposited with, or assigned to, the Bank as security for such advances, loans or credits ;

(v) accepted bills of exchange and promissory notes endorsed by the payees and joint and several promissory notes of two or more persons or firms unconnected with each other in general partnership, and

(vi) fully paid shares and debentures of companies with limited liability, or immoveable property or documents of title relating thereto as collateral security only where the original security is one of those specified in sub-clauses (i) to (iv), and if so authorized by any general or special directions of the Central Board, where the original security is of the kind specified in sub-clause (v) :

¹ Repealed by Act XII of 1927.

Provided that such advances and loans may be made, if the Central Board think fit, to the Secretary of State for India in Council, without any specific security ;

(b) the selling and realisation of the proceeds of sale of any such promissory notes, debentures, stock-receipts, bonds, annuities, stock-shares, securities or goods which or the documents of title to which have been deposited with, or assigned to, the bank as security for such advances, loans or credits, or which are held by the bank or over which the Bank is entitled to any lien or charge in respect of any such loan or advance or credit or any debt or claim of the Bank and which have not been redeemed in due time in accordance with the terms and conditions (if any) of such deposit or assignment ;

(c) the advancing and lending money to Courts of Wards upon the security of estates in their charges or under their superintendence, and the realisation of such advances or loans and any interest due thereon provided that no such advance or loan shall be made without the previous sanction of the Local Government concerned, and that the period for which any such advance or loan is made shall not exceed six months ;

(d) the drawing, accepting, discounting, buying and selling of bills of exchange and other negotiable securities payable in India, or in Ceylon; and, subject to the general or special directions of the Governor-General in Council, the discounting, buying and selling of bills of exchange, payable outside India, for and from or to such Banks as the Governor-General in Council may approve in that behalf ;

(e) the investing of the funds of the Bank upon any of the securities specified in sub clauses (i) to (m) of clause (a) and converting the same into money when required ; and altering, converting and transposing such investments for or into others of the investments above specified ;

(f) the making, issuing and circulating of bank-post-bills and letters of credit made payable in India, or in Ceylon, to order, or otherwise than to the bearer on demand ;

(g) the buying and selling of gold and silver whether coined or uncoined ;

(h) the receiving of deposits and keeping cash accounts on such terms as may be agreed on ;

(i) the acceptance of the charge of plate, jewels, title-deeds or other valuable goods on such terms as may be agreed on ;

(j) the selling and realising of all property whether moveable or immoveable, which may in any way come into the possession of the Bank in satisfaction or part satisfaction of any of its claims ;

(k) the transacting of pecuniary agency business on commission ;

(l) the acting administrator, executor or trustee for the purpose of winding up estates, and the acting as agent on commission in the transaction of the following kinds of business, namely :—

(i) the buying, selling, transferring and taking charge of any securities or any shares in any public company ;

(ii) the receiving of the proceeds, whether principal, interest or dividends, of any securities or share ;

(iii) the remittance of such proceeds at the risk of the principal by public or private bills of exchange, payable either in India or elsewhere ;

(m) the drawing of bills of exchange and the granting of letters of credit payable out of India for the use of principals for the purpose of the remittances mentioned in clause (l) and also for private constituents for *bona fide* personal needs ;

(n) the buying, for the purpose of meeting such bills or letters of credit, of bills of exchange payable out of India, at any usance not exceeding six months ;

(o) the borrowing of money in India for the purposes of the Bank's business and the giving of security for money so borrowed by pledging assets or otherwise ;

(p) the borrowing of money in England for the purposes of [the] Bank's business upon the security of assets of the Bank, but not otherwise ; and

(q) generally, the doing of all such matters and things as may be incidental or subsidiary to the transaction of the various kinds of business hereinbefore specified.

PART II.

BUSINESS WHICH THE BANK IS NOT AUTHORIZED TO CARRY OUT OR TRANSACT.

The Bank shall not transact any kind of banking business other than those specified in Part I and in particular—

(1) It shall not make any loan or advance—

(a) for a longer period than six months, or

(b) upon the security of stock or shares of the Bank, or

(c) save in the case of the estates specified in clause (c) of Part I, upon mortgage or in any other manner upon the security of any immoveable property, or the documents of title relating thereto.

(2) The Bank shall not (except upon a security of the kind specified in sub-clauses (i) to (iv) of clause (a) of part I) discount bills for any individual or partnership firm

¹ The word " the " was inserted by Act VII of 1924, Sch. I.

for an amount exceeding in the whole at any one time such sum as may be prescribed or lend or advance in any way to any individual or partnership firm an amount exceeding in the whole at any one time such sum as may be so prescribed.

(3) The Bank shall not discount or buy, or advance and lend, or open cash credits on the security of any negotiable instrument of any individual or partnership firm, payable in the town or at the place where it is presented for discount, which does not carry on it the several responsibilities of at least two persons or firms unconnected with each other in general partnership.

(4) The Bank shall not discount or buy, or advance and lend, or open cash-credits on the security of any negotiable security having at the date of the proposed transaction a longer period to run than six months or, if drawn after sight, drawn for a longer period than six months :

Provided that nothing in this Part shall be deemed to prevent the Bank from allowing any person who keeps an account with the Bank to overdraw such account, without or with security, to such extent as may be prescribed.

SCHEDULE II.

REGULATIONS OF THE BANK.

(See section 22.)

1. **SHARE CERTIFICATES.**—Every person whose name is entered as a shareholder in the register of shareholders shall, without payment, be entitled to a certificate under the common seal of the Bank (or if the certificate relates to shares registered in a branch register under the official seal of the Bank) specifying the share or shares held by him and the amount paid up thereon : Provided that, in respect of a share or shares held jointly by several persons, the Bank shall not be bound to issue more than one certificate, and delivery of a certificate for a share to one of several joint-holders shall be sufficient delivery to all.

Lien.

2. **BANK'S LIEN ON SHARES.**—The Bank shall have a lien on every share (not being a fully paid share) for all moneys (whether presently payable are not) called or payable at a fixed time in respect of that share, and the Bank shall also have a lien on all shares standing registered in the name of a single person for all moneys presently payable by him or his estate to the Bank. The Bank's lien, if any, on a share shall also extend to all dividends payable thereon.

3. **POWER TO SELL FOR DEFAULT.**—The Bank may sell, in such manner, as it thinks fit, any shares on which it has a lien, but no sale shall be made unless some sum in respect of which the lien exists is presently payable, nor until the expiration of fourteen days after a notice in writing, stating and demanding payment of such part of the amount in respect of which the lien exists as is presently payable has been given to the registered holder for the time being of the share, or to the person entitled by reason of his death or insolvency to the share.

4. **DISPOSAL OF PROCEEDS OF SALES.**—The proceeds of the sale shall be applied in payment of such part of the amount in respect of which the lien exists as is presently payable, and the residue shall (subject to a like lien for sums not presently payable as existed upon the shares prior to the sale) be paid to the person entitled to the shares at the date of sale. The purchaser shall be registered as the holder of the shares, and he shall not be bound to see to the application of the purchase-money nor shall his title to the shares be affected by any irregularity or invalidity in the proceedings in reference to the sale.

Calls on Shares.

5. **CALLS.**—The Bank may, from time to time, make calls upon the shareholders in respect of any moneys unpaid on their shares, provided that no call shall exceed one-fourth of the nominal amount of the share, or be payable at less than two months from the last call; and each shareholder shall (subject to receiving at least two months' notice specifying the time or times of payments) pay to the Bank at the time or times so specified the amount called on his shares.

6. **LIABILITY OF JOINT-HOLDERS.**—The joint-holders of a share shall be jointly and severally liable to pay all calls in respect thereof.

7. **LIABILITY TO PAY INTEREST ON UNPAID CALLS.**—If a sum called in respect of a share is not paid before or on the day appointed for payment thereof, the person from whom the sum is due shall pay interest upon the sum at the rate of ten per cent. per annum from the day appointed for the payment thereof to the time of the actual payment, but the Central Board shall be at liberty to waive payment of that interest wholly or in part.

Transfer and transmission of shares.

8. EXECUTION OF TRANSFERS.—The instrument of transfer of any share in the Bank shall be executed both by the transferor and transferee, and the transferor shall be deemed to remain holder of the share until the name of the transferee is entered in the register of shareholders in respect thereof.

9. FORM OF TRANSFER.—Shares in the Bank shall be transferred in the following Form, or in any usual or common Form which the Central Board shall approve:—

I, A B of _____, in consideration of the sum of rupees _____ (hereinafter called "the said transferee") do hereby transfer to the said transferee the share (or shares) numbered _____ in the Imperial Bank of India to hold unto the said transferee, his executor, administrators and assigns, subject to the several conditions on which I held the same at the time of the execution thereof, and I, the said transferee, do hereby agree to take the said share (or shares) subject to the conditions aforesaid.

As witness our hands this _____

day of _____

Witness to the signature of, etc.

10. POWER TO DECLINE TO REGISTER TRANSFERS.—The Bank may decline to register any transfer of shares, not being fully paid shares, to a person of whom it does not approve, and may also decline to register any transfer of shares on which the Bank has a lien. The Bank may also suspend the registration of transfers for any period during which it has under the provisions of this Act directed that the registers shall be closed.

The Bank may decline to recognize any instrument of transfer unless—

(a) a fee not exceeding two rupees is paid to the Bank in respect thereof; and

(b) the instrument of transfer is accompanied by the certificate of the shares to which it relates, and such other evidence as the Bank may reasonably require to show the rights of the transferor, to make the transfer.

11. DECEASED SHAREHOLDERS.—The executors or administrators of a deceased sole holder of a share shall be the only persons recognized by the Bank as having any title to the share. In the case of a share registered in the names of two or more holders, the survivors or survivor, or the executors or administrators of the deceased survivor, shall be the only persons recognized by the Bank as having any title to the share.

12. DEATH OR INSOLVENCY OF SHAREHOLDERS.—Any person becoming entitled to a share in consequence of the death or insolvency of a shareholder shall, upon such evidence being produced as may be required by the Bank, have the right either to be registered as a shareholder in respect of the share or, instead of being registered himself, to make such transfer of the share as the deceased or insolvent person could have made; but the Bank shall, in either case, have the same right to decline or suspend registration as it would have had in the case of a transfer of the share by the deceased or insolvent person before the death or insolvency.

13. RIGHTS OF PERSONS ACQUIRING SHARES ON DEATH OR INSOLVENCY OF SHAREHOLDER.—Any person becoming entitled to a share in consequence of the death or insolvency of the holder shall be entitled to the same dividends and other advantages to which he would be entitled if he were the registered holder of the share, except that he shall not, before being registered as a shareholder in respect of the share, be entitled in respect of it to exercise any right conferred on a shareholder in relation to meetings of the Bank.

Forfeiture of Shares.

14. FAILURE TO PAY CALL.—If a shareholder fails to pay any call or instalment of a call on the day appointed for payment thereof, the Central Board may, at any time thereafter during such time as any part of such call or instalment remains unpaid, serve a notice on him requiring payment of so much of the call or instalment as is unpaid, together with any interest which may have accrued.

15. FORM OF NOTICE.—The notice shall name a further day (not earlier than the expiration of fourteen days from the date of the notice) on or before which the payment required by the notice is to be made, and shall state that in the event of non-payment at or before the time appointed, the shares in respect of which the call was made will be liable to be forfeited.

16. FORFEITURE OF SHARES.—If the requirements of any such notice as aforesaid are not complied with, any share in respect of which the notice has been given may at any time thereafter, before the payment required by the notice has been made, be forfeited by a resolution of the Central Board to that effect.

17. DISPOSAL OF FORFEITED SHARES.—A forfeited share may be sold or otherwise disposed of on such terms and in such manner as the Central Board thinks fit, and at any time before a sale or disposition the forfeiture may be cancelled on such terms as the Central Board thinks fit.

18. LIABILITY OF SHAREHOLDERS AFTER FORFEITURE.—A person whose shares have been forfeited shall cease to be a shareholder in respect of the forfeited shares, but shall, notwithstanding, remain liable to pay to the Bank all moneys which, at the date of forfeiture,

were presently payable by him to the Bank in respect of the shares, but his liability shall cease if and when the Bank receives payment in full of the nominal amount of the shares.

Alteration of Capital.

19. POWER TO INCREASE OR REDUCE CAPITAL.—The shareholders of the Bank may, by special resolution and with the previous sanction of the Governor-General in Council, increase or reduce the capital of the Bank :

Provided that no such special resolution shall be deemed to have been passed, unless at least one-third in number of the shareholders, holding at least one-half of the paid-up capital of the Bank for the time being, be present in person or by proxy, and the majority of such shareholders have voted either by show of hands or by poll, as the case may be, in favour of the said resolution.

20. PROCEDURE ON RESOLUTION TO INCREASE CAPITAL.—When any such special resolution to increase the capital has been passed, the Central Board may, subject to the provisions of this Act and to the special directions (if any) given in reference thereto by the meeting at which such resolution has been passed—

(a) make such orders as it thinks fit for the opening of subscriptions by the shareholders towards such increase of capital ;

(b) allow to the shareholders such period to fill up the subscription as it thinks fit ;

(c) direct the manner in which the shareholders shall subscribe and pay into the Bank the proportions of new capital which they may respectively desire to subscribe ; and

(d) make such orders as it thinks fit for the disposal and allotment of the amount of new capital that may not be subscribed for and paid up in the manner aforesaid.

21. NEW SHARES.—Any new shares shall be subject to the same provision with reference to the payment of calls, lien, transfer, transmission, forfeiture and otherwise as the shares in the original capital.

22. PROCEDURE ON RESOLUTION TO REDUCE CAPITAL.—When any such special resolution to reduce the capital has been passed, the Central Board may (subject as aforesaid) determine the manner in which the reduction shall be carried into effect.

Meetings of Shareholders.

23. (1) ANNUAL GENERAL MEETING.—On the first Monday of the month of August in every year, or as soon after such day as is convenient, a general meeting shall be held at such time and at such town where there is a local head office of the Bank as shall from time to time be prescribed by the Central Board, at which meeting the Central Board shall submit to the shareholders a statement of the affairs of the Bank made up to the preceding thirtieth day of June :

Provided that such general meeting shall not be held on two consecutive occasions at any one town in which there is a local head office of the Bank.

(2) A notice convening such meeting, signed by a Managing Governor, shall be published in the *Gazette of India* and in such other manner as the Central Board may direct at least fifteen days before the meeting is held.

24. SPECIAL MEETINGS.—Any hundred or more shareholders holding shares, to the aggregate amount of five hundred thousand rupees, or any three Governors may convene a special meeting upon giving sixty days' previous notice of such meeting and of the purpose for which the same is convened, as well to the Central Board as also by public advertisement in the *Gazette of India*, and in two of the English daily newspapers and one of the Vernacular newspapers :

Provided that three months' previous notice shall be thus given of any special meeting held for the purpose of increasing or reducing the capital of the Bank, and shall also be addressed to every shareholder.

25. (1) QUORUM.—No business shall be transacted at any meeting, whether general or special, unless a quorum of two hundred shareholders, in person or by proxy is present at the commencement of such business.

(2) If within one hour from the time appointed for the meeting a quorum is not present, the meeting, if convened by shareholders not being Governors, shall be dissolved ; in any other case, it shall stand adjourned to the same day in the following week at the same time and place, and if at such adjourned meeting a quorum is not present, those shareholders who are present, shall be a quorum.

26. (1) DECISION BY MAJORITY OF VOTES.—Save as is otherwise provided in this Act in regard to resolutions for the increase or reduction of capital or for the removal of a Governor, every election and every matter submitted to a meeting, whether general or special shall be decided by a majority of votes.

(2) No shareholder shall be allowed to vote at any such meeting in respect of any share acquired by transfer, unless such transfer shall have been completed and registered at least three months before the time of such meeting.

(3) No shareholder shall be entitled to vote at any meeting in respect of any shares held by him alone or jointly, whilst any call due from him alone or jointly remains unpaid.

27. POWER TO DECLARE RESOLUTION CARRIED BY SHOW OF HANDS.—Save as otherwise provided in this Schedule a declaration by the chairman of any meeting, that a resolution has been carried or rejected thereat upon a show of hands, shall be conclusive, and an entry to that effect in the book of proceedings of the Bank shall be sufficient evidence of that fact, without proof of the number or proportion of the votes recorded in favour of or against such resolution, unless immediately on such declaration, a poll be demanded in writing by ten shareholders present and entitled to vote at such meeting.

28. POLL TO BE TAKEN, IF DULY DEMANDED.—If a poll be duly demanded, it shall be taken either at once or at such time and place, and save as otherwise provided, in this Act, either by open voting or by ballot, as the chairman directs and the result of the poll shall be deemed to be the resolution of the meeting at which the poll was demanded.

29. PROCEEDINGS AND RESOLUTIONS AT MEETINGS TO BE BINDING.—The proceedings at any meeting and all resolutions and decisions of such meeting shall be valid and binding on the Bank so far as such proceedings, resolutions and decisions are consistent with the provisions of this Act.

Votes of Members.

30. VOTES.—On a show of hands every shareholder present in person shall have one vote. On a poll every shareholder shall have one vote for every four shares of which he is the holder.

31. VOTES OF JOINT-HOLDERS.—In the case of joint-holders, the vote of the senior who tenders a vote, whether in person or by proxy, shall be accepted to the exclusion of the votes of the other joint-holders; and for this purpose seniority shall be determined by the order in which the names stand in the register of shareholders.

32. VOTES ON BEHALF OF LUNATICS.—A shareholder of unsound mind, or in respect of whom an order has been made by any Court having jurisdiction in lunacy, may vote whether on a show of hands or on a poll, by his committee or other legal guardian, and a shareholder who is a minor may similarly vote by his guardian and any such committee or guardian may, on a poll, vote by proxy.

33. SHAREHOLDERS IN DEFAULT.—No shareholder shall be entitled to vote at any general meeting unless all calls or other sums presently payable by him in respect of shares in the Bank have been paid.

34. POLL.—On a poll votes may be given either personally or by proxy.

35. FORM OF PROXIES.—The instrument appointing a proxy shall be in writing under the hand of the appointor or of his attorney duly authorized in writing. No person shall act as a proxy unless either he is entitled on his own behalf to be present and vote at the meeting at which he acts as proxy, or he has been appointed to act at that meeting as proxy for a corporation.

36. DEPOSIT OF PROXIES.—The instrument appointing a proxy and the power of attorney or other authority (if any) under which it is signed, or a notarially certified copy of that power or authority, shall be deposited at the head office of the Bank in the place where the meeting is to be held not less than ninety-six hours before the time for holding the meeting at which the person named in the instrument proposes to vote, and in default the instrument of proxy shall not be treated as valid.

Local Meetings.

37. ANNUAL LOCAL MEETING.—A general meeting of the shareholders on a branch register shall be held once in every year at the local head office of the Bank at which the branch register is kept. It shall be held on such date as the Central Board may direct.

38. PROCEDURE AT LOCAL MEETING.—The foregoing provisions of this Schedule as to the convening of general and special meetings and procedure at meetings shall, so far as may be, apply to local and special local meetings of the shareholders on a branch register:

Provided that references in the said provisions to shareholders shall be deemed to be references to shareholders on the Branch register, and references to Governors, Managing Governors and the *Gazette of India* shall be deemed to be references, respectively, to the members of the Local Board, secretaries and to the local official Gazette:

Provided further that ten or more shareholders holding shares to the aggregate amount of fifty thousand rupees may convene a special local meeting and that the number of shareholders to constitute a quorum and to demand a poll in the case of a local meeting shall be, respectively, twenty and five.

Qualifications and disqualifications of Governors and others.

39. (1) QUALIFICATION AND DISQUALIFICATION OF GOVERNORS AND OF MEMBERS OF LOCAL BOARD.—No person shall be qualified to serve as a Governor or as member of a Local Board who is not a holder in his own right of unencumbered shares of the Bank, to the nominal amount of ten thousand rupees at the least:

Provided that this provision shall not apply in the case of a person who is an officer of the Bank or is nominated or appointed by the Governor-General in Council.

(2) No person shall be qualified to serve as a Governor or as a member of a Local Board—

if he holds the office of director, provisional director, promoter, agent or manager of any joint-stock bank established, or having a branch or agency, in British India, or advertised as about to be established, or to have a branch or agency in British India :

Provided that this disqualification shall not apply to any person, being a director of a joint-stock bank, who may be nominated as a Governor under the provision of clause (iii) of sub-section (1) of S. 28; or

if he is a salaried officer of Government not specially authorized by this Act or by the Governor-General in Council to serve as a member;

and the office of a Governor or a member of the Local Board shall be vacated—

if the person holding it resigns his office or dies ;

if he accepts or holds any other office of profit under the Bank ;

if he becomes insolvent or bankrupt, or compounds with his creditors ;

if he is declared lunatic, or becomes of unsound mind ;

if he is absent from the Central Board or the Local Board, as the case may be, for more than six consecutive months ; or

if he ceases to hold in his own right the amount of shares required to qualify him for the office.

(3) No two persons who are partners of the same mercantile firm, or are directors of the same private company, or one of whom is the general agent of, or holds a power of procuration from the other, or from a mercantile firm of which the other is a partner, shall be eligible or qualified to serve as members of the Central Board or a Local Board or of the Central Board and a Local Board at the same time.

Removal of Governors and members of Local Boards.

40. REMOVAL OF GOVERNORS.—The shareholders may, by a special resolution passed by a majority of the votes of shareholders holding in the aggregate not less than one-half of the capital, remove any Governor (other than a Governor nominated or appointed by the Governor-General in Council) before the expiration of his period of office, and appoint, in his stead, a qualified person, who shall in all respects stand in his place.

41. The shareholders on a branch register may, by a special local resolution passed by the votes of shareholders holding in the aggregate not less than one-half of the capital on the branch register remove any member of the Local Board before the expiration of his period of office, and appoint, in his stead, a qualified person who shall in all respects stand in his place.

Meetings of Central Board.

42. (1) MEETINGS OF CENTRAL BOARD.—Meetings of the Central Board shall be convened not less than once in every three months by a Managing Governor and a meeting of the Central Board shall be held once at least in every year at every local head office established by this Act.

(2) Any Local Board may require a Managing Governor to convene a meeting of the Central Board at any time and a Managing Governor shall forthwith convene a meeting accordingly.

(3) Four Governors entitled to vote shall form a quorum for the transaction of business.

(4) At each meeting of the Central Board the Governors present shall elect from among themselves a chairman for such meeting, who, if he is entitled to vote, shall have a second or casting vote in all cases of an equal division of votes.

Local Boards.

43. (1) TERM OF OFFICE AND NUMBER OF MEMBERS OF LOCAL BOARDS.—At the first general local meeting after the commencement of this Act, and at the annual general local meeting thereafter, the two members of the Local Board who have been longest in office as members thereof shall go out of office. The vacancies shall be filled by election at a general or special local meeting.

(2) Any member so retiring may be re-elected ; and if any question arises as to which of the members who have been the same time in office shall retire, the question shall be decided by the Local Board by ballot.

(3) Subject to any by-laws which may be prescribed the number of members of any Local Board may be varied by a special local resolution.

(4) Three of the members of a Local Board shall form a quorum for the transaction of business.

(5) Meetings of a Local Board shall be convened by the president, vice-president, or, in their absence, the senior member of the Board, whenever he thinks fit.

44. (1) PRESIDENT, VICE-PRESIDENT AND CHAIRMAN.—At the first meeting of Local Board in every year it shall choose a president and vice-president from among its members, and whenever the office of president or vice-president becomes vacant, the Local Board shall, at its next meeting, choose a successor for the remainder of the current year :

Provided that no person shall be chosen to be president or vice-president twice in succession.

(2) The president or, in his absence, the vice-president shall be chairman at all meetings of the Local Board and at all general or special local meetings :

Provided that, if both the president and vice-president be absent at any meeting the persons present at such meeting shall elect a chairman from among themselves.

(3) The chairman shall have a second or casting vote in all cases of an equal division of votes.

45. (1) VACANCIES.—Any vacancy occurring on a Local Board by the death, resignation or disqualification of any member shall be filled up by the remaining members who shall co-opt a duly qualified person to fill the vacancy.

(2) Any member so appointed shall be considered to have held office from the date on which the member in whose place he is appointed was elected or, when such member was appointed under this clause, from the date on which his mediate or immediate predecessor was elected, as the case may be.

General provisions as to Central and Local Boards.

46. PROCEEDINGS OF BOARDS NOT INVALIDATED BY VACANCIES.—No act or proceeding of the Central Board or of a Local Board shall be invalidated merely by reason of the existence of a vacancy or vacancies among its Governors or members.

47. ACTS OF MEMBERS OF BOARDS VALID NOTWITHSTANDING SUBSEQUENT DISCOVERY OF DISQUALIFICATION.—All acts done by any person acting in good faith as a Governor or as a member of a Local Board shall be as valid as if he was a member of the Central or Local Board as the case may be, notwithstanding it be afterwards discovered that there was some defect in his appointment or qualification.

48. (1) INDEMNITY OF MEMBERS OF BOARDS.—Every Governor and every member of a Local Board shall be indemnified by the Bank against all losses and expenses incurred by him in or about the discharge of his duties, except such as happen from his own wilful act or default.

(2) A Governor shall not nor shall a member of a Local Board be responsible for any other Governor or member, or for any officer or servant of the Bank or for any loss or expense happening to the Bank by the insufficiency or deficiency of, value of or title to, any property or security acquired or taken on behalf of the Bank, or by the insolvency, bankruptcy or wrongful act of any customer or debtor of the Bank, or by anything done in the execution of the duties of his office or in relation thereto, or otherwise than for his own wilful act or default.

The Seals.

49. (1) COMMON SEAL.—The common seal of the Bank shall not be affixed to any instrument except in the presence of at least three Governors including a Managing Governor, who shall sign their names to the instrument in token of their presence, and such signing shall be independent of the signing of any person who may sign the instrument as a witness. Unless so signed as aforesaid such instrument shall be of no validity.

(2) The Bank shall have for use by the Local Boards at Calcutta, Madras and Bombay and may have for the use of other Local Boards established under this Act official seals which shall be facsimiles of the common seal of the Bank with the addition of the name of the local head office where it is to be used.

(3) The official seal shall be affixed to the certificates issued in respect of any shares entered in the branch registers kept at those places and may be used for such other purposes as may be prescribed.

(4) An instrument to which an official seal is duly affixed shall bind the Bank as if it had been sealed with the common seal of the Bank.

(5) An official seal shall not be affixed to any instrument except in the presence of at least two members of the Local Board and the secretary who shall sign their names to the instrument in token of their presence and such signing shall be independent of the signing of any person who may sign the instrument as a witness. Unless so signed as aforesaid such instrument shall be of no validity.

Officers of the Bank.

50. APPOINTMENT, SALARIES, SUSPENSION AND REMOVAL OF OFFICERS.—The Central Board and subject to the provisions of this Act, the Local Boards shall have power—

(a) to appoint, such officers, and servants as may be necessary to conduct the business of the Bank,

(b) to grant salaries, pensions and other emoluments to such officers and servants, and

(c) to suspend or remove any officer or servant of the Bank.

51. ACCOUNTS, RECEIPTS AND DOCUMENTS OF BANK BY WHOM TO BE SIGNED.—The Managing Governors, the secretaries and such other officers of the Bank as the Central Board may authorize in this behalf by notification in the *Gazette of India* are hereby

severally empowered for and on behalf of the Bank to endorse and transfer promissory notes, stock receipts, stock debentures, shares, securities and documents of title to goods, standing in the name of, or held by, the Bank and to draw, accept and endorse bills of exchange, bank post-bills, and letters of credit, in the current and authorized business of the Bank, and to sign all other accounts, receipts and documents connected with such business.

52. **OFFICERS FORBIDDEN TO ENGAGE IN OTHER COMMERCIAL BUSINESS.**—No managing governor, secretary, inspector, manager, or accountant in the service of the Bank and, without the previous sanction of the Board, no *khazanchi*, cashier or shroff in the service of the Bank and no agent, at any branch or agency of the Bank, shall engage in any other banking or commercial business, either on his own account or as agent for any other person or persons, or shall act as broker or agent for the sale or purchase of Government or other securities.

53. **SECURITY FROM OFFICERS.**—Every person appointed to hold or act in any one or more of the said offices, and every other officer from whom the Central Board may think fit to require it, shall give security to the Bank for the faithful discharge of his duty to the satisfaction of the Central Board in such amount and in such manner as it thinks proper. The security to be given as aforesaid by the person holding or acting in the office of secretary shall not be in a less amount than fifty thousand rupees.

Accounts and Dividends.

54. (1) **BOOKS TO BE BALANCED TWICE A YEAR.**—The Central Board shall cause the books of the Bank to be balanced on every thirty-first day of December and every thirtieth day of June.

(2) A statement of the balance at every such period, signed by a majority of the Governors, shall be forthwith sent to the Governor-General in Council.

(3) The Governor-General in Council shall (so long as any such arrangement with the Secretary of State as is mentioned in section 10 is in force) be entitled to require of the Central Board any information touching the affairs of the Bank and the production of any document of the Bank, and may require the publication of such statements of its assets and liabilities at such intervals and in such form and manner as he thinks fit.

55. (1) **DIVIDENDS TO BE DETERMINED HALF-YEARLY.**—An account of the profits of the Bank during the previous half-year shall be taken on or immediately after every thirty-first day of December and every thirtieth day of June, and a dividend shall be made as soon thereafter as conveniently may be and the amount of such dividend shall be determined by the Central Board.

(2) No unpaid dividend shall bear interest as against the Bank.

56. **TRANSFER TO RESERVE.**—The Central Board may, before declaring any dividend, set aside out of the profits of the Bank such sums as it thinks proper as a reserve or reserves which shall, at the discretion of the Central Board, be applicable for meeting contingencies, or for equalizing dividends, or for any other purpose to which the profits of the Bank may be properly applied, and pending such application may, at the like discretion, either be employed in the business of the Bank or be invested in any of the securities specified in sub-clauses (i) to (iii) of clause (a) of Part I of Schedule I.

57. **JOINT-HOLDERS.**—If several persons are registered as joint-holders of any shares, any one of them may give effectual receipts for any dividend payable on the share.

Audit.

58. (1) **AUDITORS.**—Three auditors shall be elected and their remuneration fixed at the annual general meeting. The auditors may be shareholders; but no Governor or member of a Local Board or other officer of the Bank shall be eligible during his continuance in office. Any auditor shall be eligible on quitting office for re-election.

(2) The first auditors of the Bank may be appointed by the Central Board before the annual general meeting and if so appointed shall hold office only until the first annual general meeting. All auditors elected under this clause shall severally be and continue to act as auditors until the first general meeting after their respective elections:

Provided that, if any casual vacancy occurs in the office of any auditor elected under this section a special meeting shall be called for the purpose of supplying the same.

59. **GOVERNMENT AUDITORS.**—Without prejudice to anything contained in the foregoing provisions the Governor-General in Council may appoint such auditors as he thinks fit to examine and report upon the accounts of the Bank.

60. (1) **RIGHTS AND DUTIES OF AUDITORS.**—Every auditor shall be supplied with a copy of the half-yearly balance-sheet, and it shall be his duty to examine the same, with the accounts and vouchers relating thereto. Every auditor shall have a list delivered to him of all books kept by the Bank, and shall at all reasonable times have access to the books, accounts and other documents of the Bank, and may, at the expense of the Bank if appointed by it and at the expense of the Governor-General in Council if appointed by him, employ accountants or other persons to assist him in investigating such accounts, and

may, in relation to such accounts, examine any Governor or any member of a Local Board, or any officer of the Bank.

(2) The auditors shall make a report to the shareholders or to the Governor-General in Council, as the case may be, upon the annual balance-sheet and accounts and in every such report they shall state whether, in their opinion, the balance-sheet is a full and fair balance-sheet containing the prescribed particulars and properly drawn up so as to exhibit a true and correct view of the state of the Bank's affairs, and in case they have called for any explanation or information from the Central Board, whether it has been given and whether it is satisfactory. Any such report made to the shareholders shall be read together with the report of the Central Board at the annual general meeting.

Notices.

61. (1) SERVICE.—A notice may be given by the Bank to any shareholder either personally or by sending it by post to him to his registered address or (if he has no registered address in British India) to the address, if any within British India supplied by him to the Bank for the giving of notices to him.

(2) Where a notice is sent by post, service of the notice shall be deemed to be effected by properly addressing, prepaying and posting a letter containing the notice and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.

62. ABSENCE OF REGISTERED ADDRESS.—If a shareholder has no registered address, a notice addressed to him and advertised in the *Gazette of India* and a daily newspaper shall be deemed to be duly given to him on the day on which the advertisement appears.

63. NOTICE ON JOINT-HOLDERS.—A notice may be given by the Bank to the joint-holders of a share by giving the notice to the joint-holder named first in the register in respect of the share.

64. Any notice given in accordance with the foregoing provisions shall be deemed to have been duly given notwithstanding that the share-holder be then deceased and whether or not the Bank had notice of his decease and shall in that event be deemed to be a notice to his legal representative.

65. SERVICE OF NOTICE ON BANK.—A notice may be served on the Bank by leaving it at, or sending it by post to, any local head office of the Bank.

SCHEDULE III.

ENACTMENTS REPEALED ¹

(See section 34.)

Year.	Number.	Short title:
1876	XI	The Presidency Banks Act, 1876.
1879	V	The Presidency Banks Act, 1879.
1899	XX	The Presidency Banks Act, 1899.
1907		The Presidency Banks (Amendment) Act, 1907.
1916	VIII	The Presidency Banks (Amendment) Act, 1926

THE INDIAN INCOME-TAX ACT (XI OF 1922.)

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THE INDIAN INCOME-TAX ACT (XI OF 1922).

Am. Act XV of 1923 ; XXXVII of 1923 ; IV of 1924 ; VII of 1924 ; XI of 1924 ; V of 1925 ; XVI of 1925 ; XXIV of 1926.

[5th March, 1922.]

An Act to consolidate and amend the law relating to Income-tax and Super-tax.

WHEREAS it is expedient to consolidate and amend the law relating to income-tax and super-tax ; It is hereby enacted as follows :—

Short title, extent and commencement.

1. (1) This Act may be called THE INDIAN INCOME-TAX ACT, 1922.

Sec. 1. SCOPE OF THE ACT.—(*Per Mukherjee.*) 40 C. L. J. 110=52 Cal. 1=28 C. W. N. 1074=1925 Cal. 34 ; (22 C. 788 ; 23 C. 563, Ref.) See also 18 S. L. R. 48=1925 Sind 130.

CONSTRUCTION.—On points specially dealt with in the Act it should be interpreted without reference to previous state of law. 28 C. W. N. 1074=40 C. L. J. 110=83 I.C. 273=52 Cal. 1=1925 Cal. 34. Construction most beneficial to the subject should be adopted. 48 C. 161 ; 43 A. 133. Income-tax Manual is only a document for

the guidance of officials. See 49 Mad. 22=91 I. C. 940=A. I. R. 1926 Mad. 287=50 M. L. J. 63.

INTERPRETATION.—Where a statute has been punctuated, the punctuation marks must be taken as part of the Statute. 46 M. L. J. 42=1924 Mad. 455=79 I. C. 608. English decisions are not decisions of "foreign courts" and the decisions of English Courts on the English Income tax Act are the best guides to the interpretation of the Indian Act. 44 M. 718=41 M. L. J. 177. But see 52 Cal. 1=40 C. L. J. 110=28 C. W. N. 1074.

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas, and applies also, within the dominions of Princes and Chiefs in India in alliance with His Majesty, to British subjects in those dominions who are in the service of the Government of India or of a local authority established in the exercise of the powers of the Governor-General in Council in that behalf, and to all other servants of His Majesty in those dominions.

(3) It shall come into force on the first day of April, 1922.

Definitions. 2. In this Act, unless there is anything repugnant in the subject or context,—

(1) "agricultural income" means—

(a) any rent or revenue derived from land which is used for agricultural purposes and is either assessed to land-revenue in British India or subject to a local rate assessed and collected by officers of Government as such;

(b) any income derived from such land by—

(i) agriculture, or

(ii) the performance by a cultivator or receiver of rent-in-kind of any process ordinarily employed by cultivator or receiver of rent-in-kind to render the produce raised or received by him fit to be taken to market, or

(iii) the sale by a cultivator or receiver of rent-in-kind of the produce raised or received by him, in respect of which no process has been performed other than a process of the nature described in sub-clause (ii) :

OPERATION & COMMENCEMENT.—Where the proceedings, such as issue of notice, etc., were taken under the Income-tax Act of 1918 the subsequent coming into force of the Act of 1922 does not make the latter applicable. 80 I.C. 362.

ENGLISH AND INDIAN LAW.—An assessment is valid in law when the source of income is non-existent in the year of assessment but had been in existence in the previous year. Per *Rankin, C. J.*—The general scheme of the Income-tax Law in England is that tax is payable in respect of a source of income existing in the year of assessment though the amount is often measured by the results of previous years. But under the Indian Income-tax Act the income of the previous year is not merely the standard by which the next year's income is to be computed but is itself the subject-matter of the tax. 54 Cal. 630 = 31 C.W. N. 557 = 103 I. C. 609 = A. I. R. 1927 Cal. 553.

See 2, cl (1). AGRICULTURAL INCOME.—Forest income is "agricultural income". 45 M. 518 = 15 L. W. 496 = 1922 Mad. 325. Income derived from pasturage is agricultural income. But income derived from fisheries and from stagaljat (*i.e.*) land used for storing timber, is not "agricultural income" or "income derived from land used for agricultural purposes" and are therefore not exempt from tax as such. 2 Rang. 211 = 82 I. C. 605 = 1924 R. 337. See also 84 I. C. 31 = 1924 Cal. 668; *Avoiding Income-tax* by means not forbidden by law is not unlawful. 26 A. L. J. 280 = A. I. R. 1928 All. 81 (F.B.) though it may be an offence by false return or concealment to evade payment of income-tax (*Ibid.*). *Second Income-tax* cannot be imposed without sanction of Governor-General. 106 I. C. 882 = A. I. R. 1928 Lah. 53. Income derived from toddy extracted from cocoanut trees situated on lands assessed to Government revenue is agricultural income when it is received by the actual cultivator, whether owner or lessee of the land on which the trees grow. 50 Mad. 923. If the income

is obtained by a person who has not produced the trees from which the toddy is tapped, or has not done any agricultural operation whereby those trees have been raised, it is not agricultural income. 50 Mad. 923 = 26 L. W. 578 = (1927) M. W. N. 843 = 105 I. C. 489 = A. I. R. 1927 Mad. 1038 = 53 M. L. J. 666 (F.B.). The words "Agricultural purposes" in S. 2 (1) of the Indian Income Tax Act cannot be held to cover the process of flooding the land occupied by letting in the sea water and then extracting the sodium chloride from it by eliminating the other chemical constituents. Consequently a licensee of salt factory is liable to pay income-tax on the profits he makes by the manufacture of salt. 50 Mad. 204 = 26 L. W. 239 = 30 M. L. T. 204 = 104 I. C. 703 = (1927) M. W. N. 804 (2) = A. I. R. 1927 Mad. 848 = 53 M. L. J. 377 (F.B.). Fees received from land used for storing purchases of crops do not come within the definition of 'agricultural income' and cannot therefore be exempted from assessment. 31 C. W. N. 1047 = A. I. R. 1927 Cal. 793; nor does nazar paid by tenants to zamindar (*Ibid.*). As to income from quarries see 25 A. L. J. 816 = 103 I. C. 477 = A. I. R. 1927 All. 703. Income derived by letting out land for purposes of stocking timber is not agricultural income. 86 I. C. 1028 = 1928 Lah. 488. "Selami" or premium when paid for recognition of a transfer of a holding from one tenant to another is not agricultural income. 25 C. W. N. 80 = 61 I. C. 112 = 32 C. L. J. 433. Nazarana paid to zamindar for petitions dealing with succession, settlement and portion do not come under "agricultural income". 31 C. W. N. 1047 = A. I. R. 1927 Cal. 793; 53 Cal. 74 = A. I. R. 1925 Cal. 929. Mutation fees paid by transferee of occupancy holding and the landlord's fees paid under S. 12 Ben. Ten. Act are agricultural income exempt from income tax. See 7 Pat. 550 = 9 Pat. L. T. 439 = A. I. R. 1928 Pat. 468. Profits derived from the sale of sugar manufactured from

(c) any income derived from any building owned and occupied by the receiver of the rent or revenue of any such land, or occupied by the cultivator, or the receiver of rent-in-kind, of any land with respect to which, or the produce of which, any operation mentioned in sub-clauses (ii) and (iii) of clause (b) is carried on;

Provided that the building is on or in the immediate vicinity of the land, and is a building which the receiver of the rent or revenue or the cultivator or the receiver of the rent-in-kind by reason of his connection with the land, requires as a dwelling-house, or as a storehouse, or other out-building;

(2) "assessee" means a person by whom income-tax is payable;

(3) "Assistant Commissioner" means a person appointed to be an Assistant Commissioner of Income-tax under section 5;

(4) "business" includes any trade, commerce, or manufacture or any adventure or concern in the nature of trade, commerce or manufacture.

[(4-A) "the Central Board of Revenue" means the Central Board of Revenue constituted under the Central Board of Revenue Act, 1924.]¹

(5) "Commissioner" means a person appointed to be a Commissioner of Income-tax under section 5;

(6) "company" means a company as defined in the Indian Companies Act, 1913, or formed in pursuance of an Act of Parliament or of Royal Charter or Letters Patent, or of an Act of the Legislature of a British possession, and includes any foreign association carrying on business in British India whether incorporated or not, and whether its principal place of business is situate in British India or not, which [the Central Board of Revenue]² may, by general or special order, declare to be a company for the purposes of this Act;

(7) "Income-tax Officer" means a person appointed to be an Income-tax Officer under section 5;

(8) "Magistrate" means a Presidency Magistrate or a Magistrate of the First Class, or a Magistrate of the Second Class specially empowered by the Local Government to try offences against this Act;

(9) "Person" includes a Hindu undivided family;

(10) "prescribed" means prescribed by rules made under this Act;

(11) "previous year" means—

(a) the twelve months ending on the 31st day of March next preceding the year for which the assessment is to be made, or, if the accounts of the assessee have been made up to a date within the said twelve months in respect of a year ending on any date other than the said 31st day of March, then at the option of the assessee the year ending on the day to which his accounts have so been made up;

Provided that, if this option has once been exercised by the assessee, it shall not again be exercised so as to vary the meaning of the expression "previous year" as then applicable to such assessee except with the consent of the Income-tax Officer and upon such conditions as he may think fit; or

(b) in the case of any person, business or company or class of persons, business or company, such period as may be determined by [the Central Board of Revenue]³ or by such authority as the Board may authorize in this behalf;

sugar-cane grown is not "agricultural income". 53 I. C. 301=1919 Pat. 377 (F. B.). Zamindar having a large house to keep up his social position—Income of house not assessable—Income-tax Officer is not competent to Judge of the necessity to the zamindar for such big house. 7 Pat. 550=9 Pat. L. T. 439=A. I. R. 1928 Pat. 468.

Sec. 2, cl. (3). ASSISTANT COMMISSIONER.—Powers of Appeal limited to subject-matter of assessment. 6 Pat. L. T. 166=4 Pat. 385.

Sec. 2, cl. (4).—"BUSINESS" includes manu-

facture. 81 I. C. 273=52 Cal. 1=A. I. R. 1925 Cal. 34=28 C. W. N. 1074=40 C. L. J. 110. The negotiation of the sale of a large mill is "business" 47 All. 372=23 A. L. J. 65.

Sec. 2, cl. 4-A.—¹Inserted by Act IV of 1924, Sch.

²The words "Central Board of Revenue" for the words "the Board of Inland Revenue" were substituted by Act IV of 1924, Sch.

Sec. 2, cl. 11 (b).—See 7 Lah. 223=27 Punj. L. R. 405=96 I. C. 368=A. I. R. 1926 Lah. 421.

(12) "principal officer," used with reference to a local authority or a company or any other public body or [any]¹ association, means—

(a) the secretary, treasurer, manager or agent of the authority, company, body or association, or

(b) any person connected with the authority, company, body or association upon whom the Income-tax Officer has served a notice of his intention of treating him as the principal officer thereof ;

(13) "public servant" has the same meaning as in the Indian Penal Code ;

(14) "registered firm" means a firm constituted under an instrument of partnership specifying the individual shares of the partners of which the prescribed particulars have been registered with the Income-tax Officer in the prescribed manner ;

(15) "total income" means total amount of income, profits and gains from all sources to which this Act applies computed in the manner laid down in section 16 and

(16) "unregistered firm" means a firm which is not a registered firm.

CHAPTER I.

CHARGE OF INCOME-TAX.

3. Where any Act of the Indian Legislature enacts that income-tax shall be charged for any year at any rate or rates applicable to the total income of an assessee, tax at that rate or those rates shall be charged for that year in accordance with,

and subject to the provisions of, this Act in respect of all income, profits and gains of the previous year of every [individual, Hindu undivided family, company, firm, and other association of individuals]²

4. (1) Save as hereinafter provided, this Act shall apply to all income, profits or gains, as described or comprised in section 6, from whatever source derived, accruing, or arising ; or received

¹ The word "any" was inserted by Act XI of 1924, S. 2.

Sec. 2, cl. (14). REGISTERED FIRM.—Assessment—Mode of Registration in the year. 21 A.L.J. 703. Registration of firm—Application for, made before commencement of financial year—Order if valid. 89 I. C. 92=A. I. R. 1925 Nag. 415. An application for registering a firm under R. 2 of the Income Tax Rules 1922 must be made on or before the date on which a return is due under sub s. (2) of S. 22. 27 Bom. L. R. 223=86 I. C. 851=1925 Bom. 247 (2). Sale of whole concern shown as at a profit—Profit not taxable in all cases. See 102 I. C. 17=A. I. R. 1927 P. C. 76.

Sec. 3.—²The words "individual, Hindu undivided family, company, firm and other association of individuals" for the words "individual, company, firm and Hindu undivided family" were substituted by Act XI of 1924, S. 3.

Income signifies what comes in: the entire income of land is 'income' within S. 3. 62 I. C. 394. The total income for the purpose of S. 16 means the total amount of income, profits or gains from all sources including (1) certain receipts on which an assessee is exempt from paying income-tax and (2) the amount of tax deducted at the source by companies when paying dividends. 26 Bom. L. R. 366=48 Bom. 503. Rate of Income-tax on salaries is on estimated income for year of payment. 1 Rang 335=1924 Rang. 30. Liability of mutation nazarana to income-tax. 29 C. W. N. 969=42 C. L. J. 151=89 I. C. 997=1925 Cal. 929 (F. B.). Income, to be taxable, must come in from outside and not from within. (1913) M. W. N. 409=1923 M. 694=47 M. 1 (F. B.). "Uttarayan" being a voluntary payment made by tenants at a particular season

of the year for a particular purpose, is not exempt from assessment. 25 C.W.N. 80=61 I. C. 112=32 C. L. J. 433. A capitalist is not entitled to interest on the money invested for arriving at the net profits of a venture. 14 I. C. 628=5 Bur. L. T. 15. A body of individuals who have agreed to take in auction, work and share the profits from four toddy shops can be taxed under S. 3 of the Act, on the combined profits of the four shops. 39 M.L.T. 612=26 L. W. 655=(1927) M. W. N. 874=A. I. R. 1927 Mad. 1052=53 M. L. J. 719 (F. B.). Selling association for a number of Ice firms, if a separate firm. See 13 O. L. J. 381=92 I. C. 257=A. I. R. 1926 Oudh 191. Fund claiming exemption—Essence is mutually and aim must be not to make profit. A. I. R. 1927 Mad. 1078=53 M. L. J. 881 (F. B.).

As between preference and ordinary shareholders, the former are not entitled to have their preference dividends paid free of income-tax, in the absence of express words to that effect in the contract regulating the rights of the parties 42. B. 570=41 I. C. 968=19 Bom. L. R. 665. An Income-tax officer of a district in British India has no power to levy income-tax on a resident of Native State unless there is proof that the profits earned by the assessee in a native state arose or were received in British India. 27 Bom. L. R. 1507. For assessment of income of Hindu joint family see notes under Ss 4 to 6 *infra*. Undervaluation of opening and closing stocks of previous year—Mode of ascertaining profits. See 30 Bom. L. R. 1160. Joint Hindu family converted into registered firm—Rate of assessment. 49 All. 611=25 A. L. J. 366=102 I. C. 189=A. I. R. 1927 All. 397. As to liability of joint Hindu family and as to the effect of partition arrangement. See 49 Mad. 833=A. I. R. 1926 Mad. 949=51 M. L. J. 123

in British India, or deemed under the provisions of this Act to accrue, or arise, or to be received in British India.

(2) Profits and gains of a business accruing or arising without British India to a person resident in British India [shall, if they are received in or brought into British India be deemed to have accrued or arisen in British India and to be profits and gains of the year in which they are so received or brought,] notwithstanding the fact that they did not so accrue or arise in that year, provided that they are so received or brought in within three years of the end of the year in which they accrued or arose.

SECS. 4 AND 6.—INCOME LIABLE TO BE TAXED.—All income from 'business' arising or received or deemed so to arise or be received in British India is taxable under the Act. 52 Cal. 1 = 83 I. C. 273 = A. I. R. 1925 Cal. 34. See also 6 P. L. J. 62 = 2 P. L. T. 188 = 60 I. C. 357 = 1921 Pat. 81. Revenue free villages situated in Nizam's territory—Rent realized from tenants of—Income from rents brought into Berar is taxable. 107 I. C. 661 = A. I. R. 1928 Nag. 146. The profits or gains of a business are generally speaking the difference between the receipts and the expenses incurred in earning them. 21 N. L. R. 175.

"INCOME RECEIVED IN BRITISH INDIA"—What constitutes—Liability to tax. 3 Lah. 349 = 1923 Lah. 14 (F. B.). Non-resident foreigner having business connection in British India is liable to income-tax in British India. 44 Mad. 773 = (1921) M. W. N. 531 = 41 M. L. J. 191 = 64 I. C. 239 = 14 L. W. 75; 49 Mad. 833 = 24 L. W. 183 = A. I. R. 1926 Mad. 949 = 51 M. L. J. 123. Liability to income-tax of foreign company—40 C. L. J. 110 = 28 C. W. N. 174 = 1925 Cal. 34. But see 44 Mad. 718 = 41 M. L. J. 177. The English Income-tax Acts lay down a territorial limit. The Indian legislature appears to have gone beyond that limit. Having regard to the essential difference in language between the English and Indian Acts upon the point under consideration English cases are of no authority in India (*Ibid.*).

PROFITS EARNED OUTSIDE BRITISH INDIA—Liability to assessment—Same sum of money cannot be received as income twice over, once outside British India, and once inside it. 46 Mad. 706 = 44 M. L. J. 523 = 1923 Mad. 574. Business outside British India—Profits not remitted to British India—Tax. 43 Mad. 7 = 37 M. L. J. 663 (F. B.). As to foreign firm lending money to resident firm, see 30 Bom. L. R. 1172. The profits arising out of the manufactures of a company carrying on its business and distributing a large part of the manufacture outside British India cannot be said to accrue or be received in British India simply because the head office is in British India and the Directors control the business of British India. 45 B. 1286 = 64 I. C. 9 = 23 Bom. L. R. 570.

COMPANY INCORPORATED IN ENGLAND—Branches in India and elsewhere—Taxable profits in British India. 44 Mad. 489 = 63 I. C. 485 = 40 M. L. J. 560 (F. B.).

INCOME RECEIVED IN NATIVE STATE.—British subject—Receipt of money in Native State—Money credited with bank. (1924) P. H. C. C. 349; 4 Pat. 210; 92 I. C. 351 = A. I. R. 1926 Bom. 50. Bank in British India having branches in Cochin and Travancore—Liability to income-tax. 24 L. W. 685 = (1926) M. W. N. 740 = A. I. R. 1926 Mad. 1048 = 51 M. L. J. 403 (F. B.). See also 107 I. C. 661 = A. I. R. 1928 Nag. 146. Money

earned in Native States—Subsequent transfer to British India—If taxable. 4 Pat. 210 = 6 P. L. T. 47 = 85 I. C. 164 = A. I. R. 1925 Patna 281. Where the receipt of the income first took place in Hyderabad outside British India it was not assessable to income-tax. (1924) P. H. C. C. 349. (3 Lah. 349; 46 M. 706, Foll.) A lady enjoying an annuity in Mysore State and receiving instalments through her agent while in British India, is liable to be taxed. 39 Mad. 885 = 31 I. C. 404.

TAXABLE INCOME.—ILLUSTRATIVE CASES.—The profits or losses arising from wagering contracts are to be taken into account in an assessment for income-tax purposes. 47 All. 368 = 23 A. L. J. 63. Income derived from forests and fisheries in a permanently settled estate are exempted from liability to income-tax. 45 Mad. 518 = 1922 Mad. 325. See also 84 I. C. 31 = 1924 Cal. 668; 92 I. C. 338 = A. I. R. 1925 Pat. 313. Income, from *hats ghasalgi and talkar*, whether included in the assets of permanent settlement—If liable to income tax—Illegal due realised in *hats*—Income of *hats* not specifically mentioned at the time of Permanent Settlement whether assessable—Onus, on assessee or Crown (1925) P. H. C. C. 49 = 6 Pat. 1. T. 55 = 1925 Pat. 313. Royalty—Payment of lump sum—Mining lease—Liability to tax. (1921) P. H. C. C. 234 = 5 Pat. 1. T. 497 = 82 I. C. 653 = 4 Pat. 73. The income of the royalty of a local mine, received by its owner, is not an income from business but it falls under S. 5 (iv) now S. 6 (vi) as one derived from other sources. 6 P. L. J. 62 = 2 P. L. T. 188 = 60 I. C. 357 = 1921 Pat. 81. Joint family property—Impartible estate—Income of, (1924) P. H. C. C. 234 = 5 Pat. 1. T. 497 = 82 I. C. 653 = 1924 P. 679 = 4 Pat. 73. Mere constitution of the partnership between some members of the family will not preclude the assessment in cases where the partnership is carried on behalf of and for the benefit of the joint family. 45 M. L. J. 150 = 46 Mad. 673 = 1923 Mad. 682. Bonus shares issued out of accumulated profits as dividends to a share holder or an addition to the shareholder's capital and not income taxable by the Crown. 3 Mys. L. J. 65. A club is liable to pay income-tax in respect of its house property. Subscriptions received from the members are not 'income' and therefore not liable to income-tax under the Act. 61 I. C. 886 = 2 Lah. 109. A partnership is, for income-tax purposes, not an entity known to law, and there is, for this purpose, no distinction between registered and unregistered firms. 1924 Mad. 474 = 47 Mad. 660 = 77 I. C. 772 = 46 M. L. J. 68. Income—Interest not realised is not taxable. 16 L. W. 174 = 1922 Mad. 426. Interest which became due but not actually realised in cash or by adjustment is not liable to tax. 44 M. 65 = 59 I. C. 482 = 39 M. L. J. 640 (F. B.).

Sec. 4 (1).—Goods sold by agent in Europe and money forwarded to India through bank—Agent getting a part of the proceeds by compromise.

Explanation.—Profits or gains accruing or arising without British India shall not be deemed to be received or brought into British India within the meaning of this sub-section by reason only of the fact that they are taken into account in the balance sheet prepared in British India.

(3) This Act shall not apply to the following classes of income :—

(i) Any income derived from property held under trust or other legal obligation wholly for religious or charitable purposes, and in the case of property so held in part only for such purposes, the income applied, or finally set apart for application thereto.

(ii) Any income of a religious or charitable institution derived from voluntary contributions and applicable solely to religious or charitable purposes.

(iii) The income of local authorities.

(iv) Interest on securities which are held by, or are the property of any Provident Fund to which the Provident Funds Act, 1897, applies, [* * *] 2

(v) Any capital sum received in commutation of the whole or a portion of a pension, or in the nature of consolidated compensation for death or injuries, or in payment of any insurance policy, or as the accumulated balance at the credit of a subscriber to any such Provident Fund.

(vi) Any special allowance, benefit or perquisite specifically granted to meet expense wholly and necessarily incurred in the performance of the duties of an office or employment of profit.

(vii) Any receipts not being receipts arising from business or the exercise of a profession, vocation or occupation, which are of a casual and non-recurring nature, or, are not by way of addition to the remuneration of an employee.

between him and principal in Kabul—Agent is liable to pay tax on such amount. 8 Lah. 335 = 9 Lah. 1. J. 405 = 102 I. C. 298 = A. I. R. 1927 Lah. 512.

Sec. 4, Cls. (1) and (2).—Income arising in British India—Mercantile basis of accountancy—Amount shown as interest in accounts—Liability to income tax—Actual receipt of amount if necessary—Assessee adopting mercantile basis of accountancy—Income tax on cash basis—Plea of, by assessee—Right of. 50 Mad. 765 = 104 I. C. 645 = 39 M. L. T. 510 = A. I. R. 1927 Mad. 841 = 26 L. W. 223 = (1927) M. W. N. 598 = 53 M. L. J. 370 (F.B.) Bank in British India—Branches in Cochin and Travancore—Profits or gains—“Received or brought in”—What amounts to. See 43 Mad. 910 Business outside British India—Profits earned more than three years before the year of assessment and profits earned within that period—Remittance of amount to British India—Presumption whether remittance made from earlier profits. 50 Mad. 853 = 26 L. W. 123 = (1927) M. W. N. 777 = 104 I. C. 352 = 39 M. L. T. 153 = A. I. R. 1927 Mad. 772 = 53 M. L. J. 416 (F.B.). Resident in British India—Company or partnership having several places of business within and outside British India—When can be said to have several residences. 50 Mad. 847 = 26 L. W. 119 = 39 M. L. T. 101 = 104 I. C. 223 = A. I. R. 1927 Mad. 732 = 53 M. L. J. 243 (F.B.).

¹The words “shall if they are...brought” were substituted for the words “shall be deemed to be profits and gains of the year in which they are received or brought into British India” by Act XXVII of 1923, S. 2.

Sec. 4 (3) (i). **PROPERTY HELD IN TRUST**, what amounts to. See 105 I. C. 155; See also 49 Mad. 833 = (1926) M. W. N. 620 = 96 I. C. 957 =

24 L. W. 183 = A. I. R. 1926 Mad. 949 = 51 M. L. J. 123. The word “wholly” in S. 4, (3) (i) must be read in its ordinary acceptation and is in this respect closely akin to the word “solely.” The word does not mean “mainly” 105 I. C. 155. Professional income dedicated to educational objects

No exemption from income tax. 4 Rang. 538 = 100 I. C. 235 = A. I. R. 1927 Rang. 95 (F.B.) Where a fund alleged to be for charitable purposes is found completely within assessee’s volition no deduction can be allowed. A. I. R. 1928 Nag. 102 Where a temple has a share in a partnership the income derived from the partnership cannot be said to be income derived from property held under trust for a religious or charitable purpose and hence is not exempt from taxation. 47 A. 68; 22 A. L. J. 913 = 84 I. C. 207 = 1925 A. 115. Where an assessee carries on business at places within and without British India and remittances are made from the place outside British India and into British India and spent on charitable and religious institutions by the assessee, the moneys, remitted are liable to assessment to income-tax unless it is shown that they were impressed with a trust before they left the foreign place for British India. The mere fact that they were allotted to a trust after their receipt in British India is not sufficient to secure exemption from liability to assessment. I. L. T. 40 Mad. 45 = 54 M. L. J. 226 (F.B.).

S. 4 (3) (iv)—²In Sec. 4 (3) (iv) the words “or any Provident Insurance Society to which the Provident Insurance Societies Act, 1912 is, or but for an exemption under that Act would be applicable” were omitted by Act XI of 1924, S. 4.

Sec. 4, Cls. (3) (vi)—**INCOME WHICH IS OF CASUAL OR NON-RECURRING NATURE.**—Profits made by money lender out of exchange fluctu-

(viii) Agricultural income.

In this sub-section "charitable purpose" includes relief of the poor, education, medical relief, and the advancement of any other object of general public utility.

CHAPTER II.

INCOME-TAX AUTHORITIES.

Income-tax authorities.

5. (1) There shall be the following classes of Income-tax authorities for the purposes of this Act, namely—

- (a) [the Central Board of Revenue.]¹
- (b) Commissioner of Income tax.
- (c) Assistant Commissioners of Income-tax, and
- (d) Income-tax Officers.

(2) [* * * * *]²

(3) There shall be a Commissioner of Income-tax, for each Province who shall be appointed by the Governor-General in Council [* * *]³

(4) Assistant Commissioners of Income-tax and Income-tax Officers shall, subject to the control of the Governor-General in Council, be appointed by the Commissioner of Income-tax by order in writing. They shall perform their functions in respect of such classes of persons and such classes of income and in respect of such areas as the Commissioner of Income-tax may direct. The Commissioner may, by general or special order in writing, direct that the powers conferred on the Income-tax officer and the Assistant Commissioner by or under this Act shall, in respect of any specified case or class of cases, be exercised by the Assistant Commissioner and the Commissioner, respectively, and, for the purposes of any case in respect of which such order applies, references in this Act or in any rules made hereunder to the Income-tax Officer and the Assistant Commissioner shall be deemed to be references to the Assistant Commissioner and the Commissioner, respectively.

(5) [The Central Board of Revenue]¹ may, by notification in the *Gazette of India*, appoint Commissioners of Income-tax, Assistant Commissioners of Income-tax

ations—If assessable. 45 M. L. J. 707=1924 Mad. 208. A receipt of a casual and non-recurring nature arising from business or the exercise of a profession, vocation or occupation does not come within exception. 47 All. 372=23 A. L. J. 65. Isolated transaction—Unusually heavy commission is not of "casual or non-recurring" nature, (*Ibid*). A remuneration earned by a cotton merchant who is appointed under a power of attorney to realize the cotton which another merchant had purchased is "receipts arising from business" and is liable to be assessed to Income Tax. 27 Bom. L.R. 478=87 I.C. 706=A. I. R. 1925 Bom. 318. The phrase, receipts 'arising from business' as used in S. 4 (3) (vii) is not confined to receipts arising from a business carried on continuously during the year. Even if they are from a single adventure in business they would be liable to be taxed. (*Ibid*).

Sec. 4 (3) (viii)—[See also Notes under S. 2 (1)]. Usufructuary mortgagee leasing mortgaged property to mortgagor on fixed annual payments—Such payments are agricultural income and should be excluded from income-tax. 26 A. L. J. 280=A. I. R. 1928 All. 81 (F.B.). See also (1928) M. W. N. 313=A. I. R. 1928 Mad 543=54 M. L. J. 524 (F. B.). Income from quarries, if income from agricultural purposes. See 50 All. 98.

SCOPE AND OBJECT.—S. 4 (3) (viii) read with S. 2 is a section designed to protect the producer by giving him exemption from liability from income-tax as a *bona fide* agriculturist carrying on business of a farmer in the ordinary course of

good husbandry. 53 I. C. 301=1919 Pat. 377 (F.B.) See also 25 A. L. J. 816=103 I. C. 477=A. I. R. 1927 All. 703; (1928) M. W. N. 313=A. I. R. 1928 Mad 543=54 M. L. J. 524 (F. B.). In the process of preparing tea for the market, the part when the tea is planted and plucked is agriculture, and the part when the leaf is dried, rolled and stored, is manufacture. For assessing income-tax, the profits from the agricultural process are exempt and only that from the manufacture is liable to assessment. 48 Cal. 161=61 I. C. 107=32 O. L. J. 421.

Income derived from *talkar*, (fishery) *hats* and *ghatlagi* is not agricultural income and is not exempt from income-tax. 3 Pat. 470=1924 P. H. C. C. 69=78 I. C. 783=2 Pat. L. R. 25 (Cr.)=5 Pat. L. T. 459=1924 P. 474; 104 I. C. 841; See also 53 Cal. 524=30 C. W. N. 524=44 C. L. J. 427=A. I. R. 1926 Cal. 819.

Sec. 5.—The Income-tax officer of the area in which the principal place of business is situated has the duty of assessing the whole of the income derived from the principal place of business as well as the various branches. 47 All. 631=23 A. L. J. 379=L. R. 6 All. 325=88 I. C. 216 (2)=A. I. R. 1925 All. 385.

¹ The words "the Central Board of Revenue" for the words "a Board of Inland Revenue" were substituted by Act IV of 1924, Sch.

² Omitted by Act I of 1914, Sch.

Sec. 5, Cl. (3)—³ The words "after consideration of any recommendation made by the local government in this behalf" omitted by Act XVI of 1928.

and Income-tax Officers to perform such functions in respect of such classes of persons or such classes of income, and for such area, as may be specified in the notification, and thereupon the functions so specified shall cease, within the specified area, to be performed, in respect of the specified classes of persons or classes of income, by the authorities appointed under sub-sections (3) and (4).

(6) Assistant Commissioners of Income-tax and Income-tax Officers appointed under sub-section (4) shall, for the purposes of this Act, be subordinate to the Commissioner of Income-tax appointed under sub-section (3) for the Province in which they perform their functions.

CHAPTER III.

TAXABLE INCOME.

6. Save as otherwise provided by this Act, the following heads of income, profits and gains, shall be chargeable to income-tax in the manner hereinafter appearing, namely :—

Heads of income chargeable to income-tax.

- (i) Salaries.
- (ii) Interest on securities.
- (iii) Property.
- (iv) Business.
- (v) Professional earnings.
- (vi) Other sources.

7. (1) The tax shall be payable by an assessee under the head "Salaries" in respect of any salary or wages, any annuity, pension or gratuity, and any fees, commissions, perquisites or profits received by him in lieu of, or in addition to, any salary or wages, which are paid by or on behalf of Government, a local authority, a company, or any other public body or association, or by or on behalf of any private employer :

¹ [Explanation.—The right of a person to occupy free of rent as a place of residence any premises provided by his employer is a perquisite for the purposes of this sub-section :]

Provided that the tax shall not be payable in respect of any sum deducted under the authority of Government from the salary of any individual for the purpose of securing to him a deferred annuity or of making provision for his wife or children, provided that the sum so deducted shall not exceed one-sixth of the salary.

(2) Any income which would be chargeable under this head if paid in British India shall be deemed to be so chargeable if paid to a British subject or any servant of His Majesty in any part of India by Government or by a local authority established by the Governor-General in Council.

8. The tax shall be payable by an assessee under the head "Interest on securities" in respect of the interest receivable by him on any security of the Government of India or of a Local Government, or on debentures or other securities for money issued by or on behalf of a local authority or a company :

Provided that no income-tax shall be payable on the interest receivable on any security of the Government of India issued or declared to be income tax free.

Sec. 6.—See under S. 4.

Sec. 6, Cl. (vi).—Income from *Jalkars* which were included in the assets of the estate at the time of Permanent Settlement is not liable to assessment to income-tax. Such income does not fall under the term "other sources". 53 Cal. 524=44 C. L. J. 427=95 I.C. 539=A. I. R. 1926 Cal. 819; 54 Cal. 863=102 I. C. 845=31 C. W. N. 765=45 C. L. J. 323=A. I. R. 1927 Cal. 432 (F. B.) (Case-law fully dismissed) Foreign firm lending to resident firm, *see* 30 Bom. L. R. 1172

Sec. 7 (1).—Scope of. 6 Pat. L. T. 47=4 Pat. 210=85 I. C. 164=A. I. R. 1925 Patna 281. As to assessment of income-tax on salaries, *see* 1 Rang. 335=1924 Rang. 30.

¹ Explanation added by Act XV of 1923, S. 2.

Sec. 8.—INTEREST ON SECURITIES.—*See* 6 P. 29=100 I.C. 897=8 Pat. L. T. 359=A. I. R. 1927 Pat. 131. Section not retrospective. 54 I. A. 421=8 Pat. L. T. 791=25 A. L. J. 964=4 O. W. N. 1053=A. I. R. 1927 P. C. 242=53 M. L. J. 819 (P. C.).

Provided, further, that the income-tax payable on the interest receivable on any security of a Local Government issued income-tax free shall be payable by that Local Government.

9. (1) The tax shall be payable by an assessee under the head "Property" in respect of the *bona fide* annual value of property consisting of any buildings or lands appurtenant thereto of which he is the owner, other than such portions of such property as he may occupy for the purposes of his business, subject to the following allowances, namely :—

(i) Where the property is in the occupation of the owner, or where it is let to a tenant and the owner has undertaken to bear the cost of repairs, a sum equal to one-sixth of such value ;

(ii) where the property is in the occupation of a tenant who has undertaken to bear the cost of repairs, the difference between such value and the rent paid by the tenant up to but not exceeding one-sixth of such value ;

(iii) the amount of any annual premium paid to insure the property against risk of damage or destruction.

(iv) where the property is subject to a mortgage or charge or to a ground rent, the amount of any interest on such mortgage or charge or of any such ground rent ;

(v) any sums paid on account of land-revenue in respect of the property ;

(vi) in respect of collection charges, a sum not exceeding the prescribed maximum ;

(vii) in respect of vacancies, such sum as the Income-tax officer may determine having regard to the circumstances of the case ;

Provided that the aggregate of the allowances made under this sub-section shall in no case exceed the annual value.

(2) For the purposes of this section, the expression "Annual value" shall be deemed to mean the sum for which the property might reasonably be expected to let from year to year ;

Provided that, where the property is in the occupation of the owner for the purposes of his own residence, such sum shall, for the purposes of this section, be deemed not to exceed 10 per-cent. of the total income of the owner.

10. (1) The tax shall be payable by an assessee under the head "Business" in respect of the profits or gains of any business carried on by him.

(2) Such profits or gains shall be computed after making the following allowances, namely :—

(i) any rent paid for the premises in which such business is carried on, provided that, when any substantial part of the premises is used as a dwelling-house by the assessee, the allowance under this clause shall be such sum as the Income-tax Officer may determine having regard to the proportional part so used ;

(ii) in respect of repairs, where the assessee is the tenant only of the premises, and has undertaken to bear the cost of such repairs, the amount paid on account thereof, provided that, if any substantial part of the premises is used by the assessee as a dwelling-house, a proportional part only of such amount shall be allowed ;

(iii) in respect of capital borrowed for the purposes of the business, where the payment of interest thereon is not in any way dependent on the earning of profits, the amount of the interest paid ;

Sec. 9 (1) (vii).—Where certain bungalows of a Rajah were kept ready for occupation they cannot escape assessment though in fact it so happened in any one year that they were not lived in by the Rajah or his guests or officers. 22 L. W. 822. Business premises, (as) shops, offices, godowns, etc., if "house property." See 11 I. B. R. 781 = 67 I. C. 781 = 1 Bur. L. J. 46, also the Amending Act of 1920. A loss incurred by a

firm by standing surety for another firm is not loss incurred forming a deduction under the Act. 92 I. C. 249 = A. I. R. 1926 Lah. 168.

Snb-sec. (1) (vii).—"Vacancy" meaning of—See 49 Mad. 22 = 91 I. C. 940 = A. I. R. 1926 Mad. 287 = 50 M. L. J. 63.

Sec. 10.—WHAT ARE PROPER DEDUCTIONS. —Money embezzled by the clerk of the assessee is a deduction in computing the income or profits

Explanation.—Recurring subscriptions paid periodically by share-holders or subscribers in such Mutual Benefit Societies as may be prescribed, shall be deemed to be capital borrowed within the meaning of this clause ;

(iv) in respect of insurance against risk of damages or destruction of buildings, machinery, plant, furniture, stocks or stores, used for the purposes of the business, the amount of any premium paid ;

(v) in respect of current repairs to such buildings, machinery, plant, or furniture, the amount paid on account thereof ;

(vi) in respect of depreciation of such buildings, machinery, plant, or furniture being the property of the assessee, a sum equivalent to such percentage on the original cost thereof to the assessee as may in any case or class of cases be prescribed :

Provided that—

of the business ; so also the boarding expenses of servants and their transit charges are items of deduction. 86 I. C. 777=4 Pat. 385=A. I. R. 1925 P. 408. Firm carrying on business in partnership with other firms—Losses if a deduction—Expenses on accountants and lawyers can be deducted. 45 M. L. J. 711=1924 M. 205. The Burma Railways Co. are the owners for the Railway system and all its premises for the purpose of S. 9 (2) of the Income-tax Act (VII of 1918), but they are owners not by reason of their being partners with the Secretary of State for India. 64 I. C. 801=11 L. B. R. 33. The amount of interest due on a mortgage debt but not actually paid is an allowable item of expenditure under head 'house property income' under the Sec. 54 Cal. 630=31 C. W. N. 557=103 I. C. 609=A. I. R. 1927 Cal. 553. Banking business at places within British India and at places outside British India—Money borrowed at head office, part of the borrowing remitted to a place outside British India and used as capital there—Interest paid not allowable as a deduction. 27 L. W. 442=54 M. L. J. 436 (F. B.) Where a company acquires lands and building and lets the same for rent the income arising therefrom is assessable under the category of "profits" and not "business". 32 C. W. N. 413=1 L. T. 40 Cal. 85. Borrowed Capital used for a separate branch of the business—Failure of this branch of business and loss of amount—Assessment for the year following the year of loss—Interest paid on borrowed capital during the year of assessment, deduction of. See 55 M. L. J. 600 (F. B.).

Business profits—Company managing railway on behalf of Secretary of State—Computation of profits—Deduction of guaranteed interest—Interest on borrowed capital. 49 Cal. 815=27 C. W. N. 34=1922 Cal. 503. Losses suffered by an assessee as a member of a company or firm are to be taken into account in fixing the amount of his taxable income. 1924 Nag. 153. Under Act VII of 1918, share of a partner's loss in an unregistered firm of which he is a partner can be deducted from his other income for purposes of income-tax. 80 I. C. 362. Business profits—Assessment based on income of the previous year—Deduction for obsolete machinery. 48 Bom. 389=26 Bom. L. R. 312. Deduction for depreciation—Rice-mill factory lease of—Owner to bear loss due to wear and tear—Deduction if allowable. See 50 Mad. 520. Profit—Computation of—Depreciation in the value of securities held by a bank. 46 Bom. 567=24 Bom. L. R. 118=1922 Bom. 75. Tax on companies levied under S. 92

of the Madras District Municipalities Act (V of 1920), can be deducted as a business allowance under S. 10, sub-S. (2), cl. (9) of the Indian Income-tax Act in calculating the profits of a company. 81 I. C. 454=1924 Mad. 693=47 Mad. 667=47 M. L. J. 160. Machinery sold as not obsolete—Loss sustained by sale—Deduction from annual profits—Assessee's right to. 1924 Mad. 455=70 I. C. 608=46 M. L. J. 42. The word "obsolete" in S. 10 (2) must be taken to include cases of unfitness from whatever cause. The question whether the total destruction of machinery which renders it unfit for the purpose it was originally intended for, entitles the owner to claim deduction from income-tax is a question on which a reference can be made under S. 66. 20 L. W. 859=1925 Mad. 157=85 I. C. 478. Business profits—Deductions—Interest taken by partners. 46 All. 1=4 L. R. A. (Civ.) 451=21 A. L. J. 703=75 I. C. 339=1924 All. 137. The question whether there has been an advance of capital by particular partners, or *bona fide* borrowing of money by the firm in which the lender happens to be a partner must be treated as one of fact in each case. (*Ibid.*) The Act exempts from the assessment the allowance made to the assessee under S. 9 (2) on account of the annual value of business premises owned and occupied by him. 43 All. 139=18 A. L. J. 1017=58 I. C. 836 (F. B.).

WHAT ARE NOT PROPER DEDUCTIONS.—Remittances from abroad to a firm are presumed to be profits, rather than capital until the contrary is shown by assessee. 49 Mad. 465=(1926) M. W. N. 622=24 L. W. 343=A. I. R. 1926 Mad. 767=51 M. L. J. 138. Assessee claiming deduction of amounts paid as road cess in computing profits of colliery assessable to a tax—Cess 'a local rate'. 89 I. C. 789=29 C. W. N. 923 ; 91 I. C. 476=A. I. R. 1926 Pat. 109. In the case of income derived from a royalty of collieries local rates and cesses paid under the Jharia Water Supply Act or Mining Settlement Act do not form permissive deductions as they are in no sense expenses incurred for the making of the income. 4 Pat. 752 ; 3 Pat. 295=6 Pat. L. T. 376=81 I. C. 920=1924 Pat. 670. Deduction on account of payment of road cess. See 53 Cal. 76=A. I. R. 1926 Cal. 396. Business profits—Isolated transaction—Casual profits—Profit through brokerage—Wagering Contracts. 23 A. L. J. 63=47 All. 368. Profits arising from wagering contracts entered into in the course of business are liable to income-tax. 23 A. L. J. 63=47 All. 368. Payments to be made

(a) the prescribed particulars have been duly furnished ;

(b) where full effect cannot be given to any such allowance in any year owing to there being no profits or gains chargeable for that year, or owing to the profits or gains chargeable being less than the allowance, the allowance or part of the allowance to which effect has not been given, as the case may be, shall be added to the amount of the allowance for depreciation for the following year and deemed to be part of that allowance, or, if there is no such allowance for that year, be deemed to be the allowance for that year, and so on for succeeding years ; and

(c) the aggregate of all such allowances made under this Act or any Act repealed hereby, or under the Indian Income-tax Act, 1886, shall, in no case, exceed the original cost to the assessee of the buildings, machinery, plant or furniture, as the case may be ;

(vii) in respect of any machinery or plant which, in consequence of its having become obsolete, has been sold or discarded, the difference between the original cost to the assessee of the machinery or plant as reduced by the aggregate of the allowances made in respect of depreciation under clause (vi), or any Act repealed hereby, or the Indian Income-tax Act, 1886, and the amount for which the machinery or plant is actually sold, or its scrap value ;

[(vii-a) "in respect of animals which have been used for the purposes of the business otherwise than as stock in trade and have died or become permanently useless for such purposes, the difference between the original cost to the assessee of the animals and the amount, if any, realised in respect of the carcasses or animals ;"]¹

(viii) any sums paid on account of land-revenue, local rates or municipal taxes in respect of such part of the premises as is used for the purposes of the business ;

(ix) any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of earning such profits or gains :

[" Provided that nothing in clause (viii) or clause (ix) shall be deemed to authorise the allowance of any sum paid on account of any cess, rate or tax levied on the profits or gains of any business or assessed at a proportion of or otherwise on the basis of any such profits or gains "]²

(3) In sub-section (2), the word "paid" means actually paid or incurred according to the method of accounting upon the basis of which the profits or gains are computed under this section.

11. (1) The tax shall be payable by an assessee under the head "Professional earnings" in respect of the profits or gains of any profession or vocation followed by him.

Professional earnings,

(2) Such profits or gains shall be computed after making allowance for any expenditure (not being in the nature of capital expenditure) incurred solely for the purposes of such profession or vocation, provided that no allowance shall be made on account of any personal expenses of the assessee.

(3) Professional fees paid in any part of India to a person ordinarily resident in British India shall be deemed to be profits or gains chargeable under this head.

in certain proportion out of the profits on the capital advanced for the purposes of the business cannot be treated as expenditure incurred solely for the purpose of earning such profits or gains within the meaning of clause (i) of sub-S. (2) of S. 10. 49 Bom. 362 = 27 Bom. L.R. 219. Question whether expenditure incurred in renewing parts of motor-car is capital-expenditure is one of evidence—But deduction for loss caused by total damage to car owned by a motor-car company is a question of importance—Reference to High Court. 85 I. C. 478 = A. I. R. 1925 Mad. 157. The commission paid by a company to underwriters for raising fresh capital is not an expenditure solely incurred with the object of earning profits of the company's business and therefore is not within the scope of Sec. 9 (2) (x) (now S. 10 (2) (ix)) of the Income-tax Act. 54 I. C. 12 = 23

Bom. L. R. 576.

Sec. 10 (2) (vii-a)—¹Inserted by Act III of 1928.

Sec. 10 (2) (ix)—Contribution to employees' Provident Fund by a bank—If entitled to deduction. See 49 Mad. 910 ; Payment of profits to working partners. 26 L. W. 659 = (1927) M. W. N. 869 = A. I. R. 1927 Mad. 1053 (F.B.). Loan advanced by partner to partnership business—Interest paid thereon must be deducted in computing the profits of the firm. See 55 M. L. J. 416 (F.B.).

Prov. 50 to Cl. (ix)—²Inserted by Act III of 1928.

Sec. 11.—Professional tax paid under City Municipal Act cannot be allowed as a deduction from the taxable income. See 92 I. C. 943 = 49 Mad. 296 = (1926) M. W. N. 478 = 24 L. W. 566 = A. I. R. 1926 Mad. 368 = 50 M. L. J. 176 (F. B.).

12. (1) The tax shall be payable by an assessee under the head "Other sources" in respect of income, profits and gains of every kind and from every source to which this Act applies (if not included under any of the preceding heads).

Other sources.

(2) Such income, profits and gains shall be computed after making allowance for any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of making or earning such income, profits or gains, provided that no allowance shall be made on account of any personal expenses of the assessee.

13. Income, profits and gains shall be computed, for the purposes of sections 10, 11 and 12, in accordance with the method of accounting regularly employed by the assessee:

Method of accounting.

Provided that, if no method of accounting has been regularly employed, or if the method employed is such that, in the opinion of the Income-tax Officer, the income, profits and gains cannot properly be deduced therefrom, then the computation shall be made upon such basis and in such manner as the Income-tax Officer may determine.

14. (1) The tax shall not be payable by an assessee in respect of any sum which he receives as a member of a Hindu undivided family.

Exemptions of a general nature.

(2) The tax shall not be payable by an assessee in respect of—

(a) any sum which he receives by way of dividend as a shareholder in a company where the profits or gains of the company have been assessed to income-tax; or
(b) such an amount of the profits or gains of any firm which have been assessed to income-tax as is proportionate to his share in the firm [at the time of such assessment.]¹

15. (1) The tax shall not be payable by an assessee in respect of any sums paid by him to effect an insurance on his own life or on the life of his wife, or in respect of a contract for a deferred annuity on his own life or on the life of his wife, or as a contribution to any Provident Fund to which the Provident Funds Act, 1897, applies.

Exemption in the case of life insurances.

(2) Where the assessee is a Hindu undivided family, there shall be exempted under sub-section (1) any sums paid to effect an insurance on the life of any male member of the family or of the wife of any such member.

Sec. 12.—The profits by resident in France having a branch or agent in British India, and which are received and retained in France are not liable to income tax in British India. 44 M. L. J. 290 = 46 Mad. 360 = 1923 Mad. 422.

"OTHER SOURCES" See 54 Cal. 863 = 102 I.C. 345 = 31 C. W. N. 765 = 45 C. L. J. 323 = A. I. R. 1927 Cal. 432 (F. B.). See also 53 Cal. 521 = 44 C. L. J. 427; 6 P. 29 = 100 I. C. 897 = 8 Pat. L. T. 359 = A. I. R. 1927 Pat. 133.

Sec. 13.—Wholly arbitrary assessment by income-tax officer is not justified by the Sec. 27 Punj. L. R. 836 = 8 L. L. J. 106 = 94 I.C. 614 = 7 Lah. 201 = A. I. R. 1926 Lah. 161. Decision of the income-tax officer as to method of accounting, finality of. See 94 I. C. 128 = A. I. R. 1926 Lah. 446. Where a method of accounting is accepted by the Income-tax officer in one transaction, he cannot object to the same method in similar other transactions. A. I. R. 1928 Nag. 102; Stock valued at cost price—Market price less in year of assessment—Assessee not claiming loss on that head—Cost price should be considered (*Ibid*).

Sec. 13. *Proviso* does not apply where genuineness of account is doubted. S. 23 (2) applies in such a case. 7 Lah. 138 = 27 Punj. L. R. 325 = A. I. R. 1926 Lah. 201.

PROCEDURE of income-tax officer must be governed by judicial considerations. Hearsay evidence is no basis for assessment. 94 I. C. 156 = A. I. R. 1926 Lah. 233. Interest due, but not collected is not assessable. A. I. R. 1926 Nag. 241 (A. I. R. 1927 Mad. 841 Dist.).

Sec. 14.—[See also notes under S. 4 *supra*]. Income personally derived by an assessee as a member of a joint family is not taxable under S. 14 of the Act. 5 Pat. L. T. 609 = 3 Pat. 664 = 1924 P. 644. See also 2 Pat. L. R. 122 (Cr.). Taxable income—Income derived by assessee as a member of a joint family. 88 I.C. 1014 = A. I. R. 1924 Pat. 644. See also 5 Pat. 20 = 93 I.C. 599 = 7 Pat. L. T. 391 = A. I. R. 1926 Pat. 256. Where a husband and wife formed a partnership and the husband took some extra rights in himself of taking new partners and each of them was entitled to take in new partners after the death of the other, held that a partnership was legally formed. 25 Bom. L. R. 1225 = 1924 Bom. 182.

¹ Added by Act III of 1928

Sec. 15 (1)—The words "or to any Provident Fund which complies with the provisions of the Provident Insurance Societies Act, 1912, or has been exempted from the provisions of that Act" were omitted by Act XI of 1924, S. 5.

(3) The aggregate of any sums exempted under this section shall not, together with any sums exempted under the proviso to sub-section (1) of section 7, exceed one-sixth of the total income of the assessee.

16. (1) In computing the total income of an assessee sums exempted under the proviso to sub-section (1) of section 7, the provisos to section 8, sub-section (2) of section 14 and section 15, shall be included.

Exemptions and exclusions in determining the total income.

(2) For the purposes of sub-section (1), any sum mentioned in clause (a) of sub-section (2) of section 14 shall be increased by the amount of income-tax payable by the company in respect of the dividend received.

17. Where owing to the fact that the total income of any assessee has reached or exceeded a certain limit he is liable to pay income-tax or to pay income-tax at a higher rate, the amount of income-tax payable by him shall, where necessary, be reduced so as not to exceed the aggregate of the following

Reduction of tax when margin above a certain limit is small.

amounts, namely :—

(a) the amount which would have been payable if his total income had been a sum less by one rupee than that limit, and

(b) the amount by which his total income exceeds that sum.

CHAPTER IV.

DEDUCTIONS AND ASSESSMENT.

18. (1) Income-tax shall, unless otherwise prescribed in the case of any security of the Government of India, be leviable in advance by deduction at the time of payment in respect of income chargeable under the following heads :—

(i) "Salaries"; and

(ii) "Interest on securities."

(2) Any person responsible for paying any income chargeable under the head "Salaries" shall, at the time of payment, deduct income-tax on the amount payable at the rate applicable to the estimated income of the assessee under this head :

Provided that such person may, at the time of making any deduction, increase or reduce the amount to be deducted under this sub-section for the purpose of adjusting any excess or deficiency arising out of any previous deduction or failure to deduct.

[2-A. Notwithstanding anything hereinbefore contained, for the purpose of making the deduction under sub-section (2), there shall be included in the amount payable any income chargeable under the head "salaries" which is payable to the assessee out of India by or on behalf of Government, and the value in rupees of such income shall be calculated at the prescribed rate of exchange.]¹

(3) The person responsible for paying any income chargeable under the head "Interest on securities" shall, at the time of payment, deduct income-tax on the amount of the interest payable at the maximum rate.

(4) All sums deducted in accordance with the provisions of this section shall, for the purpose of computing the income of an assessee, be deemed to be income received.

(5) Any deduction made in accordance with the provisions of this section shall be treated as a payment of income-tax on behalf of the person from whose income the deduction was made, or of the owner of the security, as the case may be, and credit shall be given to him therefor in the assessment, if any, made for the following year under this Act :

Provided that, if such person or such owner obtains, in accordance with the provisions of this Act, a refund of any portion of the tax so deducted, no credit shall be given for the amount of such refund.

Sec. 18 (2).—[See also notes under S. 7.] The deduction of income-tax from salaries under S. 18 at the time of the payment of the salary must be made at the rate applicable to the estimated

income for the year of assessment. 83 I.C. 20 = A. I. R. 1924 Rang. 30. See also 1 Rang. 335.

Sec. 18 (2 A).—Inserted by Act XVI of 1925, S. 2.

(6) All sums deducted in accordance with the provisions of the section shall be paid within the prescribed time by the person making the deduction to the credit of the Government of India, or as [the Central Board of Revenue]¹ directs.

(7) If any such person does not deduct and pay the tax as required by this section, he shall, without prejudice to any other consequences which he may incur, be deemed to be personally in default in respect of the tax.

(8) The power to levy by deduction under this section shall be without prejudice to any other mode of recovery.

(9) Every person deducting income-tax in accordance with the provisions of sub-section (3) shall, at the time of payment of interest, furnish to the person to whom the interest is paid a certificate to the effect that income-tax has been deducted, and specifying the amount so deducted, the rate at which the tax has been deducted, and such other particulars as may be prescribed.

19. In the case of income chargeable under any other heads than those mentioned in sub-section (1) of section 18, and in any case where income-tax has not been deducted in accordance with the provisions of that section, the tax shall be payable by the assessee direct.

[19-A. The principal officer of every company shall, on or before the 15th day of June in each year furnish to the prescribed officer a return in the prescribed form and verified in the prescribed manner of the names and of the addresses as entered in the register of shareholders maintained by the company, of the shareholders to whom a dividend or aggregate dividends exceeding such amount as may be prescribed in this behalf has or have been distributed during the preceding year and of the amount so distributed to each such shareholder.]²

20. The principal officer of every company shall, at the time of distribution of dividends, furnish to every person receiving a dividend a certificate to the effect that the company has paid or will pay income-tax on the profits which are being distributed, and specifying such other particulars as may be prescribed.

21. The prescribed person in the case of every Government office, and the principal officer or the prescribed person in the case of every local authority, company or other public body or association, and every private employer shall prepare, and, within thirty days from the 31st day of March in each year, deliver or cause to be delivered to the Income-tax Officer in the prescribed form, a return in writing showing—

(a) the name and, so far as it is known, the address, of every person who was receiving on the said 31st day of March, or has received during the year ending on that date, from the authority, company, body, association or private employer, as the case may be, any income chargeable under the head "Salaries" of such amount as may be prescribed;

(b) the amount of the income so received by each such person, and the time or times at which the same was paid;

(c) the amount deducted in respect of income-tax from the income of each such person.

22. (1) The principal officer of every company shall prepare, and, on or before the fifteenth day of June in each year, furnish to the Income-tax Officer a return, in the prescribed form and verified in the prescribed manner, of the total income of the company during the previous year:

Sec. 18 ¹ The words "The Central Board of Revenue" for the words "the Board of Inland Revenue" were substituted by Act IV of 1924, Sch.

Sec. 19-A.²—Inserted by Act XXIV of 1926, S. 2.

Sec. 22 (2).—[See also notes under S. 23.]

Where an assessee in a verified return declared he had no income from a particular source, if the authorities disbelieve it, the onus lies on them to prove there was income from that source and what it was. 50 Cal. 907 = 1924 Cal. 337.

Sec. 22, Cls. (2) and (4).—See 9 Pat. L. T. 653 = A. I. R. 1928 Pat. 529 (F B.).

Provided that the Income-tax Officer may, in his discretion, extend the date for the delivery of the return in the case of any company or class of companies.

(2) In the case of any person other than a company whose total income is, in the Income-tax Officer's opinion, of such an amount as to render such person liable to income-tax, the Income-tax Officer shall serve a notice upon him requiring him to furnish, within such period, not being less than thirty days as may be specified in the notice, a return in the prescribed form and verified in the prescribed manner setting forth (along with such other particulars as may be provided for in the notice) his total income during the previous year.

(3) If any person has not furnished a return within the time allowed by or under sub-section (1) or sub-section (2), or having furnished a return under either of those sub-sections, discovers any omission or wrong statement therein, he may furnish a return or a revised return, as the case may be, at any time before the assessment is made, and any return so made shall be deemed to be a return made in due time under this section.

(4) The Income-tax Officer may serve on the principal officer of any company or on any person upon whom a notice has been served under sub-section (2) a notice requiring him, on a date to be therein specified, to produce, or cause to be produced such accounts or documents as the Income-tax Officer may require :

Provided that the Income-tax Officer shall not require the production of any accounts relating to a period more than three years prior to the previous year.

23. (1) If the Income-tax Officer is satisfied that a return made under section 22 is correct and complete, he shall assess the total income of the assessee, and shall determine the sum payable by him on the basis of such return.

Assessment.

Sec. 22. Cl. (4) is very wide and gives the Income tax Officer very wide powers. 101 I. C. 321 = A.I.R. 1927 Lah. 5. There is no provision in the Act by which Income-tax Officer can enforce production of account books if assessee firm declines to comply with the notice. 7 Lah. 104 = 27 Punj. L. R. 298 = A.I.R. 1926 Lah. 326. Accounts or documents can be called for by the Income-tax Officer under S. 22 (4) after issue of notice and before the filing of the return. After the filing of the return Ss. 23 (2), 23 (3) and 37 give ample powers to the Income-tax Officer to call for whatever documents he requires. The failure to comply with any of the notices under these sections does not authorise the Income-tax Officer to make a summary assessment to the best of his judgment under Cl. (4) of S. 23. 8 P. L. T. 686 = A. I. R. 1927 Pat 390.

Per *Curtam*. "It is not sufficient for an assessee to suggest to the Commissioner the questions of law. It is for the Commissioner to find the facts first and then to state the point of law which arises out of those facts and on which he desires an opinion. He may then if he likes give his own opinion on the case. (*Ibid.*)

Sec. 23, Cl. (2)—NOTICE.—When an Income-tax Officer is not satisfied with a return made under Sec. 22, he has under Sec. 23 (2) to serve on the assessee a notice to produce evidence on a specified date. 29 C. W. N. 591 = 88 I. C. 404 = A. I. R. 1925 Cal. 890.

PROCEDURE.—Proceedings of Income-tax Officer is of a judicial nature and he must proceed on judicial principles. 94 I. C. 614 = 7 Lah. 201 = 8 Lah. L. J. 106 = A. I. R. 1926 Lah. 161; 94 I. C. 156 = A. I. R. 1926 Lah. 233. Value to be attached to account books produced by assessee. 94 I. C. 614 = 7 Lah. 201 = 8 L. L. J. 106.

SERVICE OF NOTICE—Notice may be served under Sec. 23 (2) on any member of the firm as provided for in Sec. 63 (2) of the Act. It is not necessary that notice should be served only on the member of the firm who made the return. 48 Mad 602 = 49 M. L. J. 124 (*See also* notes under S. 63 *infra*.) The word "person" clearly includes a firm as provided by the General Clauses Act, 1897; and when the return is made on behalf of the firm by a partner, it is the firm that is the person who makes the return and any proper service on the firm as authorised by Sec. 63 (2) will be a proper service. (*Ibid*)

Sec. 23, Cl. (4).—Assessee attending Income-tax Office with his evidence in obedience to notice issued under Sec. 23 (2)—Income-tax Officer's not accepting the evidence as conclusive does not bring that case under sub-section 4. 6 Pat. L. T. 555 = 89 I. C. 675 = A. I. R. 1925 Patna 694. "The Income-tax Officer is empowered to call upon the assessee (whether or not he has made a return) to produce such documents and accounts as he may require within the period specified in the notice requiring their production. Sub-S. 4 of S. 22 prevents the Income tax Officer from calling upon an assessee to produce books of account going back for a period of more than three years prior to the accounting period. There is a however, no such limitation upon the power to call for documents". 26 A. L. J. 340 = 103 I. C. 234 = A. I. R. 1928 A. 283. "Return"—Meaning of. *See* A. I. R. 1928 Lah. 720. Assistant Commissioner must satisfy himself that the Income-tax Officer's action under S. 23 (4) was in order. *See* 101 I. C. 321 = A. I. R. 1927 Lah. 5. Assessee filing statement of income—Maintainability of appeal to Income-tax authorities—Fine for gross under-statement of income. *See* A. I. R. 1927 Mad. 49 = 24 L. W. 771.

(2) If the Income-tax Officer has reason to believe that a return made under section 22 is incorrect or incomplete he shall serve on the person who made the return a notice requiring him, on a date to be therein specified, either to attend at the Income-tax Officer's office or to produce, or to cause to be there produced, any evidence on which such person may rely in support of the return.

(3) On the day specified in the notice issued under sub-section (2), or as soon afterwards as may be, the Income-tax Officer, after hearing such evidence as such person may produce and such other evidence as the Income-tax Officer may require, on specified points, shall, by an order in writing, assess the total income of the assessee, and determine the sum payable by him on the basis of such assessment.

(4) If the principal officer of any company or any other person fails to make a return under sub-section (1) or sub-section (2) of section 22, as the case may be, or fails to comply with all the terms of a notice issued under sub-section (4) of the same section or, having made a return, fails to comply with all the terms of a notice issued under sub-section (2) of this section, the Income-tax Officer shall make the assessment to the best of his judgment.

24. (1) Where any assessee sustains a loss of profits or gains in any year under

any of the heads mentioned in section 6, he shall be entitled to have the amount of the loss set off against his income, profits or gains under any other head in that year.

(2) Where the assessee is a registered firm, and the loss sustained cannot wholly be set off under sub-section (1), any member of such firm shall be entitled to have set off against any income, profits or gains of the year in which the loss was sustained in respect of which the tax is payable by him such amount of the loss not already set off as is proportionate to his share in the firm.

25. (1) Where any business, profession or vocation [on which income-tax was

not at any time charged under the provisions of the Indian Income-tax Act, 1918],¹ if discontinued in any year, an assessment may be made in that year on the basis of the income, profits or gains of the period between the end of the previous year and the date of such discontinuance in addition to the assessment, if any, made on the basis of the income, profits or gains of the previous year.

(2) Any person discontinuing any such business, profession or vocation shall give to the Income-tax Officer notice of such discontinuance within fifteen days thereof, and, where any person fails to give the notice required by this sub-section, the Income-tax Officer may direct that a sum shall be recovered from him by way of penalty not exceeding the amount of tax subsequently assessed on him in respect of any income, profits or gains of the business, profession or vocation up to the date of its discontinuance.

(3) Where any business, profession or vocation [* * * * *]² on which tax was at any time charged under the provisions of the Indian Income-tax Act, 1918, is discontinued, no tax shall be payable in respect of the income, profits and gains of the period between the end of the previous year and the date of such discontinuance, and the assessee may further claim that the income, profits and gains of the previous year shall be deemed to have been the income, profits and gains of the said period. Where any such claim is made, an assessment shall be made on the basis

STATING CASE TO HIGH COURT.—An assessee whose return is disbelieved and who is summarily taxed without being given notice under Sec. 23 (2) can apply to the High Court to have a case stated under Sec. 66 (2), as the question raised challenges the very foundation of the assessment. 29 C. W. N. 28=1925 Cal. 173. Assessee called upon to attend and produce evidence.—Assessment under Sec. 13 (Proviso)—Appeal rejected.—Application to Commissioner to state a case rejected.—Application to High Court. 6 Pat. L. T. 555=89 I. C. 675=A. I. R. 1925

Pat. 694. Appeal on the ground that assessee was not in British India.—Dismissal of.—Reference to High Court. See 9 Lah. 464=A. I. R. 1928 Lah. 864.

Sec. 25, Cl. 1.—¹ The words "on which..... Income-tax Act, 1918," were substituted for the words "commenced after the 31st day of March, 1922" by Act XI of 1924, S. 6

Sec. 25, Cl. 2.—² The words "which was in existence at the commencement of this Act, and" were omitted by Act XI of 1924, S. 6.

Sec. 25, cl. (3).—Transfer of business from

of the income, profits and gains of the said period, and if an amount of tax has already been paid in respect of the income, profits and gains of the previous year exceeding the amount payable on the basis of such assessment, a refund shall be given of the difference.

(4) Where an assessment is to be made under sub-section (1) or sub-section (3), the Income-tax officer may serve on the person whose income, profits and gains are to be assessed, or in the case of a firm, on any person who was a member of such firm at the time of its discontinuance, or, in the case of a company, on the principal officer thereof, a notice containing all or any of the requirements which may be included in a notice under sub-section (2) of section 22, and the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a notice issued under that sub-section.

["25-A. (1) Where, at the time of making an assessment under Sec. 23, it is claimed by or on behalf of any member of a Hindu family hitherto undivided that a partition has taken place among the members of such family, the Income-tax Officer shall make such inquiry thereinto as he may think fit, and, if he is satisfied that a separation of the members of the family has taken place and that the joint family property has been partitioned among the various members or groups of members in definite portions before the end of the previous year, he shall record an order to that effect :

Provided that no such order shall be recorded until notices of the inquiry have been served on all the members of the family.

(2) Where such an order has been passed, the Income-tax Officer shall make an assessment of the total income received by or on behalf of the joint family as such, as if no separation or partition had taken place, and each member or group of members shall in addition to any income-tax for which he or it may be separately liable and notwithstanding anything contained in sub-section (1) of section 14, be liable for a share of the tax on the income so assessed according to the portion of the joint family property allotted to him or it :

and the Income-tax Officer shall make assessments accordingly on the various members and groups of members in accordance with the provisions of Sec. 23 :

Provided that all the separated members and groups of members shall be liable jointly and severally for the tax assessed on the total income received by or on behalf of the joint family as such".]¹

["26. (1) Where, at the time of making an assessment under Section 23, it is found that a change has occurred in the constitution of a firm or that a firm has been newly constituted, the assessments on the firm and on the members thereof shall, subject to the provisions of this Act, be made as if the firm had been constituted throughout the previous year as it is constituted at the time of making the assessment, and as if each member had received a share of the profits of that year proportionate to his interest in the firm at the time of making the assessment.

(2) Where, at the time of making an assessment under section 23, it is found that the person carrying on any business, profession or vocation has been succeeded in such capacity by another person, the assessment shall be made on such person succeeding, as if he had been carrying on the business, profession or vocation throughout the previous year, and as if he had received the whole of the profits for that year."]²

one person to another—Effect. 27 Bom. L. R. 147 = 50 Bom. 87 = A. I. R. 1926 Bom. 129.

Sec. 25-A.—¹ Sec. 25-A inserted by Act III of 1928.

Sec. 26.—² Sec. 26 substituted by Act III of 1928.

Successor is not bound to pay in respect of the predecessor any tax which the predecessors would not have been liable to pay 47 All. 715 = 23 A. L. J. 685 = L. R. 6 All. 333 = 88

I. C. 239 = A. I. R. 1925 All. 535. Where any change occurs in the constitution of a firm, for example, where a registered firm succeeds to the business of an undivided Hindu family as in this case, the assessment should be made on the firm as constituted at the time of making the assessment, that is, on the registered firm in this case. 49 A. 611 = 25 A. L. J. 366 = 102 I. C. 189 = A. I. R. 1927 All. 397. On this section see also 32 C. W. N. 287 = 54 M. L. J. 1 (P. C.)

27. Where an assessee or, in the case of a company, the principal officer thereof, within one month from the service of a notice of demand issued as hereinafter provided, satisfies the Income-tax Officer that he was prevented by sufficient cause from making the return required by section 22, or that he did not receive the notice issued under sub-section (4) of section 22, or sub-section (2) of section 23, or that he had not a reasonable opportunity to comply, or was prevented by sufficient cause from complying, with the terms of the last-mentioned notices, the Income-tax Officer shall cancel the assessment and proceed to make a fresh assessment in accordance with the provisions of section 23.

28. (1) If the Income-tax Officer, the Assistant Commissioner or the Commissioner in the course of any proceedings under this Act, is satisfied that an assessee has concealed the particulars of his income, or has deliberately furnished inaccurate particulars of such income, and has thereby returned it below its real amount, he may direct that the assessee shall, in addition to the income-tax payable by him, pay by way of penalty a sum not exceeding the amount of income-tax which would have been avoided if the income so returned by the assessee had been accepted as the correct income :

Provided that no such order shall be made, unless the assessee has been heard, or has been given a reasonable opportunity of being heard :

Provided, further, that no prosecution for an offence against this Act shall be instituted in respect of the same facts on which a penalty has been imposed under this section.

(2) An Assistant Commissioner or a Commissioner who has made an order under sub-section (1) shall forthwith send a copy of the same to the Income-tax Officer.

29. When the Income-tax Officer has determined a sum to be payable by an assessee under section 23, or when an order has been passed under sub-section (2) of section 25 or section 28 for the payment of a penalty, the Income-tax Officer shall serve on the assessee a notice of demand in the prescribed form specifying the sum so payable.

30. (1) Any assessee objecting to the amount or rate at which he is assessed under section 23 or section 27, or denying his liability to be assessed under this Act, or objecting to a refusal of an Income-tax Officer to make a fresh assessment under section 27, or to any order against him under sub-section (2) of section 25 or section 28, made by an Income-tax Officer, may appeal to the Assistant Commissioner against the assessment or against such refusal or order :

Provided that no appeal shall lie in respect of an assessment made under sub-section (4) of section 23, or under that sub-section read with section 27.

(2) The appeal shall ordinarily be presented within thirty days of receipt of the notice of demand relating to the assessment or penalty objected to, or of the date

Sec. 27.—It would be for the Income-tax Officer to decide whether, on the particular facts of the case sufficient cause has been shown by the assessee for not appearing in time and producing his accounts in time. (1924) M.W.N. 785 = 1924 Mad. 880. See also 84 I.C. 131. Even if the High Court thinks that the action of the Income-tax Officer is arbitrary and harsh and that the assessment has been made *ex parte* without sufficient materials or justification, it cannot interfere under S. 66 of the Act. (1924) M.W.N. 785 = 1924 Mad. 880.

Sec. 28.—Valid reassessment proceedings a condition precedent to imposing penalty. See (1927) M.W.N. 611 (F.B.).

Sec. 29.—As to period within which notice demanding income-tax should be issued, see (1925) P.H.C. 217 = A.I.R. 1925 Patna 581.

Sec. 30.—See 27 Bom. L.R. 400 = 89 I.C. 595 = A.I.R. 1925 Bom. 257. Whether the income-tax officer legally proceeded to assess the petitioner under S. 23 (4) is a question of law and no appeal lies to the Asst. Commissioner. 100 I. C. 774 = A.I.R. 1927 Lah. 288.

Sec. 30, Cl. (2).—The use of the word "ordinarily" means that there is nothing to prevent authorities from entertaining an appeal preferred after 30 days. 31 C.W.N. 630 = 103 I.C. 120 = A. I. R. 1927 Cal. 518. On this Sec. see also. 9 Lah. 464 = A. I. R. 1928 Lah. 864.

of the refusal to make a fresh assessment under section 27, as the case may be ; but the Assistant Commissioner may admit an appeal after the expiration of the period if he is satisfied that the appellant had sufficient cause for not presenting it within that period.

(3) The appeal shall be in the prescribed form and shall be verified in the prescribed manner.

31. (1) The Assistant Commissioner shall fix a day and place for the hearing of the appeal, and may from time to time adjourn the hearing.

Hearing of appeal.

(2) The Assistant Commissioner may, before disposing of any appeal, make such further inquiry as he thinks fit, or cause further inquiry to be made by the Income-tax Officer.

(3) In disposing of an appeal the Assistant Commissioner may, in the case of an order of assessment,—

(a) confirm, reduce, enhance or annul the assessment, or

(b) set aside the assessment and direct the Income-tax Officer to make a fresh assessment after making such further inquiry as the Income-tax Officer thinks fit or the Assistant Commissioner may direct, and the Income-tax Officer shall thereupon proceed to make such fresh assessment,

or, in the case of an order under sub-section (2) of section 25 or section 28,

(c) confirm, cancel or vary such order :

Provided that the Assistant Commissioner shall not enhance an assessment unless the appellant has had a reasonable opportunity of showing cause against such enhancement.

32. (1) Any assessee objecting to an order passed by an Assistant Commissioner under section 28 or to an order enhancing his assessment under sub-section (3) of section 31, may appeal to the Commissioner within thirty days of the making of such order.

Appeals against orders of Assistant Commissioner.

(2) The appeal shall be in the prescribed form, and shall be verified in the prescribed manner.

(3) In disposing of the appeal the Commissioner may, after giving the appellant an opportunity of being heard, pass such orders thereon as he thinks fit.

33. (1) The Commissioner may of his own motion call for the record of any proceeding under this Act which has been taken by any authority subordinate to him or by himself when exercising the powers of an Assistant Commissioner under sub-section (4) of section 5.

Power of review.

(2) On receipt of the record the Commissioner may make such inquiry or cause such inquiry to be made and, subject to the provisions of this Act, may pass such orders thereon as he thinks fit :

Provided that he shall not pass any order prejudicial to an assessee without hearing him or giving him a reasonable opportunity of being heard.

Sec. 32.—Assistant Commissioner—Powers of —Appeal limited to subject-matter of assessment. 4 Pat. 385 = 6 Pat. L.T. 166.

Sec. 33.—REVIEW. — Income tax Commissioner's powers under S. 33 are subject to limitations imposed by S. 35. 8 Lah. 354 = 9 Lah. L. J. 352 = 100 I. C. 675 = A. I. R. 1927 Lah. 248. For purposes of re assessment proceedings S. 33 is subject to the provisions of S. 34. (1927) M.W.N. 611 (F.B.) Where a Commissioner reviews his decision under S. 33 of the Income tax Act and issues a supplemental demand he must give a sufficient and reasonable opportunity to the assessee to be heard. 2 Pat.L.R. 180 (Cr.) = 5 Pat. L. T. 609 = 3 Pat. 664. See also 30 C.W.N. 831 = A. I. R. 1926 Cal. 908. Review—Supplemental demand—Notice to assessee. 88 I.C. 1014 = A.I. R. 1924 Patna 644.

LIMITATION.—Even though no limitation of time is prescribed for interference by way of revision under S. 33, the Court would almost always incline in favour of taking the view that such exercise of power should be within a reasonable time of the proceedings sought to be revised reasonable time being computed by the Court having regard to all the other provisions of the Act, to the facts of the particular case and the special features, if any, of it. (1927) M. W. N. 611 (F.B.) See also 99 I.C. 221.

LAW POINT.—Arising in proceedings under S.33—High Court's power to direct Commissioner to make a statement of the case. See 99 I.C. 221. On this section see also 45 Mad 977 ; 16 L. W. 333 ; (1922) M.W.N. 583 = 1923 Mad. 34 ; 46 I.C. 285 = 34 M.L.J. 210 = 49 Mad. 725 = 24 L.W. 664 = 51 M.L.J. 650 ; (1927) M.W.N. 611 (F.B.).

34. If for any reason income, profits or gains chargeable to Income-tax has escaped assessment in any year or has been assessed at too low a rate, the Income-tax Officer may, at any time within one year of the end of that year, serve on the person liable to pay tax on such income, profits or gains, or, in the case of a company, on the principal officer thereof, a notice containing all or any of the requirements which may be included in a notice under sub-section (2) of section 22, and may proceed to assess or re-assess such income, profits or gains, and the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a notice issued under that sub-section :

Provided that the tax shall be charged at the rate at which it would have been charged had the income, profits or gains not escaped assessment or full assessment, as the case may be.

35. (1) [The Commissioner or Assistant Commissioner may, at any time within one year from the date of any order passed by him in appeal or, in the case of the Commissioner, in revision under section 33 and]¹ the Income-tax Officer may, at any time within one year from the date of any demand made upon an assessee on his own motion rectify any mistake apparent from the record [of the Appeal, revision or assesment, as the case may be]² and shall within the like period rectify any such mistake which has been brought to his notice by [the assessee]² :

Provided that no such rectification shall be made, having the effect of enhancing an assessment unless [the Commissioner, the Assistant Commissioner or Income-tax Officer as the case may be]² has given notice to the assessee of his intention so to do and has allowed him a reasonable opportunity of being heard.

(2) Where any such rectification has the effect of reducing the assessment, the Income-tax Officer shall make any refund which may be due to such assessee.

(3) Where any such rectification has the effect of enhancing the assessment, the Income-tax Officer shall serve on the assessee a notice of demand in the prescribed form specifying the sum payable, and such notice of demand shall be deemed to be issued under section 29, and the provisions of this Act shall apply accordingly.

36. In the determination of the amount of tax or of a refund payable under this Act, fractions of an anna less than six pies shall be disregarded, and fractions of an anna equal to or exceeding six pies shall be regarded as one anna.

Tax to be calculated to nearest anna.

Sec. 34.—Amending Act of 1923—Effect of—Assessment to super tax in 1922-1923 for income of 1921-1922—Legality of. 79 I. C. 798=1924 Mad. 485 (2).

SCOPE AND APPLICATION.—Service within one year of a proper notice on the assessee giving notice of the intention on the part of the Income-tax Officer to re-assess is a condition precedent to any valid re-assessment under S. 34. (1927) M.W.N. 611 (F.B.). Re assessment proceedings should be validly started under S. 34 before a penalty is imposed by the Commissioner under S. 28 and it is only in that sense S. 34 controls S. 28. (1927) M.W.N. 611 (F.B.) Reference on the question whether Hindu joint family had become divided—Jurisdiction of income-tax officer to decide. See (1927) M.W.N. 591 (F.B.)

LIMITATION.—Whatever may be the reason for which the Income tax Officer should fail to assess any income within the period prescribed by law; he is not competent to assess it after the expiration of that period of limitation. 8 Lah. 354=9 Lah.L.J. 352=100 I.C. 675 (1)=A.I.R. 1927 Lah. 248

“ESCAPED ASSESSMENT” covers not only a case where the Income-tax Officer omitted to consider the question at all, but also a case where on consideration he came to the conclusion, *ex hypothesi* an erroneous conclusion, that the pro-

perty in question was not assessable. 22 L.W. 822=49 Mad. 22=A.I.R. 1926 Mad. 287=50 M.L.J. 263. On this Sec see also (1927) M.W.N. 611 (F.B.) Where income has been assessed in the hands of an assessee to whom it was subsequently found not to belong the income must be said to have escaped assessment within the meaning of S. 34 8 Lah. 354=9 Lah. L. J. 352=100 I. C. 675=A.I.R. 1927 Lah. 248.

Sec. 35.—¹ Inserted by Act III of 1928.

² Substituted by Act III of 1928.

Rectification of a mistake which has the effect of enhancing the assessment cannot be made after the expiry of one year from the date of the demand made by the assessee. 8 Lah. 357. The fact that the assessee had moved the Commissioner under S. 33 during that period would not make any difference. 8 Lah. 357=9 Lah. L. J. 373=101 I. C. 139=28 Punj. L. R. 212=A.I.R. 1927 Lah. 421. Separate returns of five concerns filed to avoid heavy assessment—Notice served—Applicant mixing one more losing concern with the five and applying for reduction—Application is not maintainable. 4 Pat. 224=86 I. C. 170. Commissioner's powers under S. 33 is one subject to limitations imposed by S. 35. 8 Lah. 354=9 Lah. L. J. 352=100 I. C. 675=A.I. R. 1927 Lah. 248.

37. The Income-tax Officer, Assistant Commissioner and Commissioner shall, for the purposes of this Chapter, have the same powers as are vested in a Court under the Code of Civil Procedure, 1908, when trying a suit in respect of the following matters, namely :—

Power to take evidence on oath, etc.

matters, namely :—

(a) enforcing the attendance of any person and examining him on oath or affirmation ;

(b) compelling the production of documents ; and

(c) issuing commissions for the examination of witnesses ;

and any proceeding before an Income-tax Officer, Assistant Commissioner or Commissioner under this Chapter shall be deemed to be a "judicial proceeding" within the meaning of sections 193 and 228 of the Indian Penal Code.

Power to call for information.

38. The Income-tax Officer or Assistant Commissioner may, for the purposes of this Act,—

(1) require any firm, or Hindu undivided family to furnish him with a return of the members of the firm, or of the manager or adult male members of the family, as the case may be, and of their addresses ;

(2) require any person whom he has reason to believe to be a trustee, guardian, or agent, to furnish him with a return of the names of the persons for or of whom he is trustee, guardian, or agent, and of their addresses.

39. The Income-tax Officer or Assistant Commissioner, or any person authorised

Power to inspect the register of members of any company.

in writing in this behalf by the Income-tax Officer or Assistant Commissioner, may inspect and, if necessary, take copies, or cause copies to be taken, of any register

of the members, debenture-holders or mortgagees of any Company or of any entry in such register.

CHAPTER V.

LIABILITY IN SPECIAL CASES.

40. In the case of any guardian, trustee or agent of any person being a minor,

Guardians, trustees and agents.

lunatic or idiot or residing out of British India (all of which persons are hereinafter in this section included in the term beneficiary) being in receipt on behalf of such

beneficiary of any income, profits or gains chargeable under this Act, the tax shall be levied upon and recoverable from such guardian, trustee or agent, as the case may be, in like manner and to the same amount as it would be leviable upon and recoverable from any such beneficiary if of full age, sound mind, or resident in British India, and in direct receipt of such income, profits or gains, and all the provisions of this Act shall apply accordingly.

41. In the case of income, profits or gains chargeable under this Act which are

Courts of Wards, etc.

received by the Courts of Wards the Administrators-General, the Official Trustees or by any Receiver or

Manager including any person whatever his designation who in fact manages property on behalf of another appointed by or under any order of a Court, the tax shall be levied upon and recoverable from such Courts of Wards, Administrators-General, Official Trustee, Receiver or Manager in the like manner and to the same amounts as it would be leviable upon and recoverable from any person on whose behalf such income, profits or gains are received, and all the provisions of this Act shall apply accordingly.

Sec. 37.—Section being a penal section, must be construed strictly. 31 C. W. N. 996 = 46 C. L. J. 550 = A. I. R. 1927 Cal. 724. Where a person was convicted and sentenced under S. 196, Penal Code, for an offence committed during the proceeding pursuant to a notice under S. 23 (2) of

the Act, *held*, that S. 37 did not contemplate the offence and that the conviction should be quashed (*Ibid*).

Sec 39.—Assessment *ultra vires*—Maintainability of suit for declaration that assessment is illegal. See 92 I. C. 351 = A. I. R. 1926 Bom. 50.

42. (1) In the case of any person residing out of British India, all profits or gains accruing or arising to such person, whether directly or indirectly, through or from any business connection or property in British India, shall be deemed to be income accruing or arising within British India, and shall be chargeable to income-tax in the name of the agent of any such person, and such agent shall be deemed to be, for all the purposes of this Act, the assessee in respect of such income-tax :

Non-residents
Provided that any arrears of tax may be recovered also in accordance with the provisions of this Act from any assets of the non-resident person which are, or may at any time come, within British India.

(2) Where a person not resident in British India, and not being a British subject or a firm or company constituted within His Majesty's dominions or a branch thereof, carries on business with a person resident in British India, and it appears to the Income-tax Officer or the Assistant Commissioner, as the case may be, that owing to the close connection between the resident and the non-resident person and to the substantial control exercised by the non-resident over the resident, the course of business between those persons is so arranged, that the business done by the resident in pursuance of his connection with the non-resident produces to the resident either no profits or less than the ordinary profits which might be expected to arise in that business, the profits derived therefrom or which may reasonably be deemed to have been derived therefrom, shall be chargeable to income-tax in the name of the resident person who shall be deemed to be, for all the purposes of this Act, the assessee in respect of such income-tax.

[(3) Where any profits or gains have accrued or arisen to any person directly or indirectly from the sale in British India by him or by any agency or branch on his behalf of any merchandise exported to British India by him or any agency or branch on his behalf from any place outside British India, the profits or gains shall be deemed to have accrued and arisen and to have been received in British India, and no allowance shall be made under sub-section (2) of Section 10 in respect of any buying or other commission whatsoever not actually paid, or of any other amounts not actually spent, for the purpose of earning such profits or gains.]¹

43. Any person employed by or on behalf of a person residing out of British India, or having any business connection with such person, or through whom such person is in the receipt of any income, profits or gains upon whom the Income-tax Officer has caused a notice to be served of his intention of treating him as the agent of the non-resident person shall, for all the purposes of this Act, be deemed to be such agent :

Agents to include persons treated as such.
Provided that no person shall be deemed to be the agent of a non-resident person, unless he has had an opportunity of being heard by the Income-tax Officer at to his liability.

44. Where any business, profession or vocation carried on by a firm has been discontinued, every person who was at the time of such discontinuance a member of such firm shall be jointly and severally liable for the amount of the tax payable in respect of the income, profits and gains of the firm.

¹ Sec. 42 Sub. 5. (3), inserted by Act III of 1928.

Sec. 42.—Income of non-resident company, when liable for income-tax. 3 Kang. 614.

Secs. 42 & 43.—Foreign company lending money to resident company—Intimate business connection between the two companies.—Interest forwarded to foreign company—Resident company liable to income-tax on the footing of agency. See 30 Bom. L. R. 1172.

Sec. 43.—Held by the majority that the section merely defines who may be included as an agent and the agent under the section must be in receipt of income. 49 Cal 721 = 26 C. W. N. 745. Where an Indian company distributes its Indian profits to share holders outside British India, the company cannot be deemed to be the agent of the foreign shareholders and assessed as such to super-tax in British India. (*Ibid.*)

[CHAPTER V-A.¹

SPECIAL PROVISIONS RELATING TO CERTAIN CLASSES OF SHIPPING.

44-A. The provisions of this Chapter shall, notwithstanding anything contained in the other provisions of this Act, apply for the purpose of the levy and recovery of tax in the case of any person who resides out of British India and carries on business in British India in any year as the owner or charterer of a ship (such person hereinafter in this Chapter being referred to as the principal), unless the Income-tax Officer is satisfied that there is an agent of such principal from whom the tax will be recoverable in the following year under the other provisions of this Act.

44-B. (1) Before the departure from any port in British India of any ship in respect of which the provisions of this Chapter apply, the master of the ship shall prepare and furnish to the Income-tax Officer a return of the full amount paid or payable to the principal, or to any person on his behalf, on account of the carriage of all passengers, live-stock or goods shipped at that port since the last arrival of the ship thereat.

(2) On receipt of the return, the Income-tax Officer shall assess the amount referred to in sub-section (1), and for this purpose may call for such accounts or documents as he may require, and one-twentieth of the amount so assessed shall be deemed to be the amount of the profits and gains accruing to the principal on account of the carriage of the passengers, live-stock and goods shipped at the port.

(3) When the profits and gains have been assessed as aforesaid, the Income-tax Officer shall determine the sum payable as tax thereon at the rate for the time being applicable to the total income of a company, and such sum shall be payable by the master of the ship, and a port-clearance shall not be granted to the ship until the Customs-Collector, or other officer duly authorized to grant the same, is satisfied that the tax has been duly paid.

44-C. Nothing in this Chapter shall be deemed to prevent a principal from claiming, in any year following that in which any payment has been made on his behalf under this Chapter, that an assessment be made of his total income in the previous year, and that the tax payable on the basis thereof be determined in accordance with the other provisions of this Act, and, if he so claims, any such payment as aforesaid shall be treated as a payment in advance of the tax and the difference between the sum so paid, and the amount of tax found payable by him shall be paid by him or refunded to him, as the case may be.]

CHAPTER VI.

RECOVERY OF TAX AND PENALTIES.

45. Any amount specified as payable in a notice of demand under section 29 or an order under section 31 or section 32 or section 33, shall be paid within the time, at the place and to the person mentioned in the notice or order, or if a time is not so mentioned, then on or before the first day of the second month following the date of the service of the notice or order, and any assessee failing so to pay shall be deemed to be in default, provided that, when an assessee has presented an appeal under section 30, the Income-tax officer may in his discretion treat that the assessee as not being in default as long as such appeal is undisposed of.

46. (1) When an assessee is in default in making a payment of Income-tax, the Income-tax Officer may in his discretion direct that, in addition to the amount of the arrears, a sum not exceeding that amount shall be recovered from the assessee by way of penalty.

¹ Chapter V-A was inserted by Act XXVII of 1923, S. 3.

[(1-A) For the purposes of sub-section (1) the Income-tax Officer may direct the recovery of any sum less than the amount of the arrears and may enhance the sum so directed to be recovered from time to time in the case of continuing default, so however that the total sum so directed to be recovered shall not exceed the amount of the arrears payable].¹

(2) The Income-tax Officer may forward to the Collector a certificate under his signature specifying the amount of arrears due from an assessee, and the Collector, on receipt of such certificate, shall proceed to recover from such assessee the amount specified therein as if it were an arrear of land-revenue.

(3) In any area, with respect to which the Commissioner has directed that any arrears may be recovered by any process enforceable for the recovery of an arrear of any municipal tax or local rate imposed under any enactment for the time being in force in any part of the Province, the Income-tax Officer may proceed to recover the amount due by such process.

(4) The Commissioner may direct by what authority any powers or duties incident under any such enactment as aforesaid to the enforcement of any process for the recovery of a municipal tax or local rate shall be exercised or performed, when that process is employed under sub-section (3).

(5) If any assessee is in receipt of any income chargeable under the head "Salaries," the Income-tax Officer may require any person paying the same to deduct from any payment subsequent to the date of such requisition any arrears due from such assessee, and such person shall comply with any such requisition and shall pay the sums so deducted to the credit of the Government of India, or as [the Central Board of Revenue]² directs.

(6) The local Government may direct, with respect to any specified area, that income-tax shall be recovered therein, with, and as an addition to, any municipal tax or local rate by the same person and in the same manner as the municipal tax or local rate is recovered.

(7) Save in accordance with the provisions of sub-section (1) of S. 42, no proceedings for the recovery of any sum payable under this Act shall be commenced after the expiration of one year from the last day of the year in which any demand is made under this Act.

47. Any sum imposed by way of penalty under the provisions of sub-section (2) of S. 25, S. 28 or sub-section (1) of S. 46 shall be recoverable in the manner provided in this Chapter for the recovery of arrear of tax.

Recovery of penalties.

CHAPTER VII.

REFUNDS.

48. (1) If a shareholder in a company who has received any dividend therefrom satisfies the Income-tax Officer that the rate of income-tax applicable to the profits or gains of the company at the time of declaration of such dividend is greater than the rate applicable to his total income of the year in which such dividend was declared, he shall, on production

¹ **Sec. 46—** Sub-cl. (1-A) was inserted by Act III of 1928.

² **Sec. 46.**—Arrears of Income-tax can be realised like an arrear of land revenue under S. 46 of the Income-tax Act and if orders are passed by the Commissioner, like an arrear of Municipal tax or local rate. 4 Pat. L.T. 171 = 24 Cr. L.J. 490. The Collector has power to make a fresh assessment for income-tax if he finds the first assessment made by him is low. 44 B. 234 = 55 I. C. 334 = 22 Bom. L.R. 38. In order to succeed in a suit against the Collector for a declaration that he had acted without jurisdiction in realising sums from the plaintiff, it must be shown that he paid the sum under coercion. Income accru-

ing to an executor under a will is liable to be taxed and the Collector acts within the limits of his jurisdiction in determining such person to be chargeable. 42 Cal. 151 = 20 I.C. 893 = 19 C.W. N. 138.

² **Sec. 46 (5)—** The words "the Central Board of Revenue" for the words "the Board of Inland Revenue" were substituted by Act IV of 1924, Sch.

Sec. 48.—An application for refund of income-tax already paid by mistake is not in the course of assessment under the Act. 27 Bom. L.R. 400 = 89 I.C. 595. Assessment reduced after the passing of the Act—Party entitled to refund. 1924 Nag. 24.

of the certificate received by him under the provisions of S. 20, be entitled to a refund on the amount of such dividend (including the amount of the tax thereon) calculated at the difference between those rates.

(2) If a member of a registered firm satisfies the Income-tax Officer that the rate of income-tax applicable to his total income of the previous year was less than the rate at which income-tax has been levied on the profits or gains of the firm of that year, he shall be entitled to a refund on his share of those profits or gains calculated at the difference between those rates.

(3) If the owner of a security from the interest on which, or any person from whose salary, income-tax has been deducted in accordance with the provisions of section 18, satisfies the Income-tax Officer that the rate of income-tax applicable to his total income of the previous year was less than the rate at which income-tax has been charged in making such deduction in that year, he shall be entitled to a refund on the amount of interest or salary from which such deduction has been made calculated at the difference between those rates.

[(4) For the purposes of this section, 'total income' includes, in the case of any person not resident in British India, all income, profits and gains wherever arising, accruing or received, which, if arising, accruing or received in British India, would be included in the computation of total income under Section 16.

(5) Nothing in this section shall entitle to any refund any person not resident in British India who is neither a British subject as defined in Section 27 of the British Nationality and Status of Aliens Act, 1914, nor a subject of a State in India.]¹

49. (1) If any person who has paid Indian Income-tax for any year on any part of his income proves to the satisfaction of the Income-tax Officer that he has paid United Kingdom income-tax for that year in respect of the same part of his income, and that the rate at which he was entitled to, and has obtained, relief under the provisions of Section 27 of the Finance Act, 1920, is less than the Indian rate of tax charged in respect of that part of his income, he shall be entitled to a refund of a sum calculated on that part of his income at a rate equal to the difference between the Indian rate of tax and the rate at which he was entitled to, and obtained, relief under that section :

Provided that the rate at which the refund is to be given shall not exceed one half of the Indian rate of tax.

(2) In sub-section (1)—

(a) the expression "Indian income-tax" means income-tax and super-tax charged in accordance with the provisions of this Act ;

(b) the expression "Indian rate of tax" means the amount of the Indian income-tax divided by the income on which it was charged ;

(c) the expression "United Kingdom income-tax" means income-tax and super-tax chargeable in accordance with the provisions of the Income-tax Acts.

50. No claim to any refund of income-tax under this Chapter shall be allowed, unless it is made within one year from the last day of the year in which the tax was recovered.

CHAPTER VIII.

OFFENCES AND PENALTIES.

51. If a person fails without reasonable cause or excuse—
Failure to make payments or deliver returns or statements or allow inspection.

¹ Sec. 48, Sub-Secs. (4) & (5).—These sub-sections were inserted by Act III of 1928.

Sec. 50.—The words "*tax was recovered*" mean "tax was recovered by the Government" and not "tax was refunded to the assessee under the provisions of S. 27 of the Act. 50 Mad. 920=26 L. W. 679=39 M. L. T. 481=(1927) M. W. N.

837=A. I. R. 1927 Mad. 1039=53 M. L. J. 672 (F. B.)

Secs. 51 to 58.—The words "section 19-A" in Sec. 51 were inserted after the words "mentioned in" by Act XXIV of 1926, S. 3—No one can be prosecuted under the Act except at the instance of the Collector under S. 36. 23 I. C. 504=15

(a) to deduct and pay any tax as required by section 18 or under sub-section (5) of section 46;

(b) to furnish a certificate required by sub-section (9) of S. 18 or by S. 20 to be furnished;

(c) to furnish in due time any of the returns mentioned in [section 19-A],¹ section 21, section 22, or section 38;

(d) to produce, or cause to be produced, on or before the date mentioned in any notice under sub-section (4) of section 22, such accounts and documents as are referred to in the notice;

(e) to grant inspection or allow copies to be taken in accordance with the provisions of section 39,

he shall, on conviction before a Magistrate, be punishable with fine which may extend to ten rupees for every day during which the default continues.

52. If a person makes a statement in a verification mentioned in [section 19-A or]² section 22 or sub-section (3) of section 30, or sub-section (2) of section 32 which is false, and which he either knows or believes to be false, or does not believe to be true, he shall be deemed to have committed the offence described in section 177 of the Indian Penal Code.

False statement in declaration.
Prosecution to be at instance of Assistant Commissioner.

53. (1) A person shall not be proceeded against for an offence under section 51 or section 52 except at the instance of the Assistant Commissioner.

(2) The Assistant Commissioner may stay any such proceeding or compound any such offence.

54. (1) All particulars contained in any statement made, returned furnished, or accounts or documents produced under the provisions of this Act, or in any evidence given, or affidavit or deposition made, in the course of any proceedings under this Act other than proceedings under this Chapter, or in any record of any assessment proceeding, or any proceeding, relating to the recovery of a demand, prepared for the purposes of this Act, shall be treated as confidential, and, notwithstanding anything contained in the Indian Evidence Act, 1872, no Court shall, save as provided in this Act, be entitled to require any public servant to produce before it any such return, accounts, documents or record or any part of any such record, or to give evidence before it in respect thereof.

(2) If a public servant discloses any particulars contained in any such statement, return, accounts, documents, evidence, affidavit, deposition or record, he shall be punishable with imprisonment which may extend to six months, and shall also be liable to fine:

Provided that nothing in this section shall apply to the disclosure—

(a) of any such particulars for the purposes of a prosecution under section 193 of the Indian Penal Code in respect of any such statement, return, accounts, documents, evidence, affidavit or deposition, or for the purposes of a prosecution under this Act, or

Cr. L. J. 296=12 A. L. J. 258. The Collector and not the District Magistrate can direct proceedings to be taken for an offence under the Income-tax Act. 38 I. C. 993=18 Cr. L. J. 433=15 A. L. J. 163. Where a person was charged with making false statements in his petition of objection for the assessment of income-tax and the petition was not signed or verified and the order to prosecute him did not disclose what particular statement was false and fell within S. 193, Penal Code. *Held*, that the conviction was bad. 38 I. C. 993=18 Cr. L. J. 433=15 A. L. J. 163. A conviction could not be maintained if there is no formal service of notice as required by the Act the letter having been sent by ordinary post unregistered. 17 A. L. J. 146=49 I. C. 781

=20 Cr. L. J. 221=1 U.P.L.R. (H. C.) 88. The prosecution of an assessee for failure to produce his account books in obedience to a notice is not barred by reason of a prior order for penal assessment against him. 43 Mad. 498=38 M. L. J. 333. The only ground on which the Collector can direct a penal assessment is that the assessee has made a false return. The Collector cannot do so on ground of non-production of account books by the assessee. (*ibid.*)

Sec. 51.—The words “section 19-A” were inserted after the words “mentioned in” by Act XXIV of 1926, S. 3.

Sec. 52.—¹The words “section 19-A or” were inserted after the words “mentioned in” by Act XXIV of 1926, S. 4.

(b) of any such particulars to any person acting in the execution of this Act where it is necessary to disclose the same to him for the purposes of this Act, or

(c) of any such particulars occasioned by the lawful employment under this Act of any process for the service of any notice or the recovery of any demand, or

(d) of such facts to an authorised officer of the United Kingdom, as may be necessary to enable relief to be given under section 27 of the Finance Act, 1920, or a refund to be given under section 49 of this Act :

Provided, further, that no prosecution shall be instituted under this section except with the previous sanction of the Commissioner.

CHAPTER IX.

SUPER-TAX.

55. In addition to the income-tax charged for any year, there shall be charged, levied and paid for that year in respect of the total income of the previous year of any [individual, Hindu undivided family, company, unregistered firm or other association of individuals, not being a registered firm] ¹ an additional duty of income-tax (in this Act referred to as super-tax) at the rate or rates laid down for that year by Act of the Indian Legislature :

Provided that, where the profits and gains of an unregistered firm have been assessed to super-tax, super-tax shall not be payable by an individual having a share in the firm in respect of the amount of such profits and gains which is proportionate to his share.

56. Subject to the provisions of this Chapter, the total income of any [individual, Hindu undivided family, company, unregistered firm or other association of individuals] ¹ shall, for the purposes of super-tax, be the total income as assessed for the purposes of income-tax, and where an assessment of total income has become final and conclusive for the purposes of income-tax for any year, the assessment shall also be final and conclusive for the purposes of super-tax for the same year : [*Proviso—omitted*]²

57. (1) In the case of any [person] ³ residing out of British India who is a member of a registered firm, and whose share of the profits from such firm is liable to super-tax, the remaining members of such firm who are resident in British India shall be jointly and severally liable to pay the super-tax due from the non-resident member in respect of such share.

Secs. 55 to 59 —SUPER-TAX.—Super-tax—Income from dividends—Liability to pay super-tax in the hands of recipient. 3 Pat. 470=8 I. C. 783=2 Pat. I. R. 25 (Cr.). Where an unregistered Association is converted into a limited company, the rate of super-tax applicable to it in respect of the profits of the Association for the year previous to that of the conversion, is the flat rate of one anna in the rupee appropriate to a company. (47 All. 715, commented on), 30 Bom. L. R. 105=47 C. L. J. 96=5 O. W. N. 38=106 I. C. 642=A. I. R. 1928¹P. C. 1=1. T. 40 B. 38=54 M. L. J. : (P. C.) Super tax—Liability for—Undivided profits—Capitalisation of—Bonus shares newly issued on basis of—Super-tax, on value of—Shareholders' liability for. 47 Mad. 837=47 M. L. J. 242. Company—Profits—No declaration of dividend—Profits distributed as bonus shares—Super tax—Liability of shareholders 2 Rang. 211=82 I. C. 665=1924 R. 337. Super-tax being calculated on the income of the previous year, the fact that the assessee became entitled to a larger share in a firm at the time of assessment does not enable the tax being calculated on such increased share. 26 Bom L. R. 366=48 Bom. 504=1924 Bom. 361 Levy of super tax after the year of assessment is

closed—Suit for refund—Maintainability. 78 I. C. 438=1925 S. 67 Assessee controlling and receiving income from family companies—Liability to super-tax. 51 Bom. 372.

Per Marten, C. J. Though it is permissible in law for the Crown to enquire into the genuineness of the transactions between the assessee and the family company it would be quite wrong to start with the presumption that those transactions are sham ones. On the contrary one should start with the presumption that they are genuine and throw the onus on the Crown to prove the contrary. 51 Bom. 372=9 Bom. L. R. 447=102 I. C. 49=A. I. R. 1927 Bom. 371

Sec 55. ¹ The words "Individual... firm" in Ss. 55 and 56 were substituted for the words "individual unregistered firm, Hindu undivided family or company" by Act XI of 1924, S. 7.

Sec 56. ² Proviso added by Act V of 1925, S. 2 and omitted by Act III of 1928 Sec. 10. There is no provision in the Act for the assessment to income-tax or super-tax of the estate of a deceased person. 11 C. W. N. 630=103 I. C. 120=A. I. R. 1927 Cal. 518.

Sec. 57 (1). ³ For the word "assessee" the word "person" was substituted by Act XXIV of 1926, S. 5 (1)

[(2) Where the Income-tax Officer has reason to believe that any person, who is a shareholder in a company, is resident out of British India and that the total income of such person will in any year exceed the maximum amount which is not chargeable to super-tax under the law for the time being in force, he may, by order in writing, require the principal officer of the company to deduct at the time of payment of any dividend from the company to the shareholder in that year super-tax at such rate as the Income-tax Officer may determine as being the rate applicable in respect of the income of the shareholder in that year.

(3) If in any year the amount of any dividend or the aggregate amount of any dividends paid to any shareholder by a company (together with the amount of any income-tax payable by the company in respect thereof) exceeds the maximum amount of the total income of a person which is not chargeable to super-tax under the law for the time being in force, and the principal officer of the company has not reason to believe that the shareholder is resident in British India, and no order under sub-section (2) has been received in respect of such shareholder by the principal officer from the Income-tax Officer, the principal officer shall at the time of payment deduct super-tax on the amount of such excess at the rate which would be applicable under the law for the time being in force if the amount of such dividend or dividends (together with the amount of such income-tax as aforesaid) constituted the whole total income of the shareholder].¹

(4) Where any person pays any tax under the provisions of this section on account of [another person] who is residing out of British India, credit shall be given therefor in determining the amount of the tax to be payable by any agent of such non-resident [person] under the provisions of sections 42 and 43.

58. (1) All the provisions of this Act, except section 3, the proviso to sub-section (1) of section 7, the provisos to section 8, sub-section (2) of section 14, and sections 15, 17, 18, 19, 20, 21 and 48 shall apply, so far as may be, to the charge, assessment, collection and recovery of super-tax :

[Provided that sub-sections (4) to (9) of section 18 shall apply, so far as may be, to the assessment, collection and recovery of super-tax under sub-section (2) or sub-section (3) of section 57].²

(2) Save as provided in section 57, super-tax shall be payable by the assessee direct.

CHAPTER X.

MISCELLANEOUS.

59. (1) [The Central Board of Revenue]³ may, subject to the control of the Governor-General in Council, make rules for carrying out the purposes of this Act and for the ascertainment and determination of any class of income. Such rules may be made for the whole of British India or for such part thereof as may be specified.

(2) Without prejudice to the generality of the foregoing power, such rules may—

(a) prescribe the manner in which, and the procedure by which, the income, profits and gains shall be arrived at in the case of—

(i) incomes derived in part from agriculture and in part from business ;

(ii) insurance companies ;

(iii) persons residing out of British India ;

(b) prescribe the procedure to be followed on applications for refunds ;

S. 57.—¹ Cls. (2) and (3) substituted for original cl. (2) by Act XXIV of 1926, S. 5 (2).

Cl. (4)—Subsec. (3) renumbered as (4) and the words "an assessee" were changed into "another person" and the word "person" was substituted for the word "assessee" where it occurs for the 2nd time by Act XXIV of 1926, S. 2.

Sec 58. (1).—² Proviso added by Act XXIV of 1926 S. 6. See also 51 M. L. J. 1 (P. C.) cited under S. 55 *supra*.

S. 59 (1).—³ The words "The Central Board of Revenue" for the words "the Board of Inland Revenue" were substituted by Act IV of 1924, Sch.

(c) provide for such arrangements with His Majesty's Government as may be necessary to enable the appropriate relief to be granted under section 27 of the Finance Act, 1920, or under section 49 of this Act ;

(d) Prescribe the year which, for the purpose of relief under section 49, is to be taken as corresponding to the year of assessment for the purposes of section 27 of the Finance Act, 1920 ; and

(e) provide for any matter which by this Act is to be prescribed.

[(3) In cases coming under clause (a) of sub-section (2), where the income, profits and gains liable to tax cannot be definitely ascertained or can be ascertained only with an amount of trouble and expense to the assessee which, in the opinion of the Central Board of Revenue, is unreasonable, the rules made under that sub-section may—

(a) prescribe methods by which an estimate of such income, profits and gains may be made, and

(b) in cases coming under sub-clause (i) of clause (a) of sub-section (2), prescribe the proportion of the income which shall be deemed to be income, profits and gains liable to tax, and an assessment based on such estimate or proportion shall be deemed to be duly made in accordance with the provisions of this Act.”]¹

(4) The power to make rules conferred by this section shall, except on the first occasion of the exercise thereof, be subject to the condition of previous publication.

(5) Rules made under this section shall be published in the *Gazette of India*, and shall thereupon have effect as if enacted in this Act.

60. The Governor-General in Council may, by notification in the *Gazette of*

Power to make exemptions,
etc.

India, make an exemption, reduction in rate or other modification, in respect of income-tax in favour of any class of income, or in regard to the whole or any part of

the income of any class of persons.

61. Any assessee, who is entitled or required to attend before any Income-tax

Appearance by authorised
representative.

authority in connection with any proceedings, under this Act, may attend either in person or by any person authorised by him in writing in this behalf.

62. A receipt shall be given for any money paid or recovered under this Act.

Receipts to be given.

63. (1) A notice or requisition under this Act may be served on the person

Service of notices.

therein named either by post or, as if it were a summons issued by a Court, under the Code of Civil Procedure,

1908.

(2) Any such notice or requisition may, in the case of a firm or a Hindu undivided family, be addressed to any member of the firm or [to the]² manager, or any adult male member of the family [and, in the case of any other association of individuals, be addressed to the principal officer thereof.]²

64. (1) Where an assessee carries on business at any place, he shall be assessed

Place of assessment.

by the Income-tax Officer of the area in which that place is situate or, where the business is carried on in more

Sec. 59.—¹Sub-sec. 3 inserted and old sub-secs. 3 & 4 re-numbered as sub-secs. (4) and (5) by Act XXVIII of 1927.

Sec. 63.—SERVICE OF NOTICE.—Section does not require that service of a notice must be by its being placed in the hands of person named therein by the officer of the Court himself and does not exclude other forms of service permitted by Order 5 of the C. P. Code. 23 Cr. L. J. 591 = 1922 N. 187. Delivery by unregistered post does not amount to the service required by the section. Therefore a conviction under S. 34 (b) based on

such a notice is liable to be set aside. 17 A L. J. 146 = 20 Cr. L. J. 221 = 49 I. C. 781. In the case of an unregistered firm a notice need not be served only on the member of the firm who made the return but under S. 63 (2) it can be served on any member of the firm and such service is good service. 48 Mad. 602 = 49 M. L. J. 124.

² The words “to the” for the words “on the” were substituted by Act VII of 1924 and the words “and in the case....thereof” were added by Act XI of 1924, S. 9.

places than one, by the Income-tax Officer of the area in which his principal place of business is situate.

(2) In all other cases an assessee shall be assessed by the Income-tax Officer of the area in which he resides.

(3) Where any question arises under this section as to the place of assessment, such question shall be determined by the Commissioner, or, where the question is between places in more Provinces than one, by the Commissioners concerned, or, if they are not in agreement, by [the Central Board of Revenue]:¹

Provided that, before any such question is determined, the assessee shall have had an opportunity of representing his views.

(4) Notwithstanding anything contained in this section, every Income-tax Officer shall have all the powers conferred by or under this Act on an Income-tax Officer in respect of any income, profits or gains accruing, or arising or received within the area for which he is appointed.

65. Every person deducting, retaining or paying any tax in pursuance of this

Indemnity.

Act in respect of income belonging to another person is hereby indemnified for the deduction, retention or payment thereof.

ment thereof.

66. (1) If, in the course of any assessment under this Act or any proceeding in connection therewith other than a proceeding under

Statement of case by Commissioner to High Court.

Chapter VIII, a question of law arises, the Commissioner may, either on his own motion or on reference from any

Sec. 64 (3).—¹ The words "the Central Board of Revenue" for the words "the Board of Inland Revenue" were substituted by Act IV of 1924, Sch.

Sub-sec. (3) covers only the case of a refusal on the ground of any question of law arising—It does not cover the case of a refusal to refer on the ground that the application was filed beyond time. 30 Bom. L. R. 1114. Commissioner's finding of fact based on misconception of law—Interference. See 55 M. L. J. 416 (F.B.) "Ordinarily the principal's place of business of a firm or company is at the place at which the persons directing the firm or company do their business." The fact that the goods are manufactured in one place does not make that place necessarily the principal place of business. Where business is carried on in many places or at different branches, it may be said that the business is carried on in each of those places, though neither of them may be the principal place of business. 49 All. 616. The mere fact that the bulk of the business is conducted at a particular place is not conclusive as to its being the principal place of business. (*Ibid.*)

Per *Curiam*.—"The Income-tax Act provides by S. 64 (3) that where the question about the principal place of business is between places in more provinces than one, it shall be determined by the Commissioners concerned, and that the assessee shall have an opportunity of representing his view. The Act does not say who shall set the Commissioner in motion but the reasonable inference to be drawn from the language used is that it is the duty of the Income tax officer. (*Ibid.*) What is quite clear is that the Income-tax Officer cannot himself decide the question or act as though it had been determined in accordance with the section and that if he proceeds to pre-judge the issue he is committing an illegality." 49 A. 616 = 25 A. L. J. 225 = 100 I. C. 756 = A. I. R. 1927 All. 299. On this sub-clause, see also 3 Luck. 237; A. I. R. 1928 Lah. 701.

Sec. 66.—APPLICATION FOR REFERENCE WHEN MADE.—An application by assessee for reference must be made before the case is disposed of by the Chief Revenue-Authority. 64 I. C. 610 = 23 Bom. L. R. 1267. Application under S. 66 (2) must state the question of law to be referred to High Court. See 92 I. C. 249 = A. I. R. 1926 Lah. 168. No application lies to the Commissioner of Income-tax to state case to the High Court in respect of any orders passed under the provisions of S. 33 of Income-tax Act. Applications may be made in respect of orders in law under Ss. 31 and 32 when there is a question of law involved. 4 Bur. L. J. 102 = 89 I. C. 785 = A. I. R. 1925 Rang. 252. Reference on the question whether a Hindu Joint family had become divided.—Statement by members—Jurisdiction of Income-tax Officer to decide the question. See (1927) M. W. N. 591 (P.C.).

"HIGH COURT."—Chief Court of Oudh—If High Court under the section. 13 O. L. J. 381 = A. I. R. 1926 Oudh 191. See also 1 Luck. C. 499 = 105 I. C. 556 = A. I. R. 1927 Oudh 465. The duty of an Income tax Commissioner under S. 66 is to find the facts clearly and then state the points of law which arise out of those facts and on which he requires the opinion of the High Court. He may then if he chooses give his own opinion and discuss the case. 104 I. C. 841.

REFERENCE, NOT COMPULSORY.—It is not incumbent upon the Chief Revenue-Authority to make a reference to the High Court, whenever an application for a reference is made. 45 Bom. 1064 = 63 I. C. 775 = 23 Bom. L. R. 609. Piece goods—Fall in price of stock at the end of year—Estimation of loss—Balance of stock—Opening price for next year—Calculation of profit and loss—Reference under S. 66—Question—Frame of. 48 Mad. 836 = A. I. R. 1925 Mad. 1242 = 49 M. L. J. 425. Chief Revenue Authority is not bound under S. 45, Specific Relief Act, to make reference to the High Court under S. 51 of the Income-tax Act. 45 B. 881 = 60 I. C. 964 = 23

Income-tax authority subordinate to him, draw up a statement of the case and refer it with his own opinion thereon to the High Court.

Bom. L. R. 139. High Court cannot compel reference by Revenue Board—Government of India Act, S. 106 (2)—Specific Relief Act, S. 45. 44 Mad. 718=41 M. L. J. 177; 30 C. W. N. 831=A. I. R. 1926 Cal. 998; 28 Bom. L. R. 1096=A. I. R. 1926 Bom. 566. Where in pursuance of an order under S. 45 of the Specific Relief Act by the High Court, the Board of Revenue, instead of appealing against the order, made reference to the High Court it is not open to them afterwards to object to the reference on the ground that the order was without jurisdiction. 70 I. C. 30=14 L. W. 413 (F. B.). See also 44 Mad. 718=41 M. L. J. 177=(1921) M. W. N. 502=64 I. C. 782=14 L. W. 108. When an application is made to a Commissioner of Income-tax to state a case to the High Court under S. 66 he cannot refuse to pass any order on the application or delegate his authority to any subordinate officer. 1924 Lah. 662 (2). The jurisdiction of the High Court under S. 66 (3) arises on a refusal to state the case on whatever grounds it may be based. 1924 Lah. 662 (2). Application to Commissioner to refer questions of law—Fee payable. 1925 Rang. 94=2 Rang. 579 Commissioner of Income-tax—Statement of case to the High Court—Points of law. 2 Pat. L. R. 1922 (Cr.) See also 91 I. C. 980=A. I. R. 1926 Nag. 180.

REFERENCE, WHEN PROPER.—When Chief Revenue Authority can be compelled to state a case. 45 M. L. J. 592=47 Bom. 742=50 I. A. 227=1923 P. C. 138 (P. C.). Assessee can maintain an application for mandamus to direct Commissioner to state a case only on points of law which he urged before the Commissioner and he cannot be permitted to shift his ground. 6 Rang. 492=A. I. R. 1928 Rang. 281. Whether review can be granted; whether reasonable opportunity was given under S. 33 and whether personal income can be jointly assessed with family income are questions of law necessitating a reference to the High Court. 84 I. C. 792=A. I. R. 1925 Patna 155. Non-compliance with S. 23 (2) though not raised in proceedings under S. 66 (3) before Commissioner was held to be question of law under S. 66 (2). 85 I. C. 520=A. I. R. 1925 Cal. 173. The question as to what constitutes receipts for purposes of the Income-tax Act is a question of law and not a question of fact. 21 N. L. R. 175.

QUESTION OF LAW.—The question whether the Income-tax Officer legally proceeded to assess the assessee under S. 23 (4) is one of law. 100 I. C. 774 (2)=A. I. R. 1927 Lah. 288; See also 9 Lah. L. J. 463=104 I. C. 127=A. I. R. 1927 Lah. 691; as to the legal effect of the disruption of a joint Hindu family, 103 I. C. 522=A. I. R. 1927 Lah. 616; the proper legal effect of proved facts. 104 I. C. 336=A. I. R. 1927 Nag. 366 (46 Cal 189, Fol.). As to what legal presumption is to be drawn under certain stated circumstances. (*Ibid.*) A. I. R. 1927 Nag. 283.

REFERENCE, WHEN NOT PROPER.—An application under S. 66 (2) for a reference to the High Court is incompetent where the assessment has been accepted without appeal. 4 Pat. 224=86 I. C. 170. No application lies to state a case when Commissioner acts under S. 33. 4 Bur. L.

J. 102=89 I. C. 785 (1)=A. I. R. 1925 Rang. 252. When the account books of the previous years do not support the verified return and the assessee's statement on oath, and the assessee fails to make use of the opportunity given to him to substantiate his allegation, *held*, that the Income-tax authorities are entitled to draw a presumption from the state of matters which had admittedly existed in previous years and that no error of law has been committed by the income-tax authorities which would justify the High Court calling on the Commissioner of Income-tax for a reference. (50 Cal. 907, Dist.) 103 I. C. 38=A. I. R. 1927 Nag. 283. The question whether the purchase and sale of landed property is one of the objects with which a company was formed or whether the development of the property in order to earn a continuing profit year by year was its real object, is one of fact with which the High Court in a reference under S. 66 is incompetent to deal. 1 Bur. L. J. 53=11 L. B. R. 309=1922 L. B. 35 (F. B.).

JURISDICTION.—It is only upon a refusal under S. 66 (2) that a High Court has jurisdiction to order the Commissioner to state the case. Where no appeal was preferred under Ss. 31 and 32 of the Act and there was no refusal by the Commissioner. *Held*, than an application could not be maintained before the High Court to direct the Commissioner to state a case. 1 Luck. C. 499=105 I. C. 556 (2)=A. I. R. 1927 Oudh 465. Where a question is raised as to the assessee's principal place of business under S. 64 and the same is decided by the Commissioner or Board of Inland Revenue, such decision is final and cannot be interfered with. But where there is a total failure on the part of the Income-tax authorities to apply the plain provisions of S. 64 and an Income-tax officer illegally assumes authority to assess as though the assessee's place of business has been finally determined, the High Court can direct the Commissioner to have a case stated and the existence of an alternative remedy under S. 64 (3) does not affect the case. 49 All. 616=25 A. L. J. 225=100 I. C. 756=A. I. R. 1927 All. 299. Section 66 (2) is express and there is no provision in it for any official or even for the Court to *extend the time*. Therefore the Commissioner has no power to extend the time. 50 Mad. 335=25 L. W. 321=38 M. L. T. (H. C.) 109=(1927) M. W. N. 171=100 I. C. 291=A. I. R. 1927 Mad. 545=52 M. L. J. 273. Clause (1) to S. 66 refers to the reference of a question of law either by the Commissioner on his own motion or on reference from any income-tax authority subordinate to him. It does not contemplate a reference at the instance of an assessee. 105 I. C. 167=A. I. R. 1927 Lah. 513. Nor has the Lahore High Court any power to issue mandamus directing him to refer questions of law to it for opinion. (49 Mad. 925=51 M. L. J. 650 (S. B.); 5 Pat. 595 (F. B.). 4 Pat. 224, Rel on; 3 Pat. 664, doubted.) 105 I. C. 167=A. I. R. 1927 Lah. 513.

PRACTICE AND PROCEDURE.—In a reference to the High Court under S. 66 the finding of fact arrived at by the Commissioner is binding on the High Court unless it is shown that it was come to

(2) Within one month of the passing of an order under section 31 or section 32, the assessee in respect of whom the order was passed may, by application accompanied by a fee of one hundred rupees or such lesser sum as may be prescribed, require the Commissioner to refer to the High Court any question of law arising out of such order, and the Commissioner shall, within one month of the receipt of such application, draw up a statement of the case and refer it with his own opinion thereon to the High Court :

Provided that, if, in exercise of his power of [revision]¹ under section 33, the Commissioner decides the question, the assessee may withdraw his application, and if he does so, the fee paid shall be refunded.

(3) If, on any application being made under sub-section (2), the Commissioner refuses to state the case on the ground that no question of law arises, the assessee may [within six months from the date on which he is served with notice of the refusal]² apply to the High Court, and the High Court, if it is not satisfied of the correctness of the Commissioner's decision, may require the Commissioner to state the case and to refer it, and, on receipt of any such requisition, the Commissioner shall state and refer the case accordingly.

(4) If the High Court is not satisfied that the statements in a case referred under the section are sufficient to enable it to determine the question raised thereby, the Court may refer the case back to the Commissioner by whom it was stated to make such additions thereto or alterations therein as the Court may direct in that behalf.

(5) The High Court upon the hearing of any such case shall decide the questions of law raised hereby, and shall deliver its judgment thereon containing the

by some improper process or by failure to give effect to some rule of law. 6 Pat. 29=100 I. C. 897=8 Pat. L. 1 359=A. I. R. 1927 Pat. 133. Where four persons originally formed an undivided family but subsequently became divided and were separately assessed to income-tax, four separate applications and deposits are necessary to require the Commissioner of Income-tax to take action under S. 66 (2). 50 Mad. 335=52 M. L. J. 273. Reference under section—Statement of case—Form of. 4 Pat. 73=A. I. R. 1924 P. 679; (1924) P. H. C. C. 234; 5 Pat. 1. T. 497=82 I. C. 653=2 Pat. L. R. (Cr.) 233=1924 P. 679. See also 55 Cal. 953. High Court can be moved under S. 66 (3) only when assessee is competent to apply to Commissioner under S. 66 (2). 7 Lah. 226=27 Punj. L. R. 411=A. I. R. 1920 Lah. 400. Competency of High Court, to issue mandamus, when to be questioned. 94 I. C. 128=A. I. R. 1926 Lah. 446. When a judge directs the Commissioner of Income tax to state a case for the opinion of the High Court under S. 66 of the Income-tax Act, the question should be so framed as to leave it to the Court which afterwards hears the reference to decide the matter on the facts stated by the Commissioner of Income-tax who makes the reference. 48 Mad. 836=A. I. R. 1925 Mad. 1242=49 M. L. J. 425. Appeal from Commissioner's decision—Opinion of the High Court to be obtained by stating a case—Point of law not urged before the Income-tax Officer and Commissioner—Effect, L. R. 6 A. 174=86 I. C. 27=23 A. L. J. 40=A. I. R. 1925 All. 298 (1).

RIGHT TO APPEAR BY COUNSEL.—Where, on the motion of an assessee, the Board of Revenue made a reference to the High Court under S. 51 of the Act, the assessee's Pleader is entitled to be heard first. 43 Mad. 75=37 M. L. J. 663 (F.B.).

LIMITATION.—An application for reference made under S. 66 (2) more than one month after the order giving rise to the application should not

be entertained and a reference made on such an application is without jurisdiction. 6 Lah. 373=90 I. C. 1018=26 Punj. L. R. 796=A. I. R. 1925 Lah. 615. High Court has no power to extend the limitation period of one month. 28 Bom. L. R. 1096=98 I. C. 299=A. I. R. 1926 Bom. 566.

COURT-FEE.—Fee in respect of application as whole and not for each point raised. 84 I. C. 521=A. I. R. 1925 Rang. 94.

COSTS.—In an application to the High Court to reduce the amount of costs in an Income-tax reference, *Held*, by S. 66 (6) of the Act costs are in the discretion of Court. The Court having exercised its discretion is *functus officio* and cannot reopen the matter. L. R. 6 A. 218=87 I. C. 797=A. I. R. 1925 All. 403. All questions relating to costs and all submissions in which costs are involved must be argued and decided at the time of hearing and before a final order is drawn up. L. R. 6 A. 218=87 I. C. 797=A. I. R. 1925 All. 403.

REFUND OF TAX.—Application to the High Court to direct Commissioner of Income-tax to make a reference—Rectification of mistake—Refund of tax collected. (1925) P. H. C. C. 17=86 I. C. 170=4 Pat. 224=A. I. R. 1925 Pat. 352.

APPEAL TO PRIVY COUNCIL.—See now S. 66-A. The decision of a High Court on a reference is a judgment within cl. (9) of the Letters Patent, and an appeal lies to the Privy Council from the same. 64 I. C. 931=23 Bom. L. R. 1102. Subject to the provisions of Ss. 109 and 110 Civil Procedure Code, there is a right of appeal to His Majesty's Council against the decision of the High Court, on a reference to it under the Indian Income-tax Act. 18 L. W. 392=1924 Mad. 63 (40 Cal. 21 Dist.). See now Sec. 66-A. *infra*.

Sec. 68 (2).—¹ The word "revision" was substituted for "review" by Act III of 1928, Sec. 11.

Sec. 68 (3).—² The words "within.... refusal" in S. 66 (3) were added by Act XI of 1924, S. 10.

grounds on which such decision is founded, and shall send to the Commissioner by whom the case was stated a copy of such judgment under the seal of the Court and the signature of the Registrar, and the Commissioner shall dispose of the case accordingly, or, if the case arose on a reference from any Income-tax authority subordinate to him, shall forward a copy of such judgment to such authority who shall dispose of the case conformably to such judgment.

(6) Where a reference is made to the High Court on the application of an assessee, the costs shall be in the discretion of the Court.

(7) Notwithstanding that a reference has been made under this section to the High Court, income-tax shall be payable in accordance with the assessment made in the case :

Provided that, if the amount of an assessment is reduced as a result of such reference, the amount overpaid shall be refunded with such interest as the Commissioner may allow.

[(8) For the purposes of this section " the High Court " means—

(a) in relation to North-West Frontier Province and British Baluchistan, the High Court of Judicature at Lahore ;

(b) in relation to the Province of Ajmer-Merwara, the High Court of Judicature at Allahabad ; and

(c) in relation to the Province of Coorg, the High Court of Judicature at Madras.] ¹

2 [66-A. (1) When any case has been referred to the High Court under S. 66

References to be heard by Benches of High Courts, and appeal to lie in certain cases to Privy Council.

it shall be heard by a Bench of not less than two Judges of the High Court, and in respect of such case the provisions of section 98 of the Code of Civil Procedure, 1908, shall, so far as may be, apply notwithstanding anything contained in the Letters Patent of any High Court established by Letters Patent or in any other law for the time being in force.

(2) An appeal shall lie to His Majesty in Council from any judgment of the High Court delivered on a reference made under section 66 in any case which the High Court certifies to be a fit one for appeal to His Majesty in Council.

(3) The provisions of the Code of Civil Procedure, 1908, relating to appeals to His Majesty in Council shall, so far as may be, apply in the case of appeals under this section in like manner as they apply in the case of appeals from decrees of a High Court :

Provided that nothing in this sub-section shall be deemed to affect the provisions of sub-section (5) or sub-section (7) of section 66 :

Provided, further, that the High Court may, on petition made for the execution of the order of His Majesty in Council in respect of any costs awarded thereby, transmit the order for execution to any Court subordinate to the High Court.

(4) Where the judgment of the High Court is varied or reversed in appeal under this section, effect shall be given to the order of His Majesty in Council in the manner provided in sub-sections (5) and (7) of section 66 in the case of a judgment of the High Court.

(5) Nothing in this section shall be deemed—

(a) to bar the full and unqualified exercise of His Majesty's pleasure in receiving or rejecting appeals to His Majesty in Council, or otherwise howsoever, or

Sec. 66 (8).—¹ Inserted by Act XXIV of 1926, S. 7.

Sec. 66-A.—² Inserted by Act XXIV of 1926, S. 8. The intention of the legislature in adding 66-A was to enable an appeal to His Majesty in Council in cases in which the High Court could certify that the question of law involved was one of great private or public importance. 8 Lah. 269 = A. I. R. 1927 Lah. 181. See also 54 I. C. 421 = 8 Pat. L. T. 791 = 25 A. L. J. 964 = 4 O. W. N.

1053 = A. I. R. 1927 P. C. 242 = 53 M. L. J. 819 (P. C.). The fact that the decision sought to be appealed against might affect the action or the position of other companies who sought to evade payment of income-tax by adopting the method that was adopted by the assessee in the case is not sufficient for the granting of the certificate. 8 Lah. 269 = 28 Punj. L. R. 443 = 100 I. C. 97 = A. I. R. 1927 Lah. 181.

(b) to interfere with any rules made by the Judicial Committee of the Privy Council, and for the time being in force, for the presentation of appeals to His Majesty in Council, or their conduct before the said Judicial Committee.]

67. No suit shall be brought in any Civil Court to set aside or modify any assessment made under this Act, and no prosecution, suit or other proceeding shall lie against any Government officer for any thing in good faith done or intended to be done under this Act.

Repeals.

68. [Repealed by Act XII of 1927.]

THE SCHEDULE.

ENACTMENTS REPEALED.¹

THE INDEMNITY ACT (XXVII OF 1919).

PREFATORY NOTE :—The following is the statement of objects and reasons. The object of this Bill is to indemnify officers of Government and other persons for acts done *bona fide* in the course of martial law during the recent disorders, and to provide for the continuance of the sentences passed by courts established under martial law.

Such legislation is inevitable after a period of martial law, which is in its nature an extra legal proceeding. If officers are called on to discharge onerous and difficult duties in a time of emergency, they are to receive reasonable protection. The Bill goes no further than is necessary to effect this purpose. It gives protection only to acts done in good faith and in a reasonable belief that they were necessary for the purpose of restoring or maintaining order. It thus leaves open the question of fact in any given case to be considered by the intended Committee of inquiry, and does nothing to prejudice the committee's findings or the action which Government may take upon its report. Again while continuing the operation of sentences framed by summary courts established under martial law, the Bill does not affect appeals to the Privy Council from such sentences, nor does it relate at all to sentences passed or punishments inflicted by Commissions appointed under the Martial Law Ordinance, 1919. The Bill moreover provides for the payment of compensation in respect of property taken or used during martial law—(See *Fort. St. G. Gov. Gaz.* Part III, 7th Oct. 1919, pp. 153-154.

[25th September, 1919.]

An Act to indemnify officers of Government and other persons in respect of certain acts done under martial law, and to provide for other matters in connection therewith.

WHEREAS owing to the recent disorders in certain districts in the Punjab and in other parts of India, martial law has been enforced; and

WHEREAS it is expedient to indemnify officers of Government and other persons in respect of acts, matters and things ordered or done or purporting to have been ordered or done for the purpose of maintaining or restoring order, provided that such

Sec. 67.—Sec. 67 is not *ultra vires* by virtue of S. 32 of Government of India Act, because a suit for recovery of the tax paid would not have lain against the East India Company prior to 1858. 5 Rang. 825. When a statute confers exclusive powers over a subject-matter on an authority, the Civil Court cannot interfere; but it will interfere if the authority purports to exercise those powers on what is not the subject-matter. 62 I. C. 394. Suit contesting validity of assessment order—If maintainable—jurisdiction of Civil Court. 18 S. L. R. 68=A. I. R. 1925 S. 130. The Income tax Act creates a special jurisdiction and provides a special remedy against order of assessment. Where the Collector professes to tax income only and has not levied an assessment on any of the classes of income excepted under the Act, he exercises only a jurisdiction under the Act and a suit will not lie in a Civil Court challenging his order, even if there are errors in calculation. 78 I. C. 940=1925 S. 130. Civil Court has no jurisdiction where income only is

taxed. 18 S. L. R. 68=A. I. R. 1925 Sind 130. Refusal to make a return of income on alleged error of description—Assessment by income-tax officer—Suit for refund of tax paid not maintainable see 5 Rang 825. A suit by an executor of a deceased for a declaration that he is not liable to pay income-tax is barred. 42 Cal. 151=26 I. C. 893=19 C. W. N. 138. In assessing income tax, the Collector has to determine what is the income and what is the outgoing which ought to be legitimately deducted. A mistake by the Collector in his decision cannot be rectified by a Civil Court in a suit brought before it for the purpose. 62 I. C. 394. Act does not prohibit a suit for declaration that an assessment is *ultra vires*. 27 Bom. L. R. 1507. An application to have a firm registered under rule 2 of the Indian Income-tax Act, 1922, must be made on or before the date when a return is due under S. 22 (2) of the Act, 27 Bom. L. R. 223=86 I. C. 851=A. I. R. 1925 Bom. 247 (2).

¹ [Repealed by Act, XII of 1927].

acts, matters or things were ordered or done in good faith and in a reasonable belief that they were necessary for the said purposes ; and

WHEREAS certain persons have been convicted by courts and other authorities constituted or appointed under martial law, and it is expedient to confirm and provide for the continuance of certain sentences passed by such courts or authorities ; it is hereby enacted as follows :—

Short title.

1. This Act may be called THE INDEMNITY ACT, 1919.

Indemnity of Government officer and other person for certain acts

2. No suit or other legal proceeding whatsoever, whether civil or criminal, shall lie in any Court of Law against any officer of Government, whether civil or military, or against any other person acting under the orders of any such officer for or on account of or in respect of any act, matter or thing ordered or done or purporting to have been ordered or done for the purpose of maintaining or restoring order in any part of British India where martial law was enforced, on or after the 30th of March, 1919, and before the 26th of August, 1919, by any such officer or person: provided that such officer or person has acted in good faith and in a reasonable belief that his action was necessary for the said purposes ;

and if any such proceeding has been instituted before the passing of this Act it is hereby discharged.

3. For the purposes of section 2 a certificate of a Secretary to Government that any act was done under the orders of an officer of Government shall be conclusive proof thereof, and all action taken for

Rules of evidence.

aforsaid purposes shall be deemed to have been taken in good faith and in a reasonable belief that it was necessary therefor unless the contrary is proved.

4. Every person confined under and by virtue of any sentence passed by a court or other authority constituted or appointed under martial law and acting in a judicial capacity shall be deemed to have been lawfully confined and shall continue liable to confinement until the expiration of such sentence, or until released by the Governor-General in Council or otherwise discharged by lawful authority.

Confirmation and continuance of martial law sentences.

5. Where under martial law the property of any person has been taken or used by any officer of Government, whether civil or military, the Governor-General in Council shall pay to such person reasonable compensation for any loss immediately attributable to such taking or using, to be assessed upon failure of agreement by a person holding judicial office not inferior to that of a District Judge to be appointed by the Government in this behalf.

Compensation in respect of loss attributable to certain acts.

Savings.

6. Nothing in this Act shall—

(a) apply to any sentence passed or punishment inflicted by or under the orders of any Commission appointed under the Martial Law Ordinance, 1919,

(b) be deemed to bar a full and unqualified exercise of His Majesty's pleasure in receiving or rejecting appeals to His Majesty in Council or to affect any question or matter to be decided therein, or

(c) prevent the institution of proceedings by or on behalf of the Government against any person in respect of any matter whatsoever.

THE INHERITANCE ACT (XXX OF 1839).¹

Short title given, Act 14 of 1897.

Rep. (except as to intestacies occurring before 1st January, 1866), Act 8 of 1868.

Rep. in pt. Act 12 of 1891.

¹ SHORT TITLE. "The Inheritance Act, 1839" See the Indian Short Titles Act, 1897 (XIV of 1897) The whole Act, except as to intestacies occurring before 1st January, 1866, was repealed by Act, VIII of 1868. As to inheritance, where descent took place before 1st January, 1866, the Act has been declared, by the Laws Local

Extent Act, 1874, S. 3, to be in force in the whole of British India except as regards the Scheduled Districts. Section 29 of the Trustees and Mortgagees Powers Act, 1866 (28 of 1866), is to be read as part of Act 30 of 1839. See Act 28 of 1866, Sec. 29 *infra*.

S. 1 rep. in pt., Act 10 of 1914.

Supplemented, Act 28 of 1866, s. 29.

Declared in force throughout British India except as regards the Scheduled Districts, Act 15 of 1874, s. 3.

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[16th December, 1839.]

An Act for the amendment of the Law of Inheritance.

Preamble.

1. WHEREAS it is expedient to extend the amendments in the English law of inheritance contained in the Statute 3rd and 4th William IV, Chapter CVI, to the territories of the East India Company in cases which, but for the passing of this Act, would be governed by the English law of inheritance as it existed previously to the passing of the aforesaid statute;

It is hereby enacted that the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this Act, except where the nature of the provision or the context of the Act shall exclude such construction, be interpreted as follows; (that is to say.)

the word "land" shall extend to messuages, and all other hereditaments, whether corporal or incorporeal, and whether freehold or of any other tenure, and to money to be laid out in the purchase of land, and to chattels and other personal property transmissible to heirs, and also to any share of the same hereditaments and properties or any of them, and to any estate of inheritance or estate for any life or lives, or other estate transmissible to heirs, and to any possibility, right or title of entry or action, and any other interest capable of being inherited, and whether the same estates, possibilities, rights, titles and interests, or any of them, shall be in possession, reversion, remainder or contingency;

and the words "they purchaser" shall mean the person who last acquired the land otherwise than by descent, or than by any escheat, partition or enclosure, by the effect of which the land

¹ Short title, "The Inheritance Act, 1833." Vict., c. 14).
See the Short Titles Act, 1896 (59 & 60

shall have become part of or descendible in the same manner as other land acquired by descent ;

and the word "descent" shall mean the title to inherit land by reason of consanguinity, as well where the heir shall be an ancestor or collateral relation as where he shall be a child or other issue ;

"Descent"

"Descendants"

and the expression "descendants" of any ancestor shall extend to all persons who must trace their descent through such ancestor ;

and the expression "the person last entitled to land" shall extend to the last person who had a right thereto, whether he did or did not obtain the possession or the receipt of rents and profits thereof ;

"Person last entitled"

"Assurance"

and the word "assurance" shall mean any deed or instrument other than a will by which any land shall be conveyed or transferred at law or in equity ;

veyed or transferred at law or in equity ;

[* * *] 1

2. [* * *] In every case descent shall be traced from the purchaser, and to the intent that the pedigree may never be carried further back than the circumstances of the case and the nature of the title shall require, the person last entitled to the land shall, for the purposes of this Act, be considered to have been the purchaser thereof, unless it shall be proved that he inherited the same, in which case the

Descent shall always be traced from the purchaser, but the last owner shall be considered to be the purchaser, unless the contrary to be proved

person from whom he inherited the same shall be considered to have been the purchaser, unless it shall be proved that he inherited the same, and in like manner the last person from whom the land shall be proved to have been inherited shall in every case be considered to have been the purchaser unless it shall be proved that he inherited the same.

3. When any land shall have been devised by any testator who shall die after the first day of July one thousand eight hundred and forty,

Heir entitled under a will shall take as devisee, and a limitation to the grantor or his heirs shall create an estate by purchase.

to the heir or to the person who shall be the heir of such testator, such heir shall be considered to have acquired the land as a devisee and not by descent ; and, when any land shall have been limited by any assurance executed after the said first day of July one thousand eight hundred

and forty to the person or the heirs of the person who shall thereby have conveyed the same land, such person shall be considered to have acquired the same as a purchaser by virtue of such assurance, and shall not be considered to be entitled thereto as his former estate or part thereof.

4. (* * *) When any person shall have acquired any land by purchase

Where heirs take by purchase under limitations to the heirs of their ancestors, the lands shall descend as if the ancestor had been the purchaser.

under a limitation to the heirs or to the heirs of the body of any of his ancestors, contained in an assurance executed after the said first day of July one thousand eight hundred and forty, or under a limitation to the heir or to the heirs of the body of any of his ancestors, or under any limitation having the same effect, contained in a will of

any testator who shall depart this life after the said first day of July one thousand eight hundred and forty, then and in any of such cases such land shall descend, and the descent thereof shall be traced, as if the ancestor named in such limitation had been the purchaser of such land.

Sec. 1.—¹Last portion in section 1 repealed by Act X of 1914, Sch. II.

Ss. 2, 4, 5, 6. —The words "And it is hereby

further enacted, that" in Ss. 2 and 4 to 6 were repealed by the Repealing and Amending Act (XII of 1891.)

Brothers, etc., shall trace descent through their parent.

be traced through the parent.

5. [* * *] No brother or sister shall be considered to inherit immediately from his or her brother or sister, but every descent from a brother or sister shall

6. [* * *] Every lineal ancestor shall be capable of being heir to any of his issue, and, in every case where there shall be no issue of the purchaser, his nearest lineal ancestor shall be his heir in preference to any person who would have been entitled to inherit, either by tracing his descent through such lineal ancestor, or in consequence of there being no descendant of such lineal ancestor, so that the father shall be preferred to a brother or sister, and a more remote lineal ancestor to any of his issue, other than a nearer lineal ancestor or his issue.

7. [* * *] None of the maternal ancestors of the person from whom the descent is to be traced, nor any of their descendants, shall be capable of inheriting until all his paternal ancestors and their descendants shall have failed : and [* * *] no female paternal ancestor of such person, nor any of her descendants shall be capable of inheriting until all his male paternal ancestors and their descendants shall have failed; and [* * *] no female maternal ancestor of such person, or any of her descendants, shall be capable of inheriting until all his male maternal ancestors and their descendants shall have failed.

8. [* * *] Where there shall be a failure of male paternal ancestors of the person from whom the descent is to be traced, and their descendants, the mother of his more remote male paternal ancestors, or her descendants, shall be the heir or heirs of such person, in preference to the mother of a less remote male paternal ancestors, or her descendants ; and where there shall be a failure of male maternal ancestors, of such person, and their descendants, the mother of his more remote male maternal ancestor and her descendants shall be the heir or heirs of such person in preference to the mother of a less remote male maternal ancestor and her descendants.

9. [* * *] Any person related to the person from whom the descent is to be traced by the half blood shall be capable of being his heir, and the place in which any such relation by the half blood shall stand in the order of inheritance, so as to be entitled to inherit, shall be next after any relation in the same degree of the whole blood, and his issue, where the common ancestor shall be a male, and next after the common ancestor where such common ancestor shall be a female, so that the brother of the half blood on the part of the father shall inherit next after the sisters of the whole blood on the part of the father and their issue, and the brother of the half blood on the part of the mother shall inherit next after the mother.

10. [* * *] When the person from whom the descent of any land is to be traced shall have had any relation who, having been attainted, shall have died before such descent shall have taken place, then such attainder shall not prevent any person from inheriting such land who would have been capable of inheriting the same by tracing his descent through such relation if he had not been attainted, unless such land shall have escheated in consequence of such attainder before the first day of July one thousand eight hundred and forty.

Act not to extend to any descent before 1st July, 1840.

thousand eight hundred and forty.

11. [* * *] This Act shall not extend to any descent which shall take place on the death of any person who shall die before the said first day of July one thousand eight hundred and forty.

12. [* * *] Where any assurance executed before the said first day of July, one thousand eight hundred and forty, or the will of any person who shall die before that time, shall contain any limitation or gift to the heir of heirs of any person under which the person or persons answering the description of heir shall be entitled to an estate by purchase, then the person or persons who would have answered such description of heir if this Act had not been made shall become entitled by virtue of such limitation or gift, whether the person named as ancestor shall or shall not be living at the time aforesaid.

13. [* * *] This Act shall not be construed to affect inheritances of land which are not subject to the English law of inheritance, or to extend or alter the jurisdiction of any of Her Majesty's Courts of Justice.

Saving of certain inheritance and jurisdiction.

THE INDIAN INSOLVENCY RULES ACT (X OF 1898)¹.

S. 1 rep. in pt., Act 10 of 1914.

Ss. 2, 3 rep., Act 3 of 1909.

PREFATORY NOTE.—The Hon'ble Mr. Chalmers in moving for leave to introduce a Bill to make provision for certain matters connected with Insolvency said :—

“ The Bill is very simple one and consists of two clauses. Its object is to remove some doubts which have arisen as to the extent of the powers of the High Courts to frame rules under section 76 of the Indian Insolvency Act of 1848 and at the same time to confirm certain rules which were made by the Bombay High Court in 1878 under those powers and which have been acted upon ever since, but with respect to the validity of which doubts have arisen from time to time ”. (*Fort St. George Gazette*. 3 May, 1898, p. 12.)

Statement of Objects and Reasons to Indian Insolvency Rules Act, 1898.

This Bill is intended to remove some doubts which have from time to time arisen as to the extent of the Powers of a High Court to frame rules under sections 15 and 76 of the Indian Insolvency Act, 1848 (11 & 12 Viet., C. 21) and at the same time to validate and confirm certain rules which were made by the Bombay High Court in 1878 in pursuance of the said provisions.

[2nd September, 1898.]

An Act to make provision for certain matters connected with Insolvency.

WHEREAS doubts have arisen as to the extent of the power to make rules conferred by sections, 15 and 76 of the Indian Insolvency Act, 1848,² and whereas it is expedient to remove those doubts and to confirm certain rules which were made by the High Court of Judicature at Bombay on the thirty-first day of July, 1878 ; It is hereby enacted as follows:—

Short title and commencement.

1. (1) This Act may be called THE INDIAN INSOLVENCY RULES ACT, 1898 ; [³]

(2) [* * *]³

2. ⁴ The power to make rules conferred by sections 15 and 76 of the Indian Insolvency Act, 1848, shall be deemed to include, and to have included, a power to make rules for the audit of the accounts of the official assignee, and for paying for the costs of such audit and for paying the reasonable costs, charges and allowances of the official assignee, out of the funds in the hands of the official assignee.

Extent of power to make rules under the Indian Insolvency Act, 1848

¹ For Statement of Objects and Reasons, see *Gazette of India*, 1898, Pt. V, p. 275 ; for Proceedings in Council, see *ibid*, 1898, Pt. VI, pp. 295 and 366.

² Secs. 1 and 2 —For rules as to practice and

procedure made by the High Court, Madras, under this Act. See *Fort St George Gazette*, 1905, Supplement, dated 2nd May, 1905.

³ Repealed by Act X of 1914, Sch. II.

⁴ Secs. 2 and 3.—Repealed by Act III of 1909.

Confirmation of rules made on the 31st July, 1878, by the Bombay High Court.

3. 1 The rules made, in exercise of the aforesaid power, by the High Court of Judicature at Bombay on the thirty-first day of July, 1878, are hereby confirmed.

4. The Chief Justice

Official assignee's allowance for pension.

of the said Court may, with the previous sanction of the Governor-General in Council pay to the present official assignee, out of the interest on the Unclaimed Dividend Account, such sum by way of pension on retirement, or

bonus in lieu thereof, as may be reasonable and proper having regard to the length nature and conditions of his service.

THE INSURANCE COMPANIES ACT (XX OF 1928).

An Act further to amend the Indian Life Assurance Companies Act, 1912, for certain purposes, and to provide for the collection of statistical information in respect of insurance business other than life assurance business.

WHEREAS it is expedient further to amend the Indian Life Assurance Companies Act, 1912, for certain purposes hereinafter appearing, and to provide for the collection of statistical information in respect of insurance business other than life assurance business ; It is hereby enacted as follows :—

PART I.

Preliminary.

Short title, extent and commencement.

1. (1) This Act may be called THE INDIAN INSURANCE COMPANIES ACT, 1928.

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas.

(3) It shall come into force on such date as the Governor-General in Council may, by notification in the *Gazette of India*, appoint.

PART II.

Amendments to the Indian Life Assurance Companies Act, 1912.

[Sections 2 to 5 inserted in their proper places.]

PART III.

Provisions as to Life Insurance other than Life Assurance business.

6. In this part, unless there is anything repugnant in the subject or context,—

(a) "Certified" in relation to any copy or translation of a document required to be furnished by or on behalf of an insurance company,

Definitions.

means certified by a responsible officer of the company to be a true copy or a correct translation, as the case may be ;

(b) "insurance company" means any person who transacts in British India the business of effecting contracts of insurance against any risk ;

(c) expressions used in this Act and defined in the Indian Life Assurance Companies Act, 1912, shall have the meanings assigned to them respectively in that Act.

7. Every insurance company which does not transact life assurance business in

Deposit of accounts, etc., with Governor-General in Council.

British India shall, within six months after the close of each financial year or within such further period as the Governor-General in Council may in any case for special reasons allow, deposit with the Governor-General in

Council four copies of every report on the affairs of the company, and of every balance sheet, revenue account an profit and loss account, in respect of that year, which has been submitted to its shareholders or policyholders, and also, in the case of a company whose head office is situated outside British India, four copies of such of the aforementioned documents as are required by law to be submitted to the Government of the country in which the head office is situated.

8. The following statements shall be appended to every revenue account (other than a life assurance revenue account) deposited by an

Statements to be appended to revenue account.

insurance company with Governor-General in Council in compliance with section 7 or with the provisions of the Indian Life Assurance Companies Act, 1912, as respects the year and the class of insurance business to which the revenue account relates, namely, statements showing—

(1) in respect of premium income for which credit is taken in the revenue account, the amount of premiums derived from business effected in India,

(2) in respect of claims, the amount of the claims paid in the year of account under policies effected in India—

(a) to claimants in India, and

(b) to claimants outside India.

9. There shall be appended to every balance sheet deposited by an insurance

Statement of Indian assets.

company with the Governor-General in Council in compliance with section 7 a statement showing, in such form as the Governor General in Council may prescribe, a classified summary of the investments of the company in India in Government securities and in Indian concerns and other Indian assets held by the company.

10. At least one copy of every document deposited by an insurance company

Signing of documents.

with the Governor-General in Council in accordance with the requirements of section 7, section 8 or section 9 shall be signed in the manner provided in section 11 of the Indian Life Assurance Companies Act, 1912.

11. If any portion of any document required to be deposited under section 7,

Certified copies of vernacular documents.

section 8 or section 9 by an insurance company with the Governor-General in Council is not written in the English language, a certified translation thereof shall be furnished along with each copy of the document.

12. Every insurance company which does not transact life assurance business

Particulars to be filed.

in British India shall, within one month from the commencement of this Act or before it begins to carry on business, whichever is later, furnish to the Governor-General in Council—

(a) the full address of the principal office of the company in British India ;

(b) the names of the directors, the principal officer and the auditor of the company in British India ;

(c) a statement of the classes of insurance business carried on or intended to be carried on by the company in British India ;

(d) a certified copy of the charter, statutes, deed of settlement or memorandum and articles of the company, or other instrument constituting or defining the constitution of the company, and, if the instrument is not written in the English language, a certified translation thereof ;

(e) in the case of any such company established outside British India, the names and addresses of some one or more persons resident in British India, authorised to accept on behalf of the company service of process and any notice required to be served on the company ;

and, in the event of any alteration being made in the address of the principal office or in such classes of business or in any such instrument as aforesaid or in the name of any such person, the company shall forthwith furnish to the Governor-General in Council particulars of the alteration.

13 Every document deposited with the Governor-General in Council, in compliance

Custody and inspection of documents.

with section 7, section 8 or section 9, or a certified copy of such document, shall be kept by the Registrar, and any such documents or copies shall be open to inspection, and any person may procure a copy of any such document or of any part thereof on payment of a fee of six annas for every hundred words or fractional part thereof required to be copied.

14. (1) Every document deposited with the Governor-General in Council in compliance with section 7, section 8 or section 9 which has been certified by the Registrar to be a document so deposited shall be deemed to be a document so deposited.

(2) Every such document purporting to be certified by the Registrar to be a copy of a document so deposited shall be deemed to be a copy of that document, and shall be received in evidence as if it were the original document, unless some variation between it and the original document be proved.

15. The Governor-General in Council shall, from time to time, cause to be published, in such manner as he may direct, a summary of the accounts, balance sheets and statements deposited with him in compliance with section 7, section 8 or section 9, and may append to such summary any note of the Governor-General in Council thereon and any correspondence in relation thereto.

16. Any insurance company which makes default in complying with any of the requirements of this Part, and every director, manager or secretary, or other officer or agent of, or partner in, the company who is knowingly a party to the default, shall be punishable in the manner provided in section 34 of the Indian Life Assurance Companies Act, 1912.

17. If any account, balance sheet, statement or other document required by the provisions of section 7, section 8 or section 9 is false in any particular to the knowledge of any person who signs it, such person shall be punishable in the manner provided in section 35 of the Indian Life Assurance Companies Act, 1912.

18. No Court inferior to that of a Presidency Magistrate or a Magistrate of the first class shall try any offence under this Act.

19. A person transacting the business of reinsuring contracts of insurance effected by any other person in the course of any class of business other than life assurance business shall not, by reason only of that fact, be deemed to be transacting insurance business of that class.

20. The Governor-General in Council may, by notification in the *Gazette of India* and subject to such restrictions and conditions as he thinks fit, exempt from all or any of the provisions of this Act any provident insurance society registered under the Provident Insurance Societies Act, 1912.

THE INTEREST ACT (XXXII OF 1839).¹

The Interest Act (XXXII of 1839).

Short title given, Act 14 of 1897.

Declared in force —

Throughout British India except as regards the Scheduled Districts, Act 15 of 1874, S. 3.

[30th December, 1839.]

An Act concerning the allowance of Interest in certain cases.

WHEREAS it is expedient to extend to the territories under the Government of the East India Company, as well within the jurisdiction of Her Majesty's Courts as elsewhere, the provisions of ² the Statute 3rd and 4th William IV, Chapter 42, Section 28, concerning the allowance of interest in certain cases.

Preamble.

¹ Short title, "The Interest Act, 1839." See 1833." See the Short Titles Act, 1896 (58 & 60 Vict., c. 14).

² SHORT TITLE—"The Civil Procedure Act,

1. It is, therefore, hereby enacted that, upon all debts or sums certain payable at a certain time or otherwise, the Court before which such debts or sums may be recovered may, if it shall think fit, allow interest to the creditor at a rate not exceeding the current rate of interest from the time when

Power of Court to allow interest.

Sec. 1—CASE LAW—ALLOWANCE OF INTEREST IN CERTAIN CASES.—The Act is only an enabling Act by which the Court is vested with a discretion to grant interest in certain cases, but does not create a right to interest in favour of creditors, which, of itself, could be made the subject matter of a suit. 1 C.W.N. 219. But see also 4 Bom. L. R. 205. (1920) M.W.N. 717=40 M.L.J. 18=12 L. W. 562; 75 I.C. 64; 21 N.L.R. 16=1925 Nag. 451; 31 Bom. 354. Interest before suit cannot be decreed if the case is not covered either by the Interest Act or by S. 73 of the Contract Act. 4 C.W.N. 818=27 C. 814. See also D.C.R., Part II, 7; 19 P. L. R. 1902=104 P. R. 1901; 37 P.R. 1867. 54 I. C. 431; 41 A. 254=17 A.L.J. 829=21 I.C. 253; 40 M.L.J. 18=12 L. W. 568=75 I.C. 64. Act is not exhaustive of all claims as to interest and it is open to the courts in India to award interest in cases not coming within the purview of the Act, on principles of equity. Act does not apply to an unascertained sum such as the profits of a trade. 42 M. 661=25 M.L.T. 242=36 M.L.J. 456=(1919) M.W.N. 484=52 I.C. 505; 24 L.W. 657=51 M.L.J. 633; A. I. R. 1927 Mad. 59. See also (1920) M.W.N. 717=40 M. L. J. 18=12 L.W. 568; 75 I.C. 64=1923 Lah. 302; 71 I.C. 257; 47 M. L. J. 312; 20 L. W. 195=(1924) M.W.N. 499; 1925 Mad. 46=81 I. C. 536=47 M. L. J. 312. If there is no agreement between the parties to pay interest, interest may be allowed by way of damages though not authorised by the Interests Act and where the practice of the Court is not to allow more than 6 per cent. interest by way of damages the principle should be adhered to. (42 M. 661, 31 B. 354 and 22 C.W.N. 488, relied on; 20 M. 481, dist.) 105 I. C. 836=4 O. W. N. 1061. It has however, been held in a recent case by the Bombay High Court, that interest cannot be awarded by way of damages apart from the special provisions of the Interest Act. 25 Bom L. R. 817. In the absence of an agreement or usage giving a right to interest and of a written demand giving notice that interest would be claimed a creditor will not be entitled to interest 19 P. L. R. 1902=104 P. R. 1902; 22 A. L. J. 558 (40 A. 497=17 A. L. J. 177 *Ref 10.*) See also 1922 Mad. 1279=27 L. W. 490. *Per curiam*—"It is clear that neither under the common law nor, under the Indian Contract Act can interest be claimed upon a debt unless there has been either an express promise to pay interest or such promise is to be implied from the usage of trade or other circumstances." 8 Lah 524=9 Lah. L. J. 149=28 Punj. L. R. 174=101 I. C. 644=A. I. R. 1927 Lah. 287. Interest cannot be allowed merely on the ground that the debtor delayed the payment of debt due by him. 8 P. R. 1914=266 P. L. R. 1913=20 J. C. 194. (55 P. R. 1901=104 P. R. 1901; 19 P. L. R. 1902, Exp. and Ref. 30 B. 226=7 Bom. L. R. 995, Ref.) Suit on oral contract—Absence of demand—whether interest before suit recoverable. 20 M. 481=7 M. L. J. 263. Price of

goods sold—No written instrument or demand in writing—Whether interest prior to suit recoverable 6 W. R. 288. See also 33 I. C. 268=1925 Nag. 204 (No interest recoverable). Act does not apply where there is an agreement between the parties regulating the amount of interest. 4 W.R. 1 (P. C.)=10 M.I.A. 229. Act does not apply to a contract to pay interest, implied from the dealings of the parties. 36 P. R. 1894. The language of the Act does not show that a contingency in the liability, not affecting the amount of debt or the time of payment, can in any way prevent the operation of the provisions of the first part of S. 1 26 C. 955. See also (1910) M. W. N. 731=8 M. L. T. 405=8 I. C. 348. There is no general rule to the effect that payment and acceptance of a debt *post diem* precludes recovery of interest for the delay in payment. 4 Bom. L. R. 205. The Act has not the effect of restraining the power of the Court to allow interest in cases other than those mentioned in it. Marsh 239=1 Hay. 500. See also 31 Bom. 354. This Act extends the provisions of the Statute 3 and 4 Wm. IV. c. 42, S. 28 to India. 6 M. I. A. 32. See 21 I.C. 116 (P.C.) The Act is retrospective in its operation, and authorizes the allowance of interest, although it was not provided for by the bond executed prior to the passing of the Act. 6 M.I.A. 12. English decisions may be referred to as guide in construing the Act. 31 I.A. 116 (P.C.)=26 A. 229=8 C.W. N. 521=14 M.L.J. 190=6 Bom. L. R. 505. Interest is given under the Act by way of damages, on the ground that the debtor has wrongfully refused to pay the debt. 10 C.L.R. 561=7 C. 594. There can be no wrongful refusal, where there is no hand to receive payment and give a complete discharge. Thus where an Insurance Company refused payment to the executors of the assignee of an insurance policy, on the ground that they were ignorant as to the terms of the assignment, and as to whether any consideration passed or not, and that the executors should obtain the authority or concurrence of the representatives of the deceased (who was the person assured) it was held, the company were not liable to pay interest. (*Ibid.*) There is nothing to prevent a party from waiving or agreeing to waive the benefit or advantage of an Act or rule made solely for the benefit or protection of the individual in his private capacity, and which may be dispensed with without infringing on any public right or public policy 5 I. C. 285. A debt payable in kind is a debt under the Act and interest is allowable on it under the Act. 38 M. 464=31 I. C. 432. (12 Bom. L. R. 831. *Diss.*) It was however laid down in a Bombay case that payment in kind is not such a debt as is contemplated by the Interest Act. 34 B. 506=12 Bom. L. R. 831=8 I. C. 411. Act does not apply to a debt due on a foreign judgment. When a judgment given in England is silent as to interest the plaintiff cannot make the defendant liable for interest as the English

such debts or sums certain were payable, if such debts or sums be payable by virtue

statutes as to judgments carrying interest do not apply to India. 5 C. W. N. 741=28 C. 641; see also 75 P. R. 1909=99 P. L. R. 1909=92 P. W. R. 1909=3 I. C. 522. A wager contract before the passing of Act XXI of 1848 is not within the scope of this Act; as the Act does not affect debts contingent in amount and time of becoming due. 4 W. R. 8 (P. C.)=7 M. I. A. 263. See also 26 C. 955; L. R. 3 A. 163 [1922]. The Act does not authorize the allowance of interest where the debt on which it is claimed is irrecoverable. 27 R. 330=5 Bom. L. R. 198. Interest should not be awarded on unliquidated damages. 7 B. H. C. (A. C.) 89=32 C. L. J. 239=60 I. C. 288. It is doubtful whether a Court possesses the jurisdiction under the Act to allow what in effect would be compound interest. But, even if the Court has jurisdiction, there can be no doubt that it would be exercising a sound discretion in not allowing a compound interest, except in cases where compound interest is expressly provided for by the agreement. 1 C. W. N. 210. But see also 7 C. W. N. 876. The Court has power, under this Act, to give interest *post diem* at a reasonable rate, if it be on money payable at a certain time and under a written instrument. 18 M. 242=4 M. L. J. 265. Where a mortgage instrument is silent as to *post diem* interest, although more than six years have elapsed after the due date of the bond, such interest may be recovered under this Act, and may be made a charge on the mortgaged property. 5 M. L. J. 154. But see also 35 A. 534. This joint effect of the Interest Act and S. 88 of the Transfer of Property Act is in favour of the award of interest *post diem* as interest, till date of payment at a reasonable rate, and as a charge upon the mortgaged property. 18 M. 248. But see 17 A. 581, *contra*, see also 18 M. 338 (notes); 24 C. 699=1 C. W. N. 437 (F.B.); 20 M. 371; 21 C. 274. But see also 35 A. 534=11 A.L.J. 829=21 I.C. 253. Where in a mortgage bond there was no stipulation for payment of *post diem* interest such interest could be given under the Act, though the claim for future interest by way of damages had become barred. 5 M. L. J. 154. Interest can be allowed under this Act as damages for the breach of contract which occurs when the debt is wrongfully detained after it has fallen due, and it can be allowed only in a suit brought within six years of such breach under Art. 116. There can be no recurring cause of action in such cases, and the starting point for limitation is the date of failure to pay the money. If, however, the interest in question is "money charged on land" the article applicable would be Art. 132 and not 116. 18 M. 331 (R., 24 C. 699, F.B.; 12 C.P.L. R. 18; D., 22 B. 107). Effect of Contract Act, S. 73 on this Act. See 7 M.L.J. 264=24 Mad. 481. This Act provides for the award of interests on debts in certain cases, and provides that, where the conditions required by the Act are satisfied, interest will be recoverable, quite irrespective of the question whether any actual loss or damage has been caused to the creditor: but compensation under S. 73 of the Contract Act will not be recoverable by the creditor from the debtor on the ground that the payment of the money due to him has been with-

held by the debtor, unless he can show that actual loss or damage has been caused to him. 26 C. 955. See also 1 S.L.R. 179; 9 Bom. L.R. 439.

DEBTS OR SUMS CERTAIN PAYABLE AT A CERTAIN TIME.—See 9 Bom. H. C. 717 B. H. C. (A. C.) 80. When, by a contract, a sum of money is payable at a time certain, and upon a sum to be ascertained on a certain date, but a dispute occurs as to the amount, which is settled by the Court, interest is payable. 32 C. L. J. 239. Interest pending suit is not claimable in a suit for unliquidated damages. See 60 I. C. 288. The mere fact that the contract does not come within the protection afforded by the Act is not a reason for holding that it is not controlled by the Act. The term 'payable at a certain time' in the Act refers to payment agreed between parties and not under a presumption of law. (1920) M. W. N. 717=40 M. L. J. 18=12 L. W. 568. See also 8 Lah. 524=A. I. R. 1927 Lah. 287.

THE COURT MAY IF IT SHALL THINK FIT.—The Act is an enabling Act which vests the Court with a discretion; it does not create a right to interest in favour of creditors, which of itself could be made the subject-matter of a suit. 1 C. W. N. 219. See also 1925 Nag. 451. As to whether the discretion vested in the Court by this Act, in allowing or refusing interest, in cases within the Act, is liable to review. see 4 W. R. 8 (P. C.)=7 M. I. A. 263.

CURRENT RATE OF INTEREST.—Where a certain sum of money is payable by virtue of a written instrument at a certain time, the Court can under the Interest Act allow interest, if it thinks fit, at a rate not exceeding the current rate, from the time when the money is payable. Where there is no security a rate of one per cent. per mensem is not unreasonable. 52 I. C. 953 (Nag.).

IF SUCH DEBTS BE PAYABLE BY VIRTUE OF SOME WRITTEN INSTRUMENT.—A certificate of the Administrator-General admitting a debt to be due is not a "written instrument" such as is contemplated by the Act, because the amount mentioned therein is not payable by virtue of the certificate, which merely purports to certify the registration of the amount of the admitted debt for the purpose of convenience in administering the estate. 25 C. 54. See also 75 I. C. 64=1923 Lah. 302. It is doubtful whether a decree or an order of a Settlement Officer under S. 40, Act XVII of 1876, is a written instrument within the meaning of the Interest Act. 1 O. C. 94. A principal is not entitled to interest on moneys received and detained by the agent on behalf of the principal in the absence of a contract to the contrary. 41 A. 254=17 A.L.J. 169=49 I. C. 696. Interest is not allowed in a suit for recovery of money for use and occupation, because such sums are not payable by an instrument in writing and at a certain time. 9 I. C. 221 (Oudh).

WHEN DEMAND OF PAYMENT SHALL HAVE BEEN MADE IN WRITING.—There must also be demand in writing. Interest prior to the institution of the suit cannot be given under this Act, unless a demand of payment has been made in writing. 7 Bom. L. R. 703; 101 I. C. 57=A. I. R. 1927 All. 444. See also 20 I. C. 299=39 P. R. 1913; 22 L. W. 490=1925 Mad. 1279. Interest up to the date of the suit

of some written instrument at a certain time, or if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment : Provided that interest shall be payable in all cases in which it is now payable by law.

THE JUDICIAL OFFICERS PROTECTION ACT (XVIII OF 1850).

[4th April, 1850.]

An Act for the protection of Judicial Officers.¹

Preamble.

For the greater protection of Magistrates and others acting judicially ; it is enacted as follows :—

cannot be awarded on sums payable, not under a written instrument, the payment of which has been illegally delayed, unless there is a written demand of payment. 1 M. H. C. 369 (Ref. to in 20 M. 481 ; 23 M. 41 ; 31 B. 354 ; 9 Bom. L. R. 439 ; 118 P. R. 1907.) In a suit on an oral contract, where no agreement for interest or usage for payment of interest was alleged, *held*, that interest was not allowable. 20 M. 481 = 7 M. L. J. 263 ; *see also* 22 L. W. 490 = 1925 Mad 1279. A letter of the plaintiff demanding interest on an outstanding debt retrospectively, up to the date of the demand, was held to have made it sufficiently clear by implication, that it was the intention of the plaintiff to claim interest prospectively, up to the date of payment and to have complied with the requirements of the Act. 23 M. 41. *See also* 83 I. C. 253 = 1925 Nag. 245. Demand for retrospective interest may imply demand for prospective interest. *See* 181 P. L. R. 1901 and 23 M. 41. Demand for principal may imply demand for interest. 23 M. 41. Interest is not allowed upon the unpaid price of goods sold unless demand has been made for the arrears. A printed headline in the tradesman's bill that interest would be charged on all arrears after a certain period is not such a demand as is contemplated by the Interest Act. 8 P. R. 1914 = 266 P. L. R. 1913 = 20 I. C. 194 ; 47 M. L. J. (Short Notes) 41 ; 65 L. T. 453. *See also* A. W. N. (1887) 287. In the absence of any agreement to pay interest on a particular transaction or of any notice of the vendor's intention to claim interest if debt is not paid within a certain time, a claim for interest cannot be decreed under the Act. 54 I. C. 431 (All.). In a suit by a contractor to recover money payable for work and labour done under a building contract, which provided that all works done by the contractor should be paid for by the contractee according to the rates therein specified within a reasonable time after it had been inspected and finally approved and passed, *held*, that the provision was not one for the payment of a sum certain within the meaning of S. 1 and that, in the absence of provision for payment of interest in the contract or of any proof of demand, the Court had no power to allow interest under the Act from the time when the money became payable. *Held also*, that Court could not award interest under the proviso to S. 1 of the Act. 40 M. L. J. 18 = 12 L. W. 567 ; (1920) M.

W. N. 717 = 60 I. C. 353.

SUCH DEMANDS SHALL GIVE NOTICE TO DEBTOR THAT INTEREST WILL BE CLAIMED.—Under this Act, a creditor has the option of notifying to his debtor the date from which interest will be claimed, and failure to give such notice deprives the creditor of interest. 181 P. L. R. 1901 ; 92 I. C. 354 = A. I. R. 1925 Mad. 1279. At the head of every bill of the seller of goods, the following was printed : " Interest will be charged at 12 per cent. per annum on bills not paid on presentation," *held*, that the bill was a sufficient notice under the Act. 7 A. W. N. (1887) 287. But *see contra* 21 I. C. 194 = 47 M. L. J. (short notes) 41 (65 L. T. 453 Foll.). A letter demanding interest, from which it was made clear, by implication, that it was the creditor's intention to claim interest up to the date of payment, was sufficient notice under the Act. 181 P. L. R. 1901. *See also* 23 M. 41. When a contractor is, for no fault of his own, kept out of his money, the principal sum, for a long time after it is due, it would be reasonable that the law should admit of interest being recoverable, by way of damages. 23 M. 41, but *see also* (1920) M. W. N. 717 = 43 M. L. J. 18 = 12 L. W. 568 ; 60 I. C. 353. The existence of a previous litigation upon the same subject-matter is sufficient notice in order to entitle the plaintiff to charge interest. 2 Hay. 123.

EXECUTING COURT cannot award interest ; only the court which adjudicates as to the actual debt or claim can award interest. 53 Cal. 354 = 98 I. C. 238 = A. I. R. 1926 Cal. 1119.

PROVIDED THAT INTEREST SHALL BE PAYABLE IN ALL CASES IN WHICH IT IS NOW PAYABLE AT LAW.—Neither the Interest Act nor the Contract Act affects the rule of Hindu Law, that in the case of a debt wrongfully withheld after demand of payment has been made, interest becomes payable by way of damage. 9 Bom. L. R. 439 = 31 B. 3 ; 4. But *see* 3 M. L. T. 278 = 31 M. 250 ; 7 M. L. T. 1087. The Interest Act expressly provides that interest shall be payable in all cases in which it is payable by law. And money obtained by fraud can be recovered with interest under the law. 25 M. L. J. 531 = 14 M. L. T. 325 = (1913) M. W. N. 836 = 21 I. C. 394 (32 M. 421, Foll., 27 C. 814, Dist. and Ref. to).

¹ SHORT TITLE.—" The Judicial Officers Protection Act, 1850."—*See* the Indian Short Titles Act (XIV of 1897).

1. No Judge, Magistrate, Justice of the Peace, Collector or other person acting judicially shall be liable to be sued in any Civil Court for any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction : Provided that he at the time, in good faith, believed himself to have jurisdiction to do or order the act complained of ; and no officer of any

Sec. 1.—As to procedure for instituting criminal prosecutions against Judges and public servants, see Act V of 1898, S. 197.

SCOPE OF THE ACT.—The term "jurisdiction" means authority or power to act in a matter, and not authority or power to do an act in a particular manner. In the matter of warrants, the protection afforded by the section is not against suit for executing lawful warrants or orders, but against suits for executing warrants or orders, not lawful, provided that such warrants or orders have been issued by a judicial officer in a matter within his jurisdiction, and not merely in a matter in which such judicial officer has authority or power to issue the particular warrant. The term "jurisdiction" should not be construed as meaning authority or power to issue the warrant in a particular matter and in the particular manner in which it is issued. 12 A. 115. [*Diss.*, 10 M. L. J. 232.] See also 30 B. 241 = 7 Bom. L. R. 95 ; 1. B. R. (1872-1892) 83 ; 8 C. L. J. 75 ; 2 M. H. C. 396 ; 36 C. 433 = 13 C. W. N. 458. Act does not apply to acts of Governor in Council. 7 M. 466. Secretary of State not liable for acts of judicial officer. 59 P. W. R. 1908. Act XVIII of 1850 not only protects a judicial officer from suits for acts done or ordered to be done by him in the discharge of judicial duties within the limits of his jurisdiction but also protects him from suits for acts done or ordered to be done in the discharge of judicial duties, without the limits of his jurisdiction, provided that he, at the time of doing the act or ordering it to be done, believed himself, in good faith, to have jurisdiction to do or order the act complained of. 9 C. W. N. 591 = 1 C. L. J. 278. The protection afforded to judicial officers rests on public policy. And though thereby a malicious Judge or Magistrate may be given a protection designed not for him, but for the public interest, it does not follow that he can exercise his malice with impunity. His conduct can be investigated elsewhere and due punishment awarded. 7 Bom. L. R. 951. See also 30 B. 241. Where the judge acting in his judicial capacity takes in good faith all the proceedings which the law permits him to take, he is protected. See 9 I. C. 535 (All.) ; 45 Bom. 1089 = 62 I. C. 93 = 23 Bom. L. R. 447. Extent of protection to judicial officers is the same as in English law. 2 M. I. A. 293. Police and Magistrate in exercise of police powers are not judicial officers. 9 C. 341 (P. C.). Municipal councillor acting as Magistrate under Beng. Act III of 1864 is judicial officer. 13 W. R. 340. When a Magistrate directs a general search of house in view of an enquiry under the Cr. P. Code in discharge of his judicial functions he may well appeal for protection under Act XVIII of 1850. 39 Cal. 953 = 39 I. A. 163 = 23 M. L. J. 32 = 14 Bom. L. R. 717 (P. C.), overruling 36 Cal. 433 = 9 C. L. J. 298 = 13 C. W. N. 458.

Plaintiffs sued a Magistrate on the allegation that the latter took him into custody and brought a false charge against him. The trial Court dismissed the suit as barred by the Judicial Officers Protection Act. *Held*, that the allegation in the plaint disclosed a cause of action to which the Act did not apply. The defence under the Judicial Officers Protection Act is as much a defence on the merits as any other defence such as limitation, etc., and the Judge must before dismissing the suit take such evidence in a case as is necessary to bring the case within the Act. 39 All. 516 = 39 I. C. 553 = 15 A. L. J. 541.

ILLUSTRATIVE CASES.—Where a Magistrate acts without jurisdiction in the *bona fide* belief that he has jurisdiction, he is protected by Act XVIII of 1850, and no suit will lie. 10 M. L. J. 232. See also 12 A. 115. Act XVIII of 1850 does not protect a Magistrate who has not acted with due care and attention. The mere absence of *mala fides* is no defence. A Magistrate cannot be said to have "in good faith" believed himself to have jurisdiction to do or order the act complained of, unless he, in arriving at that belief, acted reasonably, circumspectively and carefully. 4 B. L. R. (A. C.) 37 = 13 W. R. 413 ; 7 B. L. R. 449 = 16 W. R. 63. See also 3 B. H. C. (A. C. J.) 36. Suit for damages against Magistrate for false imprisonment. Magistrate had not acted in good faith believing himself to have jurisdiction, but carelessly, precipitately and without caution and that this Act did not protect him from liability. 3 B. H. C. App. 1. [R., 13 W. R. 13, 12 A. 115 ; 6 Bom. L. R. 131.] See also 9 C. 341 (P. C.). Negligent and wrongful payment of money by a Judge—Cause of action not disclosed. A Judge knowingly pronouncing illegal orders is responsible to the State only, and cannot be sued so long as he keeps within his jurisdiction, though he may, in certain cases and by a particular procedure, be held criminally responsible. A contrary system would produce great inconvenience by allowing "every losing party of whom there must be one in every suit, to bring an action against the Judge, and the Judge in his turn, if unsuccessful, suing the other Judge who had pronounced against him." L. B. R. (1872-1892) 83. The Act is for the protection of judicial officers, acting judicially, and officers acting under their orders, and never for the protection of the Police or a Magistrate in the exercise of Police duties. 9 C. 341 = 13 C. L. R. 185 = 9 I. A. 152 (P. C.). There is no law which authorises the Police or a Magistrate in the exercise of Police duties or an officer in command of a cantonment, in consequence of a *bona fide* belief that a person is dangerous by reason of actual lunacy to put him into confinement, in order that he may be visited and examined by

Court or other person, bound to execute the lawful warrants or orders of any such Judge, Magistrate, Justice of the Peace, Collector or other person acting judicially shall be liable to be sued in any Civil Court, for the execution of any warrant or order, which he would be bound to execute, if within the jurisdiction of the person issuing the same.

THE KAZIS ACT (XII OF 1880).

PREFATORY NOTE.—The following are extracts from the Statement of Objects and Reasons annexed to the Bill and Proceedings in Council in connection with the passing of the Kazis Act :—

“ Under the Muhammadan Law the Kazi was chiefly a judicial officer. His principal powers and duties are stated at some length in the Hedaya (Book XX). He was appointed by the State, and may be said to have corresponded to our Judge or Magistrate. In addition, however, to his functions under the Muhammadan Law, the Kazi in this country, before the advent of British rule, appears to have performed certain other duties, partly of a secular and partly of a religious nature. The principal duties seem to have been preparing, attesting and registering deeds of transfer of property, celebrating marriages, and performing other rites and ceremonies. It is not apparent that any of these duties were incumbent on the Kazi as such. It is probable that the customary performance of them by him arose rather from his being a public functionary, and one known by his official position to be acquainted with the law, than from his having, as Kazi, a greater claim to perform them than any one else. Such was the position of the Kazi in this country under the Muhammadan Government. On the introduction of the British rule, Judges and Magistrates took the place of Kazis, and the Kazi in his judicial capacity disappeared; but the British Government, though no longer recognizing the judicial functions of the Kazi, did not abolish the office. By certain Regulations, viz., Bengal Regulation XXXIX of 1793 for Bengal, Bihar and Orissa; Bengal Regulation XLIX of 1795 for Benares; Bengal Regulation XLVI of 1803 for the Ceded Provinces; Madras Regulation III of 1806 for Madras; Bombay Regulation XXVI of 1827 for Bombay passed from time to time, the appointment of Kazi-ul-Kuzaat and Kazis by the State was provided for, and the performance of their non-judicial duties was recognized by law. In the case of Bengal, indeed, certain additional duties were imposed on them. The duties of the Kazi under these Regulations comprised some or all of the following, viz. :—

- (1) preparing and attesting deeds of transfer and other law-papers;
- (2) celebrating marriages and presiding at divorces;
- (3) performing various rites and ceremonies;
- (4) superintending the sale of distrained property and paying charitable and other pensions and allowances.

In the course of subsequent legislation, the first and last of the above duties devolved on officers specially appointed for the purpose, and there remained nothing to be performed by the Kazi but the second and third, which were purely ceremonial. Under these circumstances it appeared no longer necessary that the Government should appoint these officers. Accordingly, in 1864, by Act XI of that year, all the regulations relating to the appointment of Kazis by Government and the duties to be discharged by them were repealed, but in order that it might be clear that no interference with the ceremonial functions of these officers was intended, a section was added to that Act as follows :—“ Nothing contained in this Act shall be construed so as to prevent a Kazi-ul-Kuzaat or other Kazi from perform-

medical officers, and to keep him in confinement, until such officers can feel themselves justified in reporting whether the person is a dangerous lunatic or not; *a fortiori*, this cannot be done in the case of a *bona fide* belief of danger from impending lunacy, so that such officer would not be protected from liability in respect of such acts. 9 C. 341 = 13 C. L. R. 185 = 9 I. A. 152 (P. C.). The act of issuing a warrant for the arrest of the complainant to hear an order which directed him to pay compensation to the accused is not an act within the “jurisdiction” of the Magistrate within the meaning of that word, as used in this Act. 10 M. L. J. 232. A. Deputy Magistrate, who, without reasonable cause, delays proceeding with the trial of persons whom he keeps in jail, is liable, notwithstanding the above Act, to an action in damages if the

prisoners are eventually acquitted. 11 W. R. (Cr.) 19. Local nuisance—Jurisdiction of Magistrate.—A Magistrate is not warranted in convicting and imprisoning a person for disobeying an order, the legality of which was then properly under the consideration of an appellate Court. 2 B.H.C. (Cr.) 384. *Bona fide* discharge of duty by Judicial Officers—Liability of Secretary of State—A Magistrate, acting *bona fide*, is not liable for anything done by him in the exercise of his duty, however wrong the act may be. The Legislature, by Act XVIII of 1856, while freeing the agent, the person who actually commits the tort complained of and who would be the person primarily responsible, from all responsibility could not have intended to leave the principal liable. 9 C. W. N. 495 = 1 C. L. J. 355.

ing, when required to do so, any duties or ceremonies prescribed by the Muhammadan Law." (See section 2 of Act XI of 1864.)

Certain of his duties having thus survived the passing of Act XI of 1864, the Kazi is still a functionary of considerable importance in the Muhammadan community. What was originally in some sense an accidental adjunct of his judicial office has become his principal and only duty, and in some parts of the country at least the presence of a Kazi at certain rites and ceremonies appears now to be considered by the Muhammadans essential from their point of view.

Act XI of 1864 has, however, raised a difficulty of a sort which was not anticipated at the time it was passed. As mentioned above, the Kazi was under Muhammadan law appointed by the State and it had been held by the Courts, both of Bombay and Madras, that the appointment cannot be made except by the State. But as by Act XI of 1864, the State divested itself of the power of appointment the preamble of that Act declaring it was inexpedient that such appointment should be made by Government, it would seem that no valid nomination to the office can now be made.

The inconvenience resulting to Muhammadans from this state of things had been brought to the notice of the Government on several occasions by members of that community, and more particularly by the Muhammadans of the Madras Presidency. It was considered by the Government that the grant of the relief that was sought, viz., that Government should once more undertake the appointment of Kazi was but a reasonable concession to the wants of the Muhammadan population.

With this object the Kazi Bill had been prepared. It extends in the first instance to Madras only, where the want of duly appointed Kazis appears chiefly to have been felt but it contains a clause empowering any other Local Government to extend to the territories administered by it, should the Muhammadans in those territories hereafter request its extension. It confers no legal rights or duties on Kazis. It simply in order to satisfy the wants of the Muhammadan community provides for the appointment of Kazis whatever these may be as they now are. To prevent any possible misapprehension on this point, a saving clause has been added to the effect that nothing in the Bill confers any judicial or other powers on a Kazi, or makes his presence necessary at any marriage or other ceremony at which his presence is not now necessary. (See Statement of Objects and Reasons.)

This Act is of a permissive character and it confers no official, administrative or judicial powers upon the Kazis. (See *Fort St. George Gazette, Supplement*, 27th July, 1880, p. 2.)

THE KAZIS ACT (XII OF 1880).¹

S. 1 rep. in pt., Act X of 1914.

[9th July, 1880.]

An Act for the appointment of persons to the Office of Kazi.

WHEREAS by the preamble to Act No. XI of 1864² (*an Act to repeal the law relating to the offices of Hindu and Muhammadan Law Officers and to the offices of Kazi-ul-Kuzaat and of Kazi, and to abolish the former offices*) it was (among other things) declared that it was inexpedient that the appointment of the Kazi-ul-Kuzaat, or of City, Town or Pargana Kazis, should be made by the Government, and by the same Act the enactments relating to the appointment by the Government of the said officers were repealed; and whereas by the usage of the Muhammadan community in some parts of British India the presence of Kazis appointed by the Government is required at the celebration of marriages and the performance of certain other rites and ceremonies, and it is therefore expedient that the Government should again be empowered to appoint persons to the office of Kazi; it is hereby enacted as follows:—

Short title. Commencement. [1. This Act may be called THE KAZIS ACT, 1880; * * * * *

It extends, in the first instance, only to the territories administered by the Governor of Fort Saint George in Council. But any other

Local extent.

Local Government may from time to time, by notification in the Official Gazette, extend it to the whole or any part of the territories under its administration.

¹ For Statement of Objects and Reasons, see *Gazette of India*, 1880, Pt. V, p. 21; for the report of the Select Committee, see *ibid.*, Pt. V, p. 203; for discussions in Council, see *ibid.*, Supplement, pp. 345, 356 and 1203.

² Repealed by the Repealing Act (VIII of 1868).

³ The words "and it shall come into force at once" were repealed by Act X of 1914.

2. Whenever it appears to the Local Government that any considerable number of the Muhammadans resident in any local area desire that one or more Kazis should be appointed for such local area, the Local Government may, if it thinks fit, after consulting the principal Muhammadan residents of such local area, select one or more fit persons and appoint him or them to be Kazi for such local area.

If any question arises whether any person has been rightly appointed Kazi under this section, the decision thereof by the Local Government shall be conclusive.

The Local Government may, if it thinks fit, suspend or remove any Kazi appointed under this section who is guilty of any misconduct in the execution of his office, or who is for a continuous period of six months absent from the local area for which he is appointed, or leaves such local area for the purpose of residing elsewhere, or is declared an insolvent, or desires to be discharged from the office, or who refuses or becomes in the opinion of the Local Government unfit, or personally incapable, to discharge the duties of the office.

3. Any Kazi appointed under this Act may appoint one or more persons as his Naib Kazis, naib or naibs to act in his place in all or any of the matters appertaining to his office throughout the whole or in any portion of the local area for which he is appointed, and may suspend or remove any naib so appointed.

When any Kazi is suspended or removed under section 2, his naib or naibs (if any) shall be deemed to be suspended or removed, as the case may be.

Nothing in Act to confer judicial or administrative powers ; or

4. Nothing herein contained, and no appointment made hereunder, shall be deemed—

(a) to confer any judicial or administrative powers on any Kazi or Naib Kazi appointed hereunder ; or

to render the presence of Kazi necessary ; or

(b) to render the presence of a Kazi or Naib Kazi necessary at the celebration of any marriage or the performance of any rite or ceremony ; or

to prevent any one acting as Kazi.

(c) to prevent any person discharging any of the functions of a Kazi.

SUPPLEMENT.

LOCAL AMENDMENTS OF THE COURT-FEES ACT.

A—THE ASSAM COURT-FEES (AMENDMENT) ACT (II OF 1922).

An Act to amend the Court-Fees Act, 1870, with reference to the scale of court-fees in Assam.

WHEREAS it is necessary to revise the scale of Court-fees for Assam, by amendment of the Court-Fees Act, 1870, in its application to Assam, in the manner herein-after appearing ;

It is hereby enacted as follows :—

Short title, extent and commencement. **1.** (1) This Act may be called THE ASSAM COURT-FEES (AMENDMENT) ACT, 1922.

(2) It extends to the whole of Assam.

(3) It shall come into force on the first day of May, 1922, and shall remain in force for a period of [six] years.

2. The Court-Fees Act, 1870, as amended by subsequent legislation, shall be amended, in its application to Assam, in the manner hereinafter provided.

Amendment of section 18 of Act VII of 1870.

substituted.

3. In section 18 of the Court-Fees Act, 1870, herein-after referred to as "the said Act," for the words "a fee of eight annas" the words "a fee of one rupee" shall be

Amendment of Section 19.

rupees" shall be substituted.

4. In item VIII, in section 19 of the said Act, for the words "one thousand rupees" the words "two thousand

Amendment of Schedule I, Article 1.

5. For Article 1 in the first Schedule to the said Act the following shall be substituted, namely :—

Number.

Proper Fee.

"1. *Plaint, written statement pleading a set-off or counter claim or memorandum of appeal (not otherwise provided for in this Act, or of cross objection presented to any Civil or Revenue Court except those mentioned in section 3.*

When the amount or value of the subject-matter in dispute does not exceed one hundred rupees, for every five rupees or part thereof, of such amount or value,

Six annas.

and

When such amount or value exceeds one hundred rupees, for every ten rupees or part thereof, up to one thousand rupees,

One rupee two annas.

and

When such amount or value exceeds one thousand rupees, for every one hundred rupees, or part thereof in excess of one thousand rupees, up to seven thousand five hundred rupees,

Seven rupees eight annas.

and

When such amount or value exceeds seven thousand five hundred rupees, for every two hundred and fifty rupees, of part thereof, in excess of seven thousand five hundred rupees, up to ten thousand rupees,

Fifteen rupees.

and

When such amount or value exceeds ten thousand rupees, for every five hundred rupees, or part thereof, in excess of ten thousand rupees, up to twenty thousand rupees,

Twenty-two rupees eight annas.

and

When such amount or value exceeds twenty thousand rupees, for every one thousand rupees, or part thereof, in excess of twenty thousand rupees, up to fifty thousand rupees,

Thirty rupees.

Sec. 1 (3).—The word "six" was substituted for the word "three" by Assam Act, III of 1925, s. 2.

Number.	Proper Fee.
and	
When such amount or value exceeds fifty thousand rupees, for every five thousand rupees, or part thereof, in excess of fifty thousand rupees :	Thirty seven rupees eight annas.
Provided that the maximum fee leviable on a plaint or memorandum of appeal shall be ten thousand rupees.	

6. In the third column in article 6 in the same schedule to the said Act,—

(a) for the words "Four annas," opposite clause (a) in the second column, the words "Six annas" shall be substituted; and

(b) for the words "Eight annas" opposite the first item in clause (c) in the second column, the words "Twelve annas" shall be substituted, and for the words "One rupee" opposite the second item in that clause, the words "One rupee eight annas" shall be substituted.

7. For the entries above the proviso in the second column and for the entries in the third column, in Article 11 in the same schedule to the said Act, the following shall be substituted, namely :—

"When the amount or value of the property in respect of which the grant of probate or letters is made exceeds two thousand rupees, [on such amount or value up to ten thousand rupees,]	Two per centum on such amount or value.
and	
when such amount or value exceeds ten thousand rupees [* * *] [on the portion of such amount or value which is in excess of ten thousand rupees, [up to fifty thousand rupees,]	Three per centum [* * *]
and	
when such amount or value exceeds fifty thousand rupees, [* * *] [on the portion] of such amount or value which is in excess of fifty thousand rupees, [up to a lakh of rupees,]	Four per centum [* * *]
and	
when such amount or value exceeds a lakh of rupees, [on the portion] of such amount or value which is in excess of a lakh of rupees, *	Five per centum [* * *]

8. For the entry in the second column in Article 12 in the same schedule to the said Act, and for the first paragraph in the third column in the said Article, the following shall be substituted, namely :—

["When the original amount or value of any debt or security specified in the certificate under section 8 of the Act, or such amount or value combined with the amount or value of any debt or security to which the certificate is extended under section 10 of the Act, exceeds one thousand rupees,	Two per centum on such original amount or value and three per centum on the amount or value of any debt or security to which the certificate is extended under section 10 of the Act.
and	
"When such original or combined amount or value exceeds ten thousand rupees, on the portion of such amount or value which is in excess of ten thousand rupees,	Three per centum on such original amount or value and four and-a-half per centum on the amount or value of any debt or security to which the certificate is extended under section 10 of the Act.
and	
"When such original or combined amount or value exceeds fifty thousand rupees, on the portion of such amount or value which is in excess of fifty thousand rupees up to one lakh of rupees,	Four per centum on such original amount or value and six per centum on the amount or value of any debt or security to which the certificate is extended under section 10 of the Act.

Art. 11.—The words in the 2nd col. "on such amount... rupees" were substituted for the words "but does not exceed ten thousand rupees" and "on the portion" were substituted for "for the portion" wherever they occur and the words "but does not exceed fifty thousand rupees" and but does "not exceed a lakh of rupees" were omitted; and after the words "in excess of ten thousand rupees" the words "up

to fifty thousand rupees" and after the words "in excess of fifty thousand rupees" the words "up to a lakh of rupees" were added; by Assam Act IV of 1922, s. 2 (1); and the words "on such amount or value" wherever they occur in the 3rd column were omitted by *ibid.* s. 2 (2).

Art. 12.—The above Cols. 2 and 3 were substituted for the old Cols. 2 and 3 by Assam Act IV of 1922, s. 3.

Number. and	Proper Fee.
"When such original or combined amount or value exceeds a lakh of rupees, on the portion of such amount or value which is in excess of a lakh of rupees."	Five per centum on such original amount or value and seven and a half per centum on the amount or value of any debt or security to which the certificate is extended under section 10 of the Act.]

9. For the table of rates *ad valorem* fees leviable on the institution of suits, at the end of the same schedule to the said Act, the table set forth in the Schedule to this Act shall be substituted.

10. In Article 1 in the second schedule to the said Act,—

(a) in clause (a) after the words "Municipal Commissioner" in the third entry in the second column the words "or member of a Local Board" shall be inserted :

(b) (i) for the words "One anna" opposite clause (a) in the second column, the words "Two annas" shall be substituted,

(ii) for the words "Eight annas" opposite clause (b) in the second column, the following shall be substituted, namely :

"In the case of a complaint or charge of an offence presented to a criminal court one rupee, and in other cases ten annas ; and"

(iii) for the words "One rupee" opposite clause (c) in the second column, the words "One rupee and eight annas" shall be substituted.

11. In the third column in Article 10 in the same schedule to the said Act,—

(1) for the words "eight annas," opposite clause (a) in the second column, the words "one rupee" shall be substituted ; and

(2) for the words "one rupee," opposite clause (b) in the second column, the words "one rupee and eight annas" shall be substituted.

12. For Article 11 of the same schedule to the said Act the following shall be substituted, namely :—

Number.	Proper Fee.
"11. <i>Memorandum of appeal when the appeal is not from a decree or an order having the force of a decree and is presented—</i>	
(a) (i) to any revenue Court or Executive Officer other than the High Court of Chief Controlling Revenue or Executive Authority.	Eight annas.
(ii) to any Civil Court other than a High Court.	One rupee.
(b) to a Chief Controlling Executive or Revenue Authority.	Two rupees."

13. Above the words "five rupees" where they occur in the third column, opposite Articles 12 and 13, in the same schedule to the said Act, the words "ten rupees" shall be inserted opposite Article 12, and the bracket between Articles 12 and 13 in the second column shall be omitted.

14. (1) The words "ten rupees" in the third column opposite Article 17 in the same schedule to the said Act and the bracket opposite that article in the second column in the same schedule shall be omitted.

(2) In the third column in the said Article—

(a) opposite entries (i), (ii), (iii), (iv), and (vi), the words "fifteen rupees" shall be inserted.

THE ASSAM AND BENGAL COURT-FEES (AMENDMENT) ACTS, 1922.

SCHEDULE I.

ASSAM AND BENGAL.

Table of rates of ad valorem fees leviable on the institution of suits.

When the amount or value of the subject-matter exceeds.	But does not exceed.	Proper Fee.	When the amount or value of the subject-matter exceeds.	But does not exceed.	Proper Fee.
RS.	RS.	RS. A. P.	RS.	RS.	RS. A. P.
5	5	0 6 0	10	15	1 2 0
10	10	0 12 0	15	20	1 8 0

Table of rates of ad valorem fees leviable on the institution of suits—(Contd.)

When the amount or value of the subject-matter exceeds. RS.	But does not exceed. RS.	Proper	Fee.	When the amount or value of the subject-matter exceeds. RS.	But does not exceed. RS.	Proper	Fee.
		RS.	A. P.			RS.	A. P.
20	25	1	14 0	590	600	67	8 0
25	30	2	4 0	600	610	68	10 0
30	35	2	10 0	610	620	69	12 0
35	40	3	0 0	620	630	70	14 0
40	45	3	6 0	630	640	72	0 0
45	50	3	12 0	640	650	73	2 0
50	55	4	2 0	650	660	74	4 0
55	60	4	8 0	660	670	75	6 0
60	65	4	14 0	670	680	76	8 0
65	70	5	4 0	680	690	77	10 0
70	75	5	10 0	690	700	78	12 0
75	80	6	2 0	700	710	79	14 0
80	85	6	10 0	710	720	81	0 0
85	90	7	2 0	720	730	82	2 0
90	95	7	10 0	730	740	83	4 0
95	100	8	2 0	740	750	84	6 0
100	110	9	12 0	750	760	85	8 0
110	120	11	6 0	760	770	86	10 0
120	130	13	0 0	770	780	87	12 0
130	140	14	10 0	780	790	88	14 0
140	150	16	4 0	790	800	90	0 0
150	160	18	0 0	800	810	91	2 0
160	170	19	2 0	810	820	92	4 0
170	180	20	4 0	820	830	93	6 0
180	190	21	6 0	830	840	94	8 0
190	200	22	8 0	840	850	95	10 0
200	210	23	10 0	850	860	96	12 0
210	220	24	12 0	860	870	97	14 0
220	230	25	14 0	870	880	99	0 0
230	240	27	0 0	880	890	100	2 0
240	250	28	2 0	890	900	101	4 0
250	260	29	4 0	900	910	102	6 0
260	270	30	6 0	910	920	103	8 0
270	280	31	8 0	920	930	104	10 0
280	290	32	10 0	930	940	105	12 0
290	300	33	12 0	940	950	106	14 0
300	310	34	14 0	950	960	108	0 0
310	320	36	0 0	960	970	109	2 0
320	330	37	2 0	970	980	110	4 0
330	340	38	4 0	980	990	111	6 0
340	350	39	6 0	990	1,000	112	8 0
350	360	40	8 0	1,000	1,100	120	0 0
360	370	41	10 0	1,100	1,200	127	8 0
370	380	42	12 0	1,200	1,300	135	0 0
380	390	43	14 0	1,300	1,400	142	8 0
390	400	45	0 0	1,400	1,500	150	0 0
400	410	46	2 0	1,500	1,600	157	8 0
410	420	47	4 0	1,600	1,700	165	0 0
420	430	48	6 0	1,700	1,800	172	8 0
430	440	49	8 0	1,800	1,900	180	0 0
440	450	50	10 0	1,900	2,000	187	8 0
450	460	51	12 0	2,000	2,100	195	0 0
460	470	52	14 0	2,100	2,200	202	8 0
470	480	54	0 0	2,200	2,300	210	0 0
480	490	55	2 0	2,300	2,400	217	8 0
490	500	56	4 0	2,400	2,500	225	0 0
500	510	57	6 0	2,500	2,600	232	8 0
510	520	58	8 0	2,600	2,700	240	0 0
520	530	59	10 0	2,700	2,800	247	8 0
530	540	60	12 0	2,800	2,900	255	0 0
540	550	61	14 0	2,900	3,000	262	8 0
550	560	63	0 0	3,000	3,100	270	0 0
560	570	64	2 0	3,100	3,200	277	8 0
570	580	65	4 0	3,200	3,300	285	0 0
580	590	66	6 0	3,300	3,400	292	8 0

Table of rates of ad valorem fees leviable on the institution of suits—(Contd.)

When the amount or value of the subject-matter exceeds,	But does not exceed.	Proper Fee.	When the amount or value of the subject-matter exceeds.	But does not exceed.	Proper Fee.
RS.	RS.	RS. A. P.	RS.	RS.	RS. A. P.
3,400	3,500	300 0 0	16,500	17 000	1,065 0 0
3,500	3,600	307 8 0	17,000	17,500	1,087 8 0
3,600	3,700	315 0 0	17,500	18,000	1,110 0 0
3,700	3,800	322 8 0	18,000	18,500	1,132 8 0
3,800	3,900	330 0 0	18,500	19,000	1,155 0 0
3,900	4,000	337 8 0	19,000	19,500	1,177 8 0
4,000	4,100	345 0 0	19,500	20,000	1,200 0 0
4,100	4,200	352 8 0	20,000	21,000	1,230 0 0
4,200	4,300	360 0 0	21,000	22,000	1,260 0 0
4,300	4,400	367 8 0	22,000	23,000	1,290 0 0
4,400	4,500	375 0 0	23,000	24,000	1,320 0 0
4,500	4,600	382 8 0	24,000	25,000	1,350 0 0
4,600	4,700	390 0 0	25,000	26,000	1,380 0 0
4,700	4,800	397 8 0	26,000	27,000	1,410 0 0
4,800	4,900	405 0 0	27,000	28,000	1,440 0 0
4,900	5,000	412 8 0	28,000	29,000	1,470 0 0
5,000	5,100	420 0 0	29,000	30,000	1,500 0 0
5,100	5,200	427 8 0	30,000	31,000	1,530 0 0
5,200	5,300	435 0 0	31,000	32,000	1,560 0 0
5,300	5,400	442 8 0	32,000	33,000	1,590 0 0
5,400	5,500	450 0 0	33,000	34,000	1,620 0 0
5,500	5,600	457 8 0	34,000	35,000	1,650 0 0
5,600	5,700	465 0 0	35,000	36,000	1,680 0 0
5,700	5,800	472 8 0	36,000	37,000	1,710 0 0
5,800	5,900	480 0 0	37,000	38,000	1,740 0 0
5,900	6,000	487 8 0	38,000	39,000	1,770 0 0
6,000	6,100	495 0 0	39,000	40,000	1,800 0 0
6,100	6,200	502 8 0	40,000	41,000	1,830 0 0
6,200	6,300	510 0 0	41,000	42,000	1,860 0 0
6,300	6,400	517 8 0	42,000	43,000	1,890 0 0
6,400	6,500	525 0 0	43,000	44,000	1,920 0 0
6,500	6,600	532 8 0	44,000	45,000	1,950 0 0
6,600	6,700	540 0 0	45,000	46,000	1,980 0 0
6,700	6,800	547 8 0	46,000	47,000	2,010 0 0
6,800	6,900	555 0 0	47,000	48,000	2,040 0 0
6,900	7,000	562 8 0	48,000	49,000	2,070 0 0
7,000	7,100	570 0 0	49,000	50,000	2,100 0 0
7,100	7,200	577 8 0	50,000	55,000	2,137 8 0
7,200	7,300	585 0 0	55,000	60,000	2,175 0 0
7,300	7,400	592 8 0	60,000	65,000	2,212 8 0
7,400	7,500	600 0 0	65,000	70,000	2,250 0 0
7,500	7,750	615 0 0	70,000	75,000	2,287 8 0
7,750	8,000	630 0 0	75,000	80,000	2,325 0 0
8,000	8,250	645 0 0	80,000	85,000	2,362 8 0
8,250	8,500	660 0 0	85,000	90,000	2,400 0 0
8,500	8,750	675 0 0	90,000	95,000	2,437 8 0
8,750	9,000	690 0 0	95,000	1,00,000	2,475 0 0
9,000	9,250	705 0 0	1,00,000	1,05,000	2,512 8 0
9,250	9,500	720 0 0	1,05,000	1,10,000	2,550 0 0
9,500	9,750	735 0 0	1,10,000	1,15,000	2,587 8 0
9,750	10,000	750 0 0	1,15,000	1,20,000	2,625 0 0
10,000	10,500	772 8 0	1,20,000	1,25,000	2,662 8 0
10,500	11,000	795 0 0	1,25,000	1,30,000	2,700 0 0
11,000	11,500	817 8 0	1,30,000	1,35,000	2,737 8 0
11,500	12,000	840 0 0	1,35,000	1,40,000	2,775 0 0
12,000	12,500	862 8 0	1,40,000	1,45,000	2,812 8 0
12,500	13,000	885 0 0	1,45,000	1,50,000	2,850 0 0
13,000	13,500	907 8 0	1,50,000	1,55,000	2,887 8 0
13,500	14,000	930 0 0	1,55,000	1,60,000	2,925 0 0
14,000	14,500	952 8 0	1,60,000	1,65,000	2,962 8 0
14,500	15,000	975 0 0	1,65,000	1,70,000	3,000 0 0
15,000	15,500	997 8 0	1,70,000	1,75,000	3,037 8 0
15,500	16,000	1,020 0 0	1,75,000	1,80,000	3,075 0 0
16,000	16,500	1,042 8 0	1,80,000	1,85,000	3,112 8 0

Table of rates of ad valorem fees leviable on the institution of suits—(Contd.)

When the amount or value of the subject-matter exceeds	But does not exceed.	Proper Fee.		When the amount or value of the subject-matter exceeds.	But does not exceed.	Proper Fee.	
RS.	RS.	RS.	A. P.	RS.	RS.	RS.	A. P.
1,85,000	1,90,000	3,150	0 0	1,95,000	2,00,000	3,225	0 0
1,90,000	1,95,000	3,187	8 0	2,00,000	2,05,000	3,262	8 0

and the fee increases at the rate of thirty seven rupees eight annas for every five thousand rupees, or part thereof, up to a maximum fee of ten thousand rupees, for example—

RS.	RS.	A. P.	RS.	RS.	A. P.
3,00,000	4,012	8 0	8,00,000	7,762	8 0
4,00,000	4,762	8 0	9,00,000	8,512	8 0
5,00,000	5,512	8 0	10,00,000	9,262	8 0
6,00,000	6,262	8 0	11,00,000	10,000	0 0
7,00,000	7,012	0 0			

B—THE BENGAL COURT-FEES (AMENDMENT) ACT (IV OF 1922).

An Act to amend the Court-Fees Act, 1870, and the Presidency Small Cause Courts Act, 1882, with reference to the scale of court-fees in Bengal.

WHEREAS it is necessary to revise the scale of court-fees for Bengal, by amendment of the Court-Fees Act, 1870, and the Presidency Small Cause Courts Act, 1882, in their application to Bengal, in the manner hereinafter appearing; It is hereby enacted as follows :—

Short title, extent and commencement.

1. (1) This Act may be called THE BENGAL COURT-FEES (AMENDMENT) ACT, 1922.

(2) It extends to the whole of Bengal.

(3) It shall come into force on the first day of April, 1922.

2. The Court-Fees Act, 1870, as amended by subsequent legislation, and the Presidency Small Cause Courts Act, 1882, as amended by subsequent legislation, shall be amended, in their application to Bengal, in the manner hereinafter provided.

Application of Act.

Amendment of S. 18 of Act VII of 1870.

3. In section 18 of the Court-Fees Act, 1870, for the words "a fee of eight annas" the words "a fee of one rupee" shall be substituted.

4. In item viii in section 19 of the same Act for the words "one thousand rupees" the words "two thousand rupees" shall be substituted.

Amendment of S. 19.

Amendment of Sch. 1, Art.

1.

5. For Art. 1 in the first schedule to the same Act the following shall be substituted, namely :—

Number.

Proper Fee.

1. *Plaint written statement pleading a set-off or memorandum of appeal (not otherwise provided for in this Act) or of cross-objection presented to any Civil or Revenue Court except those mentioned in section 3.*

When the amount [or value] of the subject-matter in dispute does not exceed seventy-five rupees, for every five rupees or part thereof of such amount or value,

Six annas.

and

when such amount or value exceeds seventy-five rupees, for every five rupees, or part thereof, in excess of seventy-five rupees up to one hundred rupees,

Eight annas.

Art. 1.—In the 1st column, the commas before and after the word "pleading" were omitted; and in the 2nd column the words "or value" in the 1st entry were substituted for the words "in value" and the word "and" between the 3rd and 4th entries was omitted by Ben. Act, VI

of 1922, s. 2.

Sec. 1.—COMPETENCY OF THE LOCAL LEGISLATURE TO PASS THIS ACT.—50 Cal. 597 = 27 C. W. N. 812 = 75 I. C. 468 = A. I. R. 1924 Cal. 115.

Number.	Proper Fee.
[*]	
when such amount or value exceeds one hundred rupees, for every ten rupees, or part thereof, in excess of one hundred rupees, up to one hundred and fifty rupees,	One rupee ten annas.
and	
when such amount or value exceeds one hundred and fifty rupees, for every ten rupees, or part thereof, up to one thousand rupees,	One rupee two annas.
and	
when such amount or value exceeds one thousand rupees, for every one hundred rupees, or part thereof, in excess of the thousand rupees, up to seven thousand five hundred rupees,	Seven rupees eight annas.
and	
when such amount or value exceeds seven thousand five hundred rupees, for every two hundred and fifty rupees, or part thereof, in excess of seven thousand five hundred rupees, up to ten thousand rupees,	Fifteen rupees.
and	
when such amount or value exceeds ten thousand rupees, for every five hundred rupees, or part thereof, in excess of ten thousand rupees, up to twenty thousand rupees,	Twenty-two rupees eight annas.
and	
when such amount or value exceeds twenty thousand rupees, for every one thousand rupees, or part thereof, in excess of twenty thousand rupees, up to fifty thousand rupees,	Thirty rupees.
and	
when such amount or value exceeds fifty thousand rupees, for every five thousand rupees, or part thereof, in excess of fifty thousand rupees;	Thirty seven rupees eight annas.
Provided that the maximum fee leviable on a plaint or memorandum of appeal shall be ten thousand rupees.	

Amendment of Sch. I, Art. 6. In the third column in Art. 6 in the same schedule to the same Act,—

(a) for the words "Four annas," opposite cl. (a) in the second column, the words "Six annas" shall be substituted; and

(b) for the words "Eight annas," opposite the first item in cl. (b) in the second column, the words "Twelve annas" shall be substituted, and for the words "One rupee" opposite the second item in that clause, the words "One rupee eight annas" shall be substituted.

7. For the entries above the proviso in the second column, and for the entries in the third column in Art. 11 in the same schedule to the same Act, the following shall be substituted, namely:—

Amendment of Sch. I, Art. 11.	Two per centum.
"1. When the amount or value of the property in respect of which the grant of probate or letters is made exceeds two thousand rupees, [on such amount or value up to ten thousand rupees]	
and	
when such amount or value exceeds ten thousand rupees, [* * * *]	Three per centum [* * * *]
[on the portion] of such amount or value which is in excess of ten thousand rupees, [up to fifty thousand rupees.]	
and	
when such amount or value exceeds fifty thousand rupees, [* * * *]	Four per centum [* * * *]
[on the portion] of such amount or value which is in excess of fifty thousand rupees [up to a lakh of rupees]	
and	
when such amount or value exceeds a lakh of rupees, [on the portion] of such amount or value which is in excess of a lakh of rupees,	Five per centum [* * * *]

Art. 11.—The words "on such amount or value," whether they occur in 3rd column were omitted by Act VI of 1922, s. 3, (2).

Arts. 11 and 12.—The words "on such amount or value up to ten thousand rupees" were substituted for the words "but does not exceed ten

8. For the entry in the second column in Art. 12 in the same schedule to the same Act, and for the first paragraph in the third column in the said Article the following shall be substituted, namely:—

Amendment of Sch. I, Art. 12.

"When the amount or value of any debt or security specified in the certificate under section 8 of the Act exceeds one thousand rupees, [on such amount or value up to ten thousand rupees]

and

when such amount or value exceeds ten thousand rupees, [* * * * *] [on the portion] of such amount or value which is in excess of ten thousand rupees, [up to fifty thousand rupees]

and

when such amount or value exceeds fifty thousand rupees, [* * * * *] [on the portion] of such amount or value which is in excess fifty thousand rupees, [up to a lakh of rupees]

and

when such amount or value exceeds a lakh of rupees, [on the portion] of such amount or value which is in excess of a lakh of rupees.

Two per centum on such amount or value and three per centum on the amount or value of any debt or security to which the certificate is extended under section 10 of the Act.

Three per centum on such amount or value and four-and-a-half per centum on the amount or value of any debt or security to which the certificate is extended under section 10 of the Act.

Four per centum on such amount or value and six per centum on the amount or value of any debt or security to which the certificate is extended under section 10 of the Act.

Five per centum on such amount or value and seven-and-a-half per centum on the amount or value of any debt or security to which the certificate is extended under section 10 of the Act."

9. For the table of rates of *ad valorem* fees leviable on the institution of suits, at the end of the same schedule to the same Act, the table set forth in the schedule to this Act shall be substituted.

Amendment of Table of rates of *ad valorem* fees.

Amendment of Sch. II, Art. 1 in cls. (a), (b) and (c).

10. In Art. 1 in the second schedule to the same Act—

(a) in cl. (a) after the words "Municipal Commissioner" in the third entry in the second column the words "or member of a District Board" shall be inserted;

(b) (i) for the words "One anna," opposite cl. (a) in the second column, the words "Two annas" shall be substituted,

(ii) for the words "Eight annas", opposite cl. (b) in the second column, the following shall be substituted, namely:—

"In the case of a complaint or charge of an offence presented to a criminal court one rupee, and in other cases twelve annas"; and

(iii) for the word "One rupee," opposite cl. (c) in the second column, the words "One rupee eight annas" shall be substituted.

11. For cl. (d) in the second column in Art. 1, in the same schedule to the same Act, and for the entries opposite that clause in the third

Amendment of Sch. II, Art. 1, cl. (d).

column thereof, the following clause and entries shall be substituted, namely:—

"(d) (i) When presented to the High Court under section 115 of the Code of Civil Procedure, 1908, for the revision of an order—

(a) When the value of the suit to which the order relates does not exceed Rs. 1,000

Five rupees.

(b) When the value of the suit exceeds Rs. 1,000

Ten rupees.

(ii) When presented to the High Court otherwise than under that section.

Two rupees.

thousand rupees"; and the words "on the portion" whenever they occur were substituted for the words "for the portion"; and the words "but does not exceed fifty thousand rupees" and "but does not exceed a lakh of rupees" were omitted; and

after the words "in excess of ten thousand rupees" and "in excess of fifty thousand rupees" the words "up to fifty thousand rupees" and "up to a lakh of rupees" respectively were added by Ben. Act VI of 1922, s. 3 (1).

S. 17] THE BIHAR AND ORISSA COURT-FEES (AMENDMENT) ACT, (II OF 1922). ix

Amendment of Sch. II, Art. 10. **12.** In the third column in Art. 10 in the same schedule to the same Act,

(1) for the words "Eight annas," opposite cl. (a) in the second column, the words "One rupee" shall be substituted; and

(2) for the words "One rupee," opposite cl. (b) in the second column, the words "One rupee eight annas" shall be substituted.

Amendment of Sch. II, Art. 11. **13.** For Art. 11 in the same schedule to the same Act the following shall be substituted, namely:—

Number.	Proper fee.
---------	-------------

"11. *Memorandum of appeal when the appeal is not from a decree or an order having the force of a decree and is presented—*

- | | |
|--|------------------|
| (a) (i) to any Revenue Court or Executive Officer other than the High Court or Chief Controlling Revenue or Executive Authority. | Eight annas |
| (ii) to any Civil Court other than a High Court, | .. One rupee. |
| (b) to a Chief Controlling Executive or Revenue Authority | .. Two rupees. |
| (c) to a High Court | .. Five rupees." |

14. Above the words "Five rupees," where they occur in the third column opposite Arts. 12 and 13 in the same schedule to the same Act, the words "Ten rupees" shall be inserted opposite Art. 12 and the bracket between Arts. 12 and 13 in the second column shall be omitted.

Amendment of Sch. II, Art. 12. **15.** (1) The words "Ten rupees" in the third column, opposite Art. 17 in the same schedule to the same Act, and the bracket opposite that article in the second column in the same schedule shall be omitted.

(2) In the third column in the said article,—
(a) opposite entries i, ii, iv, and vi, the words "Fifteen rupees" shall be inserted; and

(b) opposite entries iii and v the words "Twenty rupees" shall be inserted.

Amendment of S. 71 of Act of 1882. **16.** In section 71 of the Presidency Small Cause Courts Act, 1882,—

(1) in cl. (a) for the words "five hundred rupees" the words "fifty rupees" shall be substituted;

(2) after cl. (a) the following shall be inserted, namely:—

"(b) when the amount or value of the subject-matter exceeds fifty rupees, but does not exceed five hundred rupees—the sum of six rupees four annas and three annas in the rupee on the excess of such amount or value over fifty rupees ;"

(3) cl. (b) shall be renumbered as cl. (c) and in that clause as renumbered for the words "sixty-two rupees eight annas" the words "ninety rupees ten annas" shall be substituted, and after the words "one anna" the words "six pies" shall be inserted.

17. Nothing in this Act shall apply to any probate, letters of administration or certificate in respect of which the fee payable under the law for the time being in force has been paid prior to the commencement of this Act, but which have not issued.

SCHEDULE I.

For Table of rates of *ad valorem* fees leviable on the institution of suits—See under Assam Court Fees (Amendment) Act, 1922 *supra*.

C.—THE BIHAR AND ORISSA COURT-FEES (AMENDMENT) ACT, (II OF 1922.)

An Act to amend the Court-fees Act, 1870.

WHEREAS it is expedient to amend the Court-fees Act, 1870, in its application to the Province of Bihar and Orissa in the manner hereinafter appearing; It is hereby enacted as follows:—

1. (1) This Act may be called the BIHAR AND ORISSA COURT-FEES (AMENDMENT) ACT, 1922.

(2) It extends to the whole of Bihar and Orissa including the Santal Parganas.

(3) It shall come into force on the twenty-fourth day of August, 1922.

2. In paragraph 3 of section 4 of the Court-fees Act, 1870, as amended by subsequent legislation, and hereinafter called the principal Act, for the word "two" shall be substituted the word "one."

3. In clause (a) of section 7 (v) of the principal Act, for the word "ten" shall be substituted the word "twenty" and in clause (b) of the said section for the word "five," shall be substituted the word "ten."

4. In section 17 of the principal Act, after the words "of appeal" in both places where they occur the words "or of cross-objection" shall be inserted.

5. In section 18 of the principal Act, for the words "a fee of eight annas" the words "a fee of twelve annas" shall be substituted.

6. In item viii of section 19 of the principal Act, for the words "one thousand rupees" the words "two thousand rupees" shall be substituted.

7. (1) In Article 1 of Schedule I of the principal Act, for the entry in the first column the following entry shall be substituted, namely:—

"(1) *Plaint, written statement pleading a set-off or counter-claim or memorandum of appeal or of cross-objection, not otherwise provided for in this Act, presented to any Civil or Revenue Court except those mentioned in section 3.*"

(2) For the "proper fees" set out in the third column of the said Schedule I and shown opposite Article 1 in the Schedule A of this Act, the "proper fees" shown against them in the second column of the said Schedule A shall be substituted.

(3) The proviso in Article 1 of the said Schedule I shall be omitted.

8. For the "proper fees" set out in schedule I of the principal Act for Articles 6, 7, 8 and 9 shown in Schedule A of this Act, the "proper fees" shown against them in the second column, of the said Schedule A shall be substituted.

9. For the entries above the proviso in the second column and for the entries in the third column, in Article 11 of Schedule I of the principal Act, the following shall be substituted, namely:—

"When the amount or value of the property in respect of which the grant of probate or letters is made exceeds two thousand rupees, on such amount or value up to ten thousand rupees, and	Two per centum.
When such amount or value exceeds ten thousand rupees, on the portion of such amount or value which is in excess of ten thousand rupees up to fifty thousand rupees, and	Three per centum.
When such amount or value exceeds fifty thousand rupees, on the portion of such amount or value which is in excess of fifty thousand rupees up to one lakh of rupees, and	Four per centum.
When such amount or value exceeds a lakh of rupees, on the portion of such amount or value which is in excess of one lakh of rupees.	Five per centum."

Sec. 1.—An appeal memorandum filed after the Amending Act came into force and the vakalat should be stamped under the new Court-fees Act, and the copies of judgment and decree if obtained before the Amending Act came into force, need only bear the Court fee required by the old Court-fees Act as it stood before the amendment. 3 Pat. L. T. 820=2 Pat. 264=A. I. R. 1923 Pat. 150.

Sec. 7, Sch. I, Art. 1.—Although the appeal could be presented on the 18th of August, 1922, to the Registrar or Judge of the High Court, it was not properly presented to the Court or to the

Officer appointed by the Court under O. 41, R. 1 but was presented to the Assistant Registrar. *Held*, the memorandum of appeal should be deemed to have been presented on the 23rd of October, 1922 when the Court re-opened and the Registrar actually received the document and noted on the order sheet as having been filed on that date. The New Bihar and Orissa Court-fees Act which had already come into force before the 23rd of October, 1922 will apply. 2 P. 264=3 P. L. T. 820=71 I. C. 426=1922 P. H. C. C. 365=1 P. L. R. 12=A. I. R. 1923 Pat. 150.

S. 13] THE BIHAR AND ORISSA COURT-FEES (AMENDMENT) ACT, (II OF 1922.) xi

10. For the entry in the second column of Article 12 of Schedule I of the principal Act, and for the first paragraph in the third column of the said Article, the following shall be substituted, namely :—

“ When the amount or value of any debt or security specified in the certificate under section 3 of the Act exceeds one thousand rupees, on such amount or value up to ten thousand rupees,	Two per centum, and on the amount or value of any debt or security to which the certificate is extended under section 10 of the Act, three per centum.
and	
when such amount or value exceeds ten thousand rupees, on the portion of such amount or value which is in excess of ten thousand rupees up to fifty thousand rupees,	Three per centum, and on the amount or value of any debt or security to which the certificate is extended under section 10 of the Act, four and a half per centum.
and	
when such amount or value exceeds fifty thousand rupees, on the portion of such amount or value which is in excess of fifty thousand rupees up to one lakh of rupees,	Four per centum, and on the amount or value of any debt or security to which the certificate is extended under section 10 of the Act, six per centum.
and	
when such amount or value exceeds a lakh of rupees, on the portion of such amount or value which is in excess of one lakh of rupees.	Five per centum, and on the amount or value of any debt or security to which the certificate is extended under section 10 of the Act, seven and a-half per centum.”

11. For the table of rates of *ad valorem* fees annexed to Schedule I of the principal Act, the table set forth in Schedule B of this Act shall be substituted.

12. (1) In the first column of the said Schedule II after the words “ memorandum of appeal ” in Articles 5, 11, 17, 20 and 21 the words “ or of cross-objection ” shall be inserted.

(2) For the “ proper fees ” set out in the said Schedule II, and shown in Schedule C of this Act, the “ proper fees ” shown against them in the second column of the said Schedule C shall be substituted.

13. Nothing in this Act shall apply to any probate, letters of administration or certificate under the Succession Certificate Act, 1889, in respect of which the fee payable under the law for the time being in force has been paid prior to the commencement of this Act, but which have not issued.

SCHEDULE A.

[See section 7 (3) and 8 of the Behar and Orissa Court-fees (Amendment) Act, 1922.]

Proper fees set out in Schedule I of the Principal Act.		Proper fees to be substituted.	
Article 1	.. { Twelve annas	..	One rupee.
	.. { Five rupees	..	Seven rupees and eight annas.
	.. { Ten rupees	..	Fifteen rupees.
	.. { Fifteen rupees	..	Twenty-two rupees and eight annas.
	.. { Twenty rupees	..	Thirty rupees.
Article 6	.. { Twenty-five rupees	..	Thirty-seven rupees and eight annas.
	.. { Four annas	..	Six annas.
	.. { Eight annas	..	Twelve annas.
Article 7	.. { One rupee	..	One rupee and eight annas.
	.. { Eight annas	..	Twelve annas.
	.. { One rupees	..	One rupee and eight annas.
Article 8	.. { Four rupees.	..	Six rupees.
	.. { The amount of the duty chargeable on the original.	..	One and a half times the amount of the duty chargeable on the original.
	.. { Eight annas	..	Twelve annas.
Article 9	.. { Eight annas	..	Twelve annas.

SCHEDULE B.

BIHAR AND ORISSA.

Table of rates of ad valorem fees leviable on the institution of suits.

When the amount or value of the subject-matter exceeds	But does not exceed	Proper fee.	When the amount or value of the subject-matter exceeds	But does not exceed	Proper fee.
RS.	RS.	RS. A.	RS.	RS.	RS. A.
..	5	0 6	510	520	49 8
5	10	0 12	520	530	50 8
10	15	1 2	530	540	51 8
15	20	1 8	540	550	52 8
20	25	1 14	550	560	53 8
25	30	2 4	560	570	54 8
30	35	2 10	570	580	55 8
35	40	3 0	580	590	56 8
40	45	3 6	590	600	57 8
45	50	3 12	600	610	58 8
50	55	4 2	610	620	59 8
55	60	4 8	620	630	60 8
60	65	4 14	630	640	61 8
65	70	5 4	640	650	62 8
70	75	5 10	650	660	63 8
75	80	6 0	660	670	64 8
80	85	6 6	670	680	65 8
85	90	6 12	680	690	66 8
90	95	7 2	690	700	67 8
95	100	7 8	700	710	68 8
100	110	8 8	710	720	69 8
110	120	9 8	720	730	70 8
120	130	10 8	730	740	71 8
130	140	11 8	740	750	72 8
140	150	12 8	750	760	73 8
150	160	13 8	760	770	74 8
160	170	14 8	770	780	75 8
170	180	15 8	780	790	76 8
180	190	16 8	790	800	77 8
190	200	17 8	800	810	78 8
200	210	18 8	810	820	79 8
210	220	19 8	820	830	80 8
220	230	20 8	830	840	81 8
230	240	21 8	840	850	82 8
240	250	22 8	850	860	83 8
250	260	23 8	860	870	84 8
260	270	24 8	870	880	85 8
270	280	25 8	880	890	86 8
280	290	26 8	890	900	87 8
290	300	27 8	900	910	88 8
300	310	28 8	910	920	89 8
310	320	29 8	920	930	90 8
320	330	30 8	930	940	91 8
330	340	31 8	940	950	92 8
340	350	32 8	950	960	93 8
350	360	33 8	960	970	94 8
360	370	34 8	970	980	95 8
370	380	35 8	980	990	96 8
380	390	36 8	990	1,000	97 8
390	400	37 8	1,000	1,100	105 0
400	410	38 8	1,100	1,200	112 8
410	420	39 8	1,200	1,300	120 0
420	430	40 8	1,300	1,400	127 8
430	440	41 8	1,400	1,500	135 0
440	450	42 8	1,500	1,600	142 8
450	460	43 8	1,600	1,700	150 0
460	470	44 8	1,700	1,800	157 8
470	480	45 8	1,800	1,900	165 0
480	490	46 8	1,900	2,000	172 8
490	500	47 8	2,000	2,100	180 0
500	510	48 8	2,100	2,200	187 8

When the amount or value of the subject-matter exceeds	But does not exceed	Proper fee.	When the amount or value of the subject-matter exceeds	But does not exceed	Proper fee.
RS.	RS.	RS. A.	RS.	RS.	RS. A.
2,200	2,300	195 0	16,000	16,500	990 0
2,300	2,400	202 8	16,500	17,000	1,012 8
2,400	2,500	210 0	17,000	17,500	1,035 0
2,500	2,600	217 8	17,500	18,000	1,057 8
2,600	2,700	225 0	18,000	18,500	1,080 0
2,700	2,800	232 8	18,500	19,000	1,102 8
2,800	2,900	240 0	19,000	19,500	1,125 0
2,900	3,000	247 8	19,500	20,000	1,147 8
3,000	3,100	255 0	20,000	21,000	1,177 8
3,100	3,200	262 8	21,000	22,000	1,207 8
3,200	3,300	270 0	22,000	23,000	1,237 8
3,300	3,400	277 8	23,000	24,000	1,267 8
3,400	3,500	285 0	24,000	25,000	1,297 8
3,500	3,600	292 8	25,000	26,000	1,327 8
3,600	3,700	300 0	26,000	27,000	1,357 8
3,700	3,800	307 8	27,000	28,000	1,387 8
3,800	3,900	315 0	28,000	29,000	1,417 8
3,900	4,000	322 8	29,000	30,000	1,447 8
4,000	4,100	330 0	30,000	32,000	1,477 8
4,100	4,200	337 8	32,000	34,000	1,507 8
4,200	4,300	345 0	34,000	36,000	1,537 8
4,300	4,400	352 8	36,000	38,000	1,567 8
4,400	4,500	360 0	38,000	40,000	1,597 8
4,500	4,600	367 8	40,000	42,000	1,627 8
4,600	4,700	375 0	42,000	44,000	1,657 8
4,700	4,800	382 8	44,000	46,000	1,687 8
4,800	4,900	390 0	46,000	48,000	1,717 8
4,900	5,000	397 8	48,000	50,000	1,747 0
5,000	5,250	412 8	50,000	55,000	1,785 8
5,250	5,500	427 8	55,000	60,000	1,822 0
5,500	5,750	442 8	60,000	65,000	1,860 0
5,750	6,000	457 8	65,000	70,000	1,897 0
6,000	6,250	472 8	70,000	75,000	1,935 8
6,250	6,500	487 8	75,000	80,000	1,972 0
6,500	6,750	502 8	80,000	85,000	2,010 8
6,750	7,000	517 8	85,000	90,000	2,047 0
7,000	7,250	532 8	90,000	95,000	2,085 8
7,250	7,500	547 8	95,000	1,00,000	2,122 0
7,500	7,750	562 8	1,00,000	1,05,000	2,160 0
7,750	8,000	577 8	1,05,000	1,10,000	2,197 8
8,000	8,250	592 8	1,10,000	1,15,000	2,235 8
8,250	8,500	607 8	1,15,000	1,20,000	2,272 8
8,500	8,750	622 8	1,20,000	1,25,000	2,310 0
8,750	9,000	637 8	1,25,000	1,30,000	2,347 8
9,000	9,250	652 8	1,30,000	1,35,000	2,385 0
9,250	9,500	667 8	1,35,000	1,40,000	2,422 8
9,500	9,750	682 8	1,40,000	1,45,000	2,460 0
9,750	10,000	697 8	1,45,000	1,50,000	2,497 8
10,000	10,500	720 0	1,50,000	1,55,000	2,535 0
10,500	11,000	742 8	1,55,000	1,60,000	2,572 8
11,000	11,500	765 0	1,60,000	1,65,000	2,610 0
11,500	12,000	787 8	1,65,000	1,70,000	2,647 8
12,000	12,500	810 0	1,70,000	1,75,000	2,685 0
12,500	13,000	832 8	1,75,000	1,80,000	2,722 8
13,000	13,500	855 0	1,80,000	1,85,000	2,760 0
13,500	14,000	877 8	1,85,000	1,90,000	2,797 8
14,000	14,500	900 0	1,90,000	1,95,000	2,835 0
14,500	15,000	922 8	1,95,000	2,00,000	2,872 8
15,000	15,500	945 0	2,00,000	2,05,000	2,910 0
15,500	16,000	967 8			

and the fee increases at the rate of thirty-seven rupees eight annas for every five thousand rupees or part thereof, for example, when the amount or value of the subject-matter exceeds.

3,00,000	..	3,660	8,00,000	..	7,410
4,00,000	..	4,410	9,00,000	..	8,160
5,00,000	..	5,160	10,00,000	..	8,910
6,00,000	..	5,910	11,00,000	..	9,660
7,00,000	..	6,660			

SCHEDULE C.

[See section 12 (4) of the Bihar and Orissa Court-fees (Amendment) Act, 1922.]

Proper fees set out in Schedule II of the Principal Act.		Proper fees to be substituted.
Article 1 ..	{ One anna ..	Two annas.
	{ Eight annas ..	Twelve annas.
	{ One rupee ..	One rupee and eight annas.
	{ Two rupees ..	Three rupees.
Article 1-A ..	Twelve annas in addition to any fee levied on the application under clause (a), clause (b) or clause (d) of Article 1 of this Schedule.	One rupee in addition to any fee levied on the application under clause (a), clause (b) or clause (d) of Article 1 of this Schedule.
Article 10 ..	{ Eight annas ..	One rupee
	{ One rupee ..	Two rupees.
	{ Two rupees ..	Three rupees.
Article 11 ..	{ Eight annas ..	One rupee.
	{ Two rupees ..	Four rupees.
Article 12 ..	Five rupees	Ten rupees.
Article 14 ..	Five rupees	Ten rupees.
Articles 17, 18 and 19 ..	Ten rupees	Fifteen rupees.
Articles 20 and 21 ..	Twenty rupees	Thirty rupees.

THE BOMBAY COURT FEES (AMENDMENT) ACT (III OF 1926).

(As Amended by Bom. Act II of 1928.)

An Act further to amend the Court-Fees Act, 1870.

WHEREAS it is expedient to provide for increased revenues for Government by further amending the Court-fees Act, 1870, in its application to the Presidency of Bombay in manner hereinafter appearing; It is hereby enacted as follows :—

Short title, extent, commencement and duration. 1. (1) This Act may be called THE COURT-FEES (BOMBAY AMENDMENT) ACT, 1926.

(2) It extends to the whole of the Presidency of Bombay.

(3) It shall come into force on the 1st day of April, 1926 and shall remain in operation for three years.

Amendment of section 7 of Act VII of 1870. 2. In section 7 of the Court-fees Act, 1870, hereinafter called "the said Act,"

(a) to clause (d) of paragraph iv the words "or other consequential relief" shall be added;

(b) in clauses (1), (2) and (3) of the proviso to paragraph v for the words "five" "ten" and "ten" the words "seven and a half" "fifteen" and "fifteen" shall, respectively, be substituted.

Amendment of Schedule I to Act VII of 1870. 3. For articles, 1, 8, 11, 12, and 12-A of, and the Table of rates of *ad valorem* fees in Schedule I to the said Act the following shall be substituted, namely :—

SCHEDULE I.

Ad valorem Fees.

Number.	—	Proper fee.
1. Plaint, written statement pleading a set-off or counter-claim or memorandum of appeal (not	When the amount or value of the subject-matter in dispute does not exceed five rupees.	Six annas.
	When such amount or value exceeds five rupees, for every five rupees, or part	Six annas.

Number		Proper fee.
otherwise provided for in this Act,) or of cross-objection, presented to any Civil or Revenue Court except those mentioned in section 3.	thereof, in excess of five rupees, up to one hundred rupees	Twelve annas.
	When such amount or value exceeds one hundred rupees, for every ten rupees, or part thereof, in excess of one hundred rupees, up to one thousand rupees.	Five rupees.
	When such amount or value exceeds one thousand rupees, for every one hundred rupees, or part thereof, in excess of one thousand rupees, up to five thousand rupees.	Twelve rupees and eight annas.
	When such amount or value exceeds five thousand rupees, for every two hundred and fifty rupees, or part thereof in excess of five thousand rupees, up to ten thousand rupees.	Twenty-two rupees and eight annas
	When such amount or value exceeds ten thousand rupees, for every five hundred rupees, or part thereof, in excess of ten thousand rupees, up to twenty thousand rupees.	Thirty rupees.
	When such amount or value exceeds twenty thousand rupees, for every one thousand rupees, or part thereof in excess of twenty thousand rupees, up to thirty thousand rupees.	Thirty rupees.
	When such amount or value exceeds thirty thousand rupees, for every two thousand rupees, or part thereof, in excess of thirty thousand rupees, up to fifty thousand rupees.	Thirty rupees.
8. Copy of any document liable to stamp-duty under the Indian Stamp Act, 1899, when left by any party to a suit or proceeding in place of the original withdrawn.	When such amount or value exceeds fifty thousand rupees, for every five thousand rupees, or part thereof, in excess of fifty thousand rupees :	
	Provided that the maximum fee leviable on a plaint or memorandum of appeal shall be ten thousand rupees.	
11. Probate of a will or letters of administration with or without will annexed.	(a) when the stamp-duty chargeable on the original does not exceed one rupee	The amount of the duty chargeable on the original.
	(b) In any other case	One rupee.
	When the amount or value of the property in respect of which the grant of probate or letters is made exceeds one thousand rupees, on the part of the amount or value in excess of one thousand rupees, up to ten thousand rupees.	Two per centum.
	When the amount or value of the property in respect of which the grant of probate or letters is made exceeds ten thousand rupees, on the part of the amount or value in excess of ten thousand rupees, up to fifty thousand rupees.	Three per centum.
	When the amount or value of the property in respect of which the grant of probate or letters is made exceeds fifty thousand rupees, on the part of the amount or value in excess of fifty thousand rupees, up to one lakh of rupees.	Four per centum.

Number	Proper fee
11. Probate, etc., — <i>Contd.</i>	Five per centum.
12. Certificate under the Indian Succession Act, 1925.	The fee leviable in the case of a probate (article 11) on the amount or value of any debt or security specified in the certificate under section 374 of the act, and
12-A. Certificate under Bombay Regu- lation VIII of 1827.	one and a half times this fee on the amount or value of any debt or security to which the certificate is extended under Section 376 of the Act. <i>Note.</i>—(1) The amount of a debt is its amount, including interest on the day on which the inclusion of the debt in the certificate is applied for, so far as such amount can be ascertained. (2) Whether or not any power with respect to a security specified in a certificate has been conferred under the Act; and where such a power has been so conferred, whether the power is for the receiving of interest or dividends on, or for the negotiation of transfer of the security or for both purposes the value of the security is its market value on the day on which the inclusion of the security in the certificate is applied for, so far as such value can be ascertained. The fee leviable in the case of probate (article 11) on the amount or value of the property in respect of which the certificate is granted.

TABLE OF RATES.

Table of rates of 'ad valorem' fees leviable on the institution of suits.

When the amount or value of the subject-matter exceeds.	But does not exceed.	Proper fee. Bombay Act (III of 1926)	When the amount or value of the subject-matter exceeds.	But does not exceed.	Proper fee. Bombay Act (III of 1926).
RS.	RS.	RS. A. P.	RS.	RS.	RS. A. P.
..	5	0 6 0	510	520	39 0 0
5	10	0 12 0	520	530	39 12 0
10	15	1 2 0	530	540	40 8 0
15	20	1 8 0	540	550	41 4 0
20	25	1 14 0	550	560	42 0 0
25	30	2 4 0	560	570	42 12 0
30	35	2 10 0	570	580	43 8 0
35	40	3 0 0	580	590	44 4 0
40	45	3 6 0	590	600	45 0 0
45	50	3 12 0	600	610	45 12 0
50	55	4 2 0	610	620	46 8 0
55	60	4 8 0	620	630	47 4 0
60	65	4 14 0	630	640	48 0 0
65	70	5 4 0	640	650	48 12 0
70	75	5 10 0	650	660	49 8 0
75	80	6 0 0	660	670	50 4 0
80	85	6 6 0	670	680	51 0 0
85	90	6 12 0	680	690	51 12 0
90	95	7 2 0	690	700	52 8 0
95	100	7 8 0	700	710	53 4 0
100	110	8 4 0	710	720	54 0 0
110	120	9 0 0	720	730	54 12 0
120	130	9 12 0	730	740	55 8 0
130	140	10 8 0	740	750	56 4 0
140	150	11 4 0	750	760	57 0 0
150	160	12 0 0	760	770	57 12 0
160	170	12 12 0	770	780	58 8 0
170	180	13 8 0	780	790	59 4 0
180	190	14 4 0	790	800	60 0 0
190	200	15 0 0	800	810	60 12 0
200	210	15 12 0	810	820	61 8 0
210	220	16 8 0	820	830	62 4 0
220	230	17 4 0	830	840	63 0 0
230	240	18 0 0	840	850	63 12 0
240	250	18 12 0	850	860	64 8 0
250	260	19 8 0	860	870	65 4 0
260	270	20 4 0	870	880	66 0 0
270	280	21 0 0	880	890	66 12 0
280	290	21 12 0	890	900	67 8 0
290	300	22 8 0	900	910	68 4 0
300	310	23 4 0	910	920	69 0 0
310	320	24 0 0	920	930	69 12 0
320	330	24 12 0	930	940	70 8 0
330	340	25 8 0	940	950	71 4 0
340	350	26 4 0	950	960	72 0 0
350	360	27 0 0	960	970	72 12 0
360	370	27 12 0	970	980	73 8 0
370	380	28 8 0	980	990	74 4 0
380	390	29 4 0	990	1,000	75 0 0
390	400	30 0 0	1,000	1,100	80 0 0
400	410	30 12 0	1,100	1,200	85 0 0
410	420	31 8 0	1,200	1,300	90 0 0
420	430	32 4 0	1,300	1,400	95 0 0
430	440	33 0 0	1,400	1,500	100 0 0
440	450	33 12 0	1,500	1,600	105 0 0
450	460	34 8 0	1,600	1,700	110 0 0
460	470	35 4 0	1,700	1,800	115 0 0
470	480	36 0 0	1,800	1,900	120 0 0
480	490	36 12 0	1,900	2,000	125 0 0
490	500	37 8 0	2,000	2,100	130 0 0
500	510	38 4 0	2,100	2,200	135 0 0

When the amount or value of the subject matter exceeds. Rs.	But does not exceed. Rs.	Proper fee. Bombay Act (III of 1926) RS. A.	When the amount or value of the subject-matter exceeds. Rs.	But does not exceed. Rs.	Proper fee. Bombay Act (III of 1926) RS. A.
2,200	2,300	140 0	9,000	9,250	487 8
2,300	2,400	145 0	9,250	9,500	500 0
2,400	2,500	150 0	9,500	9,750	512 8
2,500	2,600	155 0	9,750	10,000	525 0
2,600	2,700	160 0	10,000	10,500	547 8
2,700	2,800	165 0	10,500	11,000	570 0
2,800	2,900	170 0	11,000	11,500	592 8
2,900	3,000	175 0	11,500	12,000	615 0
3,000	3,100	180 0	12,000	12,500	637 8
3,100	3,200	185 0	12,500	13,000	660 0
3,200	3,300	190 0	13,000	13,500	682 8
3,300	3,400	195 0	13,500	14,000	705 0
3,400	3,500	200 0	14,000	14,500	727 8
3,500	3,600	205 0	14,500	15,000	750 0
3,600	3,700	210 0	15,000	15,500	772 8
3,700	3,800	215 0	15,500	16,000	795 0
3,800	3,900	220 0	16,000	16,500	817 8
3,900	4,000	225 0	16,500	17,000	840 0
4,000	4,100	230 0	17,000	17,500	862 8
4,100	4,200	235 0	17,500	18,000	885 0
4,200	4,300	240 0	18,000	18,500	907 8
4,300	4,400	245 0	18,500	19,000	930 0
4,400	4,500	250 0	19,000	19,500	952 8
4,500	4,600	255 0	19,500	20,000	975 0
4,600	4,700	260 0	20,000	21,000	1,005 0
4,700	4,800	265 0	21,000	22,000	1,035 0
4,800	4,900	270 0	22,000	23,000	1,065 0
4,900	5,000	275 0	23,000	24,000	1,095 0
5,000	5,250	287 8	24,000	25,000	1,125 0
5,250	5,500	300 0	25,000	26,000	1,155 0
5,500	5,750	312 8	26,000	27,000	1,185 0
5,750	6,000	325 0	27,000	28,000	1,215 0
6,000	6,250	337 8	28,000	29,000	1,245 0
6,250	6,500	350 0	29,000	30,000	1,275 0
6,500	6,750	362 8	30,000	32,000	1,305 0
6,750	7,000	375 0	32,000	34,000	1,335 0
7,000	7,250	387 8	34,000	36,000	1,365 0
7,250	7,500	400 0	36,000	38,000	1,395 0
7,500	7,750	412 8	38,000	40,000	1,425 0
7,750	8,000	425 0	40,000	42,000	1,455 0
8,000	8,250	437 8	42,000	44,000	1,485 0
8,250	8,500	450 0	44,000	46,000	1,515 0
8,500	8,750	462 8	46,000	48,000	1,545 0
8,750	9,000	475 0	48,000	50,000	1,575 0

and the fee increases at the rate of thirty rupees for every five thousand rupees, or part thereof, up to a maximum of ten thousand rupees, for example—

Rs. A.	Rs. A.
1,00,000 0	1,875 0
2,00,000 0	2,475 0
3,00,000 0	3,075 0
4,00,000 0	3,675 0
5,00,000 0	4,275 0
6,00,000 0	4,875 0
7,00,000 0	5,475 0
8,00,000 0	6,075 0
9,00,000 0	6,675 0
10,00,000 0	7,275 0
11,00,000 0	7,875 0
12,00,000 0	8,475 0
13,00,000 0	9,075 0
14,00,000 0	9,675 0
15,00,000 0	10,000 0

Amendment of Schedule II to Act VII of 1870. **4.** For Articles 1, 6, 7, 12, 14, 17, 18, 19, 20 and 21 of Schedule II to the said Act the following shall be substituted, namely :—

**SCHEDULE II.
FIXED FEES.**

Number.	—	Proper fee.
1. Application or petition.	(a) When presented to any officer of the Customs or Excise Department or to any Magistrate by any person having dealings with the Government, and when the subject-matter of such application relates exclusively to those dealings : or when presented to any officer of land-revenue by any person holding temporarily settled land under direct engagement with Government, and when the subject-matter of the application or petition relates exclusively to such engagement. or when presented to any Municipal Commissioner under any Act for the time being in force for the conservancy of improvement of any place, if the application or petition relates solely to such conservancy or improvement : or when presented to any Civil Court other than a principal Civil Court of original jurisdiction, or to any Court of Small Causes constituted under the Provincial Small Causes Courts Act, 1887, or to a Collector or other officer of revenue in relation to any suit or case in which the amount or value of the subject-matter is less than fifty rupees : or when presented to any Civil, Criminal or Revenue Court, or, to any Board or executive officer for the purpose of obtaining a copy or translation of any judgment, decree or order passed by such Court, Board or officer, or of any other document on record in such Court or office.	Two annas.
	(b) When containing a complaint or charge of any offence other than an offence for which police officers, may, under the Criminal Procedure Code, 1898, arrest without warrant, and presented to any Criminal Court: or when presented to a Civil, Criminal or Revenue Court, to a Collector, or any Revenue officer having jurisdiction equal or subordinate to a Collector, or to any Magistrate in his executive capacity and not otherwise provided for by this Act : or to deposit in Court revenue or rent : or for determination by a Court of the amount of compensation to be paid by a landlord to his tenant.	Eight annas.

Number.	—	Proper fee.
6. Bail-bond or other instrument of obligation given in pursuance of an order made by a Court or Magistrate under any section of the Code of Criminal Procedure, 1898, or the Code of Civil Procedure, 1908 and not otherwise provided for by this Act.	(c) When presented to a Chief Commissioner or other Chief Controlling Revenue or Executive Authority, or to a Commissioner of Revenue or Circuit, or to any chief officer charged with the executive administration of a division and not otherwise provided for by this Act.	Two rupees.
7. Undertaking under section 49 of the Indian Divorce Act, 1869.	(d) When presented to a High Court	Three rupees.
12. Caveat.	....	One rupee.
14. Petition in a suit under the Native Converts' Marriage Dissolution Act, 1865.	{ When the amount or value of the property involved does not exceed two thousand rupees.	Five rupees.
17. Plaint or memorandum of appeal in each of the following suits:—	{ When the amount or value of the property involved exceeds two thousand rupees.	Ten rupees.
(i) to alter or set aside a summary decision or order of any of the Civil Courts not established by Letters Patent or of any Revenue Court ;	....	Ten rupees.
(ii) to alter or cancel any entry in a register of the names of proprietors of revenue paying estates ; and	{ When the amount or value of the property does not exceed five hundred rupees.	Ten rupees.
(iii) to obtain a declaratory decree	{ When the amount or value of the property exceeds five hundred rupees.	Fifteen rupees.
		Fifteen rupees.

Number.		Proper fee.
or order, where no consequential relief is prayed ;		
(iv) to set aside alienation ;	....	Fifteen rupees
(v) to set aside a decree or award ;	{ When the amount or value of the property does not exceed five hundred rupees { When the amount or value of the property exceeds five hundred rupees.	Ten rupees. Fifteen rupees
(vi) to set aside an adoption ; and		
(vii) any other suit where it is not possible to estimate at a money value the subject-matter in dispute, and which is not otherwise provided for by this Act.	....	Fifteen rupees
18. Application—		
(a) under paragraph 17 of the Second Schedule to the Code of Civil Procedure, 1908 ;	....	Ten rupees.
(b) for probate of letters of administration or for revocation thereof under the Indian Succession Act, 1925.	{ When the amount or value of the Estate does not exceed two thousand rupees, { When it exceeds two thousand rupees, but does not exceed five thousand rupees.	Two rupees. Five rupees.
(c) for a certificate under the Indian Succession Act, 1925 or Bombay Regulation VII of 1827 ;	When it exceeds five thousand rupees.	Ten rupees.
(d) for opinion or advice or for discharge from a Trust, or for appointment of new Trustees, under Sections 34, 72, 73 or 74 of the Indian Trusts Act, 1882 ;	....	Ten rupees.
(e) for the winding up of a Company, under section 166 of the Indian Companies Act, 1913 ;	....	Ten rupees.
(f) under Rule 58 of Order XXI of the Code of Civil Procedure, 1908 regarding a claim to attached property.	When the amount or value of the property exceeds five hundred rupees.	Ten rupees.

Number.	—	Proper fee.
19. Agreement in writing stating a question for the opinion of the Court under the Code of Civil Procedure, 1908.	....	Twenty rupees.
20. Every petition under the Indian Divorce Act, 1869, except petitions under Section 44 of that Act and every memorandum of appeal under Section 55 of that Act.	....	Thirty rupees.
21. Plaint or memorandum of appeal under the Parsi Marriage and Divorce Act, 1865.	....	Thirty rupees.

E—THE CENTRAL PROVINCES COURT-FEES ACT (I OF 1923).

An Act to amend the Court-Fees Act, 1870, with reference to the scale of Court fees in the Central Provinces.

WHEREAS it is necessary to revise the scale of Court-fees for the Central Provinces, by amendment of the Court-Fees Act, 1870, in its application to the Central Provinces, in the manner hereinafter appearing :

It is hereby enacted as follows :—

- Short title. **1.** (1) This Act may be called THE CENTRAL PROVINCES COURT-FEES ACT, 1923.
- Commencement and duration. (2) It shall come into force on such date as the Local Government may, by notification, appoint in this behalf and shall remain in force to the 31st day of March, 1926.
- 2.** The Court-Fees Act, 1870, as amended by subsequent legislation, shall be amended, in its application to the Central Provinces, in the manner hereinafter provided.
- Application of Act. **3.** (1) In clause (a) of paragraph v of section 7, between the words " or " and " forms part " in line 4, the words " where the land " shall be inserted.
- Amendment of section 7, paragraph v. (2) In clause (b) of the same paragraph, between the words " or " and " forms part ", in line 3, the words " where the land " shall be inserted.
- (3) In clause (b) paragraph v of the section 7 of the said Act, for the word " five " the words " twelve and a half " shall be substituted.
- Amendment of section 7, paragraph ix. **4.** For paragraph ix of section 7, the following shall be substituted, namely :—
- " ix (a) In suits against a mortgagee for the recovery of the property mortgaged,—

according to the principal money expressed to be secured by the instrument of mortgage ;

(b) in suits by a mortgagee to foreclose the mortgage—

according to the amount claimed as due at the date of presenting the plaint ”.

Amendment of section 7, paragraph xi. before the words “ the amount ” the word “ twice ” shall be inserted.

Amendment of section 18. shall be substituted. 6. In section 18 of the said Act, for the words “ a fee of eight annas ” the words “ a fee of one rupee ”

Amendment of section 19, paragraphs iii, ix and xii. 7. (1) From section 19 of the said Act, paragraphs iii and xii shall be deleted.

(2) In paragraph ix of the said section, the words “ or the ascertainment of rights thereto or interests therein ” shall be omitted.

Amendment of Schedule I, Article I. 8. For the second and third columns of Article I in the first schedule to the said Act the following shall be substituted, namely :—

“ when the amount or value of the subject-matter in dispute does not exceed Rs. 100.

When such amount or value exceeds Rs. 100, but does not exceed Rs. 1,000

When such amount or value exceeds Rs. 1,000 but does not exceed Rs. 5,000.

When such amount or value exceeds Rs. 5,000, but does not exceed Rs. 10,000.

When such amount or value exceeds Rs. 10,000, but does not exceed Rs. 20,000.

When such amount or value exceeds Rs. 20,000 but does not exceed Rs. 50,000.

When such amount or value exceeds Rs. 50,000, but does not exceed Rs. 1,00,000.

When such amount or value exceeds Rs. 1,00,000

Seven and a half per centum of such amount or value.

Ten per centum of such amount or value.

Rs. 100 plus seven and a half per centum of the amount or value in excess of Rs. 1,000.

Rs. 400 plus six per centum of the amount or value in excess of Rs. 5,000.

Rs. 700 plus four and a half per centum of the amount or value in excess of Rs. 10,000.

Rs. 1,150 plus three per centum of the amount or value in excess of Rs. 20,000.

Rs. 2,050 plus two per centum of the amount or value in excess of Rs. 50,000.

Rs. 3,050 plus one per centum of the amount or value in excess of Rs. 1,00,000.

Provided that—

(a) the minimum fee shall be one rupee;

(b) the maximum fee shall be Rs. 5,000; and

(c) fractions of an anna shall be neglected.

Amendment of Schedule I, Article 6.

9. In the third column of Article 6 in the first schedule to the said Act,—

(a) for the words “ Four annas ” opposite clause (a) in the first entry in the second column, the words “ Six annas ” shall be substituted ; and

(b) for the words “ Eight annas ” opposite clause (b) in the first entry in the second column, the words “ Twelve-annas ” shall be substituted.

Amendment of Schedule I, Article 11. 10. For the entries above the proviso in the second column and for the entries in the third column in Article 11 in the first schedule to the said Act, the following shall be substituted, namely :—

“ When the amount or value of the property in respect of which the grant of probate or letter is made exceeds Rs. 1,000, but does not exceed Rs. 5,000.

When such amount or value exceeds Rs. 5,000 but does not exceed Rs. 10,000.

When such amount or value exceeds Rs. 10,000

Two per centum of such amount or value.

Rs. 100 plus two and a half per centum of the amount or value in excess of Rs. 5,000.

Rs. 250 plus three per centum of the amount or value in excess of Rs. 10,000.”

11. For the entry in the second column of Article 12 in the first schedule to the said Act, and for the first paragraph in the third column of the said Article, the following shall be substituted, namely :

Amendment of Schedule I, Article 12.

"When the amount or value of any debt or security specified in the certificate under section 8 of the Act exceeds Rs. 1,000, but does not exceed Rs. 5,000.

When such amount or value exceeds Rs. 5,000, but does not exceed Rs. 10,000.

When such amount or value exceeds Rs. 10,000.

Two per centum of such amount or value, and three per centum of the amount or value of any debt or security to which the certificate is extended under section 10 of the Act.

Rs. 100 *plus* two and a half per centum of the amount or value in excess of Rs. 5,000, and four and a half per centum of the amount or value of any debt or security to which the certificate is extended under section 10 of the Act.

Rs. 250 *plus* three per centum of the amount or value in excess of Rs. 10,000 and seven and a half per centum of the amount or value of any debt or security to which the certificate is extended under section 10 of the Act".

Deletion of table of rates.

12. The table of rates of *ad valorem* fees leviable on the institution of suits at the end of the first schedule to said Act, shall be deleted.

Amendment of Schedule II, Article 1, clauses (a) and (b).

13. In the third column in Article 1 in the second schedule to the said Act,—

(1) for the words "One anna" opposite clause (a) in the second column, the words "Two annas" shall be substituted; and

(2) for the words "Eight annas" opposite clause (b) in the second column, the following shall be substituted, namely:—

"In the case of a criminal complaint, one rupee, and in other cases twelve annas."

14. For clauses (c) and (d) in the second column of Article 1 in the second schedule to the said Act, and for the entries opposite these clauses in the third column, the following shall be substituted, namely:—

Amendment of Schedule II, Article 1, clauses (c) and (d).

"(c) When Presented to a Commissioner of Revenue or to any chief officer charged with the executive administration of a Division and not otherwise provided for by this Act. Two rupees.

(d) When presented to a Chief Controlling Revenue Authority or Executive Authority and not otherwise provided for by this Act. Four rupees.

(e) When presented to the Court of the Judicial Commissioner

(i) otherwise than under section 25 of the Provincial Small Causes Courts Act, 1887, or section 115 of the Code of Civil Procedure, 1908 Two rupees.

(ii) under section 25 of the Provincial Small Causes Courts Act, 1887; Three rupees.

(iii) under section 115 of the Code of Civil Procedure, 1908, and Five rupees.

the value of the suit to which the order or decree relates does not exceed Rs. 1,000.

the value of the suit exceeds Rs. 1,000

.. Ten rupees.

15. In the third column in Article 10, in the second schedule to the said Act, for the words "One rupee" opposite clause (b) in the second column the words "One rupee eight annas" shall be substituted.

Amendment of Schedule II, Article 10.

Amendment of Schedule II, Article 11.

16. In the third column in Article 11 in the second schedule to the said Act,—

(1) for the words "Eight annas" opposite clause (a) in the second column the words "Two rupees" shall be substituted; and

(2) for the words "Two rupees" opposite clause (b) in the second column, the words "Four rupees" shall be substituted.

17. (1) The words "Ten rupees" in the third column opposite Article 17 in the second schedule to the said Act, and the bracket opposite that Article in the second column, shall be omitted.

(2) In the third column, opposite the said Article:—

(a) opposite entries (i), (ii) (iii), (iv) and (vi), the words "Fifteen rupees" shall be inserted; and

(b) opposite entry (b) the words "Twenty rupees" shall be inserted.

Fees on application for imperfect partition of mahal.

18. After Article 21 in the second schedule to the said Act, the following Article shall be inserted, namely:—

“ 22. Application for imperfect partition of a Five Rupees.”
 mahal under section 16 of the Central Pro-
 vinces Land Revenue Act, 1917.

19. Nothing in this Act shall apply to any probate, letters of administration or certificate in respect of which the fee payable under the law for the time being in force has been paid prior to the commencement of this Act, but which have not been issued.

Saving of certain probates, letters of administration and certificates.

F—THE MADRAS COURT-FEES (AMENDMENT) ACT (V OF 1922).

An Act to amend the Court-Fees Act, 1870.

WHEREAS it is expedient to amend the Court-Fees Act, 1870, in its application to the Presidency of Madras ; it is hereby enacted as follows :—

Short title and application. 1. (a) This Act may be called THE MADRAS COURT-FEES (AMENDMENT) ACT, 1922.

(b) It extends to the whole of the Presidency of Madras.

Interpretation clause. 2. (1) In this Act ‘ the principal Act ’ shall mean ‘ the Court-Fees Act, 1870.’

(2) In this Act and in the principal Act, unless there is anything repugnant in the subject or context, ‘ Memorandum of appeal ’ shall include memorandum of cross-objection.

Amendment of section 5 of the principal Act. 3. In the second paragraph of section 5 of the principal Act, the words ‘ Registrar ’ and ‘ Chief Judge ’ shall be substituted for ‘ clerk of the Court ’ and ‘ first Judge ’, respectively.

Amendment of section 7. 4. In section 7 of the principal Act the words “ except suits for relief under section 14 of the Religious Endowments Act, 1863, or under section 91 or section 92 of the Code of Civil Procedure, 1908,” shall be added between the words ‘ mentioned ’ and ‘ shall ’.

Amendment of section 7 ii). 5. In section 7 (ii) of the principal Act, after the words ‘ shall be deemed ’ to be the words ‘ in suits for maintenance, the amount claimed to be payable for one year and in other suits ’ shall be added.

Addition of a proviso to section 7 (iv). 6. The following shall be added after the words ‘ Memorandum of appeal ’ in section 7, paragraph (iv), of the principal Act :—

‘ Provided that in suits coming under sub-clause (c), in cases where the relief sought is with reference to any immoveable property, such valuation shall not be less than half the value of the immoveable property calculated in the manner provided for by paragraph (v) of this section.’

Addition to section 7. 7. In section 7 of the principal Act between paragraphs (iv) and (v) the following paragraph shall be added as (iv-A) :—

‘ In a suit for cancellation of a decree for money or other property having a money value, or other document securing money or other property having such value, according to the value of the subject-matter of the suit, and such value shall be deemed to be—

Sec. 7.—In a suit for cancellation of a document securing property having a money value, the amount or value of the property for which the document was executed is the amount on

which the *ad valorem* court-fee is to be paid. 22 L. W. 515 = (1925) M. W. N. 777 = A. I. R. 1925 Mad. 1248 (38 M. 922, R.).

if the whole decree or other document is sought to be cancelled, the amount or the value of the property for which the decree was passed, or the other document executed,

if a part of the decree or other document is sought to be cancelled, such part of the amount or value of the property.'

Amendment of section 7 (v). 8. In section 7 (v) of the principal Act—

in (a) for the word 'ten' the word 'twenty' shall be substituted ;

in (b) for the word 'five' the word 'ten' shall be substituted ;

and after clause (d) the following proviso shall be substituted for the existing proviso :—

'Provided that if rules are framed under section 3 of the Suits Valuation Act, 1887, for determining the value of land for the purposes of jurisdiction, the value so determined shall be deemed to be the value of the land for the purposes of this paragraph.'

Amendment of section 11. 9. For the second paragraph of section 11 of the principal Act, the following paragraphs shall be substituted :—

'Where a decree directs an inquiry as to mesne profits which have accrued on the property during a period prior to the institution of the suit, if the profits ascertained on such inquiry exceed the profits claimed, no final decree shall be passed till the difference between the fee actually paid and the fee which would have been payable had the suit comprised the whole of the profits so ascertained is paid. If the additional fee is not paid within such time as the Court shall fix, the claim for the excess shall be dismissed, unless the Courts for sufficient cause, extends the time for payment.

'Where a decree directs an inquiry as to mesne profits from the institution of the suit, and a final decree is passed in accordance with the results of such inquiry, the decree shall not be executed until such fee is paid as would have been payable on the amount claimed in execution if a separate suit had been instituted therefor.

Amendment of section 18. 10. In section 18 of the principal Act, for the words 'eight annas' the words 'one rupee' shall be substituted.

Amendment of Schedules I and II. 11. For Schedules I and II of the principal Act, the following schedules shall be substituted :—

SCHEDULE I.

AD VALOREM FEES.

Number.		Proper fee.
1. ¹ Plaintiff, or written statement pleading a set-off or counter-claim or memorandum of appeal (not otherwise provided for in this Act) presented to any Civil or Revenue Court except those mentioned in section 3.	When the amount or value of the subject matter in dispute does not exceed five rupees. When such amount or value exceeds five rupees, for every five rupees, or part thereof, in excess of five rupees, up to one hundred rupees. When such amount or value exceeds one hundred rupees, for every ten rupees, or part thereof, in excess of one hundred rupees, up to one thousand rupees. When such amount or value exceeds one thousand rupees, for every one hundred rupees, or part thereof, in excess of one thousand rupees, up to five thousand rupees.	Eight annas. Nine annas. One rupee two annas. Seven rupees eight annas.

¹ To ascertain the proper fee leviable on the institution of a suit, see the table annexed to this schedule.

Number.		Proper fee.
1. <i>Plaint, etc.—(Contd.)</i>	When such amount or value exceeds five thousand rupees, for every two hundred and fifty rupees, or part thereof, in excess of five thousand rupees, up to ten thousand rupees.	Fifteen rupees.
	When such amount or value exceeds ten thousand rupees, for every five hundred rupees, or part thereof, in excess of ten thousand rupees, up to twenty thousand rupees.	Twenty-two rupees eight annas.
	When such amount or value exceeds twenty thousand rupees, for every one thousand rupees, or part thereof, in excess of twenty thousand rupees, up to thirty thousand rupees.	Thirty rupees.
	When such amount or value exceeds thirty thousand rupees, for every two thousand rupees, or part thereof, in excess of thirty thousand rupees, up to fifty thousand rupees.	Do.
	When such amount or value exceeds fifty thousand rupees, for every five thousand rupees, or part thereof, in excess of fifty thousand rupees.	Do.
2. ¹ <i>Plaint, or written statement pleading a set-off or counter-claim, presented to a Court outside the Presidency Town in any suit of the nature cognizable by Courts of Small Causes when the amount or value of the subject matter does not exceed Rs. 500.</i>	When the amount or value of the subject-matter in dispute does not exceed five rupees.	Six annas.
	When such amount or value exceeds five rupees, for every five rupees, or part thereof, in excess of five rupees up to one hundred rupees.	Do.
	When such amount or value exceeds one hundred rupees, for every ten rupees, or part thereof, in excess of one hundred rupees up to five hundred rupees.	Twelve annas.
	....	An amount of one half the scale of fee prescribed in article 1 above.
3. <i>Plaint in a suit for possession under [the Specific Relief Act, 1877, section 9].</i>	....	The fee leviable on the plaint or memorandum of appeal.
4. <i>Application for review of judgment, if presented on or after the ninth day from the date of the decree.</i>	....	One half of the fee leviable on the plaint or memorandum of appeal.
5. <i>Application for review of judgment, if presented before the ninth day from the date of the decree</i>	When such judgment or order is passed by any Civil Court other than a High Court or by the presiding officer of any Revenue Court or Office, or by any other Judicial or Executive Authority—	Six annas.
6. <i>Copy or translation of a judgment or order not being or having the force of a decree.</i>	(a) If the amount or value of the subject-matter is fifty or less than fifty rupees. (b) If such amount or value exceeds fifty rupees.	Twelve annas.
	When such judgment or order is passed by a High Court.	One rupee eight annas.
6-A. <i>Copy or translation of a judgment or order of a Criminal Court.</i>	....	Eight annas.

¹ To ascertain the proper fee leviable on the institution of a suit, see the table annexed to this schedule.

Number.		Proper fee
7. Copy of a decree or order having the force of a decree.	When such decree or order is made by any Civil Court other than a High Court, or by any Revenue Court—	
	(a) If the amount or value of the subject-matter of the suit wherein such decree or order is made is fifty or less than fifty rupees.	Eight annas.
	(b) If such amount or value exceeds fifty rupees.	One rupee.
	When such decree or order is made by a High Court.	Four rupees.
8. Copy of any document liable to stamp duty under the Indian Stamp Act, 1899, when left by any party to a suit or proceeding in place of the original withdrawn.	(a) When the stamp-duty chargeable on the original does not exceed eight annas	The amount of the duty chargeable on the original.
	(b) In any other case ..	Eight annas.
9. Copy of any revenue or judicial proceeding or order not otherwise provided for by this Act, or copy of any account, statement, report or the like, taken out of any Civil or Criminal or Revenue Court or Office, or from the office of any chief officer charged with the executive administration of a division.	For every three hundred and sixty words or fraction of three hundred and sixty words.	Do.
10. [<i>Repealed by the Guardians and Wards Act, 1890 (VIII of 1890).</i>]		
11. Probate of a will or letters of administration with or without will annexed.	When the amount or value of the property in respect of which the grant of probate or letters is made exceeds one thousand rupees, but does not exceed five thousand rupees.	Two per centum on such amount or value.
	When such amount or value exceeds five thousand rupees :	Three per centum on such amount or value.
	Provided that, when after the grant of a certificate under the Succession Certificate Act, 1889, or under the Regulation of the Bombay Code, No VIII of 1827, in respect of any property included in an estate, a grant of probate or letters of administration is made in respect of the same estate, the fee payable in respect of the latter grant shall be reduced by the amount of the fee paid in respect of the former grant.	
12. Certificate under the Succession Certificate Act, 1889.	When the amount or value of any debt or security specified in the certificate under section 8 of the Act does not exceed five thousand rupees.	Two per centum on such amount or value, and three per centum on the amount or value of any debt or security to which the certificate is extended under section 10 of the Act.

Number.		Proper fee.
12. Certificate, etc.— (Contd.)	When such amount or value exceeds five thousand rupees.	Three per centum on such amount or value, and four and a half per centum on the amount or value of any debt or security to which the certificate is extended under section 10 of the Act.

NOTE.—(1) The amount of a debt is its amount, including interest, on the day on which the inclusion of the debt in the certificate is applied for, so far as such amount can be ascertained.

(2) Whether or not any power with respect to a security specified in a certificate has been conferred under the Act; and where such a power has been so conferred, whether the power is for the receiving of interest or dividends on, or for the negotiation or transfer of the security, or for both purposes, the value of the security is its market-value on the day on which the inclusion of the security in the certificate is applied for, so far as such value can be ascertained.

SCHEDULE I.

MADRAS.

Table of rates of ad valorem fees leviable.

(a) On plaints, etc., mentioned in article 1 of this schedule.

When the amount or value of the subject- matter exceeds	But does not exceed	Proper fee.	When the amount or value of the subject- matter exceeds	But does not exceed	Proper fee.
Rs.	Rs.	Rs. A.	Rs.	Rs.	Rs. A.
..	5	0 8	270	280	31 7
5	10	1 1	280	290	32 9
10	15	1 10	290	300	33 11
15	20	2 3	300	310	34 13
20	25	2 12	310	320	35 15
25	30	3 5	320	330	37 1
30	35	3 14	330	340	38 3
35	40	4 7	340	350	39 5
40	45	5 0	350	360	40 7
45	50	5 9	360	370	41 9
50	55	6 2	370	380	42 11
55	60	6 11	380	390	43 13
60	65	7 4	390	400	44 15
65	70	7 13	400	410	46 1
70	75	8 6	410	420	47 3
75	80	8 15	420	430	48 5
80	85	9 8	430	440	49 7
85	90	10 1	440	450	50 9
90	95	10 10	450	460	51 11
95	100	11 3	460	470	52 13
100	110	12 5	470	480	53 15
110	120	13 7	480	490	55 1
120	130	14 9	490	500	56 3
130	140	15 11	500	510	57 5
140	150	16 13	510	520	58 7
150	160	17 15	520	530	59 9
160	170	19 1	530	540	60 11
170	180	20 3	540	550	61 13
180	190	21 5	550	560	62 15
190	200	22 7	560	570	64 1
200	210	23 9	570	580	65 3
210	220	24 11	580	590	66 5
220	230	25 13	590	600	67 7
230	240	26 15	600	610	68 9
240	250	28 1	610	620	69 11
250	260	29 3	620	630	70 13
260	270	30 5	630	640	71 15

When the
amount or value
of the subject-
matter exceeds

But does not
exceed Proper fee.

Rs.	Rs.	Rs. A.
640	650	73 1
650	660	74 3
660	670	75 5
670	680	76 7
680	690	77 9
690	700	78 11
700	710	79 13
710	720	80 15
720	730	82 1
730	740	83 3
740	750	84 5
750	760	85 7
760	770	86 9
770	780	87 11
780	790	88 13
790	800	89 15
800	810	91 1
810	820	92 3
820	830	93 5
830	840	94 7
840	850	95 9
850	860	96 11
860	870	97 13
870	880	98 15
880	890	100 1
890	900	101 3
900	910	102 5
910	920	103 7
920	930	104 9
930	940	105 11
940	950	106 13
950	960	107 15
960	970	109 1
970	980	110 3
980	990	111 5
990	1,000	112 7
1,000	1,100	119 15
1,100	1,200	127 7
1,200	1,300	134 15
1,300	1,400	142 7
1,400	1,500	149 15
1,500	1,600	157 7
1,600	1,700	164 15
1,700	1,800	172 7
1,800	1,900	179 15
1,900	2,000	187 7
2,000	2,100	194 15
2,100	2,200	202 7
2,200	2,300	209 15
2,300	2,400	217 7
2,400	2,500	224 15
2,500	2,600	232 7
2,600	2,700	240 15
2,700	2,800	247 7
2,800	2,900	254 15
2,900	3,000	262 7
3,000	3,100	269 15
3,100	3,200	277 7
3,200	3,300	284 15
3,300	3,400	292 7
3,400	3,500	299 15
3,500	3,600	307 7
3,600	3,700	314 15
3,700	3,800	322 7
3,800	3,900	329 15

When the
amount or value
of the subject-
matter exceeds

But does not
exceed Proper fee.

Rs.	Rs.	Rs. A.
3,900	4,000	337 7
4,000	4,100	344 15
4,100	4,200	352 7
4,200	4,300	359 15
4,300	4,400	367 7
4,400	4,500	374 15
4,500	4,600	382 7
4,600	4,700	389 15
4,700	4,800	397 7
4,800	4,900	404 15
4,900	5,000	412 7
5,000	5,250	427 7
5,250	5,500	442 7
5,500	5,750	457 7
5,750	6,000	472 7
6,000	6,250	487 7
6,250	6,500	502 7
6,500	6,750	517 7
6,750	7,000	532 7
7,000	7,250	547 7
7,250	7,500	562 7
7,500	7,750	577 7
7,750	8,000	592 7
8,000	8,250	607 7
8,250	8,500	622 7
8,500	8,750	637 7
8,750	9,000	652 7
9,000	9,250	667 7
9,250	9,500	682 7
9,500	9,750	697 7
9,750	10,000	712 7
10,000	10,500	734 15
10,500	11,000	757 7
11,000	11,500	779 15
11,500	12,000	802 7
12,000	12,500	824 15
12,500	13,000	847 7
13,000	13,500	869 15
13,500	14,000	892 7
14,000	14,500	914 15
14,500	15,000	937 7
15,000	15,500	959 15
15,500	16,000	982 7
16,000	16,500	1,004 15
16,500	17,000	1,027 7
17,000	17,500	1,049 15
17,500	18,000	1,072 7
18,000	18,500	1,094 15
18,500	19,000	1,117 7
19,000	19,500	1,139 15
19,500	20,000	1,162 7
20,000	21,000	1,192 7
21,000	22,000	1,222 7
22,000	23,000	1,252 7
23,000	24,000	1,282 7
24,000	25,000	1,312 7
25,000	26,000	1,342 7
26,000	27,000	1,372 7
27,000	28,000	1,402 7
28,000	29,000	1,432 7
29,000	30,000	1,462 7
30,000	32,000	1,492 7
32,000	34,000	1,522 7
34,000	36,000	1,552 7
36,000	38,000	1,582 7

When the amount or value of the subject- matter exceeds	But does not exceed	Proper fee.	When the amount or value of the subject- matter exceeds	But does not exceed	Proper fee.
Rs.	Rs.	Rs. A.	Rs.	Rs.	Rs. A.
38,000	40,000	1,612 7	44,000	46,000	1,702 7
40,000	42,000	1,642 7	46,000	48,000	1,732 7
42,000	44,000	1,672 7	48,000	50,000	1,762 7

When the amount or value of the subject-matter exceeds Rs. 50,000, for every five thousand rupees, or part thereof, in excess of fifty thousand rupees—thirty rupees.

(b) On plaints, etc., mentioned in article 2 of this schedule.

When the amount or value of the subject- matter exceeds	But does not exceed	Proper fee.	When the amount or value of the subject- matter exceeds	But does not exceed	Proper fee.
Rs.	Rs.	Rs. A.	Rs.	Rs.	Rs. A.
..	5	0 6	200	210	15 12
5	10	0 12	210	220	16 8
10	15	1 2	220	230	17 4
15	20	1 8	230	240	18 0
20	25	1 14	240	250	18 12
25	30	2 4	250	260	19 8
30	35	2 10	260	270	20 4
35	40	3 0	270	280	21 0
40	45	3 6	280	290	21 12
45	50	3 12	290	300	22 8
50	55	4 2	300	310	23 4
55	60	4 8	310	320	24 0
60	65	4 14	320	330	24 12
65	70	5 4	330	340	25 8
70	75	5 10	340	350	26 4
75	80	6 0	350	360	27 0
80	85	6 6	360	370	27 12
85	90	6 12	370	380	28 8
90	95	7 2	380	390	29 4
95	100	7 8	390	400	30 0
100	110	8 4	400	410	30 12
110	120	9 0	410	420	31 8
120	130	9 12	420	430	32 4
130	140	10 8	430	440	33 0
140	150	11 4	440	450	33 12
150	160	12 0	450	460	34 8
160	170	12 12	460	470	35 4
170	180	13 8	470	480	36 0
180	190	14 4	480	490	36 12
190	200	15 0	490	500	37 8

SCHEDULE II.

FIXED FEES.

Number.		Proper fee.
1. Application or petition.	(a) When presented to any officer of the Customs or Excise Department or to any Magistrate by any person having dealings with the Government, and when the subject-matter of such application relates exclusively to those dealings ; or when presented to any officer of land revenue by any person holding temporarily settled land under direct engagement with Government, and when the subject-matter of the application or petition relates exclusively to such engagement ;	One anna. Two annas.

Number.		Proper fee.
1. Application, etc.— (<i>Contd.</i>)	or when presented to any Municipal Commissioner under any Act for the time being in force for the conservancy or improvement of any place, if the application or petition relates solely to such conservancy or improvement ; or when presented to any Civil Court other than a principal Civil Court of original jurisdiction or to any Court of Small Causes constituted under Act No. IX of 1887, or to a Collector or other officer of revenue in relation to any suit or case in which the amount or value of the subject-matter in less than fifty rupees ; or when presented to any Civil, Criminal or Revenue Court, or to any Board or Executive Officer for the purpose of obtaining a copy or translation of any judgment, decree or order passed by such Court, Board or Officer, or of any other document on record in such Court or office. (b) When containing a complaint or charge of any offence other than an offence for which police officers may, under the Criminal Procedure Code, arrest without warrant, and presented to any Criminal Court ; or when presented to a Civil, Criminal or Revenue Court, or to a Collector, or any Revenue Officer having jurisdiction equal or subordinate to a Collector, or to any Magistrate in his executive capacity, and not otherwise provided for by this Act ; or to deposit in Court revenue or rent ; or for determination by a Court of the amount of compensation to be paid by landlord to his tenant. (c) When presented to a Chief Commissioner or other Chief Controlling Revenue or Executive authority, or to a Commissioner of Revenue or Circuit, or to any chief officer charged with the executive administration of a division and not otherwise provided for by this Act. (d) (i) When presented to a High Court under section 115 of the Code of Civil Procedure, 1908, for revision of an order— (a) when the value of the suit or proceeding to which the order relates does not exceed thousand rupees ; (b) when the value of the suit or proceeding exceeds thousand rupees. (ii) When presented to a High Court otherwise than under that section.	One anna. Two annas. Do. In the case of a criminal complaint one rupee and in other cases twelve annas. Do. Eight annas. Do. One rupee eight annas. Five rupees. Ten rupees. Two rupees. Twelve annas in addition to any fee levied on the application under clause (a), clause (b) or clause (d) of art. 1 of this schedule. Eight annas. One rupee. Two rupees.
1-A. Application to any Civil Court that records may be called for from another Court.	When the Court grants the application and is of opinion that the transmission of such records involves the use of the post.	
2. Application for leave to sue as a pauper.	..	
3. Application for leave to appeal as a pauper.	(a) When presented to a District Court or a Sub-Court. (b) When presented to a Commissioner or a High Court.	
4.	Omitted.	

Number.		Proper Fee.
5. Complaint or memorandum of appeal in a suit to establish or disprove a right of occupancy.	....	Eight annas.
6. Bail-bond or other instrument of obligation given in pursuance of an order made by a Court or Magistrate under any section of the Code of Criminal Procedure, 1898, or the Code of Civil Procedure, 1908, and not otherwise provided for in this Act.	....	Do.
7. Undertaking under section 40 of the Indian Divorce Act, 1869.	....	Do.
8. [<i>Rep. by the Repealing and Amending Act, 1891 (XII of 1891)</i>]		
9. [<i>Rep. by Act XII of 1891.</i>]		
10. Mukhtarnama, Vakalatnama or any paper signed by an Advocate signifying or intimating that he is retained for a party.	When presented for the conduct of any one case— (a) to any Civil or Criminal Court other than a High Court, or to any Revenue Court, or to any Collector or Magistrate, or other executive officer, except those mentioned in clauses (b) and (c) of this number. (b) to a Commissioner of Revenue, Circuit or Customs or to any officer charged with the executive administration of a division, not being the Chief Revenue or Executive Authority; (c) to a High Court, Chief Commissioner, Board of Revenue, or other Chief Controlling Revenue or Executive Authority. (a) to any Civil Court other than a High Court, or to any Revenue Court, or Executive Officer other than the High Court or Chief Controlling Revenue or Executive Authority; (b) to a High Court or Chief Commissioner, or other Chief Controlling Executive or Revenue Authority.	One rupee. One rupee eight annas. Three rupees. One rupee. Two rupees.
11. Memorandum of appeal when the appeal is from an order inclusive of an order determining any question under section 47 or section 144 of the Code of Civil Procedure, 1908, and is presented.		
12. Caveat ..	....	Ten rupees.
13. ..	Omitted.	....
14. Petition in a suit under the Native Converts' Marriage Dissolution Act, 1866.	....	Five rupees.
15. [<i>Rep. Act 5 of 1908.</i>]	....	....
16. [<i>Rep. by Act 6 of 1889, S. 18 (1).</i>]	....	....
17. Complaint or memorandum of appeal in a suit— (i) to alter or set aside a summary decision or order of any of the Civil Courts not established by Letters Patent or of any Revenue Court;		Fifteen rupees.

Number.		Proper Fees.
(ii) to alter or cancel any entry in a register of the names of proprietors of revenue paying estates;	....	Fifteen rupees.
(iii) for relief under section 14 of the Religious Endowments Act, 1863, or under section 91 or section 92 of the Code of Civil Procedure, 1908.	....	Do.
17-A. <i>Plaint or memorandum of appeal in a suit—</i>		
(i) to obtain a declaratory decree where no consequential relief is prayed ;	When the plaint is presented to or the memorandum of appeal is against the decree of—	
(ii) to set aside an award	a District Munsif's Court or the City Civil Court.	Do.
(iii) to obtain a declaration that an alleged adoption is invalid or never in fact took place or to obtain a declaration that an adoption is valid.	a District Court or a Sub-Court.	Hundred rupees, if the value for purposes of jurisdiction is less than ten thousand rupees; five hundred rupees if such value is ten thousand rupees or upwards.
17-B. <i>Plaint or memorandum of appeal in every suit where it is not possible to estimate at a money value the subject-matter in dispute and which is not otherwise provided for by this Act.</i>	When the plaint is presented to or the memorandum of appeal is against the decree of—	
18. <i>Application under section 17 or section 20 of the Second Schedule of the Code of Civil Procedure, 1908.</i>	a Revenue Court .. a District Munsif's Court or the City Civil Court. a District Court or a Sub-Court. ..	Ten rupees. Fifteen rupees.
19. <i>Agreement in writing stating a question for the opinion of the Court under the Code of Civil Procedure, 1908.</i>	When presented to a District Munsif's Court or the City Civil Court.	One hundred rupees. Fifteen rupees.
20. <i>Every petition under the Indian Divorce Act, 1869, except petitions under section 44 of the same Act, and every memorandum of appeal under section 55 of the same Act.</i>	When presented to a District Court or a Sub-Court.	One hundred rupees.
21. <i>Plaint or memorandum of appeal under the Parsi Marriage and Divorce Act, 1865.</i>	....	Twenty rupees.
	....	Do.

G—THE COURT-FEES (PUNJAB AMENDMENT) ACT (VII OF 1922).

An Act to amend the Court Fees Act, 1870, with reference to the scale of Court-fees in the Punjab.

WHEREAS it is necessary to revise the scale of Court-fees provided in the Court-fees Act, 1870, in its application to the Punjab, in the manner hereinafter appearing ; It is hereby enacted

Preamble.
as follows :—

Short title, extent and commencement.

1. (1) This Act may be called **THE COURT-FEES (PUNJAB AMENDMENT) ACT, 1922.**

(2) It extends to the Punjab.

(3) It shall come into force on the such date as the Local Government may by notification appoint in this behalf.

Application of Act.

2. (1) The Court-Fees Act, 1870, shall be amended in its application to the Punjab in the manner hereinafter provided.

(2) The sections and Schedules hereinafter referred to by number mean the sections and Schedules respectively so numbered in the Court-Fees Act, 1870, unless it shall appear to the contrary.

Amendment of S. 4.

3. In section 4 the word "one" shall be substituted for the word "two" between the word "of" and the word "or".

4. In section 18 between the word "of" and the word "unless" for the words "eight annas" the words "one rupee" shall be substituted.

Amendment of S. 18.

Amendment of Schedule I, Article 1.

5. (1) In the third column of Article 1 of Schedule I,—

(a) for the words "six annas" opposite the first entry in the second column, the words "nine annas" shall be substituted;

(b) for the words "six annas" opposite the second entry in the second column, the words "nine annas" shall be substituted;

(c) for the words "twelve annas" opposite the third entry in the second column, the words "one rupee two annas" shall be substituted;

(d) for the words "five rupees" opposite the fourth entry in the second column the words "seven rupees eight annas" shall be substituted;

(e) for the words "ten rupees" opposite the fifth entry in the second column, the words "fifteen rupees" shall be substituted;

(f) for the words "fifteen rupees" opposite the sixth entry in the second column, the words "twenty-two rupees eight annas" shall be substituted;

(g) for the words "twenty rupees" opposite the seventh entry in the second column, the words "thirty rupees" shall be substituted;

(h) for the words "twenty rupees" opposite the eighth entry in the second column, the words "thirty rupees" shall be substituted;

(i) for the words "twenty-five rupees" opposite the ninth entry in the second column, the words "thirty rupees" shall be substituted.

(2) The proviso, as to the maximum, after the ninth entry in the second column of the said article in the same schedule, shall be omitted.

6. Article 13 of Schedule I which was repealed by the Punjab Courts (Amendment) Act, 1912, in so far as it affected the Punjab is hereby re-enacted, save that for the words "Chief Court in the Punjab," the words "High Court of Judicature at Lahore," for the figures "70" the figures "44", and the figures "1884" the figures "1918" shall be substituted, and the words and figures "as amended by the Punjab Courts Act, 1899," shall be omitted.

Re-enactment and amendment of Schedule I, Article 13.

Amendment of table of rates of *ad valorem* fees.

7. For the table of rates of *ad valorem* fees leviable on the institution of suits set forth at the end of Schedule I, the table set forth in the schedule to this Act shall be substituted.

8. In Article 1 of Schedule II—

Amendment of Schedule II, Article 1, clauses (a) and (b).

(1) For the words "one anna" in the third column opposite clause (a) in the second column, the words "two annas" shall be substituted,

(2) for the words "eight annas" in the third column opposite clause (c) in the second column, the words "one rupee" shall be substituted;

Amendment of Schedule II,
Article 1, clause (a)

(3) for clause (d), in the second column and the corresponding entry in the third column shall be substituted the following clause and entries, namely :—

(d) When presented to the High Court—

(i) Under the Indian Companies Act, 1913, for winding up a Com- One hundred rupees.
pany.

(ii) Under the same Act for taking some other judicial action.. Five rupees.

(iii) In all other cases .. Two rupees.

Amendment of Schedule II,
Articles 4, 5 and 7.

9. In the third column of Articles 4, 5 and 7 respectively of Schedule II—

for the words "eight annas" the words "one rupee" shall be substituted.

Amendment of Schedule II,
Article 10, clause (a).

10. In the third column of Article 10 of Schedule II—

for the words "eight annas" opposite clause (a) in the second column, the words "one rupee" shall be substituted.

Amendment of Schedule II,
Article 11, clauses (a) and (b).

11. In the third column of Article 11 of Schedule II—

(1) for the words "eight annas" opposite clause (a) in the second column, the words "one rupee" shall be substituted;

(2) for the words "two rupees" opposite clause (b) in the second column, the words "four rupees" shall be substituted.

12. The following new article with the corresponding entry in the third column shall be added to the first column of Schedule II, namely :—

22. Plaint or memorandum of appeal in a suit by a reversioner under Twenty rupees.
the Punjab Customary Law for a declaration in respect of an aliena-
tion of ancestral land.

SCHEDULE.

TABLE OF RATES OF AD VALOREM FEES LEVIABLE ON THE INSTITUTION OF SUITS.

When the amount or value of the subject-matter exceeds.	But does not exceed.	Proper Fee.	When the amount or value of the subject-matter exceeds.	But does not exceed.	Proper Fee.
Rs.	Rs.	Rs. A.	Rs.	Rs.	Rs. A.
..	5	0 9	140	150	16 14
5	10	1 2	150	160	18 0
10	15	1 11	160	170	19 2
15	20	2 4	170	180	20 4
20	25	2 13	180	190	21 6
25	30	3 6	190	200	22 8
30	35	3 15	200	210	23 10
35	40	4 8	210	220	24 12
40	45	5 1	220	230	25 14
45	50	5 10	230	240	27 0
50	55	6 3	240	250	28 2
55	60	6 12	250	260	29 4
60	65	7 5	260	270	30 6
65	70	7 14	270	280	31 8
70	75	8 7	280	290	32 10
75	80	9 0	290	300	33 12
80	85	9 9	300	310	34 14
85	90	10 2	310	320	36 0
90	95	10 11	320	330	37 2
95	100	11 4	330	340	38 4
100	110	12 6	340	350	39 6
110	120	13 8	350	360	40 8
120	130	14 10	360	370	41 10
130	140	15 12	370	380	42 12

Sch. II. Art. 22.—As to the meaning of 'ancestral land', see 106 I. C. 817.

THE COURT-FEES (PUNJAB AMENDMENT) ACT (VII OF 1922). xxxvii

When the amount or value of the subject-matter exceeds.	But does not exceed.	Proper Fee.	When the amount or value of the subject-matter exceeds.	But does not exceed.	Proper Fee.
Rs.	Rs.	Rs. A.	Rs.	Rs.	Rs. A.
380	390	43 14	1,400	1,500	150 0
390	400	45 0	1,500	1,600	157 8
400	410	46 2	1 600	1,700	165 0
410	420	47 4	1,700	2,800	172 8
420	430	48 6	1,800	1,900	180 0
430	440	49 8	1,900	2,000	187 8
440	450	50 10	2,000	2,100	195 0
450	460	51 12	2,100	2,200	202 8
460	470	52 14	2,200	2,300	210 0
470	480	54 0	2,300	2,400	217 8
480	490	55 2	2,400	2,500	225 0
490	500	56 4	2,500	2,600	232 8
500	510	57 6	2,600	2,700	240 0
510	520	58 8	2,700	2,800	247 8
520	530	59 10	2,800	2,900	255 0
530	540	60 12	2,900	3,000	262 8
540	550	61 14	3,000	3,100	270 0
550	560	63 0	3,100	3,200	277 8
560	570	64 2	3,200	3,300	285 0
570	580	65 4	3,300	3,400	292 8
580	590	66 6	3,400	3,500	300 0
590	600	67 8	3,500	3,600	307 8
600	610	68 10	3 600	3,700	315 0
610	620	69 12	3,700	3,800	322 8
620	630	70 14	3,800	3,900	330 0
630	640	72 0	3,900	4,000	337 8
640	650	73 2	4,000	4,100	345 0
650	660	74 4	4,100	4,200	352 8
660	670	75 6	4,200	4,300	360 0
670	680	76 8	4,300	4,400	367 8
680	690	77 10	4,400	4,500	375 0
690	700	78 12	4,500	4,600	382 8
700	710	79 14	4,600	4,700	390 0
710	720	81 0	4,700	4,800	397 8
720	730	81 2	4,800	4,900	405 0
730	740	82 4	4,900	5 000	412 8
740	750	83 6	5,000	5,250	427 8
750	760	84 8	5,250	5,500	442 8
760	770	85 10	5,500	5,750	457 8
770	780	86 12	5,750	6,000	472 8
780	790	87 14	6,000	6,250	487 8
790	800	89 0	6,250	6,500	502 8
800	810	90 2	6,500	6,750	517 8
810	820	91 4	6,750	7,000	532 8
820	830	92 6	7,000	7,250	547 8
830	840	93 8	7,250	7,500	562 8
840	850	94 10	7,500	7,750	577 8
850	860	95 12	7,750	8,000	592 8
860	870	96 14	8,000	8,250	607 8
870	880	98 0	8,250	8,500	622 8
880	890	99 2	8,500	8,750	637 8
890	900	100 4	8,750	9,000	652 8
900	910	101 6	9,000	9,250	667 8
910	920	102 8	9,250	9,500	682 8
920	930	103 10	9,500	9,750	697 8
930	940	104 12	9,750	10,000	712 8
940	950	105 14	10,000	10,500	735 0
950	960	107 0	10 500	11,000	757 8
960	970	108 2	11,000	11,500	780 0
970	980	109 4	11,500	12,000	802 8
980	990	110 6	12,000	12,500	825 0
990	1,000	111 8	12,500	13,000	847 8
1,000	1,100	120 0	13,000	13,500	870 0
1,100	1,200	127 8	13,500	14,000	892 8
1,200	1,300	135 0	14,000	14,500	915 0
1,300	1,400	142 8	14,500	15,000	937 8

When the amount or value of the subject-matter exceeds.			When the amount or value of the subject-matter exceeds.		
Rs.	But does not exceed.	Proper Fee.	Rs.	But does not exceed.	Proper Fee.
		Rs. A.		Rs.	RA. A.
15,000	15,500	960 0	1,50,000	1,55,000	2,392 8
15,500	16,000	982 8	1,55,000	1,60,000	2,422 8
16,000	16,500	1,005 0	1,60,000	1,65,000	2,452 8
16,500	17,000	1,027 8	1,65,000	1,70,000	2,482 8
17,000	17,500	1,050 0	1,70,000	1,75,000	2,512 8
17,500	18,000	1,072 8	1,75,000	1,80,000	2,542 8
18,000	18,500	1,095 0	1,80,000	1,85,000	2,572 8
18,500	19,000	1,117 8	1,85,000	1,90,000	2,602 8
19,000	19,500	1,140 0	1,90,000	1,95,000	2,632 8
19,500	20,000	1,162 8	1,95,000	2,00,000	2,662 8
20,000	21,000	1,192 8	2,00,000	2,05,000	2,692 8
21,000	22,000	1,222 8	2,05,000	2,10,000	2,722 8
22,000	23,000	1,252 8	2,10,000	2,15,000	2,752 8
23,000	24,000	1,282 8	2,15,000	2,20,000	2,782 8
24,000	25,000	1,312 8	2,20,000	2,25,000	2,812 8
25,000	26,000	1,342 8	2,25,000	2,30,000	2,842 8
26,000	27,000	1,372 8	2,30,000	2,35,000	2,872 8
27,000	28,000	1,402 8	2,35,000	2,40,000	2,902 8
28,000	29,000	1,432 8	2,40,000	2,45,000	2,932 8
29,000	30,000	1,462 8	2,45,000	2,50,000	2,962 8
30,000	31,000	1,492 8	2,50,000	2,55,000	2,992 8
31,000	32,000	1,522 8	2,55,000	2,60,000	3,022 8
32,000	33,000	1,552 8	2,60,000	2,65,000	3,052 8
33,000	34,000	1,582 8	2,65,000	2,70,000	3,082 8
34,000	35,000	1,612 8	2,70,000	2,75,000	3,112 8
35,000	36,000	1,642 8	2,75,000	2,80,000	3,142 8
36,000	37,000	1,672 8	2,80,000	2,85,000	3,172 8
37,000	38,000	1,702 8	2,85,000	2,90,000	3,202 8
38,000	39,000	1,732 8	2,90,000	2,95,000	3,232 8
39,000	40,000	1,762 8	2,95,000	3,00,000	3,262 8
40,000	41,000	1,792 8	3,00,000	3,05,000	3,292 8
41,000	42,000	1,822 8	3,05,000	3,10,000	3,322 8
42,000	43,000	1,852 8	3,10,000	3,15,000	3,352 8
43,000	44,000	1,882 8	3,15,000	3,20,000	3,382 8
44,000	45,000	1,912 8	3,20,000	3,25,000	3,412 8
45,000	46,000	1,942 8	3,25,000	3,30,000	3,442 8
46,000	47,000	1,972 8	3,30,000	3,35,000	3,472 8
47,000	48,000	2,002 8	3,35,000	3,40,000	3,502 8
48,000	49,000	2,032 8	3,40,000	3,45,000	3,532 8
49,000	50,000	2,062 8	3,45,000	3,50,000	3,562 8
50,000	51,000	2,092 8	3,50,000	3,55,000	3,592 8
51,000	52,000	2,122 8	3,55,000	3,60,000	3,622 8
52,000	53,000	2,152 8	3,60,000	3,65,000	3,652 8
53,000	54,000	2,182 8	3,65,000	3,70,000	3,682 8
54,000	55,000	2,212 8	3,70,000	3,75,000	3,712 8
55,000	56,000	2,242 8	3,75,000	3,80,000	3,742 8
56,000	57,000	2,272 8	3,80,000	3,85,000	3,772 8
57,000	58,000	2,302 8	3,85,000	3,90,000	3,802 8
58,000	59,000	2,332 8	3,90,000	3,95,000	3,832 8
59,000	60,000	2,362 8	3,95,000	4,00,000	3,862 8

And when the amount or value of the subject-matter exceeds Rs. 4,00,000 the proper fee leviable shall be Rs. 3,862 annas 8 plus Rs. 30 for each five thousand rupees or part thereof in excess of Rs. 4,00,000.

H—THE UNITED PROVINCES COURT-FEES (AMENDMENT) ACT (III OF 1923).

PASSED BY THE LEGISLATIVE COUNCIL OF THE GOVERNOR OF THE UNITED PROVINCES.

An Act further to amend the Court-Fees Act, 1870, in its application to the United Provinces.

WHEREAS it is expedient further to amend the Court-Fees Act, 1870, in its application to the United Provinces ; it is hereby enacted as follows :—

§.5] THE UNITED PROVINCES COURT-FEES (AMENDMENT) ACT (III OF 1923), xxxix

Title, extent, commencement and duration.

1. (1) This Act may be called THE UNITED PROVINCES COURT-FEES (AMENDMENT) ACT, 1923.

(2) It extends to the territories for the time being administered by the Local Government of the United Provinces.

(3) It shall come into force on May 1st, 1923, and shall continue in force for the period of one year only.

Amendment of section 6 of Act VII of 1870. **2.** To section 6 of the Court-Fees Act, 1870, hereinafter referred to as "the said Act" the following proviso shall be added, namely:—

"Provided that where such document relates to any suit, appeal or other proceeding under the Oudh Rent Act, 1886, the Agra Tenancy Act, 1901, or the United Provinces Land Revenue Act, 1901, the proper fee shall be three-quarters of the fee indicated in either of the said schedules, except where the document is of any of the kinds specified as chargeable in the first schedule and the amount or value of the subject-matter of the suit, appeal or proceeding to which it relates [* * *] exceed [* * *] Rs. 500."

[Provided further that the fee payable in respect of any such document as is mentioned in the foregoing proviso shall not be less than that indicated by either of the said schedules before the commencement of the United Provinces Court-Fees (Amendment) Act, 1923.]

Amendment of section 7 of Act VII of 1870.

3. For clause (ix) of section 7 of the said Act, the following clauses shall be substituted, namely,—

"(ix) In suits against a mortgagee for the recovery of the property mortgaged—according to the principal money expressed to be secured by the instrument of mortgage :

(ix-a) In suits by a mortgagee to foreclose the mortgage, or where the mortgage is made by conditional sale, to have the sale declared absolute—

according to the amount claimed by way of principal and interest, or the value of the property, whichever is less."

Amendment of Schedule I to Act VII of 1870.

4. In Schedule I to the said Act the following amendments shall be made, namely,—

(i) In Article 1 for the entries in the second and third columns the entries shown in the first and second columns of Schedule A to this Act shall be substituted.

(ii) In Article 6 for the words "four" "eight" and "one rupee" in the third column the words "six", "twelve" and "one rupee eight annas," respectively, shall be substituted.

(iii) In Article 7 for the words "eight" and "one rupee" in the third column the words "twelve" and "one rupee eight annas", respectively, shall be substituted.

(iv) In Article 8 for the words "the amount of the duty chargeable on the original" and "eight" in the third column the words "one-and-a-half times the amount of the duty chargeable on the original" and "twelve", respectively, shall be substituted.

(v) For the table of *ad valorem* fees leviable on the institution of suits the table shown in Schedule B to this Act shall be substituted.

Amendment of Schedule II to Act VII of 1870.

5. In Schedule II to the said Act the following amendments shall be made, namely,—

(i) In Article 1 for the words "one anna," "eight annas," and "one rupee" in the third column the words "two annas," "twelve annas", and "one rupee and eight annas," respectively, shall be substituted.

(ii) In Article 1-A for the words "twelve annas" in the third column the words "one rupee two annas" shall be substituted.

Sec. 2, 1st proviso.—The word "does not exceed Rs. 200 or" and the words "the value of" were omitted by U. P. Act VII of 1923,

S. 2 (1).

Sec. 2, 2nd proviso.—This Proviso was added by U. P. Act VII of 1923, S. 2 (2).

(iii) In Articles 5, 6 and 7 for the word "eight" in the third column the word "twelve" shall be substituted.

(iv) In Article 11 for the word "eight" in the third column the word "twelve" shall be substituted.

(v) The bracket opposite Articles 12 and 13 in the second column shall be omitted and for Article 12 the following shall be substituted, namely,—

"12 Caveat.	Where the amount or value of the property in respect of which the caveat is lodged—
	(a) does not exceed five thousand rupees. Five rupees.
	(b) exceeds five thousand rupees Ten rupees."

(vi) In Article 14 for the words "five rupees" in the third column the words "seven rupees eight annas" shall be substituted.

(vii) For Article 17 the following shall be substituted, namely,—

"17. Plaint or memorandum of appeal in each of the following suits.—	Ten rupees.
(i) To alter or set aside a summary decision or order of any of the Civil Courts not established by Letters Patent or of any Revenue Court.	Do.
(ii) To alter or cancel any entry in a register of the names of proprietors of revenue paying estates.	Do.
(iii) To obtain a declaratory decree where no consequential relief is prayed.	Do.
(iv) To set aside an award.	Do.
(v) To set aside an adoption.	Do.
(vi) Every other suit where it is not possible to estimate at a money-value the subject-matter in dispute, and which is not otherwise provided for by this Act.	Fifteen rupees.

(viii) In Articles 18 and 19 for the word "ten" in the third column the word "fifteen" shall be substituted.

(ix) In Articles 20 and 21 for the word "twenty" in the third column the word "thirty" shall be substituted.

SCHEDULE A.

When the amount or value of the subject-matter in dispute does not exceed five rupees.	Six annas.
When such amount or value exceeds five rupees, for every five rupees, or part thereof in excess of five rupees, up to one hundred rupees.	Do.
When such amount or value exceeds one hundred rupees, for every ten rupees, or part thereof, in excess of one hundred rupees, up to two hundred rupees.	Twelve annas.
When such amount or value exceeds two hundred rupees but does not exceed two hundred and ten rupees.	Twenty-one rupees.
When such amount or value exceeds two hundred and ten rupees, for every ten rupees, or part thereof, in excess of two hundred and ten rupees, up to one thousand rupees.	Fourteen annas.
When such amount or value exceeds one thousand rupees but does not exceed one thousand one hundred rupees.	One hundred rupees.
When such amount or value exceeds one thousand one hundred rupees, for every one hundred rupees, or part thereof, in excess of one thousand one hundred rupees, up to seven thousand five hundred rupees.	Seven rupees eight annas.
When such amount or value exceeds seven thousand five hundred rupees, for every two hundred and fifty rupees, or part thereof, in excess of seven thousand five hundred rupees, up to ten thousand rupees.	Fifteen rupees.
When such amount or value exceeds ten thousand rupees, for every five hundred rupees, or part thereof, in excess of ten thousand rupees, up to twenty thousand rupees.	Twenty-two rupees eight annas.
When such amount or value exceeds twenty thousand rupees, for every one thousand rupees, or part thereof, in excess of twenty thousand rupees, up to fifty thousand rupees.	Thirty-rupees.
When such amount or value exceeds fifty thousand rupees, for every five thousand rupees, or part thereof, in excess of fifty thousand rupees. Provided that the maximum fee leviable on a plaint or memorandum appeal shall be four thousand five hundred rupees.	Thirty-seven rupees eight annas.

SCHEDULE B.

Table of rates of ad valorem fees leviable on the institution of suits.

When the amount or value of the subject-matter exceeds.	But does not exceed.	Proper Fee.	When the amount or value of the subject-matter exceeds.	But does not exceed.	Proper Fee.
Rs.	Rs.	Rs. A.	Rs.	Rs.	Rs. A.
..	5	0 6	520	530	49 0
5	10	0 12	530	540	49 14
10	15	1 2	540	550	50 12
15	20	1 8	550	560	51 10
20	25	1 14	560	570	52 8
25	30	2 4	570	580	53 6
30	35	2 10	580	590	54 4
35	40	3 0	590	600	55 2
40	45	3 6	600	610	56 0
45	50	3 12	610	620	56 14
50	55	4 2	620	630	57 12
55	60	4 8	630	640	58 10
60	65	4 14	640	650	59 8
65	70	5 4	650	660	60 6
70	75	5 10	660	670	61 4
75	80	6 0	670	680	62 2
80	85	6 6	680	690	63 0
85	90	6 12	690	700	63 14
90	95	7 2	700	710	64 12
95	100	7 8	710	720	65 10
100	110	8 4	720	730	66 8
110	120	9 0	730	740	67 6
120	130	9 12	740	750	68 4
130	140	10 8	750	760	69 2
140	150	11 4	760	770	70 0
150	160	12 0	770	780	70 14
160	170	12 12	780	790	71 12
170	180	13 8	790	800	72 10
180	190	14 4	800	810	73 8
190	200	15 0	810	820	74 6
200	210	21 0	820	830	75 4
210	220	21 14	830	840	76 2
220	230	22 12	840	850	77 0
230	240	23 10	850	860	77 14
240	250	24 8	860	870	78 12
250	260	25 6	870	880	79 10
260	270	26 0	880	890	80 8
270	280	27 2	890	900	81 6
280	290	28 0	900	910	82 4
290	300	28 14	910	920	83 2
300	310	29 12	920	930	84 0
310	320	30 10	930	940	84 14
320	330	31 8	940	950	85 12
330	340	32 6	950	960	86 10
340	350	33 4	960	970	87 8
350	360	34 2	970	980	88 6
360	370	35 0	980	990	89 4
370	380	35 14	990	1,000	90 2
380	3,0	36 12	1,000	1,100	100 0
390	400	37 10	1,100	1,200	107 8
400	410	38 8	1,200	1,300	115 0
410	420	39 6	1,300	1,400	122 8
420	430	40 4	1,400	1,500	130 0
430	440	41 2	1,500	1,600	137 8
440	450	42 0	1,600	1,700	145 0
450	460	42 14	1,700	1,800	152 8
460	470	43 12	1,800	1,900	160 0
470	480	44 10	1,900	2,000	167 8
480	490	45 8	2,000	2,100	175 0
490	500	46 6	2,100	2,200	182 8
500	510	47 4	2,200	2,300	190 0
510	520	48 2	2,300	2,400	197 8

When the amount or value of the subject matter exceeds.	But does not exceed.	Proper Fee	When the amount or value of the subject-matter exceeds.	But does not exceed.	Proper Fee.
Rs.	Rs.	Rs. A.	Rs.	Rs.	Rs. A.
2,400	2,500	205 0	10,000	10,500	752 8
2,500	2,600	212 8	10,500	11,000	775 0
2,600	2,700	220 0	11,000	11,500	797 8
2,700	2,800	227 8	11,500	12,000	820 0
2,800	2,900	235 0	12,000	12,500	842 8
2,900	3,000	242 8	12,500	13,000	865 0
3,000	3,100	250 0	13,000	13,500	887 8
3,100	3,200	257 8	13,500	14,000	910 0
3,200	3,300	265 0	14,000	14,500	932 8
3,300	3,400	272 8	14,500	15,000	955 0
3,400	3,500	280 0	15,000	15,500	977 8
3,500	3,600	287 8	15,500	16,000	1,000 0
3,600	3,700	295 0	16,000	16,500	1,022 8
3,700	3,800	302 8	16,500	17,000	1,045 0
3,800	3,900	310 0	17,000	17,500	1,067 8
3,900	4,000	317 8	17,500	18,000	1,090 0
4,000	4,100	325 0	18,000	18,500	1,112 8
4,100	4,200	332 8	18,500	19,000	1,135 0
4,200	4,300	340 0	19,000	19,500	1,157 8
4,300	4,400	347 8	19,500	20,000	1,180 0
4,400	4,500	355 0	20,000	21,000	1,210 0
4,500	4,600	362 8	21,000	22,000	1,240 0
4,600	4,700	370 0	22,000	23,000	1,270 0
4,700	4,800	377 8	23,000	24,000	1,300 0
4,800	4,900	385 0	24,000	25,000	1,330 0
4,900	5,000	392 8	25,000	26,000	1,360 0
5,000	5,100	400 0	26,000	27,000	1,390 0
5,100	5,200	407 8	27,000	28,000	1,420 0
5,200	5,300	415 0	28,000	29,000	1,450 0
5,300	5,400	422 8	29,000	30,000	1,480 0
5,400	5,500	430 0	30,000	31,000	1,510 0
5,500	5,600	437 8	31,000	32,000	1,540 0
5,600	5,700	445 0	32,000	33,000	1,570 0
5,700	5,800	452 8	33,000	34,000	1,600 0
5,800	5,900	460 0	34,000	35,000	1,630 0
5,900	6,000	467 8	35,000	36,000	1,660 0
6,000	6,100	475 0	36,000	37,000	1,690 0
6,100	6,200	482 8	37,000	38,000	1,720 0
6,200	6,300	490 0	38,000	39,000	1,750 0
6,300	6,400	497 8	39,000	40,000	1,780 0
6,400	6,500	505 0	40,000	41,000	1,810 0
6,500	6,600	512 8	41,000	42,000	1,840 0
6,600	6,700	520 0	42,000	43,000	1,870 0
6,700	6,800	527 8	43,000	44,000	1,900 0
6,800	6,900	535 0	44,000	45,000	1,930 0
6,900	7,000	542 8	45,000	46,000	1,960 0
7,000	7,100	550 0	46,000	47,000	1,990 0
7,100	7,200	557 8	47,000	48,000	2,020 0
7,200	7,300	565 0	48,000	49,000	2,050 0
7,300	7,400	572 8	49,000	50,000	2,080 0
7,400	7,500	580 0	50,000	55,000	2,117 8
7,500	7,750	595 0	55,000	60,000	2,155 0
7,750	8,000	610 0	60,000	65,000	2,192 8
8,000	8,250	625 0	65,000	70,000	2,230 0
8,250	8,500	640 0	70,000	75,000	2,267 8
8,500	8,750	655 0	75,000	80,000	2,305 0
8,750	9,000	670 0	80,000	85,000	2,342 8
9,000	9,250	685 0	85,000	90,000	2,380 0
9,250	9,500	700 0	90,000	95,000	2,417 8
9,500	9,750	715 0	95,000	1,00,000	2,455 0
9,750	10,000	730 0			

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